

A Comparative Study: Arbitration Agreement in OHADA and People's Republic of China Arbitration Laws

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Abstract

This article aims to compare the arbitration agreement of the OHADA (Note 1) legal system to that of the People's Republic of China. In the Chinese legal system the parties to a contract are required to have an arbitration agreement written before the occurrence of any incident in the execution of their contract. The parties must specify in advance, in the said agreement, the chosen arbitration institution for potential disputes. In the OHADA legal system, the parties are free to decide before or during execution of the contract of an arbitration agreement. They may also decide whether in case of a dispute, they would want to refer to an institutional arbitration or an ad hoc arbitration.

According to the chosen legal system the consequences are different.

Keywords: OHADA arbitration, China arbitration, Arbitration agreement, Institutional arbitration, Ad hoc arbitration, Split clause

Introduction

International investors are aware that commercial disputes often arise during the interpretation and implementation of business contracts. Because of the risk of commercial disputes, foreign businesses are anxious that any disputes that arise are resolved swiftly and efficiently.

In response to these concerns, the Chinese Government in 1956 set up an arbitration body whose sole purpose was to settle international commercial disputes. This authority was called the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC was established as the country's principal arbitration institute for resolving disputes between foreign firms and Chinese legal persons. However, until 1995 there had been no comprehensive set of arbitration legislation established in China. Conducting arbitration between local Chinese concerns and foreign concerns was done in a piece-meal fashion by borrowing relevant provisions from the different statutes that governed commercial transactions. With the implementation of its open-door policy, the Chinese Government came under increasing pressure to rectify the existing arbitration laws. As a result, China's first Arbitration Law was promulgated on 31 October 1994 and came into effect on 1 September 1995. The purpose of the Arbitration Law is to provide a system of arbitration in China that meets both foreign and domestic demands for efficient resolution of disputes. (Zhang, 1999, 6, 3)

Africa also created an important organization named OHADA. It is an international organization that was created by a treaty signed in Port-Louis (Mauritius) on 17 October 1993 by 14 African States (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Democratic Republic of Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo).

The idea behind the creation of OHADA sprang from a political will to strengthen the African legal system by enacting a secure legal framework for the conduct of business in Africa, which is viewed as essential to the development of the continent. In pursuance of these aims, OHADA issues unified legislation in the form of Uniform Acts (note 2) on particular areas of the law. These Acts are directly applicable in all the Member States and supersede the previous national legislation on the same topic in each country. However, they do not prevent the Member States from enacting specific legislation that does not conflict with the Uniform Acts. The Uniform Act on Arbitration Law, (note 3) was signed on 11 March 1999 and entered into force 90 days later.

When entering into a contract for any significant value, the parties will generally want to ensure that any disputes that might arise under the contract in the future will be dealt with efficiently, rapidly and confidentially. If the parties are from different countries, each of them will also generally prefer disputes to be dealt with by a neutral body rather than by the national courts of the other party. These considerations have led to the popularity of arbitration clauses, particularly in international contracts.

Arbitration allows parties to have their dispute settled by a private tribunal consisting of a sole arbitrator or a panel of arbitrators, who may be chosen by the parties themselves. All this is rightly provided in a legal document called the arbitration agreement. An arbitration agreement is “an agreement by two parties to submit a dispute to arbitration”, (note 4)

Under the OHADA rules, an arbitration agreement may be entered into at any time.

As a result, it should be considered that any ad hoc arbitration taking place in a Member State will be governed by the Uniform Act and by any other arrangements as may be agreed between the parties, to the extent that such arrangements are permissible under the Uniform Act. If institutional arbitration has been provided for and the seat of the tribunal is in a Member State, the Uniform Act will apply, but only to the extent necessary to complement the institutional rules that the parties have chosen.

The Arbitration Law of the People’s Republic of China provides that an arbitration agreement shall contain an express intention of arbitration, the matters subject to arbitration and the appointed arbitration commission. These three elements are also the required criteria for the validity of an arbitration clause. Among them, whether an arbitration commission is appointed in the parties’ agreement is equal to whether the parties’ agreement on the appointment of an arbitration tribunal is clear. (Wei & Keke, 2006)Once there is a valid arbitration clause, it is a clear indication that the parties have renounced the jurisdiction of national court.

This comparative study between the OHADA arbitration system and that of the People Republic of China is not only interesting in the field of theory, but also in commercial practice. In the globalization context, it will be of particular interest to investors (African or Chinese) who are required to enter into a joint venture or to participate in a privatization with a public authority or company to know their partners arbitral system to be prepare for all contingencies.

At first, it will be interesting to distinguish between the legal rules of the two systems (1) and then, focus on the implications of distinguishing between the two legal systems. (2).

1. The arbitration agreement under the OHADA and People’s Republic of China legal systems

The purpose of this part is to examine the issue of validity of an arbitration agreement under the OHADA legal system (1.1), and under the law of the People’s Republic of China (1.2).

1.1 Arbitration agreement under the OHADA legal system

The arbitration agreement is the foundation of almost every arbitration. There can be no arbitration between parties which have not agreed to arbitrate their dispute. (Lew, Mistelis & Kroll, 2003, p.99)

Under the OHADA rules, the parties are allowed to use an arbitration agreement at the outset of their contractual relationship. The Uniform Act also provides that the parties may enter into such an agreement even if they have already commenced proceedings before a court, (note 5).

Article 3, (note 6) provides that “the arbitration agreement must be made in writing or by any other means allowing its existence to be proven”. It is not entirely clear how the latter part of this provision should be interpreted. The provision further states that such means would include, in particular, a reference to another document which itself stipulates an agreement to arbitrate. This would occur, for example, when a contract simply makes reference to the general conditions of contract of one of the parties, which, in turn, include an arbitration clause. This is in conformity with the present trend in many countries to validate arbitration clauses by reference and is again an instance where the parties to a contract must be vigilant.

In addition to arbitration clauses by reference, Article 3 implies that other means of entering into an arbitration agreement might be possible, for example by oral agreement before witnesses, who could then attest to the existence of the agreement. However, even if this were possible – and the Common Court of Justice and Arbitration (CCJA) has not yet had the opportunity to express any view on this point – it would be inadvisable, as the Uniform Act itself requires a copy of the arbitration agreement to be produced in enforcement proceedings in the Member States, (note 7). In addition, if enforcement is sought in other countries the New York Convention may come into play. This convention also requires the arbitration agreement to be in writing, (note 8). For these reasons, it is strongly recommended that if arbitration is the desired means of settling disputes, it should be clearly spelt out in the contract.

(Martor, Pilkington & Thouvenot, 2002, p.263) The Uniform Act expressly lays down the principle of autonomy of the arbitration agreement, (note 9) as established by modern case law. This principle has two main implications:

- (1) the arbitration agreement is independent from the main contract and its validity is unaffected by any finding that the main contract itself is null and void;
- (2) the arbitration agreement is not necessarily governed by the same law as the main contract or any particular national law, but it is to be interpreted in accordance with the common intention of the parties.

1.2 Arbitration agreement under China law

Before the effectiveness of the Chinese Arbitration Law, the jurisdiction of arbitral commissions was based on Article 9 of the Regulations on the Arbitration of Economic Contracts, which established jurisdiction only over those disputes that fell within the scope detailed in the regulations. In the years following those regulations, some new laws such as the Foreign Economic Contract Law, the Technology Contract Law, the Copyright Law, and the Civil Procedure Law provided for the arbitration of disputes on the basis of an arbitration agreement, but only for those specific issues. (The Grand Book of Arbitration of PRC, 1995, p.10)

The Arbitration law (note 10) in force expressly provided that: “the parties adopting arbitration for dispute settlement shall reach an arbitration agreement on a mutually voluntary basis.”(Article 4)

The Arbitration Law did away with forum level jurisdiction and territorial jurisdiction entirely. Article 6 of the Arbitration Law states: “An arbitration commission shall be selected by the parties by agreement. The jurisdiction by level system and the district jurisdiction system shall not apply in arbitration.” This is important because the parties can select which commission they want to use. It is also relevant because when the parties are selecting an arbitration commission, they are not limited by the geographical place of residence, or the location of the dispute, nor are they limited by the hierarchical jurisdiction of commissions at different levels. This embodies the principle of party autonomy by allowing the parties to choose if they will arbitrate, and where they would like to do so. (Xuan, 2008, p.4.)

The Chinese Arbitration Law expressly presupposes the existence of arbitration commissions. The law provides, inter alia, that arbitration agreement shall contain a designated arbitration commission, and that the arbitration agreement shall be void if it contains no or an unclear provision concerning the arbitration commission, unless the parties can reach a supplementary agreement thereon (Articles 16 and 18) .

PRC law requires a valid arbitration agreement to be in ‘writing’. Article 1 of the Supreme People’s Court Interpretation (hereinafter: “Interpretation”) clarifies that a ‘written’ arbitration agreement may be reached by express agreement in writing by exchange of letters and electronically transmitted documents (including telegrams, telefaxes and facsimiles, electronic data interchange and emails). (Supreme People’s Court Interpretation, 8,9,2008)

The PRC Arbitration Law stipulates, in articles 2 (note 11) and 3 (note 12), the types of disputes that are arbitrable and those that are not. Article 2 of the Supreme People Court Interpretation adopts an expansive interpretation of matters that are arbitrable. It provides that where the scope of the arbitration agreement is unclear, ‘arbitrable matters’ include (but are not limited to) disputes regarding contractual formation, validity, modification, assignment, performance, liability for breach of contract, interpretation and rescission of a contract

2. The implications of distinguishing between the two systems

The implications can be perceived at two levels:

- The possibility or not for the parties to choose an arbitration institution or an ad hoc arbitration (2.1);
- The possibility or not for the parties to apply to a court notwithstanding the arbitration agreement (2.2).

2.1 Arbitration institution or ad hoc arbitration?

Under the OHADA legal system, when the parties draw up an arbitration clause, they can decide whether they would like to have their arbitration in the framework of an institution or rather by way of ad hoc arbitration, (note 13).

An arbitration institution has the advantages (note 14) of containing a set of rules for the conducting of the procedure and possibly aiding with the administration of the arbitration and with the appointment or confirmation of the arbitrator (s). (Kruger, 2008, p.2)

OHADA institutional arbitration has been created under the aegis of the CCJA. The CCJA is an arbitration centre which administers the arbitration procedure with a remit covering all the OHADA states (note 15). The latter has the power to review draft arbitral awards with regard to their form. Thus, before an award becomes final, it has to pass through the hands of the Court (note 16). One of the particularities of CCJA institutional arbitration is the double

role of the CCJA: administrative and jurisdictional (note 17). The administrative function consists of that of an arbitration centre (note 18). In its jurisdictional function the CCJA acts as a Supreme Court which rules on appeals made against arbitration decisions (review (Article 32), third party proceedings (Article 33), request for enforcement of foreign decisions (Article 30), and opposition to foreign decisions).

The OHADA Common Court of Justice and Arbitration is also a court in the true sense of the word. It is the highest court of appeal when it comes to the interpretation of uniform acts, and thus also of the uniform act of arbitration (Article 14).

But under the OHADA legal system, we have also a non-institutional arbitration, or ad hoc arbitration. Such procedures take place under the auspices of national courts. This is determined by the Uniform Arbitration Act, which at various instances refers to the competent judge in a Member State (note 19). However, as the highest court of appeal, the Common Court of Justice and Arbitration has an important role. In case national courts refuse to enforce an arbitral award, a party may appeal to the CCJA for recognition of the award. The situation is different in the People's Republic of China. Institutional arbitration is the only form of arbitration recognized in Mainland China (note 20). Where a contract provides for arbitration in Mainland China but does not specify an arbitral institution, it is not therefore a valid arbitration agreement. According to Article 16 and 18 of PRC Arbitration Law, the absence of an explicit designation of an arbitration commission in the arbitration agreement suffices to invalidate the agreement unless the parties reach a supplementary agreement to that effect. Such a requirement is unusual in international practice, in which parties frequently agree to arbitration rules without expressly designating an arbitration institution in their arbitration agreement. The Supreme People's Court suggests the relaxation of this requirement in the articles 3 and 4 of its Interpretation. (Supreme People's Court Interpretation, 8, 9, 2008) In particular, article 4 suggests that even if an 'arbitration institution' is not expressly designated, the arbitration agreement will not be invalid if the arbitration institution can be ascertained under the applicable arbitration rules. Numerous arbitration commissions have been established throughout the country, all working within the framework of China's Arbitration Law. These bodies mainly receive domestic arbitration cases; some are permitted to handle investment disputes between Chinese and foreign parties (note 21).

Ad hoc arbitration is not possible in Mainland China. Before the arbitration Law of 1995, Chinese law was silent about it and the validity of its arbitration agreement. Therefore, an ad hoc arbitration agreement is void (note 22). In fact, ad hoc arbitration is excluded in China. Despite these provisions, it should be noted that foreign ad hoc arbitration awards have been enforced in China. *Guangzhou Ocean Shipping Company v Marships of Connecticut* (1990) recognized three arbitral awards made by an ad hoc tribunal in London. Ad hoc arbitration awards made in Hong Kong are also enforceable in the PRC.

2.2 *The split clauses*

The split clauses allow one or more parties to elect arbitration or litigation after the dispute arises. (Norton Rose, 2010, p.13)

In PRC, the Supreme People's Court has stated that a clause will be considered invalid if it purports to give parties the option of submitting their disputes to an arbitral tribunal or to the court. (Supreme People's Court Minute, 2nd, 2005, Para. 68) However, the Interpretation also clarifies that if parties have agreed that any dispute be referred to either arbitration or to the People's Court in the PRC, such an arbitration agreement will be considered void. The only exception is where one party commences arbitration and the other party does not object before the specified deadline (Article 26) . The situation is different in regard to the validity of the arbitration agreement. Article 20 of the Arbitration Law suggests that the jurisdiction of the People's Court takes precedence over that of the arbitration institution when one party has asked the People's Court and the other party the arbitration institution to rule on the validity of their arbitration agreement. In consequence, if a party does not dispute the validity of an arbitration agreement prior to the first hearing before the arbitral tribunal but subsequently applies to a court to challenge the validity of the agreement, the court will not consider the application. Likewise, a party will not be permitted to resist enforcement of an arbitration award on the basis of invalidity of the agreement if it did not challenge the validity of the agreement during the arbitration itself. (Pe, 2010, 9)

In the OHADA legal system the split clauses are regulated by article 23 of the Treaty of OHADA and article 13 of OHADA Arbitration Law. The incompetence of courts affirmed by these articles is a consequence of the arbitration agreement. The effectiveness of the arbitration agreement is clear to the judges because they have no competency to hear the dispute referred in an arbitration agreement. This incompetence is relative because the court can decide on the matter of its own motion competency. Moreover, when an issue before the court is already pending before the arbitral tribunal, the court refuses to hear that matter, thus allowing the arbitral tribunal to proceed. The aim is to prevent delaying tactics.

In regard to the existence and validity of the arbitration agreement and the jurisdiction of the arbitral tribunal, OHADA Arbitration law (Article 11), devotes the principle of *competenz-competenz* (note 23).

Conclusion

OHADA arbitration law and Chinese arbitration law were both inspired by the UNCITRAL Model Law and international arbitration law in general. In practice these two arbitration legislations have different rules regarding the arbitration agreement. On this point OHADA is more in conformity with international norms. In fact, in line with international practice, OHADA allows for ad hoc administration, the possibility for arbiters to rule on the question of their own jurisdiction and the validity of the arbitration agreement. These possibilities are nonexistent in Chinese Arbitration Law. Therefore, Chinese arbitration law shall be in compliance with UNCITRAL Model Law and international practice.

The remarkable growth in commercial transactions between Chinese and non-Chinese parties deserve to be accompanied by less restriction on the parties' choice and autonomy in an eventual arbitration agreement. For this purpose:

- China arbitration Law should change and should allow for the ad hoc arbitration in mainland China;
- the arbitration commission should allow the arbitrator or the tribunal to rule on the validity of the arbitration agreement and on their own jurisdiction;
- the parties should be able to appoint an arbitrator, by agreement, without the commission panel list.

These desirable measures will strengthen the independence of Chinese arbitration, its legislation will be closer to the international practice, and party autonomy will be more expressed.

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Notes

Note 1. The acronym 'OHADA' stands for 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires' (Organization for the Harmonization of Business Law in Africa), p. 1.

Note 2. Eight (8) Uniform Acts have now entered into force. These relate, to general commercial law (1998), commercial companies and economic interest group (1998), securities (1998), simplify recovery procedure and

enforcement measures (1998), collective insolvency proceedings (1999), arbitration (1999), accounting law (2001-2002) and carriage of goods by road (2004), p. 2.

Note 3. Article 16 of China Arbitration Law, p.2.

Note 4. The article 1 states that the ‘vocation’ of the Uniform Act is to apply to all arbitrations where the seat of the arbitral tribunal is located in one of the Member States, p. 2.

Note 5. Article 4 of OHADA Arbitration Law., p.2.

Note 6. Ibid, Article 3.

Note 7. Article 31 OHADA Arbitration Act, p.3.

Note 8. Article IV of New York Convention of 1958, p.3.

Note 9. Article 4 OHADA Arbitration Law, the People’s Republic of China Arbitration Law has the same provision in its Article 19, p.3.

Note 10. Came into force on 1 September 1995, p.3.

Note 11. Article 2: “Disputes over contracts and disputes over property rights and interests between citizens, legal persons and over organizations as equal subjects of law may be submitted to arbitration”, p.3.

Note 12. Article 3:”The following disputes shall not be submitted to arbitration: (1) disputes over marriage, adoption, guardianship, child maintenance and inheritance; (2)and administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.”

Note 13. Article 1 of OHADA Arbitration Law didn’t distinguish between national or international arbitration, commercial or non-commercial arbitration, institutional or ad hoc arbitration, p.4.

Note 14. See A Redfern, M Hunter, N Blackaby & C Partasides, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) para 1-100 – 1-120, discussing the advantages and disadvantages of these different types of arbitration, p.4.

Note 15. Some OHADA Member States have one their own arbitration centre : Benin (CAMEC: Centre d’Arbitrage de Mediation et de Conciliation based in Cotonou), Burkina Faso (CAMC-O: Centre d’Arbitrage, de Mediation et de Conciliation de Ouagadougou, based in Ouagadougou), Cameroun (GICAM: Centre d’Arbitrage du Groupement Interpatronal du Cameroun, based in Douala), Cote d’Ivoire (Chambre d’Arbitrage de Cote d’Ivoire, based in Abidjan), Guinea (Chambre d’Arbitrage de la Guinee, based in Conakry), Mali (CECAM: Centre de Conciliation et d’Arbitrage du Mali, based in Bamako), Senegal (Centre d’Arbitrage attached to Senegal’s Chamber of Commerce, industry and Agriculture, based in Dakar), Togo (Centre d’Arbitrage du Togo, attached to Togo’s Chamber of Commerce, Agriculture and Industry, based in Lome), p.4.

Note 16. Articles 2.2 and 23 of the Reglement d’arbitrage de la Cour Commune de Justice et d’arbitrage (CCJA Arbitration Rule), p.4.

Note 17. Ibid at Article 1, p.4.

Note 18. Articles 21, 22, and 24 of OHADA Treaty of 17 October 1993, p.4.

Note 19. For instance art 5 regarding the composition of the arbitral tribunal, art 12 on the determination of time limits, art 14 regarding evidence, art 25 on annulling the award, and art 30 on recognition and enforcement, p.4.

Note 20. Ad hoc arbitration is permissible in Hong Kong, p.4.

Note 21. Most international commercial, trade and investment cases are handled by the China International Economic and Trade Arbitration Commission (CIETAC), which is receiving an increasing number of appointments. Cases of a maritime nature may be referred to the China Maritime Arbitration Commission (CMAC). The Beijing Arbitration Commission (BAC) is also proving a popular choice. The Shanghai Arbitration Commission established the Shanghai Court of Financial Arbitration (December 2007) and the Shanghai Court of International Shipping Arbitration (May 2009). CIETAC is headquartered in Beijing; it has subsidiary commissions in Shanghai and Shenzhen (called the South China Sub-Commission or Huanan fenhui) and liaison offices in various cities. It is permissible for parties in some cases to agree to hold CIETAC arbitrations or hearings outside China; this raises the possibility of administering arbitrations outside China, supervised by local courts. CMAC is also headquartered in Beijing, with one subsidiary commission in Shanghai, p.4.

Note 22. Articles 16 and 18 of PRC Arbitration Law, p. 4.

Note 23. “Competence-Competence addresses the issue of allocation of authority between arbitral tribunals and

domestic courts to decide disputes over the existence and enforceability of arbitration agreements.” Born (2001). *International Commercial Arbitration* at p. 74.

The Competence-Competence principle is well-established in international arbitration and recognized by most jurisdictions. Most notably, the Competence-Competence principle is enshrined in Article 16 of the UNCITRAL Model Law which clearly authorizes arbitral tribunals to rule on challenges to their jurisdiction “either as a preliminary question or in an award on the merits” and to render arbitral awards even if a jurisdictional challenge is brought in a court action. The ICC Rules make similar provisions in Article 6 which preserves the arbitral tribunal’s jurisdiction even if the tribunal is faced with a challenge to the validity or existence of an arbitration agreement or a principal contract. A survey of domestic legislation and case law also shows a tendency to endorse Competence-Competence at the national level of most major commercial jurisdictions.