

OHADA

Amended treaty on the harmonization of business law in Africa

Treaty of 17 October 1993 signed at Port-Louis

[NB - Treaty of 17 October 1993 on the harmonization of business law in Africa signed at Port-Louis

Amended by the treaty of 17 October 2008 done at Quebec]

High contracting parties to the treaty for the harmonisation of business law in Africa

Determined to make more progress on the path to African unity and to establish an atmosphere of trust conducive to the economies of States Parties with a view to setting up a new pole of development in Africa ;

Reaffirming their commitment to establishing an African Economic Community ;

Convinced that membership in the Franc Zone, a factor of economic and monetary stability constitutes a major asset for the progressive realisation of their economic integration which must be pursued within a larger African framework ;

Convinced that achieving these objectives requires the enactment in the States Parties, of harmonised, simple, modern and adapted business law, in order to facilitate business activities ;

Conscious of the fact that it is essential that this law be applied with diligence in order to guarantee legal stability of economic activities, encourage the growth of the latter and create favourable environment for investment ;

Desirous of promoting arbitration as an instrument for the settlement of contractual disputes ;

Determined to jointly put in greater effort towards improving the training of judicial and legal officers and auxiliaries of justice ;

Hereby agree as follows :

Title 1 - General provisions

Art.1.- The object of the present Treaty is to harmonise business law in the States Parties by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and promoting arbitration as a means of settling contractual disputes.

Art.2.- For the purpose of the Treaty, business law shall include all regulations relating to company law, the definition and classification of traders, recovery procedures measures of enforcement, liquidation and administration proceedings and arbitration, labour law, accounting law, carriage and sales of goods, and any such other matters that the Council of Ministers shall unanimously decide, to include in accordance with the object of the Treaty and the provisions of Article 8 below.

Art.3.- *(Treaty of 17 October 2008)* The execution of the tasks laid down in the Treaty shall be ensured by an organisation known as the Organisation for the Harmonisation of Business Law in Africa.

OHADA shall comprise the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration and the Permanent Secretariat.

The seat of OHADA shall be in Yaoundé in the Republic of Cameroon. It may be transferred to another place by decision of the Conference of Heads of State and Government.

Art.4.- *(Treaty of 17 October 2008)* Rules for the implementation of the present treaty and decisions taken shall be enacted, where necessary, by an absolute majority of the Council of Ministers.

Title 2 - Uniform Acts

Art.5.- Acts enacted for the adoption of the common rules provided for in Article 1 of the Treaty shall be known as "Uniform Acts".

Uniform Acts may include provisions relating to criminal offences. States Parties undertake to determine criminal sanctions that may be incurred.

Art.6.- Uniform Acts shall be drafted by the Permanent Secretariat in consultation with the Governments of the States Parties. They shall be debated and adopted by the Council of Ministers upon the opinion of the Common Court of Justice and Arbitration.

Art.7.- *(Treaty of 17 October 2008)* Draft versions of the Uniform Acts shall be forwarded by the Permanent Secretariat to the Governments of States Parties, who shall submit

their written observations to the Permanent Secretariat within ninety days of receipt of the draft versions.

However, the time limit provided for in subsection 1 above may, on the demand of the Permanent Secretariat, be extended for an equivalent duration, depending on the circumstances and the nature of the text to be adopted.

Upon expiry of the above time limit, the draft Uniform Acts, including the observations of the States Parties and a report from the Permanent Secretariat, shall be forwarded immediately by the latter to the Common Court of Justice and Arbitration for its opinion. The Court shall present its opinion thereto within thirty days of receipt of the said request.

Upon expiry of this time limit, the Permanent Secretariat shall finalise the text of the draft Uniform Acts and propose that it be included in the agenda of the next meeting of the Council of Ministers.

Art.8.- Adoption of the Uniform Acts by the Council of Ministers shall be by a unanimous vote of the representatives of the Member States present and voting.

Adoption of the Uniform Acts shall not be valid unless at least two-thirds of the States Parties are represented.

Abstention shall not prevent the adoption of the Uniform Acts.

Art.9.- *(Treaty of 17 October 2008)* The Uniform Acts shall be published in the OHADA Official Gazette within sixty days of adoption. They shall be enforceable ninety days after such publication, subject to contrary provisions in a particular uniform act.

Uniform Acts shall also be published in States Parties, in the official gazette or by any other appropriate means. This formality shall not affect the coming into force of the Uniform Acts.

Art.10.- Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law.

Art.11.- The annual programme for the harmonisation of business law shall be approved by the council of ministers on the recommendation of the permanent secretariat.

Art.12.- *(Treaty of 17 October 2008)* Uniform Acts may be amended at the request of a State Party, or the Permanent Secretariat upon the approval of the Council of Ministers.

Such amendment shall be made in accordance with the conditions provided in article 6 to 9 above.

Title 3 - Disputes relating to the interpretation and application of the Uniform Acts

Art.13.- Disputes relating to the application of the Uniform Acts shall be settled at first instance and on appeal therefrom by national courts of States Parties.

Art.14.- *(Treaty of 17 October 2008)* The Common Court of Justice and Arbitration shall ensure the uniform interpretation and application of the Treaty, its rules of enforcement as well as Uniform Acts and decisions.

Any State Party or the Council of Ministers may seek the advisory opinion of the Court on any issue relating to the preceding paragraphs. National Courts may also seek the opinion of the Court in matters relating to the application of article 13 above.

When sitting as a court of final appeal, the Court shall rule on decisions delivered by the Courts of Appeal of States Parties on all matters relating to the Uniform Acts and rules provided for in this Treaty with the exception of decisions administering criminal sanctions.

The Court shall rule as above with regard to decisions delivered by the national courts of the States Parties in the same disputes, which are not appealable to the national Court of Appeal.

Where the Court quashes the decision of the national court, it shall reconsider the case on its merits.

Art.15.- Appeals to the Common Court of Justice and Arbitration, as provided for in Article 14 above, shall be brought either directly by one of the parties to the proceedings, or upon referral of the highest appellate court of a State Party before which issues relating to the application of the Uniform Acts have been brought.

Art.16.- The lodging of an appeal before the Common Court of Justice and Arbitration shall stay any proceedings pending before the highest appellate national Court. However this rule does not concern the enforcement of the decision under appeal. Any such proceedings may only be relisted after the Common Court of Justice and Arbitration has declared its lack of jurisdiction.

Art.17.- *(Treaty of 17 October 2008)* Manifest lack of jurisdiction of the Common Court of Justice and Arbitration may be raised either by the Court of its own motion or in limine litis by any party to the proceedings.

The court shall rule within thirty days of receipt of the observations of the adverse party or at the expiry of the time limit for the presentation of the said observations.

Art.18.- Any party who challenges the jurisdiction of a national final appellate court, and has been overruled, may bring the issue before the Common Court Justice and Arbitration within two months of notification of the said ruling.

The court shall rule on the issue of its jurisdiction by a decision which shall be notified to the party and the national court concerned.

Where the court decides that the national court had in error decided that the matter in issue was outside its jurisdiction such decision of the national court shall be deemed null and void.

Art.19.- The procedure before the Common Court of Justice and Arbitration shall be determined by the Rules adopted by the Council of Ministers pursuant to Article 8 above and shall be published in the OHADA Official Gazette, as well as in the Official Gazette of the States Parties or by any other appropriate means.

The hearing shall be in the presence of all parties. The assistance of a counsel is mandatory. The hearing shall be in open court.

Art.20.- Judgments of the Common Court of Justice and Arbitration are final and enforceable. They shall be enforceable in the States Parties in the same manner as decisions of national courts. Any decision which is contrary to a judgment of the Common Court of Justice and Arbitration delivered in respect of the same matter shall not be enforceable in the territory of a State Party.

Title 4 - Arbitration

Art.21.- Pursuant to an arbitration clause or submission agreement, any party to a contract may submit a contractual dispute to arbitration as provided for in this part, where one of the parties is domiciled or has his usual place of residence in the territory of a State Party, or where the contract is performed or will be performed wholly or partly in the territory of one or more States Parties.

The Common Court of Justice and Arbitration shall not itself settle such a dispute. It shall appoint or confirm arbitrators who shall keep the court informed of the progress of the proceedings and submit the draft award to the court for its approval in conformity with article 24 below.

Art.22.- Disputes may be settled by a sole or by three arbitrators. Under the following articles, the term “arbitrator” may either refer to one or more arbitrators.

Where the parties have agreed that the dispute shall be settled by a sole arbitrator, he shall be appointed by mutual agreement, subject to the approval of the Court. Where the parties fail to agree within thirty days of notification of the request for arbitration, the arbitrator shall be appointed by the Court.

Where the dispute is to be referred to three arbitrators, each party shall in the request for arbitration or in the reply to the request appoint an independent arbitrator, subject to the approval of the Court. If one of the parties fails to appoint an arbitrator, the latter shall be appointed by the Court. The third arbitrator who will act as President of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed that the

two arbitrators they had designated would appoint the third arbitrator within a given time limit. In that case the Court shall confirm the third arbitrator. If the two arbitrators fail to agree on the third arbitrator within the time limit fixed by the parties or the Court, the third arbitrator shall be appointed by the court.

Where the parties have not mutually agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator ; unless it appears that the dispute is such as to justify the appointment of three arbitrators. In that case, the parties shall appoint the arbitrators within a period of fifteen days.

The arbitrators may be chosen from the list of arbitrators established by the Court and updated annually No members of the Court may be registered on the said list.

The Court shall rule on any challenge of an arbitrator by a party. Its decision shall not be subject to appeal.

An Arbitrator shall be replaced upon his death or when he is unable to perform functions, or when he has to resign from assignment either by reason of his challenge a party or for any other reason or when the Court, after having examined his observations, decides that he has not fulfilled his obligations pursuant to the provisions of this Part or the time limit provided herein or in the Rules of Arbitration of the Common Court of Justice Arbitration. In either case, the court shall precede in accordance with paragraphs two and three above.

Art.23.- Any national court of a State Party before which a dispute which the parties had agreed to settle by arbitration is brought shall upon the request of one of the parties declare it lacks jurisdiction and, where applicable, refer the matter to Arbitration, in accordance with the present Treaty.

Art.24.- Before signing a partial or final arbitral award, the arbitrator shall submit the draft to the Common Court of Justice and Arbitration. The Court may only propose amendments as to the form of the award.

Art.25.- Arbitral awards made in compliance with the provisions of this Part shall be final and binding in the territory of each State Party, in the same manner as decisions delivered by their national courts.

Such awards may be forcefully enforced by virtue of exequatur.

The Common Court of Justice and Arbitration has exclusive jurisdiction to grant such exequatur Exequatur shall only be refused in the following cases :

- 1) where the Arbitrator has ruled without an arbitration agreement or where the arbitration agreement was void or had expired ;
- 2) where the Arbitrator has not ruled within the scope of the mission conferred upon him ;
- 3) where the principle of an adversary process has not been respected;

4) where the award is contrary to international public policy.

Art.26.- The Rules of Arbitration of the Common Court of Justice and Arbitration shall be laid down by the Council of Ministers in accordance with the provisions of Article 8 above. The Rules shall be published in the OHADA Official Gazette of and in the Official Gazette of the States Parties and by any other appropriate means.

Title 5 - Institutions

Art.27.- *(Treaty of 17 October 2008)* The Conference of Heads of State and Government shall be composed of the Heads of State and Government of the States Parties. It shall be presided over by the Head of State or the Head of government of the country presiding over the Council of Ministers.

It shall be convened when need be on the demand of the President either of his own motion or at the request of one third of the States Parties ; it shall take decisions on questions related to the treaty.

The Conference shall carry on its deliberations only when two thirds of the States Parties are represented.

The decisions of the Conference shall be unanimous, failing which, it shall be by an absolute majority of the States present.

2) The Council of Ministers shall be composed of the Ministers in charge of Justice and the Ministers in charge of Finance of the States Parties.

The States Parties shall take turns in alphabetical order at presiding over the Council of Ministers for a year.

The President of the Council of Ministers shall be assisted by the Permanent Secretary.

The States subsequently adhering to the treaty shall chair the Council of Ministers for the first time in order of adherence, after the turn of countries which are signatory to the Treaty.

Where a State Party is unable to take office when due, the Council of Ministers shall designate the state coming immediately after in the order provided for in the preceding sub-sections.

However, the State that could hitherto not preside over the council and considers that it is ready to do so shall, in good time, notify the Permanent Secretary for a decision to be taken by the Council of Ministers.

Art.28.- The Council of Ministers shall meet at least once a year. It shall be convened by its president on his own initiative or at the request of at least one third of the States

Parties. No deliberation shall take place unless at least two-thirds of the States Parties are represented.

Art.29.- The President of the Council of Ministers shall establish the agenda of the council on the proposal of the Permanent Secretariat.

Art.30.- The decisions of the Council of Ministers, other than those provided for in Article 8 shall be arrived at by an absolute majority of the States Parties present and voting. Each State shall have one vote.

Art.31.- *(Treaty of 17 October 2008)* The Common Court of Justice and Arbitration shall be composed of nine judges.

However, the Council of Ministers may, depending on the needs of the service and the financial means, fix a higher number of judges than provided for in the preceding subsection.

The judges of the Common Court of Justice and Arbitration shall be elected for a seven year non renewable term, from among nationals of States Parties.

They shall be chosen from among :

- 1) Judicial and Legal Officers with at least fifteen years of professional experience, qualified to hold high judicial office in their respective countries ;
- 2) Lawyers who are members of the Bar of one of the States Parties with at least fifteen years of professional experience ;
- 3) Lecturers of law with at least fifteen years of professional experience.

Only two members of the Court may belong to the categories provided for in paragraphs 2 and 3 above.

One seventh of the composition of the Court shall be renewed each year.

The Court shall not comprise of more than one judge from the same State Party.

The mode of enforcement of the present article shall be determined by the rules provided for in article 19 above.

Art.32.- The members of the Court shall be elected by a ballot of the Council of Ministers from a list of candidates nominated by the States Parties for this purpose.

No State may nominate more than two candidates.

Art.33.- The Permanent Secretary of OHADA shall invite the States Parties to furnish a list of their candidates, within a period of at least four months before the elections.

The Permanent Secretary of OHADA shall establish a list in alphabetical order of the candidates presented and shall transmit a copy thereof to the States Parties at least one month before the elections.

Art.34.- Upon their election, the members of the Court shall solemnly take oath to faithfully perform their functions with total impartiality.

Art.35.- In the event of death of a member of the Court, the President of the Court shall immediately inform the Permanent Secretary, who shall declare the seat vacant from the date of the member's death.

In case of the resignation of a member of the Court, or if, in the unanimous opinion of the other members of the Court, a member has ceased to perform his functions for reasons other than temporary absence or if he is no longer able to perform them, the President of the Court, after having invited the member concerned to present his oral observations before the Court, shall inform the Permanent Secretary who shall then declare the seat vacant.

In each of the circumstances mentioned above, the Council of Ministers shall proceed under the conditions set forth in Articles 32 and 33, with the replacement of the member whose seat has become vacant, for the remaining period of the mandate, unless the remaining period is less than six months.

Art.36.- Members of the Court shall be irremovable.

A member of the court shall remain in office until the date his successor assumes duty.

Art.37.- The Court shall elect from among its own members, for a non renewable term of three and a half years, its President and two Vice Presidents. The members of the Court whose remaining term of office at the date of the election is less than this duration may be re-elected by the Council of Ministers to exercise a new term as members of the Court. Members of the Court shall not be allowed to exercise political or administrative functions. Any other paid activity must be authorised by the Court.

Art.38.- The duration of the term of office of the seven judges elected simultaneously for the initial constitution of the Court will be respectively three years, four years, six years, seven years, eight years and nine years. The term of office of each judge shall be determined by lots drawn by the President of the Council of Ministers at a session of the Council. The first renewal of the members of the Court shall take place three years from the date of its initial constitution.

Art.39.- *(Treaty of 17 October 2008)* The President of the Common Court of Justice and Arbitration shall appoint the Registrar-in-Chief of the Court on the recommendation of the court, from among the Registrars-in-Chief, who have served in that capacity for at least fifteen years, and who are nominated by the States Parties. Upon consultation with the Court, The President shall also appoint the Secretary General who shall assist the Court in the discharge of administrative functions in matters of arbitration in accordance with the criteria laid down by regulation of the Council of Ministers.

He may employ other personnel on the proposal of the Registrar-in-Chief or the Secretary General as the case may be.

Art.40.- *(Treaty of 17 October 2008)* The Permanent Secretariat shall be the executive organ of OHADA. It shall be placed under the authority of a Permanent Secretary appointed by the Council of Ministers for a four year term.

The Permanent Secretary shall represent OHADA. He shall assist the Council of Ministers.

The appointment and functions of the Permanent Secretary as well as the organisation and functioning of the Permanent Secretariat shall be determined by regulation of the Council of Ministers.

Art.41.- *(Treaty of 17 October 2008)* There shall be created a Centre for training, further training and research in business law known as The Advanced Regional School of Magistracy [E.R.SU.M.A].

The Centre shall be attached to the Permanent Secretariat.

The name and orientation of the Centre may be changed by regulation of the Council of Ministers.

The Centre shall be placed under the authority of a Director General appointed by the Council of Ministers for a term of four years renewable once.

The organisation, functioning, resources and services of the Centre shall be determined by regulation of the Council of Ministers.

Art.42.- *(Treaty of 17 October 2008)* The working languages of OHADA shall be French, English, Spanish and Portuguese.

Pending their translation into the other languages, the documents already published in French shall have their full effect. When the translations are at variance, the French version shall be the authentic version.

Title 6 - Financial provisions

Art.43.- *(Treaty of 17 October 2008)* The resources of OHADA consist principally of :

- a) The annual contributions of States Parties, the modalities of which shall be determined by regulation of the Council of Ministers ;
- b) Assistance provided for in conventions between OHADA and States or International Organisations ;
- c) Gifts and legacies.

The annual contributions of States Parties shall be determined by the Council of Ministers.

The Council of Ministers shall approve the conventions referred to in paragraph (b) and accept the gifts and legacies provided for in paragraph (c).

Art.44.- The schedule of fees for arbitral proceedings provided for in the present Treaty, as well as the distribution of the corresponding income shall be approved by the Council of Ministers.

Art.45.- *(Treaty of 17 October 2008)* The annual budget of OHADA shall be voted by the Council of Ministers.

The accounts for each financial year shall be certified correct by auditors appointed by the Council of Ministers.

They shall be approved by the Council of Ministers.

Title 7 - Status, immunities and privileges

Art.46.- OHADA shall have full international legal personality. In particular, it shall have the capacity :

- a) to enter into contracts ;
- b) to acquire and dispose of movable and immovable property ;
- c) to sue and be sued.

Art.47.- In order to perform its functions, OHADA shall enjoy in the territories of each State Party the immunities and privileges provided for in this title.

Art.48.- OHADA as well as its property and assets, shall not be subject to any judicial proceedings, unless it waives its immunity.

Art.49.- *(Treaty of 17 October 2008)* Civil servants and employees of OHADA, Judges of the Common Court of Justice and Arbitration as well as arbitrators appointed or confirmed by the Court shall, under conditions laid down by regulation, enjoy diplomatic privileges and immunities in the course of their duties.

The immunities and privileges referred to above may be lifted by the Council of Ministers depending on the circumstances.

Furthermore, Judges shall not be prosecuted for anything done outside the scope of their duties except with the authorisation of the Court.

Art.50.- The archives of OHADA shall be inviolable irrespective of where they are kept.

Art.51.- OHADA as well as its assets, property and revenue, including the operations authorised by the present Treaty, shall be exonerated from taxes, custom and excise duties. OHADA shall also be exempt from any obligation related to the recovery or payment of taxes, custom or excise duties.

Title 8 - Protocol clauses

Art.52.- The present Treaty shall be ratified by the States Parties in accordance with the procedure laid down by their respective constitutions.

The present Treaty shall enter into force sixty days after the date of deposit of the seventh instrument of ratification. However, if the date of the deposit of the instrument is earlier than the hundred and eightieth day that follows the day of signing the Treaty, the Treaty shall enter into force the two hundred and fortieth day following the day of signing.

With regard to any State Party which shall deposit the instrument of ratification following the above, the Treaty and the Uniform Acts adopted before the ratification, shall enter into force sixty days after the date of the said deposit.

Art.53.- As soon as the treaty enters into force, membership shall be open to all Member States of the O.A.U. which are not signatory to the Treaty. Membership shall also open to any other state which is a non-Member State of the O.A.U. invited to adhere to it, upon the mutual agreement of all the States Parties.

With regard to any adhering State, the Treaty and the Uniform Acts enacted prior to its adherence shall come into force sixty days after the deposit of the instrument of adhesion.

Art.54.- No reservation shall be allowed to the present Treaty.

Art.55.- As soon as the Treaty enters into force, the common institutions provided for in Articles 27 to 41 will be established. States Parties which have not yet ratified the Treaty may nonetheless sit at the Council of Ministers as observers without the right to vote.

Art.56.- Any dispute that may arise between States Parties regarding the interpretation or the application of the present Treaty and which is not settled by mutual agreement may be referred by a State Party to the Common Court of Justice and Arbitration.

Where a judge of the nationality of one of the parties is a member of the panel any other party to the case may choose an ad hoc judge to sit in his place. The latter shall comply with the criteria set forth in Article 31 above.

Art.57.- *(Treaty of 17 October 2008)* The instruments of ratification and the instruments of adhesion shall be deposited with the Government of Senegal which shall be the depository Government.

A copy thereof shall be issued by the latter to the Permanent Secretariat.

Art.58.- Any State ratifying the present Treaty or adhering to it after the entry into force of an amendment to it shall be deemed to be a party to the Treaty as amended.

The Council of Ministers shall include the name of the adhering State on the list provided for in Article 27 immediately before the name of the State assuming the presidency of the Council of Ministers at the date of its adherence.

Art.59.- *(Treaty of 17 October 2008)* The depository Government shall register the Treaty with the African Union and with the United Nations Organisation in accordance with article 102 of the Charter of the United Nations.

The depository Government shall issue a copy of the registered Treaty to the Permanent Secretariat.

Art.60.- The depository Government shall inform, without delay all the signatories or adhering States of :

- a) the dates of signature ;
- b) the dates of registration of the Treaty ;
- c) the dates of filing of the instruments of ratification and adhesion ;
- d) the date of the entry into force of the Treaty.

Title 9 - Revision and denunciation

Art.61.- *(Treaty of 17 October 2008)* The Treaty may be amended or revised where a State Party makes a written request to the Permanent Secretariat of OHADA. Such request shall be submitted to the Council of Ministers for action.

The Council of Minister shall assess the purport of the request and the extent of the amendment.

The amendment or the revision shall be adopted in the same manner as the Treaty at the instance of the Council of Ministers.

Art.62.- The present Treaty is concluded for an unlimited duration. In any event it shall not be denounced before ten years from the date of its entry into force.

Any denunciation of the Treaty shall be notified to the depository Government and shall not become effective until one year after the date of such notification.

Art.63.- *(Treaty of 17 October 2008)* The Treaty, drawn up in two copies in French, English, Spanish and Portuguese, shall be deposited in the archives of the Government of Republic of Senegal which shall deliver a certified true copy to each State Party.