DISPUTE RESOLUTION IN CIVIL-LAW AFRICAN JURISDICTIONS: OPTIONS FOR INDIAN INVESTORS

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I. Introduction

Indian investments into Africa, which have been growing at an exponential rate, have until now largely focused on the eastern and southern, English-speaking countries of the continent. A number of reasons have been cited for this, including linguistic affinities, historical connections, and a legal system similar to India, based on English Common Law.

The Third India-Africa Summit in Delhi on October 29-30, 2015, with invitations sent to 54 heads of State, was a reminder of India's strategic interests in Africa and highlighted the Indian government's renewed priorities on the African continent.[1] This is exemplified by India's expanding Africa strategy in North, West and Central Africa – regions which are largely French-speaking (along with other official languages which include Arabic, Portuguese and Spanish) and primarily governed by civil-law systems. For this, India already has in place a number of programs to facilitate investments and encourage bilateral economic development. These include ITEC,[2] the

* Senior Consultant, Cyril Amarchand Mangaldas (Neither the author, nor Cyril Amarchand Mangaldas shall be liable for any losses incurred by any person from any use of this article or its contents. This article does not constitute legal or any other form of advice from the author or from Cyril Amarchand Mangaldas).

[1] *Reaching out to Africa*, THE HINDU, Oct. 31, 2015, http://www.thehindu.com/opinion/editorial/indiaafrica-forum-summit-reaching-out-to-africa/article7823807.ece; *India-Africa Summit: 50 African leaders set to attend,* BUSINESS STANDARD, Aug. 20, 2015, http://www.business-standard.com/article/news-ians/india-africa-summit-50-african-leaders-set-to-attend-115082000552_1.html. More recently, the Fourth India-Africa Hydrocarbons Conference, held in Delhi, on January 21-22, 2016, with 21 African participating countries, has focused on sector-specific opportunities for Indian and African stakeholders. See: *4th India Africa Hydrocarbons conference ends; paves the way for strengthening India Africa relations*, BUSINESS STANDARD, January 22, 2016, http://www.business-standard.com/article/government-press-release/4th-india-africa-hydrocarbons-conference-ends-paves-the-way-for-strengthening-116012201533_1.html.

[2] Indian Technical & Economic Cooperation Programme (ITEC), http://itec.mea.gov.in. ITEC, which is sponsored by the Indian Government, covers 158 developing countries, including in Africa, and funds training programs in a range of sectors.

PanAfrica E-Network,[3] Focus Africa[4] and Team-9[5]- the latter two with a Sub-Saharan scope. Seven of the eight African participants in Team-9 are civil-law jurisdictions and (except for Guinea-Bissau) are French-speaking. Focus Africa includes the French-speaking nations of Côte d'Ivoire and Senegal. Senegal is also a key partner under the PanAfrica E-Network program – which includes a 14,000 km undersea cable between Chennai and Dakar, Senegal's capital city and the program's satellite hub earth station on the African continent. Finally, India has implemented a Duty Free Tariff Preference ["DFTP"] Scheme for Least Developed Countries ["LDCs"] in 2008[6], which provides duty free and preferential market access on a range of exports from selected African LDCs – including a number of French-speaking countries.

As India's investments in the region expand, a clear understanding by Indian investors of the legal environment is necessary. The majority of jurisdictions in North, Central and West Africa tend to follow a civil law system – thus distinct from the Common Law known in India, and in most English-speaking countries of Africa. It is also critical for Indian investors to build reasonable expectations as to the mechanisms

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[3] Pan Africa E-Network, http://www.panafricanenetwork.com. The PanAfrica E-Network program is a USD 117 million joint India-African Union initiative launched in 2006 to provide an optical fibre and satellite network among 53 African countries and India to facilitate tele-education and tele-medicine programs between Indian and African universities and hospitals – including, in French-speaking Africa, with the University of Yaounde (Cameroon), Brazzaville Hospital (Republic of the Congo), and Dakar's Fann Hospital (Senegal). The project is funded and implemented by the Government of India, with Indian ICT equipment and Indian services providers.

[4] Focus Africa, http://focusafrica.gov.in/focus_africa_Programme.html. The Focus Africa program, launched in 2002, now includes 24 African States, including, among civil-law jurisdictions, Côte d'Ivoire, Madagascar, Mauritius, Senegal and Seychelles (French-speaking), Algeria, Morocco, and Tunisia (Arabic-speaking, with French widely used for business), as well as Angola and Mozambique (Portuguese-speaking). The program targets specific sectors of interest to India trade and makes available government credit lines for Indian exports.

[5] The Techno-Economic Approach for Africa India Movement (TEAM-9) brings together India and eight West African countries - including seven civil-law jurisdictions (French-speaking Burkina Faso, Chad, Côte d'Ivoire, Equatorial Guinea, Mali and Senegal) and Portuguese-speaking Guinea-Bissau. Ghana, a neighbouring country, which is English-speaking and follows a Common Law system, is also a member. A key component is a US$500M Indian government line of credit to finance local projects which involve Indian companies and/or which contribute to further bilateral trade with India.

[6] *India's Duty Free Tariff Preference (DFTP) Scheme for Least Developed Countries (LDCs)*, http://commerce.nic.in/trade/international_tpp_DFTP.pdf.

available to address potential disputes with their local partners, or with host States. Dispute resolution clauses, in particular, will need specific attention.

This note focuses on dispute resolution issues for Indian investors in a representative group of Western and Central African States – all members of OHADA, an organization of African civil law countries which provides for a unified legislation in areas of interest to foreign investors – including for the resolution of commercial disputes.

II. OHADA as an Economic Regional Organization

OHADA is a group of now 17 African nations, namely, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, the Republic of the Congo, Senegal and Togo. The OHADA zone has a combined population of approximately 236 million people (roughly a quarter of the population of Sub-Saharan Africa) and an aggregate GDP of US$228 billion.[7]

All OHADA member States (except the Comoros, the Democratic Republic of the Congo and Guinea) use the CFA Franc – which is pegged to the Euro and guaranteed by the French Treasury. Each is also a member of a customs and economic union, being either the West African Economic and Monetary Union (known as "UEMOA", for *Union Economique et Monétaire Ouest-Africaine*)[8] or the Economic and Monetary Community of Central Africa ('CEMAC', for *Communauté Économique et Monétaire de l'Afrique Centrale*).[9]

Finally, OHADA States all have French as an official language (except for Portuguese-speaking Guinea-Bissau)[10] and use civil law concepts as a foundation of their legal system,[11] with Cameroon having a mixed civil-law and Common Law system.[12]

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[7] World Bank country figures (2014), www.worldbank.org/en/country.
[8] Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.
[9] Cameroon, the Central African Republic, Chad, the Republic of the Congo, Equatorial Guinea and Gabon.
[10] Three OHADA countries are bilingual, namely Chad (Arabic and French), Cameroon (English and French) and the Central African Republic (Sango and French). Two are officially trilingual, Comoros (Comorian, Arabic and French) and Equatorial Guinea (Spanish, Portuguese and French).
[11] In addition to Islamic and/or customary laws, in specific instances.

OHADA, the French acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organisation for the Harmonization of Business Law in Africa), was created by the eponymous treaty, signed on October 17, 1993 in Port-Louis (Mauritius) (the "OHADA Treaty")[13]. Its avowed objective then and today is to encourage and facilitate foreign and cross-border investments[14] in the region.[15] This effort is two-pronged. First, a set of common legislation (known as "Uniform Acts") was adopted by OHADA member States – with a focus on business law. Second, common institutions were established: the Conference of Chiefs of States and Governments; the Council of Justice and Finance Ministers; a Permanent Secretariat (based in Yaounde, Cameroon); the Common Court of Justice and Arbitration ("CCJA", for *Cour Commune de Justice et d'Arbitrage*) (based in Abidjan, Côte d'Ivoire); and the Higher Regional School of Magistracy ('ERSUMA', for *Ecole Régionale Supérieure de la Magistrature*) (based in Porto Novo, Benin). These institutions administer and oversee the implementation of the nine Uniform Acts adopted to date, which are all directly applicable in each OHADA Member State:[16]

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[12] A number of other African countries which either have French as an official language or where French is frequently used in commercial relations are not OHADA members (ie. Algeria, Burundi, Djibouti, Madagascar, Mauritania, Mauritius, Morocco, Rwanda, Seychelles and Tunisia) ; like OHADA States, each of these has a civil-law based system (except for Mauritius and the Seychelles, which use a mixed Common Law/civil-law system, and Rwanda, which is transitioning to Common Law), as do the Portuguese-speaking nations of Angola, Cabo Verde, Mozambique and Sao Tome & Principe. Incidentally, two of Africa's three largest economies, are also civil-law-based: South Africa has a dual Dutch (civil law) and Common Law system, while Egypt's Civil Code was originally inspired by the Napoleonic (French) Civil Code.

[13] *Traité Relatif à l'Harmonisation en Afrique du Droit des Affaires* (Treaty on the Harmonization of Business Law in Africa) ["OHADA Treaty"]*, signed on October 17, 1993 (as amended on October 17, 2008)* http://ohada.org/traite-ohada-consolide-traites-1993-et-2008-combines.html.

[14] *Id.* at art. 1. Article 1 of the OHADA Treaty states that '[t]he objective of the [OHADA] Treaty is the harmonisation of business laws in the [OHADA] Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes".

[15] *Id.* at art. 42. Under Article 42 of the OHADA Treaty, French is the sole working language of the organization. All translations of OHADA texts herein are based on the unofficial English versions available at www.ohada.com, as reviewed, amended and supplemented by the author, where appropriate.

[16] *Id.* at art. 10. Article 10 states that "Uniform Acts are directly applicable and obligatory in the Contracting States notwithstanding any provision of national law enacted either prior or subsequently [to the OHADA Treaty]".

(i) 'Uniform Act Relating to General Commercial Law';

(ii) 'Uniform Act Relating to Commercial Companies and Economic Interest Groups';

(iii) 'Uniform Act Relating to Cooperative Companies';

(iv) 'Uniform Act Organizing Securities';

(v) 'Uniform Act Organizing Collective Proceedings for Wiping-Off Debts';

(vi) 'Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution';

(vii) 'Uniform Act Organizing and Harmonizing Undertakings' Accounting Systems';

(viii) 'Uniform Act Relating to Contracts for the Transportation of Goods on Land'; and

(ix) 'Uniform Act on Arbitration'.

III. Investor-State Disputes: ICSID and BITs.

All OHADA States, except Equatorial Guinea, are now signatories to the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States' ["ICSID Convention"],[17] which entered into force on October 16, 1966. Conversely, India is not – and has, as of today, indicated no intention to become one. The ICSID Convention allows for the establishment of the International Centre for the Settlement of Investment Disputes ["ICSID Centre"][18] - a forum for foreign investors to

[17] International Centre for the Settlement of International Disputes, Database of Member States, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx.

[18] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter *ICSID Convention*], entered into force on October 14, 1966, as amended on April 10, 2006 https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf. Article 1 of the ICSID Convention states that "(1) [i]t is hereby established the Center for the Settlement of Investment Disputes (hereinafter the [ICSID] Center); (2) [t]he purpose of the Center shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of [the][ICSID] Convention".

settle investment disputes with their host States (and with any local State agency, authority or subnational entity).

ICSID has become a favoured route for foreign investors to address disputes and Sub-Saharan African States have until now constituted the third largest group of State respondents in ICSID-administered cases.[19] Among them, 45 ICSID cases have involved OHADA States – that is close to 10% of all ICSID cases and more than the 41 cases involving all other, non-OHADA, Sub-Saharan African States. Unsurprisingly, roughly a third of OHADA cases to date are related to investments in the oil and gas sectors.[20]

For Indian investors, the ICSID Convention contains one significant restriction. Per Article 25 of the Convention, "[t]he jurisdiction of the [ICSID Centre] shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the [ICSID Centre] by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the [ICSID Centre] [...]."[21] To the extent they are not nationals of a contracting State, or incorporated in a contracting State, Indian investors will thus not be in a position to avail of the ICSID conventional dispute settlement mechanisms in the event of a dispute with and in an OHADA Member State.

An alternate route for Indian investors however remains under the ICSID Centre's Additional Facility Rules.[22] These allow for an optional ICSID-administered conciliation or arbitration process[23] for parties which do not meet the personal

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[19] International Centre for the Settlement of International Disputes, *The ICSID Caseload – Statistics* (Issue 2015-2), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf.

[20] ICSID cases database, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx (as at October 1, 2015).

[21] *Supra,* note 18, at art. 25.

[22] *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes* [hereinafter *Additional Facility Rules*], adopted on September 27, 1978, as amended with effect on January 1, 2003 and April 10, 2006, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf.

[23] *Id.* at art. 2. Article 2 of the Additional Facility Rules states that "[t]he Secretariat of the [ICSID] Centre is hereby authorized to administer, subject to and in accordance with these [Additional Facility] Rules, proceedings between a State (or a constituent

jurisdictional requirements under the ICSID Convention. [24] Two considerations substantially mitigate the relevance of the Additional Facility for any investor. First, the consent of the host State is required in order to submit any dispute under the Additional Facility Rules (as will the approval of the ICSID Centre's Secretary-General)[25] – which is by implication highly hypothetical. Second, unlike ICSID Convention awards[26], an award rendered under the Additional Facility Rules is not directly enforceable in ICSID Convention Contracting States; rather, as for awards issued under any other institutional rules, they are subject to external review and enforcement mechanisms in local courts.

On a related note, it should be reminded at this stage that India has to date entered into Bilateral Investment Treaties ("BITs") with only two of the 17 OHADA States. BITs typically provide for institutional or *ad hoc* arbitration in the event of a dispute between an investor and the host State on grounds of alleged breaches of, or interference with, the terms of the BIT by the host State (or any local State agency, authority or subnational entity).

The 'Agreement for the Promotion and Protection of Investments' entered into between India and Senegal on July 3, 2008 (the "India-Senegal Agreement")[27] provides

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subdivision or agency of a State) and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the [ICSID] Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the [ICSID] Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; [...]".

[24] *Supra,* note 18, at art. 25, and note 21 above.

[25] *Supra,* note 22, at art.4 (1). Article 4(1) of the Additional Facility Rules states that "[a]ny agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General [...]".

[26] *Supra,* note 18, at art. 54. Article 54 of the ICSID Convention states that "(1) [e]ach Contracting State shall recognize an award rendered pursuant to [the] [ICSID] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State. [...]".

[27] *Agreement between the Government of the Republic of India and the Government of the Republic of Senegal for the Promotion and Protection* of Investments, http://finmin.nic.in/bipa/Senegal.pdf.

for such a dispute resolution mechanism in its Article 9 ('Settlement of Disputes Between an investor and a Contracting Party'). Under Article 9(3)-(4), disputes between an investor (from a contracting State) and one of the contracting States must be resolved by arbitration (where no resolution may be reached amicably or by way of conciliation in accordance with paragraphs (1) and (2) of Article 9). Arbitration under the India-Senegal Agreement is available under three alternate options. The first is an ICSID arbitration,[28] which, as discussed earlier, is not a possibility for Indian investors. A second option is to submit to arbitration under the ICSID Additional Facility Rules[29] – which, as also discussed, is hypothetical. A third, and default option, is for the parties to initiate *ad hoc* arbitration under the UNCITRAL Rules, with a three-arbitrator panel.[30]

India has also recently entered into an investment treaty with the Democratic Republic of the Congo on April 13, 2010 – which, as of today, has yet to come into force[31]. The text of this treaty is not currently publicly available.

In the absence of a BIT or similar 'investment protection and promotion agreement', the default option for Indian investors in the case of an investment dispute in most OHADA jurisdictions will rest on an arbitration clause in their respective investment or partnership agreements – and, failing that, on the jurisdiction of local courts.[32]

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[28] *Id,* at art. 9(3)(a).
[29] *Id,* at art. 9(3)(b).
[30] *Id,* at art. 9(3)(c).
[31] Ministry of Finance, Government of India, *Bilateral Investment Promotion and Protection Agreements*, http://finmin.nic.in/bipa/bipa_index.asp?pageid=3.
[32] India has entered into BITs (or investment protection and promotion agreements) with a number of other civil-law jurisdictions in Africa, including (partly) French-speaking countries - eg. Mauritius (4 September 1998) and Morocco (13 February 1999), and with Portuguese-speaking Mozambique (19 February 2009). Each provides for dispute resolution clauses with, *mutatis mutandis*, similar arbitration options for investors as otherwise provided for in the India-Senegal Agreement. See: http://finmin.nic.in/bipa/bipa_index.asp?pageid=3. India has also entered into Trade Agreements with the following OHADA States: Cameroon (22 February 1968), Côte d'Ivoire (17 February 1993), Senegal (22 May 1974) and Zaire (now the Democratic Republic of the Congo) (11 November 1988). None of these Trade Agreements provides for a dispute resolution process. See: http://commerce.nic.in/trade/international_ta_indaf.asp.

IV. Institutional Arbitration: Offshore Seats

The larger arbitration institutions are ubiquitous in arbitration clauses involving African parties or Africa-based projects. These include London's LCIA, the Swiss Chamber of Commerce ["SCC"] and the International Chamber of Commerce ["ICC"] – the latter being a preferred choice for OHADA parties. Arbitration clauses providing for disputes to be resolved under the rules of any of these institutions will typically (but not always) provide for a seat in either Paris, London, Zurich or Geneva. A seat in an OHADA State is in theory a possibility under any of the ICC, LCIA and SCC rules, as is a seat in India, for instance.

One of the key concerns for the parties (and for Indian investors) when drafting an arbitration clause, and choosing a seat, will be to pre-empt eventual enforcement issues of an award. Enforcement of an award rendered by a foreign-seated tribunal in one of the 17 OHADA jurisdictions will be subject to local exequatur proceedings, to the extent the relevant OHADA State is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "New York Convention")[33](or to any bilateral agreement). Enforcement will also be subject to any reservations that the OHADA State may have made under the New York Convention.

Two OHADA States, namely the Central African Republic and the Democratic Republic of the Congo, have made two standard reservations providing for enforcement under the New York Convention to be subject to (i) reciprocity (i.e. enforcement is limited to awards rendered by an arbitral tribunal with a seat in another New York Convention contracting State), and (ii) commerciality (i.e. the subject-matter dispute must be of a commercial nature under national laws).[34] The Democratic Republic of the Congo has made an important additional reservation providing that the New York

[33] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter the New York Convention], adopted on June 10, 1958, entered into force on June 7, 1959, http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[34] New York Convention - Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. See also: Law of the Democratic Republic of the Congo No. 13/03 of June 26, 2013 authorizing RDC's accession to the New York Convention (in: *Journal Officiel de la République Démocratique du Congo, Recueil de textes sur l'amélioration du climat des affaires et des investissements, Numéro spécial,* 14 May 2015).

Convention does not apply to disputes related to immovable property[35] (which, per Article 3 of the Democratic Republic of the Congo's Mining Code, includes the country's significant mining rights).[36]

It is also worth noting that, as of today, five OHADA States have not acceded to the New York Convention.[37] The enforcement of an international award in those States will in principle be possible solely on the basis of bilateral agreements with the concerned States and the respective OHADA State's local laws. The same will be true, by default, for an international award covered by a reservation made by an OHADA State which is otherwise party to the New York Convention.

It is thus critical for Indian investors to anticipate the full range of enforcement issues, and the possible alternate options, in light of their individual situations. Where, for instance, enforcement of an international award under the New York Convention is not available in an OHADA State on any ground, parties may consider whether offshore assets may be seized in another jurisdiction.

V. Regional Institutions and Local *Fora*: An Overview

Increasingly, offshore seats are being challenged by African parties during negotiations of arbitration clauses. This is particularly the case where State or subnational entities are involved in the proposed transaction. It is more specifically the case in sectors involving sovereign assets or extractive industries, including natural resources (such as oil and gas) and mining rights. African arbitration seats are an option under the rules of any of the larger institutions, such as the ICC, the LCIA or the SCC. Where the seat is not in Africa, the parties do have the option to choose an alternate location, in Africa, as the venue for the actual arbitration hearings. A venue in Africa is often agreed for reasons of practicality, for instance where the witnesses are based locally.

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[35] *Id.*

[36] Law of the Democratic Republic of the Congo No. 007/2002 of 11 July 2002 providing for the Mining Code, http://droit-afrique.com/upload/doc/rdc/RDC-Code-2002-minier.pdf.

[37] Chad, Equatorial Guinea, Guinea-Bissau, the Republic of the Congo and Togo. *See* United Nations Commission on International Trade Law, *Status, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Regional arbitration institutions have also been gaining prominence. In Africa, these regional institutions include the LCIA's Mauritius branch ("LCIA-MIAC") and the Arbitration Foundation of Southern Africa ("AFSA") – although the latter two would be unlikely choices for disputes subject to the substantive law of a civil law jurisdiction. Here again, enforcement issues will be a determinant factor in opting for a local forum or for regional institutional rules (which, in practice, implies the choice of a regional seat). Regional judicial agreements may contribute to mitigate enforcement issues in certain jurisdictions. By way of example, the Arab Convention on Judicial Co-operation (the "Riyadh Convention") adopted by the Arab League on April 6, 1983 provides for facilitated enforcement of judicial decisions and awards among member States. In Africa, Arab League members include the Comoros (also an OHADA member), as well as Morocco, Algeria, Tunisia and Egypt, all civil law jurisdictions. Facilitated enforcement under the Riyadh Convention of course assumes that the seat of arbitration is in an Arab League State, with Dubai often a preferred choice by the parties. The Dubai International Arbitration Centre ["DIAC"] or the Dubai International Financial Centre-London Court of International Arbitration ["DIFC-LCIA"] Arbitration Centre may thus be, in certain instances, specifically relevant for foreign investors in Africa.

A second issue to be considered by the parties, while considering an African seat in an arbitration clause, is the local courts' role in supervising the arbitration process – whether in the event of a jurisdictional challenge, for purposes of interim relief or for the appointment of arbitrators. In this respect, the OHADA court, known as the CCJA, stands as the most comprehensive regional institutional system on the African continent. Like the LCIA-MIAC, the CCJA, which is based in Abidjan (Côte d'Ivoire), provides a regional institutional forum, with its own rules and a supporting administration. The CCJA however goes further than other regional (or international) arbitration institutions, in at least two respects. First, the CCJA concurrently exercises supervisory jurisdiction for any arbitration conducted in OHADA States. Second, an award rendered under the CCJA rules of arbitration will be directly enforceable in all OHADA member States – as would the judgments of local courts.

VI. OHADA'S Court as a Hybrid Institution

The CCJA, established under the OHADA Treaty, is thus a unique hybrid judicial institution.

First, it provides advice to national governments and jurisdictions on the interpretation of the OHADA Treaty and the Uniform Acts– as would the constitutional council or the Supreme Court, in other jurisdictions.[38] Second, it is the jurisdiction of last resort for all judicial proceedings within the scope of the Uniform Acts – as would a court of *cassation*, in civil law systems.[39] Third, it acts as an arbitration institution for all arbitrations conducted under Title IV (Arbitration) of the OHADA Treaty and under the rules of arbitration of the CCJA (the "CCJA Arbitration Rules")[40] - as would major arbitration institutions such as the ICC, the LCIA or the SCC; it may, as such, supplement the parties for the appointment of arbitrators[41] and take any urgent action necessary to the conduct of the arbitration proceedings.[42] Fourth, the CCJA grants the

[38] *Supra*, note 13*,* at art. 13 and 14. Article 14 of the OHADA Treaty states that, "the [CCJA] ensures a common interpretation and application of the [OHADA] Treaty, of any regulation passed for its implementation, of the Uniform Acts and of any decisions" (par. 1); "[t]he [CCJA] may be consulted by any [OHADA] contracting State or by the [OHADA] Council of Ministers on any matter within the scope of [the matters given in paragraph 1]. The same right is recognized to the national courts where Article 13 [of the OHADA Treaty] applies" (par. 2). Article 13 of the OHADA Treaty states that "[l]itigation regarding the implementation of Uniform Acts is settled in the first instance and on appeal by the courts of the [OHADA] contracting States".

[39] *Id.* at art. 14. Article 14 of the OHADA Treaty states that "[b]y way of appeal, the [CCJA] shall rule on the decisions pronounced by the appellate courts of [OHADA] Contracting States in all business issues raising questions pertaining to the application of Uniform Acts and to the Regulations provided for in the [OHADA] Treaty, save decisions regarding penal sanctions pronounced by the appellate courts" (par. 3) ; "[t]he [CCJA] will rule as above with regard to non-appeallable decisions delivered by any national court of the [OHADA] Contracting States which pertains to those matters brought to the attention of the [CCJA] by virtue of the above paragraphs" (par. 4);."[w]hile sitting as a court of final appeal, the [CCJA] can hear and decide on the merits of the case (par. 5)".

[40] Arbitration Rules of the Common Court of Justice and Arbitration [hereinafter *CCJA Arbitration Rules*], adopted by the OHADA Council of Ministers on March 11, 1999 (*Journal Officiel de l'OHADA*, No. 8, May 15, 1999), http://www.ohada.com/reglements/666/arbitration-rules-of-the-common-court-of-justice-and-arbitration.html .

[41] *Id.* at art. 3.1. Article 3.1 (par. 2) of the CCJA Arbitration Rules states that "[w]hen the parties have agreed that the dispute shall be settled by a sole arbitrator, they may appoint him/her by mutual agreement for confirmation by the [CCJA]. If the parties fail to agree within thirty (30) days of notification of the request for arbitration by the other party, the arbitrator shall be appointed by the [CCJA]".

[42] *Id.* at art. 2.5. Article 2.5 of the CCJA Arbitration Rules states that "[i]n urgent cases, the President of the [CCJA] may take decisions necessary for the organization and proper functioning of arbitral proceedings, subject to informing the [CCJA] in the next meeting, to the exclusion of decisions requiring an order of the [CCJA]. [...]".

exequatur certification for purposes of enforcement of a CCJA Arbitration Rules award within OHADA member States.[43]

At this stage, it is useful to review in some details the specific alternatives available under OHADA law for Indian (and other foreign) investors where it comes to the choice of both seat and rules of arbitration in drafting a dispute resolution clause. As discussed, parties may of course provide for international, foreign-seated arbitration under the rules of an international arbitration institution (such as the ICC or LCIA).

Whether for political, logistical or commercial reasons, parties may however decide to provide for a seat of arbitration in an OHADA State. In the context of the OHADA Treaty, this implies two mutually exclusive sets of procedural rules – and options. The first is institutional arbitration under the CCJA Arbitration Rules (and Part IV of the OHADA Treaty). The second, and default option, is an *ad hoc* arbitration under the OHADA's Uniform Act on Arbitration. A third option, providing for an OHADA-seated arbitration under the rules of a foreign-based institution (such as the ICC), is a theoretical, but in practice only distant, possibility.

Indian parties may submit a dispute to the CCJA under the CCJA Arbitration Rules provided that they (or another party to the dispute) are domiciled in an OHADA State, or that the contract is to be performed, in all or in part, in an OHADA member State.[44] The CCJA Arbitration Rules largely draw on the rules of the ICC[45] – and civil law procedural traditions. As another key factor for foreign parties to consider, and as already mentioned, an award rendered under the CCJA Arbitration Rules will be enforceable in all OHADA member States, with *res judicata* effect, as would a judgment from a local

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[43] *Id.* at art. 30.2. Article 30.2 of the CCJA Arbitration Rules states that the "[t]he exequatur is granted by order of the President of the [CCJA] or of the judge delegated for this purpose and shall make the award enforceable in all the [OHADA] members States. [...]".

[44] *Id.* at art. 2.1. Under Article 2.1 of the CCJA Arbitration Rules which reflects Article 21 of the OHADA Treaty (*OHADA Treaty*, supra note 13), "[t]he mission of the [CCJA] shall be to procure, in conformity with these [CCJA Arbitration Rules], an arbitral solution when a dispute is of a contractual nature, in application of an arbitration clause or an arbitration agreement submitted to it by any party to a contract either when one of the parties is domiciled or normally resides in one of the [OHADA] member States, or, when the contract has been performed or is to be performed, wholly or partially, on the territory of one or several [OHADA] member States.

[45] *Id.* at art. 15.2. Including by providing for "terms of reference" (*procès-verbal*) to be agreed among the parties at the outset of the proceedings.

court.[46] Enforcement across OHADA jurisdictions is thus subject only to an exequatur being granted by the CCJA.[47]

The foregoing thus distinguishes from proceedings conducted under the Uniform Act on Arbitration, which are subject to the supervision of the local courts in each OHADA member State – with exequatur being granted by the courts of the relevant State.[48] Uniformity in interpretation across OHADA jurisdictions is however here again ensured since appeals to the CCJA are available (by way of *cassation*) against any local OHADA court's decision to refuse an exequatur,[49] or against a local court's ruling on a petition for annulment of an award.[50]

The Uniform Act on Arbitration, based on the UNCITRAL Model Law, is in effect intended to constitute the OHADA member States' internal arbitration law.[51] By default, it applies to all and any arbitration with a seat in an OHADA member State,

[46] *Id.* at art. 27. Article 27 of the CCJA Arbitration Rules states that "[a]wards made in conformity with the provisions of these [CCJA Arbitration Rules] have res judicata effect on the territory of each [OHADA] member State, as would decisions of the courts of [OHADA] member States [...]".

[47] *Id.* at art. 30. Article 30 of the CCJA Arbitration Rules states that "[t]he exequatur is requested by petition addressed to the [CCJA]" (par. 30.1); "[t]he exequatur is granted by order of the President of the [CCJA] or judge delegated for this purpose and shall confer on the award an enforceable character in all the [OHADA] members States" (par. 30.2).

[48] Uniform Act on Arbitration, adopted by the OHADA Council of Ministers on March 11, 1999 (*Journal Officiel de l'OHADA,* No. 8, May 15, 1999) http://www.ohada.com/actes-uniformes/658/uniform-act-on-arbitration.html. Article 30 of the Uniform Act on Arbitration states that "[t]he award can only be enforced subject to an exequatur granted by the judge having jurisdiction in the relevant [OHADA] member State".

[49] *Id.* at art. 32. Article 32 of the Uniform Act on Arbitration states that "[t]he decision [of the court of an OHADA member State] denying the exequatur may only be appealed by way of *cassation* to the [CCJA][...]".

[50] *Id.* at art. 25. Article 25 of the Uniform Act on Arbitration states that "[t]he award may not be challenged by way of opposition, appeal or an application for *cassation.* It may be subject to a petition for nullity, which must be filed with the judge having jurisdiction in the relevant [OHADA] member State. The decision of the judge having jurisdiction in the relevant [OHADA] member State may only be set aside by way of *cassation* by the [CCJA][...]".

[51] *Id.* at art. 35. Article 35 of the Uniform Act on Arbitration states that "[t]his Uniform Act [on Arbitration] shall be the law governing arbitration in the [OHADA] member States [...]".

where the parties have not elected to submit to the CCJA Arbitration Rules.[52] It also applies to the recognition and enforcement of awards issued by tribunals seated in a non-OHADA jurisdiction, where individual States have not provided otherwise.[53] This suggests that foreign investor seeking to enforce a non-OHADA award (including, hypothetically, an award under the ICSID Additional Facility Rules) in an OHADA State which is otherwise not a party to the New York Convention (or to a bilateral agreement) may be able to do so on the basis of the Uniform Act on Arbitration.

Under OHADA law, an award may only be challenged[54] and an exequatur may only be refused[55] if the tribunal's decision is found to be contrary to the "international public policy" of OHADA member States. Due process is, by implication, an additional ground for challenging the CCJA's exequatur under the CCJA Arbitration Rules[56] and a separate ground for annulment of an award under the Uniform Act on Arbitration.[57]

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[52] *Id.* at art. 1. Article 1 of the Uniform Act on Arbitration states that "[t]his Uniform Act [on Arbitration] shall apply to any arbitration when the seat of the arbitral tribunal is in one of the [OHADA] member States".

[53] *Id.* at art. 34. Article 34 of the Uniform Act on Arbitration states that "[a]wards made on the basis of rules different from those provided in this Uniform Act [on Arbitration] shall be recognized in the [OHADA] member States, subject to the conditions provided by any international agreements which may be applicable and, by default, subject to the same conditions as provided in this Uniform Act [on Arbitration]".

[54] *Id.* at art. 26. Article 26 of the Uniform Act on Arbitration states that "[r]ecourse for nullity is only admissible in the following cases: [...] - if the arbitral Tribunal has violated an international public policy rule of the States signatories to the [OHADA] Treaty; [...]".

[55] *Id.* at art. 31 Article 31 of the Uniform Act on Arbitration states that "[...] [t]he recognition and exequatur of the award shall be refused where the award is manifestly contrary to the international public policy of the [OHADA] member States." *Supra,* note 40, at art. 30.6. Article 30.6 of the CCJA Arbitration Rules (*supra*, note 39) states that "[t]he exequatur may only be refused and opposition to the exequatur may only be initiated in the following cases: [...] 4 - if the award is contrary to international public policy".

[56] *Supra,* note 40. Article 30.6 of the CCJA Arbitration Rules states that "[t]he exequatur may only be refused and opposition to the exequatur may only be initiated in the following cases: 1 - if the arbitrator has ruled without an arbitration agreement or on the basis of an agreement which is void or which has expired; 2 - if the arbitrator has ruled without conforming to the mission assigned; 3 - when the principle of adversary procedure has not been respected; [...]".

[57] *Supra,* note 48, at art. 26. Article 26 of the Uniform Act on Arbitration states that "[r]ecourse for nullity is only admissible in the following cases: - if the arbitral tribunal has ruled without an arbitration agreement or on the basis of an agreement which is void or which has expired; - if the arbitral Tribunal was irregularly composed or if the sole arbitrator was irregularly appointed; - if the arbitral Tribunal has ruled without

OHADA law does however not reflect Article 5.1(e) of the New York Convention, for instance, which allows for recognition and enforcement to be refused where the award "has been set aside by a competent authority of the country in which, or under the law of which, [the] award was made". In that, and as a final note, it is interesting that OHADA law (as other civil-law systems on the African continent) goes further than the New York Convention in facilitating the enforcement of international awards.

VII. Conclusion

The OHADA sub-region offers a unique common legal framework for Indian (and other international) investors in Africa. This is complemented by the use of the common CFA franc, and of French as a common language in the majority of OHADA member States. These have been essential in facilitating trade and investments across West and Central Africa.

A thorough grasp by Indian investors, and by Indian counsels, of the specificities of civil law, as it is practiced on the African continent, will however also be indispensable – as will an understanding of the local context. It will in particular be critical for Indian investors to anticipate any disputes with their local or international partners – and to identify the procedural and enforcement issues associated with their respective, specific situations as they elect an arbitral seat and procedural rules.

Possible difficulties in enforcing an arbitral award in the context of transactions with State-owned entities, or in sectors associated with sovereign assets (including extractive industries), will in particular require close attention. The extent of local sovereign immunities may need to be tested in the local courts of individual OHADA member State for purposes of enforcement of an award.

On that backdrop, and in this context, an offshore arbitration seat (usually coupled with the choice of ICC or LCIA arbitration rules) will more often than not continue to be a preferred route for international investors in Africa – although one which may be commercially and politically difficult to engage State counterparts on.

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conforming to the mission assigned; - if the principle of adversary procedure has not been respected; [...]; - if no reasons are given for the award".