

## The Evolution of Arbitration Laws in Francophone Africa\*

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### • Introduction

A lot of preconceived ideas have been propagated concerning arbitration in Africa. Indeed, for many practitioners and arbitrators from Western Countries, arbitration in this continent is more or less, terra incognita.

It is true that while arbitration was developing and expanding fast all over the world, Africa was being left behind in this race. In addition, the notable dearth of literature on arbitration in this area cannot be denied (1).

Currently, significant steps are being taken regarding the laws and practice of arbitration in Africa. On this basis, one must certainly admit that now the time is ripe for arbitration to expand in this part of the world.

The purpose of this paper is to present the evolution of the arbitration laws and practices in francophone Africa since anglophone Africa has already been very well covered (2) .

African laws relating to arbitration comprise two main sets of rules. The first relates to the general rules of law and the second to investment law. Both have domestic and international sources.

Investment law contains a whole range of legal guarantees intended to attract investments. Included among these legal guarantees is arbitration. Thus "arbitration under the general rules of law" means arbitration not involving matters of investment law(3) , which is itself an important but different issue that will not be considered here.

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In order to locate ourselves within the evolution of arbitration under the "general rules of law" in francophone Africa, it may be useful to consider the early sixties as the focal point.

The early sixties coincided with the accession to political independence of most of Africa's sub-Saharan states. This time is also considered as the starting point of expansion of international commercial arbitration (4) .

## **I - The past : the background of francophone Africa's legal systems with regards to the "Process of legislative extension"**

This rule is particular to the French colonial system. It is established by the principle of "legislative speciality" (a), which needs to be illustrated here with some examples (b). After which we will see that some of the difficulties with which francophone African countries have been confronted to date, especially in the matter of arbitration legislation, originate from that principle (c).

### *a) The definition of the principle "legislative speciality"*

*The principle of "legislative speciality" has a history that goes back a long way. Following the Revolution of 1789, the French authorities established that "the status of the colonies are determined by special orders" (5) .*

*From this time onwards, the laws applicable in France's overseas territories were those enacted in the Metropole and extended to these territories by a special enactment of the colonial legislator (6) .*

### *b) The application of the principle of "legislative speciality" in the matter of arbitration : some examples.*

*The impact of this principle in the matter of arbitration, can be examined in the light of the Civil Procedure (i), the Commercial Law (ii) and the Administrative Law (iii).*

#### *i) The Civil Procedure*

*As far as arbitration was concerned, although the French Code of Civil Procedure was extended to francophone Africa (7) , surprisingly, the provisions related to arbitration in this Code were not applicable.*

*This contrasts with the English African colonies, where the Arbitration Act of England was deemed applicable (8) . The example of Kenya is a good illustration of the difference between the legal policies of the French and English colonial authorities.*

*As pointed out by Mr. Justice Coudrey OBE (9) , the Order in Council of 1897 which established the Protectorate of Kenya provided that the Common Law, Doctrines of Equity, and Statutes of General Application in force in England on the 12th August 1897 should apply in Kenya. This*

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*meant that from the beginning, The Arbitration Act of 1889 applied in this country.*

*This raises the important issue of why the French colonial authorities did not extend the arbitration legislation to their colonies? Of course such a question is not easy to answer.*

*One acceptable hypothesis is that during the nineteenth century, arbitration as a judicial means of settlement of disputes on the legal basis of the parties's agreement, did not fit in with the French colonial policy known as "direct rule", as opposed to the "indirect rule" of the English colonial system<sup>(10)</sup>*

*The French authorities were more dictatorial in administrating their territories. Their preoccupation at that time was to keep tight control on the resolution of disputes in their territories <sup>(11)</sup> .*

*The lower judicial power was delegated to the indigenous authorities but at the same time, any powers of arbitration which might interfere with the judicial organization mentioned above were removed from the potential users of the Code of Civil Procedure <sup>(12)</sup> .*

*Therefore, the absence of law concerning arbitration within the legal system of the French colonies soon after independence originates from this French colonial policy.*

## *ii) The Commercial Law*

*The French Code of Commerce was extended to the former French territories of Western (FWA) in 1907 and Equatorial Africa (FEA) in 1910 <sup>13</sup> . Also applicable to the former territories was the law of 31st December 1925 which completed the provisions of the Code of Commerce and declares arbitration agreement valid in commercial matters <sup>(14)</sup>.*

*It is noteworthy that this law of December 31st 1925, was enacted after the Geneva Convention of 1923 on arbitration agreement <sup>(15)</sup>, to which France was party in the context of what may be considered as a certain "openness" to arbitration. This "openness", benefited the French colonies because this law was declared applicable to them.*

*But paradoxically, this extension of the law of 31st December 1925 created an abnormal situation in the legal sphere in that it produced the existence of a law admitting the validity of arbitration agreements in commercial matters on the one hand, while on the other hand, the rules of procedure enabling the arbitration process to work were absent.*

## *iii) The Administrative Law*

*The Administrative Law represents one important particular of the French legal system compared to the English Common Law. The French Administrative Law's prohibition of arbitration as a means of settlement of disputes for administrative bodies was extended to the colonies.*

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*To the best of our knowledge, the only exception concerns Burkina Faso (ex Upper Volta), where a law of 17th April 1906 authorises arbitration for settlement of disputes in the matter of public delivery or construction (16) .*

c) The limitations of "legislative speciality" with regards to the difficulties raised  
The legislation in the Metropole was not extended systematically to all the territories.

Furthermore, when it occurred (which was not always the case as in the matter of arbitration in the Code of Civil Procedure), the extension of the French law in the colonies, was only effective from a precise date, sometimes after the original legislation was enacted. These extensions became the starting point of the evolution of the African legal system.

Any modification made in the law of the Metropole was only extended to the African law if the modification was anticipated, which was rarely the case. This is the reason why African countries lived, and are still living in a state of law that is out of date in the "exporting country".

This situation added to the above mentioned legal vacuum in arbitration, results in a damaging legal insecurity for business and trade transactions, which African judges and legislators are trying to deal with.

## **II- The Present : current situation of arbitration laws in francophone Africa**

The current state of arbitration of "general nature" (as opposed to arbitration of "investment nature") concerns two main sources, domestic (a) and international (b).

### a) Domestic sources of arbitration

Following independence in the 1960's, the majority of the new francophone African states kept the status quo of their legal inheritance. As a result, no arbitration laws exist in their legal systems to date (i). On the other hand, among the new African states which filled the vacuum concerning arbitration legislation, some enacted laws related to domestic arbitration (ii) while very few of them have promulgated laws on domestic and international arbitration (iii). In all cases, arbitration laws in force in francophone Africa whether domestic or international, show that "the basic connection with the parent legal system remains" (17) .

#### *(i) African states with no arbitration laws*

*These are Benin (18), Burkina Faso, Central African Republic, Gabon, Guinea, Mali, Mauritania and Niger (19). The former French law on arbitration not having been extended to these countries, means that there is a total legislative vacuum.*

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*However, as already mentioned above, the Law of December 31st 1925 which authorises arbitration clauses in commercial matters is applicable.*

*(ii) African states with domestic arbitration laws*

*Contrary to what happened in the countries where the status quo was maintained, soon after their independence, many French speaking countries enacted legislation related to domestic arbitration. It would be interesting to review the situation in some of the countries concerned.*

*- Cameroon*

*The legal system of this country is influenced both by the French and the English law<sup>(20)</sup>. Arbitration is governed by articles of the Code of Civil and Commercial Procedure <sup>(21)</sup> which are very close to the former French law on arbitration. It is to be noted that the previously mentioned law of 31st March 1925 is also applicable in Cameroon.*

*- Congo*

*The Code of Civil, Commercial, Administrative and Financial Procedure <sup>(22)</sup> of Congo includes only one article governing arbitration. Indeed, under article 310 paragraph 2 of said Code, a foreign award can be granted exequatur and enforced in Congo although the arbitration agreement and the arbitral proceedings are not regulated.*

*One can deduce that there is a tacit acceptance of the arbitration agreement in the Congolese law. Although it seems that Congo is not yet party to the New York Convention on recognition and enforcement of foreign awards, one can conclude that the solution adopted by the Congolese legislator is concise and effective as they have not thought it necessary to enact other provisions to enable international arbitration.*

*The international validity of the arbitration agreement, derived from the well established general legal principles of separability and competence-competence on the one hand, and the domestic recognition of the foreign award on the other hand, seem sufficient to make arbitration effective in the Congolese legal system.*

*- Senegal*

*This country was one of the most important territories in the French colonial policy in Sub-Saharan Africa <sup>(23)</sup>. Arbitration is currently regulated in Senegal, in the Code of Civil Procedure promulgated in 1964 <sup>(24)</sup>. These provisions are quite similar to those of Cameroon and therefore, to the former Code of Civil Procedure of France. The law of December 31st 1925 is still applicable in Senegal.*

*However a new arbitration bill has already been drafted and submitted to the legislative authorities. This law will probably be enacted in 1998.*

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*- Chad*

*In this country, arbitration is governed by Ordinance of 28th July 1967, related to the Code of Civil Procedure (25). It is influenced by former French arbitration rules, like the other former French colonies. One should bear in mind that the law of 31st December 1925 is also applicable in this country.*

*- Democratic Republic of Congo (Ex - Zaire)*

*Although it is a francophone country, the Democratic Republic of Congo (Ex Zaire), is not a typical French colony. This country was a former colony of Belgium, which is also a French speaking country. Arbitration is regulated in The Democratic Republic of Congo (26) by articles 159 to 194 of the judicial Code of 1960(27).*

*(iii) African States with international arbitration laws*

*To date, only three countries are concerned : Djibouti, Ivory Coast and Togo (28).*

*- Djibouti*

*The Djiboutian Code of International Commercial arbitration which was the very first African legislation on the matter of international arbitration was enacted in 1984 (29) .*

*It is influenced by the French decree of May 12th 1981 on international arbitration. The definition of international commercial arbitration and the arbitral proceedings are organized on the same legal basis. It is also in accordance with the modern instruments on international arbitration such as the Geneva Convention of 1961 and the United Nation Commission for International Trade Law (UNCITRAL) Model Law. It is important to note that The Federation of the Chambers of Commerce of the member states of the Preferential Trade Area for Eastern and Southern African States ("PTA") (30) decided in 1987 to create a Regional Arbitration Center based in Djibouti. As a result, the Djiboutian Code may be of considerable importance for arbitration in the region during the coming years.*

*- Ivory Coast*

*The Code of Civil, Commercial and Administrative Procedure of Ivory Coast of 1972 (31) does not regulate arbitration. Thus, when the tribunals of this country were to decide on the issue of the validity of the arbitration agreement, during the late eighties, they faced a serious obstacle. In the presence of contradictory decisions made by the lower courts, the chambers of the Supreme Court gathered to decide on the issue, which led to a decision of April 4th 1989 (32) . According to this decision, the arbitration agreement is valid in Ivory Coast under the law of December 31st 1925.*

*In the light of the above the legislative authorities realised that the time had come to fill the void in the area of arbitration in the country. This is why the law of August 9th 1993 related to arbitration was passed.*

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*The particular of this law is that it is nearly entirely based on the French decrees of 1980 on domestic arbitration and 1981 on international arbitration (33) .*

*- Togo*

*This country has two sets of rules related to arbitration. The first ones are subject to the decree of March 15th 1982 (34) also influenced by the former French Code of Civil Procedure. The second are regulated by the law of 28th November 1989 which creates a Court of International Arbitration on the model of the ICC Court of International Arbitration, in order to promote international arbitration in Togo (35) . To date, no records on arbitration proceedings administered in Togo under the auspices of this Center have been brought to my attention.*

b) International sources of arbitration

These concern both bilateral accords (i) and multilateral conventions (ii).

*(i) Bilateral accords*

*Following the independence of the early sixties, France signed a great number of accords with its former colonies. They relate to co-operation in the field of justice and the enforcement in one state of judgements handed down in another state. They also contain special provisions regarding the recognition and enforcement of awards made in one country and "imported" into the contracting country (36) .*

*Although very useful in practice, these accords are not specific to arbitration, as they are generally limited to reference to provisions of the New York Convention.*

*(ii) Multilateral conventions*

*It will be sufficient to mention The New York Convention of 10th June 1958 and the European Convention on International Arbitration of April 21st 1961.*

*- The New York Convention of 10th June 1958*

*It has been notable success in Francophone Africa (37). As a consequence, the Geneva protocols of September 24th 1923 and September 26th 1927, ratified by France and applicable to its former colonies are now of limited interest.*

*- The Convention on International Arbitration of 21st April 1961*

*This Convention was drafted under the auspices of the United Nations Commission for Europe and concerned European East-West trade. Hence, in principle, the African countries are not covered. However, I should point out that Burkina Faso adhered to the Geneva Convention on January 26th 1965 (38).*

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### III - The future : The OHADA Treaty

As a consequence of what has been mentioned above, one can see that the laws in force in Francophone Africa are not harmonised. This situation causes serious harm to regional policies for trade and investment in the former French colonies <sup>(39)</sup> .

Thus in 1963, the Ministers of Justice of the countries concerned aimed to harmonise the legal systems they had inherited from the colonial period. This would make their legal systems more coherent in order to facilitate their political and economic co-operation <sup>(40)</sup>. Therefore, in October 1992 in Libreville, (Gabon), the Heads of States of the Franc Zone approved the project of a Treaty of Harmonisation of Business Laws. On October 17th 1993, the draft Treaty for Harmonisation of Business Laws in Africa, was signed by fourteen member states, and is already in force.

The Treaty is open to membership of other African countries and also to countries outside Africa <sup>(41)</sup>.

Article 3 of the Treaty creates an Organisation for Harmonisation of Business Laws so called "OHADA", composed of a Counsel of Ministers and a "Joint Court of Justice and Arbitration" (JCJA) which will be in charge of the realization of the goals of the Treaty. The legislative texts, termed "Uniform Acts" <sup>(42)</sup>, which will be directly applicable and mandatory in the Member States "notwithstanding any prior or subsequent domestic provision", are the principal means of realizing the objectives fixed in the Treaty.

The "OHADA" Treaty, attributes great importance to arbitration <sup>(43)</sup> and intends to set out original rules in this matter. But to date, the "Uniform Act" on Arbitration has not yet been drafted.

It seems important to emphasize the role of the JCJA <sup>(44)</sup> which has power of adjudication in the issues of interpretation of the Treaty and also in judicial and arbitration matters.

Concerning this second power, the JCJA does not decide the dispute itself. It nominates or confirms arbitrators, has an overview on the procedure and reviews the draft awards. The JCJA also has power to grant exequatur to the final award.

In many aspects concerning arbitration, the organisation and powers the JCJA seem similar to the China International Economic and Trade Arbitration Commission or "CIETAC", under the auspices of which "foreign-related" arbitration is administered in China since 1995 <sup>(45)</sup>.

It is noteworthy that the major concern of the Draftsmen of the OHADA Treaty was to secure the efficiency of arbitration agreements and awards. In this respect, they found unnecessary to provide for grounds for vacating arbitral awards, contrary to widespread understanding elsewhere <sup>(46)</sup>.

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This new African System is original and audacious in that it has restricted recourse to the JCJA against an arbitral award only at the stage of recognition and enforcement.

## • CONCLUSION

As we can see, arbitration in Africa must not be considered as terra incognita, although currently, international arbitration is only incorporated into the laws of three Francophone countries and in the "OHADA" Treaty.

Two other countries, Benin and Senegal are preparing to enact new laws on domestic and international arbitration.

However, in general, the legislations in force in the region have no "African distinctness". They are very similar to the French system that they are based on, and The UNCITRAL Model Law had no significant impact in francophone Africa, to date.

The expansion of international commercial arbitration in these countries will depend on the enactment of modern legislations and the adhesion to the New York Convention of 1958.

In addition to this, the creation of efficient Arbitration Centers - the JCJA system still has to prove itself - and the training of African lawyers must not be neglected.

### Footnotes

1 See Tiewul S.A. and Tsegah F. "Arbitration and the settlement of commercial disputes : a selective survey of African practice", *The International and Comparative Law Quarterly*, July 1975, p. 393.

2 See *inter alia*, papers presented by Judge Austin NE Amisshah (Ghana), Prince Bola Ajibola (Nigeria), Stephen Kokerai (Namibia/Botswana), Geoffrey WM Kiryabwire (Uganda), Prof David Butler (South Africa), Ian Donovan (Zimbabwe) at the Resolution of Trade and Investments Dispute conference held in Johannesburg from 5-7 March 1997. Adde "Arbitration in Africa", *The LCIA and Kluwer Law International*, 1996.

3 On the issue of arbitration involving matters of investment law, see Roland Amoussou-Guenou "International Commercial Arbitration in Sub-Saharan Africa : Laws and Practice", *the ICC International Court of Arbitration Bulletin*, Vol. 7/1 n°1, p. 63, and the footnotes...

4 See Bruno Oppetit "Philosophy of International Commercial Arbitration", *Journal Of International Law (JDI)* 1993, p. 811 and seq...

5 See Claude Lussan, "Législation de sociétés dans les territoires d'Outre-mer et dans les territoires associés

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(A.O.F. - A.E.F. - Madagascar - Togo - Cameroun), A.I.D.E., Copyright by Claude Lussan, 1953, pp. 20 & seq. This principle was officially established by the *Senatus-Consult* (which is the denomination of the decisions of the Senate under the first and second French Empire) of May 3rd 1854. See also François Luchaire in the "Manuel de droit d'Outre-mer", Paris, 1949. Adde "Quelles sont les lois applicables de plein droit ?", D. 1950, Chr. p. 135.

6 For example, the Former Code of Civil procedure in force in France since 1807 was extended to The West and Central African colonies by Decree of 15th May 1889 (see L.A 1891, p. 39, J.CL Outre-mer, VI., Proc., Introduction). This rule has been reaffirmed by the French Supreme Court. See Cass. Ch. Réunies 29th April 1959, Bull. civ. 1959, n° 4p. 3 (P.G. Yaoundé c/ Fende) ; Bull. Civ. 1959, n° 3, p. 2 (P.G. Yaoundé c/ Malika).

7 See Decree of 15th May 1889.

8 See A. Allot, "Judicial and legal system in Africa", London-Butterworths, 1962; J. Vanderlinden, "Les systèmes juridiques africains", PUF, p.32.

9 Mr. Justice Coudrey OBE, "Arbitration in Kenya", paper presented at the Inaugural Conference of the Pan-African Council of the London Court of International Arbitration (LCIA), Nairobi, Kenya, 7- 8th December 1994, p. 1.

10 See A.J. Van Den Berg "Etude comparative du droit de l'arbitrage commercial international dans les pays de Common Law", Doctorate thesis in law, Aix, 1977. Adde T. Hutchison "Africa and law. Developing legal systems in African Commonwealth nations", Madison, University of Wisconsin Press, 1968.

11 See J.P. Musseron, "Le pouvoir et la justice en Afrique francophone et à Madagascar", Paris, Pedone 1966, pp. 23 & seq ; Koffi Amega "Dix ans de droit en Afrique", Penant 1972, pp. 285 & seq.

12 See René Degni Segui "Codification et Unification du droit en Afrique francophone", Rev. Jur. et Pol. d' Outre mer, 1985, p. 285.

13 See decrees of 6th August 1907 and of 15th January 1910, "Legal Encyclopaedia of Black Africa", Les Nouvelles Editions africaines; ISTR, 1982, part I, législation.

14 See Decree n° 54-325 of 16th march 1954, Recueil annoté des textes de procédure civile et commerciale applicables en Afrique occidentale française de Gaston Jean Bouvenet, Paris, ed. de l'Union Française, 1954.

15 See Lampue, "L'application des Traités dans les territoires et départements d'Outre mer", AFDI., 1960, p. 191.

16 See Alain Bockel "Les contrats administratifs : données générales, le problème de l'arbitrage", Encyclopédie juridique de l'Afrique, p. 265.

17 This expression applies also to the African countries of English influence. See A. Allot, "Judicial and legal system in Africa", op. cit, p. 54.

18 Information from Benin indicates that the Beninese authorities are preparing to pass a domestic and international arbitration bill.

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19 For more details on these countries, see Roland Amoussou-Guenou the ICC International Court of Arbitration Bulletin, op. cit p. 64.

20 See Wendy Dorman, "Cameroon", World Arbitration Reporter Issue 0 (1986) p. 1081.

21 See articles 576 to 601 (Book II part II)

22 Law n° 51/83 of 21st April 1983

23 Dakar was the capital of the French empire in Black Africa.

24 See Book III, title I (arbitrations), articles 795 to 820

25 See articles 370 to 383

26 See articles 159 to 194.

27 See Decree of March 7th 1960, updated on July 30th 1985.

28 Draft arbitration Bills are currently being prepared in Benin and Senegal.

29 See Law of 13 February 1984, Rev. arb. 1984, p. 533 & seq. commented by Yves Derains.

30 The PTA was created on 21st December 1981 and came into force on September 30th 1982.

31 See Law n° 72 833 of 21st December 1972, Official Gazette (J.O.R.C.I) of 5 February 1973.

32 See Talal Massi v/ Omais, April 4th 1989, Rev. arb. 1989, p. 530, commented on by Laurence Idot

33 Law n° 93-671, Official Gazette (J.O.R.C.I.) of September 14th 1993.

34 See articles 275 to 290 of the Code of Civil Procedure.

35 See Law n° 89-31 of November 28th 1989, instituting an Arbitration Court (J.O.R.T. of January 10th 1990).

36 See Ministry of Foreign Affairs, "Liste des Traités et Accords de la France en Vigueur ....", Direction des Archives et de la Documentation , Conservation des Traités.

37 Cf. List of contracting states, Multilateral Treaties, UN Secretariat General, vol 330, p.3

38 Cf. list of signatory states, Multilateral Treaties, UN S ecretariat General, doc. I ONU XX 557, p. 744.

39 See Akimuni, A. M., "A plea for harmonisation of African investment laws", African Law Journal 1975, p. 134 & seq.

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40 See Mr President Keba Mbaye, in "Harmonisation of Business law in the Franc Zone ". An experience of judicial integration in Africa. Bulletin of the Institut International de Droit d'Expression et d'Inspiration Françaises.

41 See article 53 of the Treaty.

42 See article 5 of the Treaty.

43 See articles 21 to 26.

44 See Aboubacar Fall, "Harmonisation of Commercial Law in the Franc Zone", International Business Lawyer, February 1995, vol. 23 n° 2 p. 82; Pascal Agboyibor "Recent Developments in the Planned Harmonization of Business Law in Africa", International Business Law Journal, 1996, n° 3, p. 30 ; Roland Amoussou- Guenou "Arbitration Pursuant to the Treaty For Harmonization For African Business Law", International Business Law Journal, 1996, n° 3, p.321.

45 See Sally A. Harpole, "International Arbitration in the People's Republic of China under the New Arbitration Law", The ICC International Court of Arbitration Bulletin, Vol. 6/N°1, May 1995, p. 19.

46 See inter alia sections 66 and 67 of England Arbitration Act 1996, article 1504 of the French New Code of Civil Procedure, article 34 of the UNCITRAL Model Law.

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