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**Does a Right to a
Physical Hearing Exist
in International
Arbitration?**

BENIN

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a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. *Does the lex arbitri of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?*

Short answer: No, though the parties and the tribunal may choose to have one.

Benin is a member-State of the OHADA legal system.¹ As such, its normative frameworks on arbitration found in the OHADA norms. In Benin, the *lex arbitri* is made

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¹ The *Organisation pour l'Harmonisation du Droit des Affaires*, in French "OHADA", is translated into English as the Organization for the Harmonization of Business Law in Africa. It is one of the most important experiences of legal and judicial integration in the world and by far the most successful of the late 20th century. Created by the Treaty of Port-Louis (or the "OHADA Treaty") in October 1993 (revised on October 17, 2008 in Quebec City, Canada), OHADA is a fully-fledged international organization with a legal international personality. It pursues a work of legal integration between its members. Adhesion to the Treaty, as provided for in its Article 53, is open to any member-State of the African Union that is not a signatory and to any State that is not a member of that Union. Currently, it brings together 17 States, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Ivory Coast, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo. With French, Portuguese, Spanish and English as working languages, OHADA is viewed as both an international governmental organization and a crucible for sharing a set of legal instruments including the so-called Uniform Acts, which are directly applicable in all the member-States. Its objective is the furtherance of its norms via the facilitation of trade and investment and the guarantee of legal and judicial security for business activities. In other words, it aims at propelling economic development and create a large integrated market. The OHADA Treaty expresses in the Preamble and Article 1 its founders' desire to promote arbitration "as an instrument for the settlement of contractual disputes". To achieve this goal, the OHADA arbitration system has been designed to take into consideration two sets of norms. There is, on the one hand, institutional arbitration organized under the Arbitration Rules of the Common Court of Justice and Arbitration ("R. CCJA"), which is also the highest court, or Court of Cassation, of the member-States. There is also, on the other hand, *ad hoc* arbitration governed by the Uniform Act on the Law of Arbitration ("UAA"), which defines the basic rules applicable to

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up of a set of two legal instruments. On the one hand, the Rules of the Common Court of Justice and Arbitration (“R. CCJA”),² which apply to institutional arbitration, especially that of the Arbitration Centre of the Common Court of Justice and Arbitration (“CCJA”) and, on the other hand, the Uniform Act on Arbitration Law (“UAA”), which is viewed as the common law on arbitration governing *ad hoc* arbitration. None of these norms makes a distinction between domestic and international arbitration.

It should be noted that the UAA is the arbitration law, i.e., the *lex arbitri* of each of the OHADA member countries. As such, it replaces the old arbitration laws of countries that have opted for such a choice, or comes as a supplement to it in those that have opted for a new arbitration law regarding their deficiencies. On the other hand, the R. CCJA is applicable to arbitrations that take place under the auspices of the Common Court of Justice and Arbitration having its seat in Abidjan and, in this capacity, the UAA is applied to it in a suppletive way.

Having made this essential clarification, it is worth noticing that in both cases, physical hearings are expressly or impliedly provided for only at the initiative of either the parties or the arbitral tribunal. With regard to institutional arbitration within the OHADA system, and by extension in Benin, conducted under the auspices of the Common Court of Justice and Arbitration (CCJA), it is clear that the choice of a permanent arbitral institution implies the choice of its rules of arbitration under Article 10, paragraph 1, of the UAA, which provides:

“The fact that the parties have recourse to an arbitration body commits them to apply the Rules of Arbitration of that body, except for the parties to expressly disregard certain provisions thereof”.

any arbitration. The CCJA is at the same time a Supreme Court of law dealing with the effective and coherent implementation of OHADA business law in all the member States, and an Arbitration Reference Centre called upon to rule on disputes over the duty of the member-States to foster and promote this dispute settlement mechanism. To that end, it plays an administrative and supervisory role for the arbitral procedure. It also ensures the effective enforcement of arbitral awards in the OHADA area. However, it follows from the provisions of Article 21 of the OHADA Treaty that arbitration under the auspices of the CCJA with its R. CCJA is open for disputes of which at least one of the parties has either his domicile or his habitual residence in a State party to the OHADA or disputes arising out of contracts whose performance takes place, or is intended to take place, in whole or in part, on the territory of a State party. In turn, the Uniform Arbitration Act Law (“UAA”) is directly applicable in all member-States and prevails over any other conflicting national provision. Under Article 1, the UAA only applies when the seat of the arbitral tribunal is located in one of the member-States. In sum, neither of these norms differentiates between international and domestic arbitration.

² This norm is supplemented by the Treaty of OHADA in its Articles 21 to 26 dealing with arbitration.

Similarly, Article 10.1 of the R. CCJA provides:

“When the parties have agreed to have recourse to an arbitration administered by the Court, they thereby submit themselves to the provisions of Title IV of the OHADA Treaty, to the present Rules, to the Rules of Procedure of the Court, to the annexes thereto and to the Schedule of Arbitration Costs [...]”.³

Article 16, paragraph 1, of the R. CCJA provides:

“The rules applicable to the arbitral proceedings, shall be the present rules and, in the silence of the latter, any rules which the parties or failing them, the arbitral tribunal, establish, whether by referring to rules of procedure of the national law applicable to the arbitration or not”.

It results from this provision that the arbitral proceedings, and thus the possibility of holding a physical or a remote hearing, is to be dealt with under the Rules of the CCJA and, in the absence of any applicable provision, the rules agreed by the parties or defined by the arbitral tribunal. The right to opt between a physical or a remote hearing of the parties in arbitration is recognized under Article 19.1, paragraph 4, of the R. CCJA, which provides: “The parties shall appear either in person or through their duly authorized representatives. They may be assisted by their counsel”.

This is further supported by Article 19.1, paragraph 5, of the R. CCJA, which provides: “The arbitral tribunal may decide to hear the parties separately, should it consider it necessary. In such a case, the hearing of each party shall take place in the presence of counsel for both parties”.

Through these provisions, the R. CCJA unambiguously envisages the possibility for the parties to be physically present in the course of the hearing contrasting, at the same time, the position adopted by the UAA.

As to the requirements, Article 19.1, paragraph 2, of the R. CCJA adds as follows: “[...] the arbitral tribunal shall hear the parties in an adversary manner if one of them so requests. Otherwise, it may decide to hear them *ex officio*”. It follows from this provision that the arbitral tribunal, at the request of one of the parties, shall hear all of them *in an adversary manner*. In other words, due process is an explicit requirement. Should the parties not ask for a hearing, the arbitral tribunal may decide to hear them *ex officio*. Moreover, Article 19.5 of the R. CCJA stipulates as follows:

“The arbitral tribunal shall invite the parties to the hearings, the conduct of which it shall regulate. These hearings must be conducted in an adversary manner. Unless the tribunal and the parties agree otherwise, the hearings are not open to persons not involved in the proceedings”.

³ Free translation by the Authors. Since there is no official translation in English of the OHADA norms, the Authors provide the translations of all the Articles cited in this report.

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This provision not only puts emphasis on the right of the parties to opt for a physical hearing, but it also specifies the conditions under which it can take place. Thus, first, it is up to the arbitral tribunal to regulate the conduct of the procedure, including the hearing procedure, second, the principle of adversarial proceedings must be applied by the arbitral tribunal and, third, persons not involved in the proceedings shall not, in principle, attend the hearings, unless the arbitral tribunal and the parties agree otherwise. Finally, this provision sets out more the conditions for a hearing to take place. It places emphasis on the arbitral tribunal's authority to organize the hearing, as Article 19.1, paragraph 6, provides: "the hearing of the parties shall take place on the day and at the place fixed by the arbitral tribunal".

As a concluding note, it is worth specifying that if the UAA does not contain any provisions similar to the R. CCJA.

As to the question of knowing if witness testimony can be given remotely, no provision in this norm allows it. Nevertheless, it may be considered if: (i) the parties' will to that end is clearly stated and, failing this, if the arbitral tribunal has so decided, and (ii) the technical means permit it.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: Arguably under the UAA.

Under the UAA, no express reference is made as to the right to a physical hearing or the possibility of having a remote hearing in arbitration. In spite of this silence, this right is impliedly provided for in Article 14 of the UAA, but only under certain circumstances. Indeed, paragraphs 1 and 2 of Article 14 of the UAA state as follows:

- "(1) The parties may, directly or by reference to arbitration rules, determine the arbitral procedure. They may also make it subject to a procedural law of their choice.
- (2) Absent such agreement, the arbitral tribunal may conduct the arbitration as it deems appropriate".

This provision poses the principle of party autonomy to define the arbitration's procedure and the power of the arbitral tribunal to define such procedure in the absence of the parties' agreement. Consequently, it is up to the parties to set the suitable rules of procedure to their arbitration and consequently the rules applicable to a hearing (physical

or remote). Failing such agreement by the parties, this power is vested in the arbitral tribunal, which may conduct the proceedings as it deems appropriate.⁴

It should be noted that although the UAA does not contain any express provision on this right, the above cited provisions, i.e., Article 14, paragraphs 1 and 2, of the UAA will in practice be interpreted in such a way as to authorize the physical presence of the parties to enable them to be heard. It is therefore not excluded that the courts interpret them in such a way as to allow a physical hearing of the parties.

Regarding the requirements, no condition is needed by this norm to that end.

As for the question of remote witness testimony, nothing prevents it. This is only feasible, according to Article 14 of the UAA, when the parties agree it or when their choice refers either to a specific arbitration rules or a procedural law providing it and, in this default, when the arbitral tribunal decides to conduct the arbitration as it deems appropriate, i.e., remotely. Therefore, pursuant to this norm, this procedure is permitted only if it results from a clear choice of the parties and failing this from the arbitral tribunal choice.

b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes.

The Authors are unable to specifically point to any provisions in the Benin Code of Civil Procedure, which would require the parties' physical presence during judicial proceedings.⁵

However, as discussed below, such rules are normally inapplicable to arbitration.

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

Short answer: No.

⁴ Under this provision, in the absence of an agreement of the parties, the arbitral tribunal shall proceed with the arbitration as it deems appropriate, that is that in the event that they have not made any provision in this respect, it is up to the arbitral tribunal to freely establish the rules applicable to the arbitral proceedings.

⁵ Law No. 2008-07 on the Code of Civil, Commercial, Social and Administrative Procedure in Benin [*Loi n° 2008-07 portant Code de procédure civile, commerciale, sociale et administrative*].

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The OHADA norms on arbitration and, by ricochet, those applicable in Benin are autonomous and separate from the Beninese Code of Civil Procedure, which contains no reference to its extension to arbitration. Nevertheless, to the extent that the arbitral tribunal or the parties to the arbitration choose its application, the provisions of the Beninese Code of Civil Procedure can only complement and clarify the OHADA norms in the internal legal order of Benin for this purpose.

c. **Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: Yes.

Neither OHADA norm (UAA and R. CCJA) provides for the waiver of the right to a physical hearing.⁶ However, the fact remains that if the parties have chosen institutional arbitration rules that contain provisions relating to remote hearings and testimony, this would constitute a waiver of such a right. The rationale is that the right to a physical hearing is not mandatory in nature and cannot be considered in any way as public policy procedural rule. As a consequence, the parties can derogate from it. The parties can elect to waive the right to a physical hearing in advance or after the dispute has arisen.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No.

Knowing that the jurisdiction of the arbitral tribunal results from the mission entrusted to it by the parties, it cannot decide on its own motion to hold a remote hearing in violation of the parties' agreement. Otherwise, this would certainly result in the setting

⁶ Such a waiver is not expressly stipulated in the system's norms. Accordingly, though remote hearings are not provided for in the norms applicable to arbitration in Benin and in the OHADA system, knowing that arbitration is based on the parties' common intention to submit their dispute to such a procedure in case they decided to waive their right to a physical hearing by adopting institutional rules that allow remote hearing, the arbitral tribunal is bound by such a choice of the parties.

aside of the resulting award or the refusal of its recognition and enforcement under the provisions of Article 26(c) of the UAA and Article 29.2, letter (c), of the R. CCJA.

d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Yes.

A party's failure to raise a breach of the right to a physical hearing during the proceedings prevents that party from using it as a defence for challenging the award in the OHADA system, and by extension in Benin's legal system. This observation is based on two main considerations.

First, Article 14, paragraph 10, of the UAA provides: "A party who knowingly abstains from invoking, without delay, an irregularity and yet proceeds with the arbitration, is deemed to have waived its right to object".

In other words, in the context of a procedural irregularity due to a non-compliance with any fundamental principle, a party which has knowledge of it, or of any other defect, and fails to exercise its right to invoke it within a reasonable time, is deemed to have waived the exercise of that right. The phrasing of this provision shows its broad application to any kind of defect, including fundamental procedural rights, more broadly than the rules from which the parties may derogate. As a logical consequence, the same applies to defects resulting from the breach of the right to a physical hearing that one of the parties would not have raised within a reasonable period of time.

It should be noted that the effects of this implicit renunciation of the right to raise an irregularity under Article 14, paragraph 10, of the UAA are twofold. First, with regard to the arbitral tribunal in the OHADA system and second, with regard to the competent judge of the member-State in the OHADA system at the stage of the review of the arbitral award, pursuant to Article 26 of the UAA, or when recognition and enforcement are sought, pursuant to Article 31 of the AAA.

Second, as far as the R. CCJA is concerned, Article 16, paragraph 3, also addresses this matter in more or less the same wordings and provides: "Any party who knowingly fails to raise promptly an irregularity and pursues the arbitral proceedings, shall be deemed to have waived the right to claim this irregularity". As a consequence, by not invoking in due time a procedural defect, such as failure to conduct a physical hearing by the arbitral tribunal, that party may not invoke it subsequently in that it is deemed to have had knowledge thereof and waived it.⁷

⁷ As a consequence, in both cases, once the proceedings are closed, the parties may not make any claim or raise any plea of irregularity. Nor may they make any submissions or produce any documents except at the express written request of the arbitral tribunal.

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To conclude on this point, in the OHADA system, any procedural defect that is not raised in a timely manner entails, as a sanction, the waiver of the right to invoke it as a basis to set aside the arbitral award. This rule is the clear expression of a general principle of good faith, the purpose of which is to sanction unfair conduct by the parties to the arbitral proceedings.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: No, it is not *per se* a basis to set aside an award.

The breach of a right to a physical hearing does not constitute *per se* a ground for setting aside of the arbitral award whether in the UAA or in the R. CCJA systems. But, if the parties had agreed to conduct a physical hearing and the arbitral tribunal did not, this may constitute a basis to set aside the award if the party opposing the award proves that it has translated into a material violation of a due process principle or of procedural public policy as defined in law in accordance with Article 26, letters (d) and (e), of the UAA and Article 29.2, letters (d) and (e), of the R. CCJA or it has otherwise caused actual prejudice.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: N/A

See analysis above.

e. Recognition/Enforcement

10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: Yes.

The right of the parties to present their cases is part of the parties' fundamental procedural rights in Benin. Even if such a right does not expressly appear in the provisions of the two OHADA arbitration norms, the fact remains that its breach may constitute in OHADA arbitration law, and thus in Benin, a ground for refusing the recognition and the enforcement of a foreign arbitral award in accordance with the 1958 New York Convention. It goes without saying that in the OHADA system, for the enforcement of a foreign arbitral award, the competent judge needs to assess whether it complies with the requirements set forth by the 1958 New York Convention. Such approach is based on the provisions of Article 34 of the UAA, which provides that arbitral awards made on the basis of rules different from those provided for by this Uniform Act, shall be recognized in the Contracting States in accordance with the conditions laid down in any international Conventions which may be applicable and, failing this in the same conditions as those laid down by the provisions of this Uniform Act.

Based on the foregoing, in Benin jurisdiction, and beyond in the OHADA system, a breach of a right to a physical hearing would constitute a ground for refusing recognition and enforcement of a foreign arbitral award if that prevented a party from presenting its case under Articles V(1)(b) and V(1)(d) of the 1958 New York Convention.

As for the violation of public policy of the country where recognition and enforcement are sought under Article V(2)(b) of the 1958 New York Convention, this ground falls within the scope of the provisions of Article 31, paragraph 4, of the UAA, which states that: "The recognition and the enforcement (exequatur) are denied if the arbitral award is manifestly contrary to a rule of international public policy". That said, the question remains how the concept of international public policy will be interpreted in the context of the OHADA law.

f. COVID-Specific Initiatives

11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?

Short answer: Not really.

Since the COVID 19 crisis, many feared that Benin's judiciary would be paralysed during the confinement period and even beyond. To a great extent, this has not been the case. Even if there has been no apparent break in the continuity of the public service of justice, such continuity and the need to guarantee the rights of the parties to legal proceedings, while fighting against the spread of COVID-19, would have required that the Beninese government took clear and substantial steps to that end, such as for example supporting at least the use of videoconference in the course of proceedings. Regretfully,

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nothing has been undertaken to allow the courts to hold hearings by videoconference. While this is certainly deplorable, there is reason to wonder whether remote hearings are at the heart of the authorities' concerns who could have taken appropriate measures for rendering it possible.

Apart from the social distancing and other precautionary measures prescribed by the Beninese government and considered by the various institutions, no specific innovations have taken place as far as the challenges presented to holding physical hearings during the COVID 19 pandemic are concerned.