



RESEARCH BRIEF

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Investment Arbitration under OHADA Law: Advantages for Chinese Investments in Africa

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Key Points:

- Recent revision of the OHADA arbitration framework allows Chinese investors to commence investment arbitration proceedings against a host state in the OHADA region, based on any instrument related to the protection of investments, including bilateral investment treaties, and local investment laws.
- However, the establishment of arbitration requires consent, an unlikely scenario for many disputes.
- Practical considerations could also reduce the appeal of investment arbitration under OHADA law for Chinese investors.

Legal and judicial insecurity have been the main impediments to foreign investments and, by extension, to the economic development of African countries, particularly in the Sub-Saharan region. Compared to most regions of the world, starting a business in Sub-Saharan Africa has historically been riskier and more cumbersome, time-consuming, and expensive.¹ Against this background, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (the Organisation for the Harmonisation of Business Law in Africa, or OHADA)² aims to facilitate local and (more importantly) foreign investments via simple, modern, and attractive

¹ Grégoire Bakandjea and Wa Mpungu in Grégoire Bakandjea Wa Mpungu & Bernard Rémiche (eds.), *D'UNE ECONOMIE POPULAIRE A UNE ECONOMIE FISCALISEE* 16 (2010); Roger Masamba, *L'OHADA et le climat d'investissement des affaires en Afrique*, 855 *PENANT* 137, 137-138 (2006).

² Treaty on the Harmonisation in Africa of Business Law, signed in Port Louis on October 17, 1993, 4 J.O. OHADA 1, available at <http://www.ohada.com/traite/10/treaty-on-the-harmonisation-of-business-law-in-africa.html>. The OHADA Treaty was revised in Quebec on 17 October 2008 (available at [\[2008.html\]\(http://www.ohada.com/traite/937/treaty-on-the-harmonization-in-africa-of-business-law-signed-in-port-louis-on-17-october-1993-as-revised-in-quebec-on-17-october-2008.html\)\). Please note that OHADA is sometimes referred to in English academic publications as "OHBLA;" see, e.g., Kenfack Douajni, *OHBLA Arbitration*, 17\(1\) *JOURNAL OF INTERNATIONAL ARBITRATION* 127 \(2000\); Franco Ferrari, *The Ohbla Draft Uniform Act on Contracts for the Carriage of Goods by Road*, *REVUE DE DROIT DES AFFAIRES INTERNATIONALES* 898 \(2001\); Thierry Lauriol, *Legal Aspects of Creating Security Interests over Mining Titles in the States Parties to the OHBLA*, 19 *JOURNAL OF ENERGY & NATURAL RESOURCES LAW* 207 \(2001\); Franco Ferrari, *International Sales Law in the Light of the OHBLA Uniform Act Relating to General Commercial Law and the 1980*](http://www.ohada.com/traite/937/treaty-on-the-harmonization-in-africa-of-business-law-signed-in-port-louis-on-17-october-1993-as-revised-in-quebec-on-17-october-</p></div><div data-bbox=)

business regulations.³ Article 5 of the OHADA Treaty provides that acts enacted for the adoption of the rules mentioned in Article 1 of the OHADA Treaty are to be known as “Uniform Acts.” Uniform Acts are the main instrument of OHADA. They are unified legal provisions that regulate a specific area of business law. They are directly applicable in the OHADA Member States and override all national contrary provisions (Article 10 of the OHADA Treaty). From a strictly substantive law perspective, the Council of Ministers has adopted Uniform Acts on the law of commercial companies and economic interest groups,⁴ general commercial law,⁵ security interests,⁶ simplified procedures for recovery and enforcement measures,⁷ collective proceedings for the clearing of debts,⁸ the organisation and harmonisation of accounting of companies,⁹ contracts of carriage of goods by road,¹⁰ and the Uniform Act on Cooperatives.¹¹

Over the past 15 years, investment flows between China and Africa have soared. In many instances,

Chinese investments in Africa are realized based on bilateral investment treaties (hereinafter referred to as BITs). China now has BITs with at least 29 sub-Saharan African countries, including, in the OHADA region, the Republic of Congo (2000), Côte d’Ivoire (2002), and Benin (2000).¹² Procedurally, the more recent BITs contain broad arbitration clauses that allow investors to access arbitration for any investment disputes.¹³ However, under OHADA law, there was no provision governing how a Chinese investor could activate a treaty-based arbitration against an OHADA Member State. In response to this weakness, the Council of Ministers adopted on November 23, 2017, a new Uniform Act on the Law of Arbitration,¹⁴ repealing the previous Uniform Act dated 11 March 1997.¹⁵ It also revised the Arbitration Rules of Procedure of the Common Court of Justice and Arbitration (hereinafter referred to as the Arbitration Rules of Procedure).¹⁶ Under the revised OHADA arbitration framework, any legal entity governed by public law (such as

Vienna Sales Convention REVUE DE DROIT DES AFFAIRES INTERNATIONALES 599 (2001).

³ Claire Moore Dickerson, *Harmonizing Business Law in Africa: OHADA Calls the Tune*, 44 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 17 (2005); For an empirical evaluation of the impact of OHADA law on the economies of its Member States, see Abdoullah Cissé, *L’harmonisation du droit des affaires en Afrique: L’expérience de l’OHADA à l’épreuve de sa première décennie*, 2 REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE 197 (2004).

⁴ J.O. OHADA n° 2, January 1, 1997, 1 *et seq.* This Uniform Act entered into force on January 1, 1998 was revised on May 5, 2014.

⁵ J.O. OHADA n° 23, February 15, 2011, 1 *et seq.* This Uniform Act entered into force on January 1, 1998 and was revised on May 15, 2010.

⁶ J.O. OHADA n° 22, February 15, 2011. This Uniform Act entered into force on January 1, 1998 and was also revised on 15 December 2010.

⁷ J.O. OHADA n° 6, June 1, 1998, 1 *et seq.* This Uniform Act entered into force on July 10, 1998.

⁸ J.O. OHADA n° 7, July 1, 1998, 1 *et seq.* This Uniform Act entered into force on January 1, 1999.

⁹ J.O. OHADA n° 10, November 20, 2000, 1 *et seq.* This Uniform Act was revised on January 26, 2017.

¹⁰ J.O. OHADA n° 13, July 31, 2003, 3 *et seq.* This Uniform Act entered into force on January 1, 2004.

¹¹ J.O. OHADA n° 23, February 15, 2011. This Uniform Act entered into force on May 16, 2011.

¹² However, it is important to highlight that several China-Africa BITs do not appear to be in force (see Lorenzo Cotula, Xiaoxue Weng, Qianru Ma & Peng Ren, *China-Africa investment treaties: do they work?* International Institute for Environment and Development (2016) 24, 25.

¹³ *E.g.*, China’s investment treaties with South Africa (1997), Botswana (2000), Congo (2000), Côte d’Ivoire (2002), Djibouti (2003), Benin (2004), Madagascar (2005), Nigeria (2001), and Uganda (2004).

¹⁴ J.O. OHADA, *numéro spécial*, December 15, 2017, 15 *et seq.* This Uniform Act has replaced the Uniform Act on Arbitration Law of March 11, 1999.

¹⁵ The Council of Ministers also adopted a Uniform Act on Mediation (J.O. OHADA, *numéro spécial*, December 15, 2017, 5 *et seq.*). This Uniform Act was adopted on November 23, 2017. The Uniform Act on Mediation covers any disputes submitted to a mediator, without any restriction as to geographical location or the subject matter of the relevant dispute. It also applies to either conventional or judicial mediations.

¹⁶ J.O. OHADA, *numéro spécial*, December 15, 2017, 29 *et seq.*

states, local governments, and public establishments) may henceforth be a party to an investment arbitration. Investment arbitration is usually defined as an arbitration forum that hosts disputes between a State or one of its entities, and a foreign private entity carrying out an investment transaction in that State.¹⁷ Article 3 of the Uniform Act on the Law of Arbitration and Articles 2.1 and 5.1(b) of the Arbitration Rules of Procedure now expressly allow foreign investors to start an arbitration based on any instrument related to the protection of investments, including BITs, and local investment laws. This new legal arsenal on alternative dispute resolution under OHADA law now allows Chinese investors to start arbitration proceedings under the auspices of the Common Court of Justice and Arbitration (hereinafter referred to as the CCJA) to make direct claims against a host country in the OHADA region. It deters host countries from harming the interests of Chinese and other foreign investors by ensuring that the dispute is handled by a neutral arbitral tribunal, which is independent from the host country's judicial system.

However, from a procedural perspective, it is important to note that several BITs between China and some African countries are not in force. For instance, the BITs between China and the Democratic Republic of the Congo (signed 11 August 2011) and Cote d'Ivoire (signed on 30 September 2002) are not in force yet.¹⁸ Nevertheless, under Article 3 of the Uniform Act on the Law of Arbitration and Articles 2.1 and 5.1(b) of

the Arbitration Rules of Procedure, there can still be an investment arbitration even without a BIT provision. Consequently, the arbitration proceedings could still take place under OHADA law, subject to the provisions of the relevant national investment law or the existence of any other instrument related to the protection of investments. However, in such a case, issues may arise in respect of the consent that the host country must give to the arbitration. Indeed, the consent of both parties is a prerequisite to the establishment of international arbitration.¹⁹ It is unlikely for countries to give consent to entertain foreign investors' claims when they are under no international obligation to do so. Unfortunately, the new provisions under OHADA arbitration law do not address this issue. Moreover, practical considerations could also reduce the appeal to investment arbitration under OHADA law for Chinese investors, who are still at the stage of market penetration in Africa. Commencing investment arbitration proceedings against a host state to protect their investments might damage their relations with that state. This could ultimately result in a loss of future contracts, particularly in the infrastructure sector.

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¹⁷ Qingtao Xie, *The Protection of China's Investment in Africa Under the International Investment Law*, Current Summers 28, 32 (2014).

¹⁸ UNCTAD, *Full List of Bilateral Investment Agreements Concluded*.

<https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (last visited June 6, 2019)

¹⁹ Xie, *supra*, note 18, at 32;