

THE ENFORCEMENT OF ARBITRAL AWARDS IN CAMEROON WITHIN THE FRAMEWORK OF THE UNIFORM ACT OF OHADA ON ARBITRATION



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Introduction

The OHADA UNIFORM ACT on arbitration awards is one of the laws that are applicable in Cameroon and many other French-speaking Countries and this law covers a range of remedies such as punitive damages, specific performance and restitution, injunctions, monetary compensation, declaratory reliefs, rectification, adaptation of contracts, interest and costs. The successful party in an arbitration proceeding expects the award to be performed without delay. However, it may happen that the beneficiary of an award has to forcefully execute it for him to enjoy the fruit of the award.

There are various jurisdictions which are competent to enforce arbitral awards in Cameroon depending on the type of award in question. In Cameroon, the legislator has recognized four types of arbitral awards to ease enforcement proceedings. They are, awards governed by the Uniform Act on Arbitration, Common Court of Justice and Arbitration (CCJA) awards, Foreign Arbitral (New York Convention) awards and International Centre for the Settlement of Investment Disputes (ICSID) awards.

a) **Uniform Act on Arbitration Awards**

These are awards where the proceedings of the arbitral tribunal were governed by the OHADA Uniform Act on Arbitration 1999. Concerning the enforcement of this type of award, Article 30 of the Uniform Act stipulates that no arbitral award can be susceptible to forceful execution unless a ruling granting an exequatur by a competent judge in a member State is delivered. The Cameroonian legislator in designating the 'competent judge' in Article 30 of the Uniform Act nominated the President of the Court of First Instance or magistrate delegated by him of the envisaged place of enforcement of the award or where necessary the residence of the Respondent/defendant. It can therefore be deduced that an exequatur can be

obtained from a President of the Court of First Instance at the place of residence of the Respondent or where the Petitioner wants the execution of the award to take place. This solution is flexible and a beneficiary of an award can bring an action for forceful execution wherever the Respondent has assets.

As to the commencement of an action for exequatur, the President of the Court of First Instance is seized by application or by motion *ex parte*, along with documents establishing the existence of the award as set forth in Article 31 of the Uniform Act. The documents attached must be the original copies of the arbitral award and arbitration agreement or copies of these documents satisfying the conditions for their authenticity. These documents must be in the working language of the Court and if they are not, they must be translated to the working language of the court by a registered translator on the list of experts established by the competent court.

The Cameroonian legislator in enacting Law no. 2003/009 of 10th July 2003 designating the competent judge for exequatur filled the lacuna that existed in Cameroonian law before the coming into force of this law. Formerly, the competent jurisdiction for an application for exequatur of an arbitral award in Cameroon was not harmonized. In the French-speaking Regions, the President of the Court of First Instance or magistrate delegated by him was the competent forum for an application for exequatur for an arbitral award. In the English speaking Regions, there was no provision for exequatur applications in either the Supreme Court (Civil Procedure) Rules 1948 or the Magistrate Court (Civil Procedure) Ordinance 1948[applicable in high courts and magistrate courts (now Courts of First Instance) respectively. With this lacuna, recourse was had with pre-1900s laws from Britain as stipulated by Section 11 of Southern Cameroon High Court Law 1955. In this regard, the English Arbitration Act 1889 was applicable in Anglophone Cameroon. Under this Act, “Court” means the Supreme Court and includes a Judge thereof. In the Anglophone regions, this means High court. So it was correct for an application for an exequatur to be made before any competent High Court in Anglophone Cameroon. Though, the material competence for an exequatur application was determined by Justice Mokwe Edward Misime by the amount in award in Suit no. HCF/91/M/2001-2002 African Petroleum Consultants (APC) v. Société Nationale de Raffinage (SONARA), which was wrong, the High Court was still competent to hear the application. It was held by His Lordship that since the high court was competent to hear matters where the amount of damages claimed exceeded five million francs CFA then

the high court was competent to hear an exequatur application where the amount in the arbitral award exceeded five million francs CFA.

Gladly, as noted before, the procedure for exequatur has been unified in Cameroon by Law no. 2003/009 of 10th July 2003 and the President of the Court of First Instance or magistrate delegated by him is the competent magistrate to hear applications for exequatur in the Anglophone and Francophone regions. In all, when an application for exequatur is granted by the President of the Court of First Instance or a magistrate delegated by him, the executory formula is appended to the award at the behest of the Registrar-in-Chief of the Court of First Instance seised and must be signed by the magistrate and registrar-in-chief. Many exequatur applications have been granted in Cameroon.

The ruling of a competent magistrate granting an exequatur is not subject to any appeal. On the other hand, a ruling of the competent magistrate denying an application for exequatur for an award can only be set aside by a judgment of the Common Court of Justice and Arbitration sec 25 of the Uniform Act of OHADA on Arbitration. In the case where the CCJA quashes the ruling of the court below (the CFI seised) and the exequatur is granted, the said judgment is regarded as equivalent to a CCJA award and an exequatur granted by the CCJA and enforcement of this judgment is done in Cameroon in the same manner as any other CCJA arbitral award.

b) Common Court of Justice and Arbitration Awards

The Common Court of Justice and Arbitration (CCJA) located in Abidjan, Ivory Coast is the Supreme Court of the OHADA member States in commercial matters and at the same time a Centre for International Arbitration. On adopting the Uniform Act for Arbitration on the 11th June 1999, the Council of Ministers also at the same time adopted the Rules of Arbitration for the CCJA Centre for International Arbitration.

According to the Arbitration Rules of CCJA, only the CCJA acting as a court is competent to grant an exequatur to a CCJA arbitral award. In this case, the application or petition is addressed to the court and the exequatur is granted or refused by a ruling of the President of the said court or by a judge delegated by the President for that purpose.

An exequatur granted by the CCJA renders the award executory in all OHADA member States. Even though a CCJA award is executory in all OHADA member States, forceful execution of a CCJA award in any of the member States must be preceded by the affixing or

appending of an exeutory formula on the award by an authority designated by the relevant Member State.

In view of forceful execution of a CCJA award in Cameroon and in cognizance of Article 31(3) of the CCJA Rules of Arbitration, the President of the Republic of Cameroon by Decree no. 2002/299 of 3rd December 2002 designated the Registrar-in-Chief of the Supreme Court as the Cameroonian authority in-charge to affix an exeutory formula on a CCJA arbitral award under the control of the President of the Supreme Court. It should be noted that an exeutory formula can only be appended to a CCJA award by the Registrar-in-Chief of the Supreme Court when the said award is accompanied with an attestation of the exequatur issued by the Secretary General of the Common Court of Justice and Arbitration.

c) Foreign Arbitral (New York Convention) Awards

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 came into being to strengthen the recognition and enforcement of awards rendered in a venue other than where execution is sought. In our present context, this will mean that the recognition and enforcement of arbitral awards rendered outside the territory of OHADA and most probably delivered using different rules of arbitration than the Uniform Act on Arbitration which applies only where the seat of the arbitral tribunal is in one of the member States. It is an obligation for contracting States of the New York Convention to recognize the authority of an arbitral award and to enforce the said award in conformity with conditions stated in the Convention.

Foreign arbitral awards are recognized in the contracting States by a competent judge of that State but must respect the conditions of the New York Convention. It therefore means that if a beneficiary of a foreign arbitral award decides to enforce an award in Cameroon forcefully then he/she must conform to Article 11 of Law no. 2007/001 of 19th April 2007 and bring its application for exequatur before the competent judge in-charge of litigation related to the execution of judgments. This law further indicates that the competent judge in-charge of litigation is the President of the Court of First Instance or a magistrate delegated by him where execution of the award is envisaged or at the residence of the Respondent/defendant. The magistrate solicited must however also act in conformity with the conditions of the New York Convention when enforcing the said award. In respecting the conditions of the New York Convention, the Petitioner must take particular note of Article IV of the said Convention to furnish the original copy of the award or a duly certified copy of the award and an original

copy of the arbitration agreement or duly certified copy of the arbitration agreement drafted in compliance of Article II of the Convention.

Where the said arbitral award or arbitration agreement is not drafted in the language where enforcement is sought as in the case of Cameroon where English and French are the official languages, the Petitioner must furnish a translation of the said documents in English or French. The said translation must be duly certified by an official or sworn translator or by a consular officer. Looking at the enforcement procedure of a foreign arbitral award by the New York Convention, it can be noted that barring little differences this procedure is similar to that stated in Article 31 of the Uniform Act which is presumed to have been inspired by that of the New York Convention. This may be the reason why the judge in the case of African Petroleum Consultants (APC) v. Société Nationale de Raffinage (SONARA), relied on both provisions of the Uniform Act on Arbitration and the New York Convention.

d) International Centre for the Settlement of Investment Disputes (ICSID) Awards

The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18th March 1965 created at the seat of the World Bank the International Centre for the Settlement of Investment Disputes (ICSID). The Centre was established as an autonomous international institution with status, immunities and privileges well spelt out. Its purpose is to provide facilities for conciliation and arbitration for investment disputes between Contracting States and Nationals of other Contracting States.

Though the ICSID Convention is applicable only to investment disputes, it must be noted that parties to the investment contracts must consent to its application and also parties involved should come from a Contracting State and the State involved should be a Contracting State. A State can consent to submit before the ICSID in advance through an investment law, a bilateral or multilateral treaty relating to investment, while the investor can express his consent later by submitting the matter to the ICSID.

Each Contracting State must recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award in its territory as if it were a final judgment of a court of that State. In order for the award to be recognized and enforced in the territory of a Contracting State, the beneficiary must present to the competent national court or authority a certified copy of the award by the Secretary General of the ICSID. Every Contracting State of the Washington Convention must also designate the

competent jurisdiction to grant an exequatur for an ICSID award to ensure forceful execution. In complying with this requirement the Cameroonian legislator enacted Law No. 75/18 of 18th December 1975 which designated the Supreme Court of Cameroon as the competent court to grant exequatur on ICSID awards in view of their judicial execution in Cameroon.

Despite having searched at the registry of the Supreme Court and talked to other researchers, this researcher has found no evidence that the Supreme Court of Cameroon has ever been solicited to grant an exequatur on an ICSID award. It is also true that the State of Cameroon is not always before ICSID tribunal but since its first appearance in *Klockner v. The State of Cameroon and Société Camerounaise des Engrais (SOCAME)* in the early 80s, the State of Cameroon has been before the ICSID tribunal at the initiative of the company, Lafarge in 2002 but the matter was settled by the parties amicably.

e) **Nullification of Arbitral Awards**

The potential bases for the nullification of arbitral awards in Cameroon are contained in Article V of the New York Convention and Article 26 of the Uniform Act on Arbitration. Though an arbitral award is not subject to an opposition, appeal or setting aside under the Uniform Act on Arbitration, it is however subject to a petition for nullity or annulment which must be lodged with a competent judge in a member State. Hence, it was wrong for the President of the Court of First Instance, Limbe in the case of *National Refining Co. Ltd (SONARA) v. African Petroleum Consultants (APC) & 2 others* to rely on the English Arbitration Act 1950 and Arbitration Law (Lagos) to set aside an arbitral award since the said laws had been repealed as they applied in Cameroon with the coming into force of the New York Convention and the Uniform Act.

It should also be noted that before the enactment of the Uniform Act on Arbitration and Law no. 2003/009 of the 10th July 2003, the procedure for the annulment of arbitral awards was not unified in the Anglophone and Francophone regions. While the Court of Appeal of the envisaged area of execution was the competent court for annulment proceedings in the Francophone Regions the High court of the envisaged area of execution was the competent court for annulment proceedings in the Anglophone Regions.

Hence, it was wrong for the President of Court of First Instance, Limbe in the case of *National Refining Co. Ltd (SONARA) v. African Petroleum Consultants (APC) & two others* to have arrogated to himself competence to annul the arbitral award in *APC v. SONARA* under

Section 13(2) of Law no. 89/019 Of 29/12/1989 on Judicial Organisation, when the competent jurisdiction at the time was the High court in Fako Division. SONARA again applied to the Southwest Court of Appeal to stay the execution of the award in Société Nationale de Raffinage (SONARA) v. African Petroleum Consultants (APC). In granting the application for stay of execution, Najeme C.J. (as she then was) also declared that there was no contract between APC and SONARA. In other words, the award was declared unenforceable. Curiously, the sole arbitrator, Dr. Fru John Nsoh, having being presented with evidence of fraud and misrepresentation by the then Attorney General of the Southwest region called for a session to review his decision. In the arbitral tribunal held at Ibis hotel London, Heathrow, on the 18th of March 2003, the arbitral award between APC v. SONARA dated 17/04/2002 was set aside. The present award was later enforced by the President of the Court of First Instance, Limbe, bringing to an end the execution of the previous award.

In 2003 the procedure for annulment of arbitral awards was harmonized by Law no. 2003/009 of the 10th July 2003. In Cameroon, the competent judge to entertain an application for annulment of an award is the same judge who is competent to rule on disputes on the execution of provisional awards. The competent judge mentioned in Articles 25 and 28 of the Uniform Act Arbitration is a judge of the Court of Appeal of the place of arbitration. In other words, the Court of Appeal at the seat of arbitration is the competent jurisdiction. However, the Court of Appeal of Littoral region has entertained an application for nullity or annulment at the place of execution of the award and ruled on it without any objection. This goes to show that a Court of Appeal at the place of execution can be competent to hear an application for nullity. It should be noted that though the Uniform Act talks of a competent judge, all matters subject to the jurisdiction of the Court of Appeal must be heard by three judicial officers who are members of the said court. A competent Court of Appeal can annul an arbitral award only when one or more of the grounds provided by article 26 are violated to:

- When the arbitration tribunal rule without an arbitration agreement
- When the arbitration tribunal rule on a convention that is null and void
- When the arbitration tribunal was not duly constituted or one of the members was not dully appointed
- When the arbitration tribunal decides on issues that were never submitted to the tribunal
- Whenever the principal of contradiction was never respected

- When the arbitral award is not motivated

Note should be taken that application for nullify awards in Cameroon have been rejected.

f) **Practical Issues**

As demonstrated above, the enforcement procedures of an award by the New York Convention and by the Uniform Act are similar with little differences especially the mode of commencement for an action for exequatur. Article III of the New York Convention stipulates that “each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory.”

The adjectival law regulating the recognition and enforcement of arbitral awards in Cameroon is contained in the Uniform Act on Arbitration and Law no. 2003/009 of 10th July 2003. The 2003 law opts for unilateral procedure (motion ex parte). It might seem that the procedure adopted by Cameroonian law (i.e. Uniform Act on Arbitration and Law No. 2003/09 of 10/07/2003) for exequatur does not support the maxim audi alterem partem because it is not adversarial and also due to the fact that the ruling granting exequatur is not susceptible to any appeal. However, it should be noted that the Respondent has a right to make an application for the annulment of an enforceable award. When the ruling granting the exequatur is made and the executory formula is appended to the award it must be served on the Respondent. The Respondent has a period of one month to contest the award. This was the scenario in *Complexe Chimique Camerounais (CCC) c/ Société SAFIC ALCAM SA* where after service of the award on the Petitioner, the Littoral Court of Appeal was petitioned to annul the award. The application was granted and the award annulled.

Despite the above conclusion, Dr. Gaston Kenfack thinks differently. In his article “Le juge et l’arbitrage en droit Camerounais après la loi no. 2003/009 du 10 Juillet 2003”, he insists that the mode of commencement of an action for exequatur under the New York Convention is adversarial (i.e. the other party must be heard in the said action). According to him, the sentence in Article V(1) of the New York Convention, “recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked...” means that the party against whom the award is invoked must be present during the enforcement proceedings to raise the grounds for refusal. While the maxim audi alterem partem and the rights of the defence may be guaranteed herein, it has however been postulated by some Cameroonian lawyers that this procedure might cause a lot of delay to obtain an exequatur

because the Respondent might employ dilatory tactics which is not in the spirit of rapidity which is one of the goals of commercial arbitration.

Hence, it can be seen that the procedure for exequatur propounded by Cameroonian legislation and complemented by Uniform Act on Arbitration is more favourable to enforcement proceedings than the view postulated by Dr. Gaston Kenfack pursuant to the New York Convention because it is faster due to its non-adversarial character. It is therefore very advantageous to apply for an exequatur for a foreign arbitral award in Cameroon using the Uniform Act on Arbitration and Law no. 2003/009 of 1st July 2003 and since noncompliance with a mode of commencement is not a ground for nullity or annulment, the competent court cannot annul the said award on this ground.

g) Local Protectionism

Cameroonian legislation requires the applications for exequatur for arbitral awards to be brought before the courts in Cameroon at the venue where the Respondent (party against who enforcement is sought) either maintains his domicile or owns property. These laws force the beneficiary to deal with the non-performer's local court. If the latter party has economic or political connections, these connections are likely to be found where the party has his business or where he resides and these connections can be used to frustrate the enforcement of an award especially where the non-performer is a State agency or the State itself.

The Cameroonian Constitution guarantees separation of powers into the executive, legislative and the judiciary. The judiciary is independent of the executive and legislature. Thus, in carrying out their functions judges answer only to the law and their own conscience. In practice however, the judiciary is dependent on the executive. The President of the Republic is responsible for the appointment and promotion of magistrates based on recommendations of the Higher Judicial Council. The President is also charged with disciplinary power over magistrates. The dependence of the judiciary has a financial dimension as well. The budget of the judiciary is a component of the State budget. The Minister of Finance, a member of the executive, controls the State budget. Moreover, the budget for the judiciary is insufficient. It is less than 1% of the overall State budget.

The judiciary faces a lot of pressure in its functioning. Above all, it has been noted that the threat stems from magistrates themselves when they favour their religious, philosophical or political affiliations or their personal economic interests over their legal responsibility. Thus,

they sacrifice the universal principles of ethics for their personal interests. The judiciary faces external threats as well. The most glaring of these are executive intervention and the influence of financial powers. Corruption is common in Cameroon. Many people believe that they must bribe in order to win a court case.

In some glaring cases, magistrates applied a kind of national preference instead of applying the law (i.e. favouring Cameroonian partners). The verdicts in the Reemtsa Cigaretten Fabriken GmbH c/ SITABAC and Siac-Isenbeck cases indicated to foreign investors that investments in Cameroon are risky due to the unpredictability of the justice system. The Minister of Justice responded promptly to this situation, described as 'judicial hold-up', and to other dysfunctions, creating a committee for dialogue between the judiciary and the private sector, an ad hoc committee to investigate cases of seizure and re-distribution and an ad hoc committee to monitor and evaluate implementation of the recommendations of the latter committee, among other bodies.

Another glaring case where the executive has also contributed in forestalling the enforcement of an arbitral award in Cameroon is the case of African Petroleum Consultants (APC) v. Société Nationale de Raffinage (SONARA). In this case after the ruling by the judge granting the exequatur, the judge (then President of the Fako High Court) was transferred to the Meme High Court as an assistant judge (Vice President). This was regarded by many observers as a punitive transfer. More so, the general manager of African Petroleum Consultants, Dr. Ekollo Moundi Alexandre was investigated by the Ministry of Justice through its Attorneys Generals of the Southwest and Littoral Provinces until he was prosecuted in the Court of First Instance, Limbe for false pretences, fraud, false oath and forgery and was later convicted and imprisoned for five (5) years and ordered to pay a fine of 450.000frs CFA. This goes to show the extent the State of Cameroon might go to prevent its State agencies from respecting rulings, awards and judgments.

The problems with local protectionism are not, however, as big as they used to be as efforts have been undertaken by the Cameroonian judicial authorities to minimize the problems.

h) Obtaining Remedies Included in the Award

A judicial process whether it is arbitration or litigation only comes to an end when the decision of the tribunal or the court is executed. A judgment or an arbitral award which orders a party to pay damages or an order for an injunction can be spontaneously respected. The

unsuccessful party can respect the award or judgment by paying the damages or respect the injunction order as the case may be. However, it may happen that the unsuccessful party may refuse to respect the decision of the tribunal or the court despite the fact that the award is final and enforceable. In this case the beneficiary of the decision is bound to carry out forceful execution of the award which orders the other party to respect the decision delivered. It should be noted that a ruling granting exequatur for an award does not constitute a step in execution but simply an act which is susceptible to execution. The execution of judgments and arbitral awards in Cameroon are principally regulated by the OHADA Uniform Act on Simplified Recovery Procedure and Measures of Execution.

To obtain the remedy in an award by forceful execution can be very difficult in Cameroon and other OHADA member States where the unsuccessful party is a State agency due to immunity from execution. This immunity, however, is not absolute since the unquestionable debts due State corporations and State enterprises by a third party can be used to set off creditors of State corporations and State enterprises. Despite this fact, State corporations have still refused to honour their obligations by invoking their immunity. A glaring situation is the case of African Petroleum Consultants (APC) v. Société Nationale de Raffinage (SONARA), where based on the ruling of the court granting an exequatur to an arbitral award, APC served on Shell Cameroun SA (debtors of SONARA) on the 29 and 30 May 2002 a saisie-attribution (seizure order) to pay the sum contained in the award. This seizure having not been complied with, APC then seised the Fako High Court, Buea and a ruling was delivered on the 13th August 2002 ordering Shell Cameroun SA to comply with the seizure and pay the sum contained in the award to APC. This ruling and the execution of this ruling was however, set aside by the Court of First Instance, Limbe on the 19/08/2002.

Though it has been postulated by many authors that a State corporation which has submitted itself to arbitration must respect the decision of the arbitral tribunal and comply with the said award, this has not been the case. These State agencies have used all means to resist the execution of court decisions by especially invoking their immunity.

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