Part II: West Africa

Chapter 2: International Arbitration in the West African States

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§2.01 The Region

Sixteen independent countries make up the West African region, all of which (except Mauritania) are Members of the Economic Community of West African States (ECOWAS) [1] and nine of which are also members of the Organisation for the Harmonisation of Business Law in Africa (OHADA).[2] The sixteen States are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.[3]

Part V of this book examines the arbitration law and practice in the nine OHADA States under the UAA.[4] The ECOWAS does not make uniform laws for its Member States. Therefore, there is no equivalent of the UAA applicable in the ECOWAS region.

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[1]The Economic Community of West African States ('ECOWAS') was founded in 1975 by the Treaty of Lagos of 28 May 1975 (*see* <www.ecowas.int>). Note that States within the region also belong to other regional affiliations, such as the former eight French colonies that use the CFA Franc currency who also belong to the *Union Economique et Monetaire oust-Africaine* (UEMOA) (*see* <www.uemoa.int>), while Mali, Niger and Burkina Faso also belong to the Liptako-Gourma Region Integrated Development Authority created in December 1970.

[2]Of these sixteen States, nine are also members of OHADA, so that the Uniform Arbitration Act 2017 (UAA) will govern matters related to arbitration in those States according to Art. 1. Note that national arbitration laws in OHADA Member States are still relevant since provisions not contrary to the UAA remain applicable. These West African States are Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

[3]The Gambia, Ghana, Nigeria and Sierra Leone were colonized by Britain and so have a common law legal system. Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mali, Niger and Senegal were all French colonies with the civil law legal system. Cape Verde and Guinea-Bissau were Portuguese colonies, while Togo (an erstwhile German colony) was divided between France and Britain following the Treaty of Versailles of 28 June 1919 after the First World War. Liberia remained independent with a legal system heavily influenced by the Anglo-American legal system.

[4]Boris Martor et al., *Business Law in Africa* (2nd edn, GMB 2007) at page 260 refers to arbitration under the rules of the CCJA as a form of institutional arbitration under the UAA 'which lays down basic rules that are applicable to any arbitration where the seat of arbitration is in one of the Member States'. See also Chapter 5 on the OHADA arbitration regime.

This chapter's discussions will primarily focus on arbitration law and practice in Cape Verde, the Gambia, Ghana, Liberia, Mauritania, Nigeria and Sierra Leone, with references made to the UAA.[5]

To determine the status of international arbitration in these States, this chapter will, under section 2.02, examine certain common features of the arbitration laws of the countries forming the West African region. Section 2.03 considers the national courts' role and attitudes to arbitration references in some of these States. Finally, section 2.04 analyses the rules and functions performed by some arbitral institutions in the region.

Part II of this book also dedicates chapters to specific jurisdictions within the West African region. This chapter only examines the common themes in the West African jurisdictions and analyses arbitration law provisions peculiar to some States in the region.

§2.02 Arbitration Laws

The deployment of arbitration as a dispute resolution mechanism is well entrenched and fully accepted in West Africa.[6] An examination of the arbitration laws in force in these jurisdictions evidences the acceptance and codification of various internationally accepted arbitration principles, including:

– the recognition of pre-dispute and post-dispute arbitration agreements;
– the formal requirement of writing to evidence an arbitration agreement and a robust definition of writing;
– party autonomy over the numbers of arbitrators, their appointment procedure, and grounds on which an arbitrator may be challenged (influenced by the UNCITRAL Model Law on International Commercial Arbitration or 'Model Law');
– the arbitrator's broad discretion and control over the procedure;
– adequate protection for the parties to ensure due process;
– very robust provisions for the making, recognition and enforcement, and setting aside of the arbitral award; and
– a limited supportive role for the national courts.

[5]In Chapter 2.4, the Arbitration Rules of the Court of Arbitration of Côte d'Ivoire are examined as one of the notable institutions in the region.
[6]In the different States there are references to customary arbitration, arbitration under specific statutes or civil procedure rules. This chapter shall dwell primarily on arbitration regulated by specific arbitration statutes though such arbitrations are consensual.

These criteria demonstrate the existence of modern arbitration laws in West Africa. Nevertheless, having robust current laws is one side of the coin, with the other side of the same coin being the interpretation and role performed by the national courts.

Fifteen of the sixteen countries in the West African region have ratified and implemented the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) in their various jurisdictions.[7] Guinea-Bissau signed the Convention in 1991 but is yet to ratify it.[8] Therefore, parties may refer investment disputes involving any of these fifteen States to adjudication under the ICSID mechanism.[9] Thirteen of the sixteen States have implemented the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[10] Of the sixteen countries that make up the West African region, only the Arbitration and Conciliation Act 1988 of Nigeria (ACA) is based on the UNCITRAL Model Law text.[11]

Ghana, for its part, has enacted a new Alternative Dispute Resolution Act, which came into effect in 2010 (Ghana ADR Act) and regulates the use of arbitration, mediation and customary arbitration as dispute resolution mechanisms.[12] The relevant law in Mali is the

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[7]See Table 2.1 below for details of the dates when the Convention came into force in the various States.

[8]See ICSID website for details at <icsid.worldbank.org/ICSID/index.jsp>.

[9]It is instructive to note that all sixteen States have been respondents before investment claims under the ICSID regime.

[10]The Gambia, Guinea-Bissau and Togo are not parties to the New York Convention. Of the thirteen that have implemented the Convention, only Nigeria and Sierra Leone made the reciprocity and commercial reservations. See for details <www.uncitral.org>. The Gambia will also make the two reservations following section 56 of its ADR Act 2005 amended 2006 when it ratifies the Convention.

[11]This position may change as this law is under review with a copy of the draft Bill available at www.aluko-oyebode.com/_uploads/publications/further%20amended%20draft%20faca.pdf. The ACA came into force on 14 March 1988 and regulates both domestic and international arbitration. Note that as Nigeria is a Federation, some of its constituent States have also enacted their own State arbitration laws. An example is the Lagos State Arbitration Law 2009. Such laws do not however apply to international arbitration references connected to Nigeria. The Alternative Dispute Resolution Act of The Gambia 2005 (amended 2006) came into force on 29 July 2005 and draws heavily on the UNCITRAL Model Law.

[12]The Alternative Dispute Resolution Act, No. 798 of 2010.

Arbitration Code of 2000.[13] International arbitration in Cape Verde is regulated under the Arbitration Law of 2005. In the Gambia, the Alternative Dispute Resolution Act 2005 (Gambia ADR Act) regulates national and international arbitration, conciliation and mediation.[14]

This section examines the requirements for a valid arbitration agreement (subsection 2.02[A]), the role of the arbitrator (subsection 2.02[B]), the arbitral award (subsection 2.02[C]), mandatory requirements under the various laws (subsection 2.02[D]) and some notable and peculiar features of some of the laws of which foreign parties need to be aware (subsection 2.02[E]).

[A] Arbitration Agreement

Some of the West African States' arbitration laws contain a definition or description of an arbitration agreement. Nevertheless, the arbitration laws in all West African States generally recognize and treat the arbitration agreement as a contract evidencing the parties' intention and consent to resolve all covered disputes through the arbitration process.[15] Some of these laws limit arbitrable disputes to commercial or civil disputes.[16] The Ghana ADR Act went further and listed samples of arbitration clauses or agreements that parties can adopt or adapt in its Fifth Schedule.[17] All the relevant statutes require the

[13]This Law 2000-06 regulates both domestic arbitration (Chapter II) and international arbitration (Chapter III). Note that other laws also provide for the resolution of disputes in specific sectors by arbitration. Examples are the Mining Code Law 99-013 of 1999 and the Code Pastoral law of 2007 on the rights to common property of traditional nomads. The original texts of all these laws are in French, the official language of Mali.
[14]The Alternative Dispute Resolution Act, Cap 6:08, Act No. 6 of 2005 as amended by Act No. 6 of 2006 came into force on 29 July 2005 and applies to arbitration agreements whether made before or after the commencement of the Act as long as the arbitration itself was commenced after the Act came into force.
[15]Section 135 Ghana ADR Act; Art. 3 ALCV; Art. 3 UAA; section 1 ACA; and section 11 Gambia ADR Act.
[16]Section 1 Ghana ADR Act; Art. 4 ALCV; Art. 2 UAA; section 57(1) and 57(2)(d) ACA; and section 5(1) Gambia ADR Act.
[17]An example is sample 1, which provides 'any dispute or difference between the parties in connection with this agreement shall be referred to arbitration'. This short and simple clause encompasses all the necessary ingredients for a valid arbitration agreement. The samples are a very good guide to parties drafting arbitration agreements. It is important to

arbitration agreement to be in writing or evidenced in writing.[18] However, the definition varies, with the Ghana ADR Act currently giving the most liberal definition of writing as including electronic communications and an unchallenged assertion or claim of the existence of an agreement in the parties' pleadings.[19]

The various arbitration statutes generally mandate their national courts to uphold a valid arbitration agreement – but on the timely application of a party to the agreement.[20] It is important to note that in most of these jurisdictions, a national court is not required of its own volition to refer the parties to arbitration when presented with a valid arbitration agreement in a matter before it.[21] The provision under section 12 of the Gambia ADR Act is worth quoting. It provides:

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, not later than when submitting his or her first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration.[22]

Given the consensual nature of arbitration in these jurisdictions, it is for a party whose right to arbitration is infringed to request the court to enforce this right. The second critical issue to note is that this right must be exercised timeously. Some statutes contain further guidance on when such request or application should be made to the court, while case law fills this gap in other jurisdictions where the statute does not provide any guidance.

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emphasize that they are samples and not prescriptive clauses that parties are bound to use for their reference to be administered under the ADR Act.

[18]Section 2(3) Ghana ADR Act; Art. 5 ALCV; Art. 3-1 UAA; section 1(1) ACA; and section 11(1) Gambia ADR Act.

[19]Section 2(4)(a) and (b) Ghana ADR Act; see also Art. 5(2) ALCV for another robust definition of writing.

[20]See, e.g., section 6(1) Ghana ADR Act, but note the power of the court under section 7 to refer parties to arbitration on its own volition; section 4(1) ACA; and section 12 Gambia ADR Act.

[21]Exceptions are contained in section 7 Ghana ADR Act and section 9 Gambia ADR Act, which require a court in such circumstance to obtain the consent of the parties and refer them to arbitration.

[22]However, the court will not stay proceedings if the arbitration agreement is null and void, inoperative or incapable of being performed or where there is no dispute.

An example of a statute under which the court can, on its own volition, refer the parties to arbitration is the Arbitration Law of Cape Verde (ALCV). Article 6.3 of the ALCV requires its relevant national court, immediately upon becoming aware that a matter before it is covered by an arbitration agreement, to refer the parties to arbitration unless it finds that the arbitration agreement is null.[23] The provision appears to prohibit the court's investigation into the arbitration agreement's validity of the arbitration agreement, at least in the first instance. Indeed, Article 30 of the ALCV expressly empowers the arbitrator to determine their jurisdiction, including where this requires a determination of the arbitration agreement's validity.

The parties may call upon the court to determine the arbitration agreement's validity where there is no arbitral tribunal in place. Where an arbitral tribunal has been constituted and a party contends that the arbitration agreement is invalid, it falls to the arbitral tribunal to make the decision.[24] Note, however, that such challenge must be made no later than when filing the defence on the merits, and the arbitrator's decision on his competence is not appealable.[25]

All the relevant statutes recognize both an arbitration clause for pre-dispute references and a submission agreement for post-dispute references. In addition, the laws accept the principle of the autonomy or separability of the arbitration clause from the substantive contract in which it is contained.[26] For example, section 3(1) of the Ghana ADR Act provides:

Unless otherwise agreed by the parties, an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent

[23]This is on the basis that according to Art. 6.1 ALCV, the parties undertake by signing the arbitration agreement not to litigate such covered disputes. Therefore, both parties (without expressly terminating the arbitration agreement) are in breach by litigating any covered dispute. We also note that pursuant to Art. 454 of the Code of Civil Procedure, the court cannot raise this matter on its own volition.
[24]Section 24(1)(a) Ghana ADR Act; Art. 30 ALCV; Art. 11 UAA; section 12 ACA; and section 30(1) Gambia ADR Act.
[25]See Art. 30(2) and (3) ALCV and note that the award may be annulled on this ground pursuant to Art. 36 and refused enforcement under Art. 39.
[26]Article 7 ALCV, Art. 4 UAA, section 12(2) ACA, and section 30(2) Gambia ADR Act.

or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement.

It is important to note that the arbitration clause's autonomy is limited to the circumstances listed in section 3(1). For example, the same law will apply to both the substantive agreement and the arbitration clause as part of that agreement. This can be contrasted with the provision under the ACA Nigeria to the effect that:

An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the (in)validity of the arbitration clause.

Section 12(2) ACA Nigeria is wider and more in keeping with the requirements under most modern arbitration laws and the Model Law. The arbitration clause truly enjoys an independent existence under such laws.[27] Article 4 of the UAA goes further and provides that the arbitration clause 'shall be interpreted in accordance with the common intention of the parties, without reference to a national law'.

Parties can opt for either ad hoc or institutional arbitration, which is very useful in international disputes where parties can opt to arbitrate under an arbitral institution's rules in any of these jurisdictions. Some of the laws also schedule arbitration rules that parties can adopt or adapt for their ad hoc proceedings or the arbitration rules of a particular institution usually promoted by the specific State.[28]

[B] Role of the Arbitrator

[27] See also Art. 7 ALCV for another wide provision of the autonomy of the arbitration clause.

[28] See, e.g., the Second schedule of the ADR Act, which contains the Arbitration Rules of the Alternative Dispute Resolution Centre and the Arbitration Rules scheduled to the ACA.

Under the laws of these jurisdictions, arbitrators shall be individuals appointed directly or indirectly by the parties.[29] Under some of the laws, the arbitrator is expressly required to accept his or her appointment.[30] These laws entrench the principle of party autonomy by allowing the parties to determine and regulate the number, qualifications and method of appointment of the arbitrators to constitute the arbitral tribunal.[31] On the default number of arbitrators, the laws differ. Some provide for either one or three arbitrators, while some do not contain such limitations on the parties' autonomy.[32]

The various laws generally endow the arbitrator with the power to control the arbitral process, including the vital ability to determine their jurisdiction in the first instance. The laws, therefore, recognize and implement the well-known principle of competence-competence.[33] Different descriptors are used to donate this power in the various laws. The ACA Nigeria, for example, grants full and mandatory authority to the arbitrator; the UAA provides that the arbitral tribunal 'alone is competent to rule on its own jurisdiction', while the Ghana ADR Act gives the parties the power to limit this power of the arbitrator.[34] However, under all the laws, the arbitrator's authority extends to determining the arbitration agreement's validity and scope where such is contested as a jurisdictional matter. As mentioned earlier, these laws confer extensive powers on the arbitrator over the arbitration's conduct, admission of evidence and determination of the materiality, relevance and weight to attach to such evidence.[35] Generally, in all of these

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[29]See, e.g., sections 12–14 Ghana ADR Act; Arts 14–15 ALCV; Arts 5–6 UAA; and section 44 ACA.

[30]See, e.g., Art. 16 ALCV; and Art. 7 UAA.

[31]It is important to note that these laws contain a default number of arbitrators. For example, section 6 ACA and section 13(2) Ghana ADR Act refer to three arbitrators while Art. 12.1 ALCV refers to one or more (odd numbered) arbitrators.

[32]See, e.g., section 44(1) and (5) ACA and Art. 5 UAA, which imply either one or three arbitrators while section 13 Ghana ADR Act requires uneven number of arbitrators as does Art. 12.1 ALCV. The Gambia ADR Act on its part in section 14(2)(a) provides for a default of three arbitrators in international disputes and one arbitrator in every other case.

[33]Section 24 Ghana ADR Act; Art. 30 ALCV; Art. 11 UAA; section 12(1) ACA; and section 30(1) Gambia ADR Act.

[34]The same position applies in Cape Verde and the Gambia where parties can limit the power of the arbitrator to rule on his jurisdiction. In OHADA Member States, the power is not so limited and is mandatory.

[35]Sections 34 and 36 Ghana ADR Act; Art. 26 ALCV; Art. 14 UAA; sections 19 and 20 ACA and section 38 Gambia ADR Act. The disputing parties are generally allowed to put

jurisdictions, the arbitral tribunal and national courts have concurrent jurisdiction to grant interim measures of protection or conservation of the property that is the subject matter of the arbitration and use whatever assistance (such as tribunal-appointed experts) may be required for the effective and efficient discharge of their obligations.[36]

The arbitrator also has obligations and duties that he or she must comply with under these laws. An example of a helpful provision that lists the arbitrator's ethical responsibilities can be found in the ALCV.[37] One of the common law regime's legacies, which is still preserved in some of these countries (those with common law backgrounds), concerns the grounds on which the mandate or authority of the arbitrator may be revoked. There are usually separate provisions in these laws regulating the challenge of the arbitrator and grounds for such challenge and those on the revocation of the authority of the arbitrator. Thus, in these jurisdictions, there may be more grounds on which an arbitrator may be removed. The grounds for challenge and the procedure for such challenge are quite similar under the various laws and generally mirror the UNCITRAL Model Law. The grounds are lack of impartiality and independence, failure to disclose any disqualifying factor, and lack of possession of any pre-determined qualification.[38] Taking the Ghana ADR Act as an example, the arbitrator's authority may be revoked either by his or her withdrawal from office, the parties jointly terminating his or her appointment, or by his or her failure to sit within a reasonable time.[39] In addition, the court can also revoke an arbitrator's authority where substantial injustice is caused to one of the parties on the same grounds on which the arbitrator may be challenged, where they are found to be physically or mentally incapable of conducting the proceedings, or

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in evidence any material they wish in support of their case. However, note that Art. 26.1 ALCV limits this to such evidence as is admissible in law.

[36]Sections 38 and 39 Ghana ADR Act; Arts 6.2 and 27 ALCV; Art. 13 UAA; section 13 ACA; and sections 13 and 31 Gambia ADR Act.

[37]Article 22 ALCV, which includes the arbitrator: not representing the interests of any party; not receiving material inducement; being independent and impartial, and being available, among others.

[38]See, e.g., section 15 Ghana ADR Act; Art. 7 UAA; section 8 ACA; and section 16 Gambia ADR Act. Under the ALCV, an arbitrator in breach of the duties under Art. 22 may be challenged and may also be liable in damages.

[39]See section 17 Ghana ADR Act, and for similar provisions, see also section 18 Gambia ADR Act.

failed or refused to conduct the proceedings properly or make the award with reasonable dispatch.[40] Under the Nigerian ACA, the common law ground of misconduct forms another vast and flexible ground on which an arbitrator may be removed.[41]

Some of the laws make express provisions for the immunity and limitation of liability of the arbitrator.[42] An example of a law that grants complete immunity is section 28 Gambia ADR Act, which provides that 'An arbitrator is not liable in respect of anything done or not done in his or her capacity as an arbitrator.'

For an example of a law that grants partial immunity, section 23(1) Ghana ADR Act provides: 'An arbitrator is not liable for any act or omission in the discharge of the arbitrator's functions as an arbitrator unless the arbitrator is shown to have acted in bad faith.'[43]

Some of the laws also make provisions for the arbitration costs, which the arbitrator determines and includes in the award. An example is section 49 ACA Nigeria, which lists the arbitrator's fees, travel and other expenses; the cost of expert advice; travel and expenses of witnesses; and the cost of legal representation as comprising costs of the arbitration.[44] Under the Ghana ADR Act, the arbitrator is granted the right to exercise a

[40]Section 18 Ghana ADR Act and for similar provisions see section 10 ACA.
[41]Section 30(2) ACA. Joseph O. Orojo & M. Ayo Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* 283–286 (Mbeyi & Associates Lagos 1999) lists the following actions as constituting misconduct in common law: inadequate evidence to support the arbitrator's conclusion, wrong conclusion on the facts or law or misunderstanding the submissions of counsel.
[42]The predominant position is that the arbitrator has partial immunity in these jurisdictions. See, e.g., Arts 16.3 and 22.3 ALCV. There is no statutory provision on this in the ACA. However *Orojo & Ajomo, ibid*., at 163–164 are of the view that on grounds of public policy, an arbitrator should enjoy immunity from suit. In this author's view, arbitrators should enjoy partial immunity on the same public policy grounds.
[43]This limitation of liability extends to employees and agents of the arbitrator but not to arbitral institutions except where the institution is treated as an agent of the arbitrator, which is doubtful. However in these jurisdictions, arbitral institutions commonly include exclusion of liability clauses in their Rules as evidenced in section 2.04 below.
[44]Section 51 Ghana ADR Act, Art. 11 ALCV and section 50 Gambia ADR Act all refers to the cost of the arbitration in the same terms.

lien over the award and refuse to publish it until the parties pay the tribunal's fees and reimbursable expenses fully.[45]

[C] The Award

[1] General

The laws all require the arbitrator to personally determine the dispute between the parties and evidence their determination or decision in an arbitral award.[46] These laws expressly state that the award has res judicata effect,[47] and generally require the award to be in writing, contain reasons for the arbitrator's decisions, be signed, dated, and state where the award was made.[48] In most West African jurisdictions, the award should be made within six months from the date of commencement of the arbitral reference or constitution of the arbitral tribunal, with provision for extension of such time limit.[49] In all the laws, the arbitrator retains the power to correct, interpret and make additional awards.[50]

[2] Enforcement

Arbitral awards made in those States that have implemented the New York Convention can be enforced as Convention awards. Their enforcement will be under the procedure set

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[45]Section 56 Ghana ADR Act, but note that there is no similar provision in the other laws examined.
[46]Section 48 Ghana ADR Act; Art. 32 ALCV; Art. 15(1) UAA; section 47 ACA; and section 3 Gambia ADR Act.
[47]Section 52 Ghana ADR Act on the finality of the award; Art. 35 ALCV with the award given the same status as the judgment of a Court of First Instance; Art. 23 UAA on the award's res judicata effect; section 31 ACA; and section 52(1) Gambia ADR Act on the binding nature of the award.
[48]Section 49 Ghana ADR Act allows the parties to agree the form of the award; Art. 32 ALCV; Art. 20 UAA in addition requires the full names and addresses of the parties, their counsel and arbitrators; section 26 ACA; and section 45 Gambia ADR Act.
[49]See section 46(2) Ghana ADR Act, which refers to the time to be fixed in the arbitration agreement or agreed by the parties; Art. 28 ALCV and Art. 12 UAA both make a default provision of six months from the date the last arbitrator accepted appointment; and the ACA and Gambia ADR Act are silent on the time within which the award should be made.
[50]Section 53 Ghana ADR Act; Art. 22 UAA; section 28 ACA; and section 48 Gambia ADR Act.

out in Article IV of the Convention,[51] and such awards must comply with Article I of the Convention. As such, awards that are not regarded as 'domestic' under these countries' laws are enforceable under the New York Convention. It is instructive to take account of the English Court of Appeal's decision in *NNPC v. IPCO* on applying the first part of Article I of the Convention.[52] This decision effectively clarified that an award (even a domestic award as in the case itself) made in one Convention State could be enforced under the New York Convention in another Convention State. In effect, for an award to be enforceable under the New York Convention, it does not have to be international as long as it is foreign to the court of enforcement. Thus, it is suggested that enforcement of an arbitral award made in a New York Convention State can be pursued under the Convention's provisions in any West African jurisdiction that is also a Convention Member State.

All the laws examined in this chapter make provision for the recognition and enforcement and setting aside or annulment of arbitral awards, whether domestic or international. Where an award also falls within the description of a New York Convention award, it is then for the applying party to choose whether to proceed under the provisions of the Convention or the relevant country's arbitration law. At this stage of the proceedings, where recognition and enforcement of the award or the setting aside or nullification of the award are sought, the laws and, in particular, the courts of these States become relevant.[53]

The provisions of the ALCV shall be examined as an example. This law regulates international arbitration in Chapter III, defining international arbitration as between parties domiciled in different countries or where the underlying transaction implicates international trade interests.[54] Thus, an arbitration reference that satisfies any of these

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[51]See Emilia Onyema, 'Formalities of the Enforcement Procedure (Articles III and IV)', in *Enforcement of Arbitration Agreements and International Arbtiral Awards* 597–612 (Emmanuel Gaillard, Domenico Di Pietro & Nanou Leleu-Knobil eds., Cameron May 2008).

[52]*Nigerian National Petroleum Corporation v. IPCO (Nig.) Ltd* [2008] EWCA Civ 1157, [2008] 2 CLC 550.

[53]This will primarily be where the seat of the arbitration was in any of these States, or assets that the applying party wishes to proceed against are in any of these States.

[54]Article 40 ALCV.

requirements will be regarded as international under this law. The effect is that the award from such reference will be viewed as an international arbitration award for which enforcement proceedings will fall under Article 44 of the Law. The relevant courts in Cape Verde will recognize an international arbitral award as binding. They will enforce such an award on the application of one of the parties to the arbitration reference.[55] All the applying party need produce to the enforcing court in support of its application is the original or certified true copy of the arbitral award and arbitration agreement.[56] Where these documents are not written in the Portuguese language, then the applying party must also provide notarized translated copies to the court.[57] These are effectively the same documents required for enforcement under the New York Convention and so clearly a regime that meets international standards.[58]

Most of the States that are also New York Convention signatory States make provision for the enforcement of foreign or international awards made in non-Convention States. An example is section 59 Ghana ADR Act on the requirements for recognizing and enforcing a foreign award.[59] The applying party will need to prove that a competent authority made the award under the law of the seat. To satisfy this requirement, the applicant will need to show that the arbitral tribunal was properly constituted under the relevant law (usually the law of the seat of arbitration). The second requirement to be satisfied is a reciprocity arrangement between the country where the award was made and

[55]The relevant court for purposes of recourse against the award in Cape Verde is the Supreme Court of Justice according to Art. 37 ALCV. In Ghana, the relevant court is the High Court according to section 59 ADR Act, while under the OHADA regime it will be the 'competent jurisdiction' in the relevant Member State according to Art. 25. The relevant court in Nigeria is the High Court according to section 57 ACA, and the High Court in the Gambia pursuant to section 49(2) Gambia ADR Act.

[56]Under the provisions of section 52(2) Gambia ADR Act, the applying party is not required to produce the arbitration agreement.

[57]Portuguese is the official language of Cape Verde.

[58]For the same requirements, see Art. 31 UAA with documents to be translated into the French language or the language of the enforcing court, and section 51 ACA with documents to be translated into the English language.

[59]Under section 57 Ghana ADR Act, section 31(3) ACA and section 52(1) Gambia ADR Act, the award can also be enforced as a judgment of the court.

Ghana.[60] The third requirement is for the applying party to produce, in support of its application for enforcement of the award, the original or authenticated copies of the arbitral award and arbitration agreement and translated into the English language where necessary. The fourth requirement is for the applying party to prove that there is no appeal pending against the award in any court under the law applicable to the arbitration (again, usually at the seat of the arbitration). Thus, it is evident that seeking enforcement of a foreign or international award under section 59 is more onerous than seeking such enforcement under the New York Convention included as a schedule to the Ghana ADR Act and by virtue of section 59(1)(c) Ghana ADR Act.

The recognition and enforcement of a foreign or international arbitral award may be refused under the laws of West African States on various grounds.[61] Under Article 45 of the ALCV, for example, the resisting party needs to prove that: (1) the arbitration

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[60]Ghana made the reciprocity reservations under the New York Convention in the Legislative Instrument (LI 261) of 1963.

[61]In Ghana, under section 59(3) ADR Act a foreign award may be refused enforcement if: (1) the award has been annulled in the country where it was made; (2) the party was unable to present its case; (3) the party lacking legal capacity was not properly represented; (4) the award deals with issues not submitted to the arbitration; or (5) the award contains a decision beyond the scope of the arbitration agreement. In Nigeria, under section 52 ACA the award may be refused recognition and enforcement where: (1) a party was under some incapacity; (2) the arbitration agreement was invalid; (3) the party was unable to present its case; (4) the award deals with a dispute outside the scope of the arbitration agreement; (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; (6) the award is not yet binding on the parties or has been suspended or set aside by a court where the award was made; (7) the subject matter of the arbitration is not arbitrable under Nigerian law; or (8) the recognition or enforcement of the award will be contrary to the public policy of Nigeria. Note however that under Art. 26 UAA a party can only pursue an application to nullify the award on the ground that: (1) there was no valid arbitration agreement; (2) irregular composition of the arbitral tribunal; (3) the tribunal disregarded its mandate; (4) lack of due process; (5) the award was contrary to international public policy; and (6) the award was not reasoned. In the Gambia, an award may be set aside under section 49 Gambia ADR Act where: (1) a party was under some incapacity; (2) the arbitration agreement was not valid under its proper law or the law of the Gambia; (3) the applicant was not properly notified of the appointment of the arbitrator or the hearing; (4) the award deals with disputes outside the scope of the arbitration agreement; (5) the tribunal was not properly constituted; (6) the agreement was in conflict with a mandatory provision of the ADR Act; (7) the subject matter was not arbitrable under the laws of the Gambia; or (8) enforcing the award will conflict with public policy.

agreement was not valid under the law applicable to it or under the law where the award was made; (2) it was not informed of the constitution of the arbitral tribunal; (3) the award deals with matters outside the scope of the arbitration agreement;[62] (4) the arbitral tribunal was not properly constituted, or the arbitral procedure was inconsistent with the agreement of the parties or the law of the seat of arbitration;[63] (5) the award is not yet binding on the parties or has been annulled or suspended by a competent court in the country or under the law where the award was made; (6) the subject matter of the arbitration is not arbitrable under the laws of Cape Verde;[64] (7) recognizing and enforcing the award will be contrary to the public policy of Cape Verde; or (8) the country where the award was made will not recognize or enforce an award made in Cape Verde.

[3] Time Limits

Some of these laws also provide the time limit when an application to set aside or nullify an award may be filed before the relevant courts. In Ghana, such an application must be made within three months from the date the applicant received the award.[65] In Cape Verde, the application for nullification of the award must be made within one month of the award's notification.[66] In the OHADA Member States, the application to nullify the award must be made within one month of the notification of the exequatur of the award.[67] In Nigeria, the application to set aside the award must be made within three months from the date of the award or additional award.[68] Finally, in the Gambia, the application to set

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[62]In situations where the award contains decisions on matters not falling within the scope of the arbitration agreement and these can be separated from those matters falling within the scope of the arbitration agreement, then those falling within the scope of the agreement will be enforced.
[63]The ALCV does not contain any waiver provisions unlike the other arbitration laws examined.
[64]See, e.g., Art. 4 ALCV, which lists matters that cannot be submitted to arbitration.
[65]The court can extend such time under section 58(4) Ghana ADR Act.
[66]Note that the same grounds on which an award may be nullified can be raised in defence of an application to recognize and enforce the award.
[67]Article 27 UAA and see Emilia Onyema, 'Arbitration under the OHADA Regime', *International Arbitration Law Review* 205, at 213 (2008).
[68]In accordance with section 29 ACA, and see Emilia Onyema, 'Enforcement of Arbitral Awards in Sub-Sahara Africa', *Arbitration International*, Vol. 26, 115 at 130–134 (2010). In *Nigerian Telecommunications Limited v. Okeke* (2017) 9 NWLR (Part 1571)

aside must be made within sixty days from the date of the award or additional award, except where the ground for setting aside is based on an allegation that the award was procured by fraud, corruption or gross irregularity. In such a situation, the sixty days will begin to run from the date the fraud, corruption or gross irregularity was discovered by the applicant or could have been discovered with reasonable diligence.[69] These laws, except the UAA, do not provide deadlines for the courts to decide arbitration-related applications. The UAA provides short turnaround times for the courts of its Member States to make some important decisions. For example, the courts have a period of three months to decide on an annulment application. Failure to meet this deadline will lead to loss of jurisdiction for the Member State court, with the parties able to request (within fifteen days) a decision from the Common Court of Justice and Arbitration (CCJA), which then gets a maximum of six months to make the decision.[70]

[D] Some General Mandatory Requirements

One mandatory requirement evident in all the laws is that the arbitration agreement must be in writing or evidenced in writing. It is important to produce a record of the arbitration agreement to commence arbitration and to enforce any resultant award in any of these jurisdictions. Parties cannot contractually agree not to be bound by the provisions requiring the arbitration agreement to be in writing. This requirement's mandatory nature endorses arbitration based on the parties' consent in these jurisdictions. No party can be forced against its will to arbitrate a dispute. Arbitration of cross-border disputes in these jurisdictions is therefore consensual. Note, however, that the methods of establishing or proving the existence of a party's consent to arbitrate vary in these jurisdictions, though such consent is objectively established.

Another mandatory requirement is for a national court seized of a matter where there is proof of a valid arbitration agreement to stay its proceedings and refer the parties to

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439 at 451[E-H], the Nigerian Supreme Court held that a party's receipt of the award triggers the three-month time limit.

[69]Section 49(4) Gambia ADR Act; note that these fall within the definition of public policy under section 49(7).

[70]Article 27 UAA. These are very tight deadlines and it will be interesting to see compliance data from the OHADA region.

arbitration. This is a very reassuring provision for foreign partners of local businesses, knowing that the West African States have committed themselves to honour arbitration agreements asserted in their jurisdictions. An examination of national courts' attitude in some of these jurisdictions shows the courts' willingness to enforce these provisions of their laws, as noted in Part II of this book, concerning the individual States.

The last generally applicable mandatory requirement under these laws is that parties are entitled to be granted a fair hearing, given a reasonable opportunity to present their case and respond to their opponent's case. In furtherance of these essential assurances, the laws require the arbitrators to be independent and impartial, duly notify parties of any hearings, grant adjournments within reasonable limits, accept evidence produced by the parties, and hear witnesses of fact and opinion. In addition, these laws all provide minimal grounds on which challenges to the arbitral award may be upheld.

[E] Peculiar Features

The Ghana ADR Act helpfully lists in section 1 some subject matters that are not arbitrable.[71] All civil and commercial matters are arbitrable, except those that affect Ghana's 'national or public interest', the environment, the enforcement and interpretation of the Ghanaian Constitution, or 'any other matter that by the law [of Ghana] cannot be settled by an alternative dispute resolution method'.[72]

The courts in Ghana are empowered under the ADR Act to initiate a referral or recommend to parties litigating before it to arbitrate the dispute where the judge 'is of the view that the action or a part of the action can be resolved through arbitration'.[73] This provision is new to the 2010 ADR Act and not contained in the former Arbitration Act of 1961 in Ghana. The parties' consent to the referral addresses the appearance of coercion that this section raises initially. Thus, the arbitration reference will not be anchored on the court's referral but the consent that the judge extracts from the parties. The reference,

[71]Article 4 ALCV, Art. 2 UAA, and section 5 Gambia ADR Act also provide which matters can be submitted to arbitration in their various jurisdictions.
[72]Matters of economic and commercial interest in the areas of investment, labour, copyright, economic free zones, and mining are all arbitrable. In all West African jurisdictions, commercial and investment matters in a very broad sense are arbitrable.
[73]Section 7 Ghana ADR Act and see section 9 Gambia ADR Act to the same effect.

therefore, remains consensual. The practical concern with this provision is the possibility of parties feeling a sort of 'compulsion' when a judge recommends arbitration to the parties. It may be difficult for a party to refuse to accept such referral or recommendation by a judge before whom his case is pending. It is therefore hoped that the judges in Ghana will resort to this section very sparingly.

One of the most notable departures from the old law (and from most arbitration laws in the region) under the Ghana ADR Act is the expanded jurisdiction given to the appointing authority under various sections of the Act.[74] These provisions elevate the status of the appointing authority from that of a private entity to a public entity. The appointing authority's decisions are subject to judicial review and ultimately appealable to the High Court. Even the UNCITRAL Arbitration Rules (which include the appointing authority mechanism) do not give the appointing authority such status. It will be interesting to see how these provisions are applied to assess their impact on the arbitral process. When the Ghana ADR Act applies, international arbitration practitioners should consider whether to nominate an appointing authority or not.

Under the OHADA UAA, the parties may waive the annulment action against an award that complies with international public policy. A third party who had not appeared before the arbitral tribunal but whose rights may be adversely affected by the arbitral award may challenge the award before the 'jurisdiction of the Member State' that would have been competent in the absence of the arbitration agreement.[75] This provision has been criticized because such a third party, not being party to the arbitration agreement, has no standing to challenge the award.[76] Moreover, this may compromise the privacy of the arbitral process and the arbitral award.[77] The UAA also limits the levels of appeals to higher courts in arbitration-related matters. For example, according to Article 6 of the

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[74]See, e.g., section 26 Ghana ADR Act on the appointing authority hearing applications challenging the jurisdiction of the arbitrator; for a discussion of the status of the appointing authority, see Emilia Onyema, 'The New Ghana ADR Act 2010: A Critical Overview', *Arbitration International*, Vol. 28, 101, at 111–113 (2012).
[75]See Art. 25 UAA.
[76]See Boris Martor et al., *Business Law in Africa: OHADA and the Harmonization Process* (GMB publishing, 2007), 267–268.
[77]Note that the arbitral reference is not confidential under the UAA, which expressly states in Art. 18 that only the deliberations of the tribunal shall be confidential.

UAA, where the court appoints an arbitrator, such a decision is not appealable. And, in some matters, the appeals lie directly from the Court of First Instance in the Member State to the CCJA (contrary to Article 10 of the OHADA Treaty). Examples include decisions on arbitrators' challenge,[78] applications for anti-suit injunctions,[79] and annulment of the award.[80] Finally, a party can request the arbitral tribunal to grant provisional enforcement of the award under Article 24 UAA.[81]

The ALCV, for its part, gives special recognition and wider powers to the president or chair of the arbitral tribunal that is worth highlighting.[82] The president of the arbitral tribunal (under ad hoc references), for example, is empowered to determine arbitrator challenge applications.[83] His decision is not appealable except in an application before the national courts to nullify the arbitral award or refuse its enforcement.[84] The law is silent on the position where the president of the tribunal himself is challenged. It is suggested that in such a situation, the court will determine the challenge. Another peculiar provision under the ALCV is the requirement that where the parties or the arbitrators cannot agree among themselves on the person to appoint as the tribunal president, the most senior member of the tribunal in terms of age should preside.[85] The parties can also empower the president solely to determine the substantive dispute where it becomes impossible for the arbitral tribunal to reach a majority decision.[86] Finally, for

[78]Article 8 UAA.
[79]Article 13 UAA.
[80]Article 25 UAA and such appeal can only be on points of law.
[81]It is not clear how the parties will enforce such order of the arbitral tribunal particularly since Art. 30 UAA provides that the award shall only be subject to enforcement when an exequatur is issued by the competent jurisdiction of the Member State, which the arbitral tribunal is not.
[82]See Art. 22 and Art. 17.2 ALCV, which unless agreed by the parties in writing, excludes a person who has acted as mediator over the same dispute between the parties from acting as arbitrator.
[83]Article 17.4 ALCV.
[84]Article 30.3 ALCV.
[85]Article 21.2 ALCV, which imports into the Arbitration Law an ancient tradition known in almost all African communities of respect for elders, even though it is now known that advancement in age does not necessarily translate into greater wisdom or knowledge.
[86]Article 29 ALCV, which also gives the president a deciding vote.

international arbitration references, the arbitral award is not appealable except where the parties have expressly agreed otherwise.[87]

The Gambia's ADR Act contains a comprehensive confidentiality provision that parties need to opt out of, if they do not wish to be bound by it. In every arbitration agreement to which it applies, section 6 implies an agreement by the parties not to 'publish, disclose or communicate any information' relating to the arbitral proceedings or the award.[88] It also makes provision for the appointment and role of an umpire in the arbitral reference, and this is not limited to domestic arbitral references.[89] The ADR Act helpfully defines what is covered by 'public policy' under its provisions. Sections 49(7) and 53(3) in the same terms provide:

An award is in conflict with public policy if (a) the making of the award was induced or affected by fraud, corruption or gross irregularity, or (b) a breach of the rules of natural justice occurred (i) during the arbitral proceedings; or (ii) in connection with the making of the award.

It is evident from this analysis that the laws that regulate the process of arbitration in the countries of the West African region are modern in their approach, with a clear intent of adopting and implementing internationally recognized norms, while at the same time protecting concepts (such as reciprocity) in their national interest. These efforts are geared towards making arbitration more accessible and standardized for quality assurance to attract more international arbitration references in these jurisdictions. Since the first edition of this text, more domestic and international arbitration cases are seated in these jurisdictions, some more than others. For example, Ghana and Nigeria are reporting more cases.

The COVID-19 pandemic has raised questions regarding the availability and propriety of remote hearings in arbitration. As with most jurisdictions globally, arbitration laws in the West African region are silent on the question but do not prohibit remote hearings.[90]

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[87]Article 42 ALCV.
[88]This does not affect the disclosure of such information where such is contemplated under the ADR Act or to a professional or other adviser of any of the parties.
[89]Sections 20–25 Gambia ADR Act.
[90]Specific provisions are provided in each country chapter.

In our view, a tribunal's decision to proceed remotely will not, of itself, impugn an award's validity. In these circumstances, the tribunal's material concern should be to ensure that remote proceedings adhere to mandatory due process requirements. We are of the view that to ensure certainty and clarity, national legislators and arbitral centres should expressly include in their arbitration laws and rules, respectively, provisions on technology-assisted and remote hearings.

§2.03 Arbitration and National Courts

National courts may become involved in international arbitration references at various stages. Primary involvement occurs: before the commencement of the arbitral proceedings, where one party wishes to assert and enforce the arbitration agreement; thereafter requesting the assistance of the court with the appointment of the arbitrators; requesting a definitive determination regarding the jurisdiction of the arbitrator or validity of the arbitration agreement; challenging an arbitrator; seeking from the court interim or interlocutory relief for the preservation of relevant assets or assistance with the taking of evidence; and applying for the setting aside, annulment or enforcement of the final award after the arbitral process.[91]

Since a national court must ensure that it has jurisdiction to adjudicate a matter before it, in international arbitral references, the jurisdiction of courts in the States of the West African region may arise where one party to the reference (usually the respondent) is its resident or national, the juridical seat or relevant assets are within its territorial jurisdiction, or the arbitral award is sought to be set aside, annulled or enforced within its jurisdiction. Where any of these connectors are present, a court in any of these jurisdictions may be requested to adjudicate matters and make orders that directly impact the arbitral reference or award. The decisions of national courts made in these circumstances reflect courts' attitude to arbitration and, by extension, courts' reputation

[91]Applying to court for an order of interim measure of protection can be made before commencement of the arbitral reference but usually when arbitration is also contemplated.

in these jurisdictions in the international arbitration community.[92] This section briefly examines some decisions on international commercial arbitration from the superior courts of record in Nigeria, Ghana, Liberia, and the Gambia, showing the courts' supportive attitude to international arbitration references.

[A] The Nigerian Courts

In *The Owners of the MV Lupex v. Nigerian Overseas Chartering and Shipping Ltd*,[93] NOCSL (Nigerian Overseas Chartering and Shipping Ltd) chartered the vessel *MV Lupex* from its owners. Upon an allegation of breach of the charter, the Charterer filed a suit in the Federal High Court and further arrested the vessel in Nigeria. The Owners applied for a stay of proceedings and release of the vessel on the ground that there was an ongoing arbitration in London in which NOCSL was participating. The application for stay was refused by both the Federal High Court and the Court of Appeal in Nigeria. On further appeal to the Supreme Court, the Court allowed the appeal, holding that so long as there is a valid and enforceable arbitration clause in the parties' contract, the Court is bound to stay proceedings. The Court found that the dispute was within the contemplation of the clause. Therefore, it gave due regard to the parties' voluntary agreement by enforcing the arbitration clause. The Supreme Court then provided guidance on when an application to stay proceedings may be refused, that is: where the defendant establishes that he would suffer injustice if the case is stayed; that he cannot obtain justice from the arbitration tribunal; or that the agreement between the parties is null and void, inoperative and incapable of being performed. Finally, the Supreme Court listed those matters a court should consider in deciding whether to grant a stay. These are: (1) the country where the evidence is and its effect on the relative convenience and expense of trial; (2) whether the law of the foreign court applies and if it differs with local law on any material respect; (3) the countries to which parties are connected; (4) whether the defendant genuinely desires trial in the foreign country or is only seeking procedural advantage; (5) whether the

[92]For more detailed discussion on the attitude of the courts of various African countries towards arbitration, see Emilia Onyema (ed), *Rethinking the Role of African National Courts in Arbitration* (Wolters Kluwer 2018).
[93]*Owners of the MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd* [2003] 15 NWLR (pt 844) 469; (2003) 6 SC (pt II) 62.

plaintiff will be prejudiced by having to sue in the foreign court because he would be deprived of security for the claim, be unable to enforce any judgment, be faced with a time bar not applicable in the local courts, or on political, racial, religious or other reasons be unlikely to get a fair trial. The Supreme Court then made the noteworthy pronouncement that the Court should not be seen to encourage the breach of a valid arbitration agreement, particularly if it has an international flavour.[94]

Again, in *Ras Pal Gazi Construction Company v. Federal Capital Development Authority*,[95] a dispute arose between the parties out of an agreement for constructing a cultural centre in Abuja. The arbitrator rendered an award favouring the appellant, which the respondent sought to set aside before the courts. The High Court held that the parties were bound by the award, making the award the judgment of the court and awarding interest at the rate of 20% on the award sum from the date of the court's judgment. On appeal, the Court of Appeal set aside this decision of the High Court and the interest on the judgment sum as made without jurisdiction. It substituted it with a judgment recognizing the award as binding on the parties. On further appeal to the Supreme Court, the Court, in unanimously dismissing the appeal, held that:

An award made pursuant to arbitration proceedings constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and upon application in writing to the court (shall) be enforced by the court … Once an award has been made and not challenged in court, it should be entered as a judgment and given effect accordingly … The only jurisdiction conferred on the court is to give leave to enforce the award as a judgment unless there is real ground for doubting the validity of the award.[96]

These decisions from the highest court in Nigeria show a clear understanding and support for upholding valid arbitration agreements and awards, even where a State entity is involved and the award is made against it, as in the case of *Ras Pal Gazi Construction*

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[94] *Ibid*., at 488.
[95] *Ras Pal Gazi Construction Company v. Federal capital Development Authority* [2001] 5 SC (pt II) 16.
[96] *Ibid*., at 25–26 and on the point of awarding interest on the award, the Supreme Court held that the judge lacked jurisdiction since it was the responsibility of the arbitrator to award interest and costs on the date of the award.

Company v. Federal Capital Development Authority above. However, an applicant must be ready, able and willing to pursue its claim through the various courts to the Supreme Court if necessary.

[B] The Ghanaian Courts

The courts have exemplified the same attitude in Ghana. In *Klimatechnik Engineering Ltd v. Skanska Jensen International*,[97] a dispute arose out of a subcontract to install air-conditioning equipment in two hospitals in Ghana. The award made by a majority of members of the arbitral tribunal was challenged on the grounds of perverseness by the arbitrators for allegedly misconducting the proceedings and that the award had been improperly procured by the majority, which were grounds for setting aside the award. To sustain this application, the applicant needed to extend the time to apply to set aside the award. The High Court granted both applications. On appeal, the Court of Appeal allowed the appeal and dismissed the application for an extension of time. On further appeal to the Supreme Court, the Court unanimously dismissed the appeal. It held that the finality of the award was implied in all arbitration agreements. In the absence of a contrary agreement, no right of appeal lies against the award. Georgina Wood JSC then admonished that:

in the absence of any clear evidence of impropriety on the part of the arbitrators or umpire, if our courts would routinely review and overturn, on the law and merits, awards which were given within jurisdiction and were not improperly procured, and in respect of which the procedural and natural justice rules were never breached, the speed and above all, the finality of the arbitral process would be greatly undermined and jeopardised. The courts have a duty to support and give validity to arbitral awards properly procured.[98]

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[97] *Klimatechnik Engineering Ltd v. Skanska Jensen International* [2005–2006] SCGLR 913. This decision was based on sections 20 and 26 Arbitration Act 1961. There are no equivalent grounds under the new ADR Act 2010, but note that for arbitration of actions pending before the court, Order 64 rule 12(1) and (2) of the Ghana High Court (Civil Procedure) Rules 2004 requires an application to set aside an award to be made within six weeks from the date the award was published to the parties; such time can be extended by the court. This may affect arbitration proceedings arising from section 7 ADR Act.

[98] *Ibid*., at 926.

This opinion of the learned Justice of the Supreme Court clearly shows the attitude of the Ghanaian courts as supporting and not undermining the arbitral reference and its outcome. This attitude is further seen in the progressive decision in *State Insurance Corporation, Takoradi v. Badu*,[99] which considered whether a party taking steps in the proceeding loses the right to have the dispute referred to arbitration. The Accra High Court stayed the proceedings and observed that 'the courts have always refused to preclude parties to an agreement from pursuing their rights thereunder'.[100] In *Strojexport v. Edward Nassar & Co. (Motors) Ltd*,[101] the High Court in Accra held that an award made in Prague (Czech Republic) in 1962 could be enforced against the respondents in Ghana in 1963 (under the old Arbitration Act of 1961). The Court made this decision notwithstanding that the award was made when no reciprocity agreement existed between Ghana and Czechoslovakia (as the Czech Republic was then known). The Court held that the relevant period when there must be reciprocity is at the time enforcement of the award is sought. The Court granted the enforcement of the award against the Ghanaian company.

[C] The Gambian Courts

In the Gambia, the Court of Appeal sitting in Banjul in *ESB International Ltd and Biwater International Ltd v. Utilities Holding Corporation*[102] stayed the court proceedings favouring arbitration. The dispute between the parties arose from a management contract agreement that contained an arbitration clause referring to the International Chamber of Commerce (ICC) arbitration rules. The respondent alleged that it had made overpayments to the appellants and applied to the High Court to recover the

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[99] *State Insurance Corporation, Takoradi v. Badu* [1965] GLR 105, decision of the High Court Accra. This was a decision based on section 5 Arbitration Act 1961 but note that section 6 ADR Act 2010 on stay of proceedings does not refer to taking steps in the proceedings thus removing this barrier to holding parties to their agreement to arbitrate.

[100] *Ibid*., at 106.

[101] *Strojexport v. Edward Nassar & Co. (Motors) Ltd* [1965] GLR 591. This decision was based on the Arbitration Act, 1961, and it remains relevant since section 59(1)(b) ADR Act 2010 still requires reciprocity for the enforcement of foreign awards.

[102] *ESB International Ltd and Biwater International Ltd v. Utilities Holding Corporation* [1997–2001] GR 297. This was a decision based on section 5 Arbitration Act Cap 9 Laws of Gambia 1955, which is in the same terms as section 9 ADR Act 2005.

overpaid sums while filing an ex parte application for an injunction restraining the appellants from withdrawing the amount claimed from their bank account. The trial court granted the injunction and ordered the appellants to show cause why the amounts in their bank account should not be attached pending the substantive action's determination. The appellants filed an affidavit in answer to this order as required and at the same time filed a separate motion for an order staying the action in favour of arbitration. The trial High Court judge refused the motion for a stay on the grounds that the appellants had not entered conditional appearance and had taken a step in the proceeding (by filing the affidavit), thereby voluntarily submitting to the jurisdiction of the court. On appeal, the Court of Appeal unanimously allowed the appeal. It found that the relevant Arbitration Act did not require the appellants to enter conditional appearance before delivering any pleadings.

Moreover, filing an affidavit to show cause did not amount to taking steps in the proceeding since it was not a defence pleading. However, the Court of Appeal refused to discharge the injunction since the amount was frozen in the respondent's bank account and not paid out to the appellants. This decision conforms to the generally accepted definition of taking steps in the proceedings and shows a supportive attitude towards arbitration. It should be noted that this was a dispute involving a State entity over the provision of water as a public service. Yet, the Court of Appeal gave effect to the arbitration agreement between the parties.

[D] The Liberian Courts

The Supreme Court of Liberia upheld the arbitration agreement in *Chicri Brothers, Inc., v. Isuzu Motors Overseas Distribution Corporation and Others*.[103] The applicant instituted an action for damages arising from the respondent's breach of the provisions of a non-exclusive franchise dealership agreement. The franchise agreement was governed by the law of Japan and included a reference to arbitration in Tokyo for the settlement of all disputes. The respondent filed an Answer and a motion to dismiss the complaint for lack of jurisdiction because of the arbitration clause. The appellant argued that it would

[103]*Chicri Brothers, Inc., v. Isuzu Motors Overseas Distribution Corporation & Others* [2000] 40 LLR 128.

not obtain justice in Japan since there was no recourse to appeal. The trial court dismissed the complaint. On appeal to the Supreme Court for a final review, the Supreme Court upheld the trial court's decision. In its decision, the Supreme Court said:

This Honourable Court is of the considered opinion that to agree with the appellant and invalidate standard arbitration provisions of an international franchise agreement, would be tantamount to simultaneously invalidating various international conventions, treaties, agreements, and protocols to which the Republic of Liberia is a party.[104]

In this case, the Liberian courts upheld an arbitration agreement even where this meant its national would have to arbitrate in Tokyo under the laws of Japan. These decisions and the pronouncements from these superior courts of record show a supportive attitude towards arbitration in general and specifically toward international commercial arbitration connected to the States of this region.

§2.04 Arbitral Institutions

Arbitral institutions are part of and complete the administrative pillars of arbitration. It is firmly established that the role of the arbitral institution is administrative.[105] The arbitral institution assists the parties in the organization and administration of their arbitration reference. To do this, the institution usually (though not necessarily) drafts and publishes a set of arbitration rules that contain the functions or services it will render to the parties. It also publishes the fees it will charge for rendering such services. The structure of arbitral institutions varies. Some are private organizations that are profit-making while others are non-profit-making, though they still charge a fee for their services to ensure that their costs are covered. These various types operate in the West African region, which also boasts one regional centre in Lagos under the auspices of the Asian-African Consultative Committee.

Regarding those nine West African States that are also parties to OHADA under both the OHADA Treaty and the UAA, decisions of the CCJA are also relevant. The ECOWAS Common Court of Justice, though a regional court, does not have the same

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[104] *Ibid.*, at 137.
[105] See, e.g., Art. 3 GAC Rules, Art. 2 LRC Rules, and Art. 1 CACI Rules.

remit as the OHADA CCJA concerning arbitration. The arbitral institutions operating in the region also organize seminars, workshops and conferences on arbitration and ADR-related topics to execute their mandates to disseminate knowledge of these dispute resolution mechanisms.[106] Table 2.2 provides a list of some of the more prominent arbitral institutions in West Africa.

This section examines the provisions of the arbitration rules of three major arbitral institutions in the region. The chosen institutions administer domestic and international references and broadly reflect the nature of institutions that serve the region. The institutions examined are the Ghana Arbitration Centre (GAC) (subsection 2.04[A]), the Lagos Regional Centre (LRC) (subsection 2.04[B]) and the Court of Arbitration Côte d'Ivoire (which is also an OHADA jurisdiction) (subsection 2.04[C]).

[A] Ghana Arbitration Centre

This section examines the status and function of the GAC[107] (subsection 2.04[A][1]), the role of the arbitrator (subsection 2.04[A][2]) and the arbitration process under its Rules (subsection 2.04[A][3]).

[1] The Institution

The GAC was established primarily to 'reinforce the legal framework for protecting commercial and economic interests and accordingly inspire the prospective investor's confidence in Ghana'.[108] It, therefore, promotes itself as an institution that primarily focuses on the resolution of business, commercial, investment, construction and other civil disputes in Ghana to enhance expertise and specialization in these areas of the law.[109] The GAC was founded in 1997 and has regional offices in Ghana. In addition to administering arbitration references under its Arbitration Rules, it also organizes

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[106]The websites of these institutions usually advertise such seminars, workshops or conferences.

[107]On the GAC, see Emmanuel Amofa, 'The Ghana Arbitration Centre', in *The Transformation of Arbitration in Africa: the Role of Arbitral Institutions*, 121–148 (Emilia Onyema ed. Wolters Kluwer 2016).

[108]See the GAC website at <www.arbitrationcentregh.com> (accessed 27 March 2021).

[109]Note that the Ghana Judiciary has created a specialist Commercial Court to ease congestion and effect speedy determination of commercial disputes by specialist judges.

seminars particularly targeted at commercial operators or businesses in Ghana to sensitize its target audience on developments in the law and practice of arbitration per its mission statement. It administers both domestic and international references.[110] The fees payable to both the institution and the arbitrators are scheduled under the Rules. They are revised intermittently, so parties should check the GAC website for relevant updates. The GAC recommends a wide but succinct arbitration clause to be included in agreements by parties wishing to arbitrate under its auspices.[111] The clause provides:

Any dispute, controversy, claim or interpretation arising out of or relating to this contract, or the breach of this contract, shall be finally settled by arbitration under the auspices and Rules of the Ghana Arbitration Centre by one or more arbitrators appointed in accordance with the Rules of the Ghana Arbitration Centre.

There are certain important provisions of which parties seeking to arbitrate under the GAC Arbitration Rules should be aware. In the first instance, parties cannot choose which version of the Rules will apply to their reference.[112] It is the version of the Rules in force when the arbitration reference is initiated that will apply. Arbitral institutions (including the GAC) review and revise their arbitration Rules from time to time. Where a clause in a contract (especially a long-term contract) refers to the resolution of disputes under the GAC Rules, the parties need to ensure that they keep themselves informed of developments and changes made to the Rules by the GAC. The GAC also makes provisions for expedited arbitration proceedings.[113] The Expedited Rules will automatically apply to references with a claim of USD 10,000 or less, unless the GAC decides otherwise. There is nothing in the Rules that permits the GAC to act as appointing authority or administer arbitration references under any other arbitration rules

[110]The Arbitration Rules of the GAC are available at <www.arbitrationcentregh.com> (accessed 27 March 2021).
[111]Note that existing disputes can also be submitted to the GAC in accordance with Art. 9 of the GAC Rules.
[112]See Art. 1 GAC Rules, which is a mandatory provision to which the parties are bound.
[113]The expedited procedure rules are contained in Arts 55–60 GAC Rules and primarily reduce the time limits for taking various steps such as appointing arbitrators, mandating the use of telephone as the primary means of communication and providing that the arbitrator should render the award within five working days from the close of the hearing.

(even those specially designed for ad hoc references such as the UNCITRAL Arbitration Rules). Thus, parties wishing to have the GAC administer their arbitral reference must arbitrate under the GAC Arbitration Rules.

[2] The Arbitrator

The arbitrator must be an individual and shall be neutral.[114] The parties can choose the arbitrator and agree on the arbitrator appointment procedure; by failure to appoint, the GAC will appoint the arbitrators.[115] The GAC maintains a list of arbitrators from which parties may appoint arbitrators if they wish but from which the GAC itself must appoint arbitrators when called upon to do so.[116] The GAC will appoint arbitrators where parties default but especially sole arbitrators and the arbitral tribunal's chair.[117] In international arbitration references, the sole arbitrator and tribunal chair shall be nationals of a State other than those of the parties.[118] Once the individual to act as arbitrator is agreed by the parties or selected by the GAC, it is the GAC itself that will notify the appointee and require them to submit a signed statement of Independence and Disclosure which they return to the GAC. The arbitrator is required to disclose in writing 'any circumstances likely to affect (his) impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel'.[119] This gives arbitrators clear guidance as to what they are expected to disclose. It appears from the GAC Rules that party-appointed arbitrators may be of the same nationality as their appointing parties but not the presiding arbitrator.[120] Therefore, if the

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[114]The parties can agree the number of persons they want as arbitrators to form the arbitral tribunal, but Art. 17 of the GAC Rules provide for a default of one arbitrator unless the GAC decides otherwise.
[115]Articles 12–15 GAC Rules.
[116]See Art. 5 for the National Panel of Arbitrators and Art. 14 of the GAC Rules, which expressly empower parties to appoint arbitrators outside the National Panel if they wish. The National Panel includes the names of Ghanaians and non-Ghanaians so that it can be said to be international in nature.
[117]According to Art. 15 GAC Rues the chair must be neutral, which raises the concern whether under the Rules, the party-appointed arbitrators are not expected to be neutrals.
[118]See Art. 16 GAC Rules; this is in addition to being neutral, independent and impartial of the parties.
[119]Article 19 GAC Rules.
[120]Article 16 GAC Rules.

parties (especially in an international reference) wish all the arbitrators to be neutrals, they must specify this in their arbitration agreement.[121]

Another important reason to think of this is that it appears that the GAC will only make notification of appointment to arbitrators who are neutrals and who will also need to accept their appointment to the GAC.[122] This, in effect, implies that the contract with the non-neutral arbitrators will be directly with each appointing party (or both parties jointly) and not the GAC. This contractual matrix becomes relevant where the arbitrator's fees remain unpaid after they have issued their award and wish to pursue enforcement of their right to be paid.[123] Moreover, a non-Ghanaian arbitrator may not want to pursue the parties directly to pay their fees and expenses.

Whether appointed by a party or not, an arbitrator can be challenged for breach of the disclosure requirement mentioned above. The challenge application will be filed with the GAC, whose decision on the challenge shall be final and binding on the parties.[124] A vacancy on the arbitral tribunal may occur due to several factors, including an arbitrator's successful challenge, resignation, withdrawal, disqualification, or death of an arbitrator. The default position under the GAC Rules when the arbitral tribunal is truncated is not for a replacement arbitrator to be appointed, as is the situation under most arbitration rules.[125] Rather, the default position is for the remaining arbitrators, in a tribunal of neutral arbitrators, to continue the hearing in its truncated form.[126] The parties can agree otherwise and should exercise this right, mainly where the truncation occurs due to a vacancy caused by the neutral arbitrator.

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[121]See, e.g., reference to neutral arbitrators in Art. 15 GAC Rules.
[122]Article 18 GAC Rules.
[123]Where the GAC appoints, the arbitrator need look to the GAC but where it is one party or both parties that make the appointment, then the arbitrator will need to look to the parties directly for payment. Note that under section 56 of the Ghana ADR Act, the arbitrator can exercise a lien on the award.
[124]See Art. 19 GAC Rules, which also specifies the challenge procedure and the important requirement that the arbitrator has the right to respond to the allegations forming the grounds of challenge.
[125]See, e.g., Art. 15 UNCITRAL Rules 2010; Art. 17 LRC Rules; and Art. 15(2) CACI Rules.
[126]See Art. 20 GAC Rules; it is suggested that the same rule will apply even to tribunals where the arbitrators are not all neutrals.

Arbitrators have powers to determine their jurisdiction in the first instance and the arbitration agreement's existence and validity.[127] They also have broad powers over the conduct of the arbitral reference and any oral hearing.[128] These include powers to order interim measures, 'to safeguard the property which is the subject matter of the arbitration',[129] inspect or investigate any property,[130] grant adjournments,[131] and exclude persons from the hearing.[132] They also include the power to grant any remedy or relief they deem just and equitable, such as specific performance of the contract,[133] and to close and reopen the arbitral hearing.[134] This is a critical power because the arbitrator's time to produce the arbitral award begins to run from the date of closure of the hearing. It is for the parties to adduce whatever evidence they wish to support their claims or defences. Still, it is for the arbitrator to determine the weight, relevance, materiality and evidential value to allocate to such evidence.[135] An essential clause under the Rules is that which excludes liability for both the GAC and arbitrators for 'any act or omission in connection with any arbitration' conducted under the Rules.[136] Another important power given to the arbitrator under the Rules is the ability to interpret all provisions of the Rules that impact

[127]See Art. 54 GAC Rules, which also recognizes the principle of the autonomy of the arbitration clause and the effect on the clause of the invalidity of the substantive contract in which it is contained.
[128]Article 25 GAC Rules expressly states that the arbitral hearing is private and gives the arbitrator control over persons that can attend the hearings. However, arbitrators under the Rules should note that any person with 'direct interest' in the arbitration is entitled to attend the hearing.
[129]Article 34 GAC Rules.
[130]Article 33 GAC Rules.
[131]Article 26 GAC Rules.
[132]See Art. 25 GAC Rules and note that under Art. 30 the arbitrator can proceed with the hearing in the absence of a party who had been notified but failed to either attend or seek an adjournment.
[133]See Art. 43 GAC Rules, which limits this wide power to those reliefs that fall within the scope of the arbitration agreement.
[134]Articles 35 and 36 GAC Rules.
[135]See Art. 31(c) GAC Rules, and note that under Art. 31(d) parties are not obligated to attend the hearing but all arbitrators must be present at the hearing.
[136]Article 47(b) and (d) GAC Rules, but see the partial immunity granted under section 23 ADR Act.

his powers and duties. The GAC itself has the power to make a final determination of such matters and all other provisions of the Rules.[137]

Arbitrators also have some obligations imposed on them under the GAC Rules. As discussed above, these include that they must make necessary disclosures and remain impartial and independent of the parties and their counsel. They are also under a mandatory obligation to afford the parties 'full and equal' opportunity to present their case and deal with the case against them.[138] They must publish the award within thirty days of closure of the hearing (this is five working days under the expedited proceedings), and cannot extend this time, although the parties can agree to extend this time limit.[139]

[3] The Arbitral Process

A reference under the GAC Rules commences once the parties have exchanged pleadings and the arbitral tribunal constituted. It is important to note that the parties serve the pleadings on each other and notify the GAC.[140] Each document shall be produced in sufficient copies, depending on the number of parties and arbitrators, who shall each receive one set of the documents exchanged, with the GAC also receiving a set of documents.[141] The Demand (the equivalent of a Notice of Arbitration) should state the names and contact details of the parties, nature and circumstance of the dispute, the remedy sought, the amount of claim, and the arbitration agreement. The applicant may attach any other relevant documents to the Notice.[142] It is the applicant's responsibility to file the Demand in appropriate copies with the GAC and pay the administrative fees as assessed by the GAC.[143] It is important to note that the applicant files the demand with

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[137]Article 53 GAC Rules.
[138]Article 29 GAC Rules.
[139]See Art. 35(c) GAC Rules for when time begins to run; Art. 36(c) for reopened hearings; Art. 41 on time of making the award by the arbitrator; and Art. 39 for extension of time by the parties.
[140]See Art. 7(a) (the initiating party serves the Demand on the responding party) and Art. 7(c) (the responding party serves his Answer on the applicant and the GAC simultaneously) GAC Rules.
[141]Article 7(b) GAC Rules.
[142]Article 7(a) GAC Rules.
[143]See Art. 7(b) GAC Rules, which is very important in deciding whether to commence the reference in the first place, since the applicant will be liable for the filing fee. It also

the GAC *after* he has served it on the respondent. Upon the applicant's payment of the necessary fees, the GAC will only notify the respondent of the filing (and its acceptance to administer the reference). The respondent's time of seven days to file its Answer and counterclaim (if any) begins to run after the GAC gives the said notification.[144] It is also instructive that the respondent may decide not to file an Answer. Still, such a respondent must be aware that this action will not delay the reference's commencement since the Rules will presume that the respondent has denied the claim.[145] This will have the effect of progressing the reference, and the arbitrator may proceed in the absence of a party who, 'after due notice fails to be present or fails to obtain an adjournment'. However, an award shall not be made solely on this ground of lack or default of appearance.[146] After filing the pleadings, the parties can still file with the GAC or the arbitral tribunal (on its constitution) new or additional claims if such claims fall within the arbitration agreement's scope.[147]

Before the constitution of the tribunal, the GAC and parties may hold a pre-hearing conference 'to arrange for an exchange of information and the stipulation of uncontested facts'.[148] This is an extraordinary power the institution has allocated to itself, especially as this is one of the arbitral tribunal's functions. The provision of the Rules says that this is to expedite the arbitration proceedings. Note that the parties can request this pre-hearing conference, or the GAC can call for one at its discretion. It is advisable that parties in international references expressly opt out of this article. The parties are empowered to agree on the place of arbitration, which can be anywhere in the world (for international references). Where parties disagree, the GAC will fix the place, and its decision will be final and binding on the parties and arbitral tribunal.[149] As is the practice of most arbitral institutions, communication between the arbitral tribunal and the parties

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removes the effect of the respondent not paying his share of the assessed filing fees as a way of frustrating the applicant or causing him any hardship.

[144]Article 7(c) GAC Rules. The Answer should also be filed in appropriate copies.

[145]Articles 7(d) and 30 GAC Rules.

[146]Article 30 GAC Rules.

[147]Article 8 GAC Rules.

[148]Article 10 GAC Rules.

[149]Article 10 GAC Rules.

should pass through the GAC Secretariat.[150] If parties need certified copies of documents used in the arbitration for judicial proceedings, it is the GAC that provides such copies upon written request by any party to the arbitration.[151]

It appears that parties arbitrating under the GAC Rules can only be represented by counsel, which is very restrictive since a party may wish to be represented by a person who is not a legal practitioner.[152] It will, therefore, be essential to agree on this issue with the other party and the arbitral tribunal before the commencement of the hearing. Parties wishing to use stenographers or interpreters will need to pay for these services independently and instruct a provider of their choice outside of the GAC.[153]

The GAC Rules include many provisions evidencing a robust party autonomy regime over the arbitral process. As mentioned above, parties can directly appoint the arbitrators, agree on an appointment procedure and the place of arbitration. In addition, they can extend all time limits,[154] produce whatever evidence they wish in support of their case,[155] waive an oral hearing,[156] settle their dispute at any time during the reference[157] and accept the award made by the arbitrator.[158] For the majority of these actions, the parties need to agree or evidence their agreement in writing. Parties must be aware of the waiver provision in Article 38 GAC Rules, which provides: '*Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state objection thereto in writing shall be deemed to have waived the right to object*.' (emphasis added)

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[150]Article 40 GAC Rules, though this does not include video or telephone conferencing. However, the tribunal will do well to make a written note of what was said for its records.
[151]Article 46 GAC Rules, on payment of an administrative fee.
[152]Article 22 GAC Rules.
[153]See Arts 23–24 GAC Rules. These are usually services arbitral institutions provide and which all form part of the fees payable to the institution for administering the arbitral reference.
[154]Article 39 GAC Rules.
[155]Articles 31–32 GAC Rules.
[156]Article 37 GAC Rules.
[157]Article 44 GAC Rules, and they can request the arbitrator to transform their settlement agreement into a consent award.
[158]Article 45 GAC Rules, which is an important safeguard against parties refusing to take up the award since that arguably, is a breach of the contract terms contained in the GAC Rules.

This is an essential provision since it implicates any of the provisions of the Rules, and such objection must be made in writing. It is suggested that where an oral application is made, and the tribunal records such objection, this should satisfy the writing requirement. However, the point here is to be aware that any objections or reservation of a party's position for breach of any provisions of the Rules or agreement of the parties should be made in writing. Parties usually may wish to rely on such notifications to challenge the arbitral award and must not deprive themselves of such an opportunity through a technical glitch.

The arbitral reference will usually terminate in the publication of the final award. As mentioned above, the arbitrator or a majority of the arbitral tribunal makes the award within thirty days of closing the arbitral hearing. The award should be in writing and signed and is final and binding on the parties.[159] Once the award is ready, the arbitrator's responsibility is to transmit hard copies and electronic copies of the award to the GAC Secretariat, which shall then forward the same to the parties.[160]

It has been clearly shown above that the GAC is actively involved in administering the arbitral reference, so the parties must carefully assess the provisions of the Rules and opt out of any unsatisfactory articles over which they may agree otherwise.[161]

[B] The Regional Centre for International Commercial Arbitration Lagos

This section examines the status and function of the LRC as an arbitral institution (subsection 2.04[B][1]), the role of the arbitrator (subsection 2.04[B][2]), and the arbitral process (subsection 2.04[B][3]) under the Arbitration Rules of the Regional Centre.

[1] The Institution

The Regional Centre for International Commercial Arbitration in Lagos ('LRC' or the 'Centre') is one of the Asian-African Legal Consultative Organisation (AALCO) arbitral

[159]Article 42 GAC Rules, and this include the parties' assigns and successors.
[160]Article 45 GAC Rules.
[161]The final determination on the interpretation of the provisions of the Rules and how they should be applied rests with the GAC as contained in Art. 53 GAC Rules.

institutions.[162] It was established in 1989 and became operational in 1999.[163] The LRC adopted the 1976 UNCITRAL Arbitration Rules, as was the practice of AALCO Regional Centres when commencing business, and the latest revision of its arbitration Rules was in 2019. The new Rules became effective on 3 October 2019.[164] The 2019 Rules are based on the 2013 revision of the UNCITRAL Arbitration Rules and are designed for 'parties to domestic and international arbitrations, including Treaty-based Investor-State arbitrations'.[165] All AALCO Regional Centres, though set up with the consent and assistance of the host State government, are independent of such host State governments and enjoy the status of an international non-profit organization with diplomatic privileges and immunities.[166]

The LRC's primary function is to promote international commercial arbitration in the West African Region.[167] This implies both creating awareness and promoting the use of arbitration as a mechanism for resolving international or cross-border commercial disputes to make the Centre truly an 'international arbitral institution'. To further enhance this primary function, the Centre adopted the UNCITRAL Arbitration Rules, which are well known, tried and tested with a global brand of its own.[168] To make the Centre attractive to international arbitration practitioners and businesses, its administrative functions extend under the Headquarters Agreement and its Rules to assisting parties to enforce their arbitral award obtained from a reference conducted under its Arbitration

[162]The AALCO currently has five arbitral institutions in Africa, Asia and the Middle East in: Cairo, Nairobi, Lagos, Kuala Lumpur and Tehran (see <www.aalco.int>).
[163]See the Regional Centre for International Commercial Arbitration Act No. 39 of 1999 available at < https://rcical.org/index.php/rcica-degree-no-39-of-1999/>.
[164]The new Rules are available at < https://rcical.org/wp-content/uploads/2019/09/RCICAL-Arbitration-Rules.pdf>.
[165]As noted by the Director-General of the Centre, Hon. Wilfred D. Ikatari, in the Foreword to the new Rules.
[166]See, e.g., the Headquarters Agreement between the AALCO and the Federal Republic of Nigeria dated 26 April 1999 at <www.aalco.int/agreements/Agreement%20between%20AALCO%20and%20Government%20of%20Nigeria.pdf>.
[167]In accordance with Art. 1(a) of the Headquarters Agreement.
[168]This is also the same with all other AALCO Regional Centres.

Rules.[169] Thus, the LRC does not just ensure the conduct of a valid arbitration. It goes further to assist the parties in obtaining the tangible benefit of their participation in the process. It is important to note that because the Centre's remit is 'the West Africa region', this necessarily extends its award enforcement assistance role to all the sixteen States within the West Africa Region and not just to Nigeria where its offices are located.[170] This function is a major boost for the Centre and a reason why parties should choose to arbitrate their relevant disputes under its Rules and administration.[171]

The Centre also administers domestic arbitration references in Nigeria. Unlike the GAC discussed above, the LRC administers non-Centre or ad hoc arbitral references and accepts requests to act as appointing authority in both domestic and international references.[172] The Lagos Regional Centre Arbitration Rules (LRC Rules) suggest the following pre-dispute model clause for those wishing to arbitrate under its auspices:

Any dispute controversy or claim arising out of or relating to this contract, including any question regarding its breach, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one or three]. The place of arbitration shall be [City and or Country]. The language to be used in the arbitral proceedings shall be []. The governing law of the contract shall be the substantive law of [].[173]

The LRC Rules following the UNCITRAL Arbitration Rules expressly entrench the principle of party autonomy and grant the arbitrator control over the arbitral process. At

[169]See Art. 1(d) and (f) of the Headquarters Agreement and Introduction of the Centre in the LRC Rules.
[170]It is important however to note that there is no data on the number of times the Centre has performed this function and how effective its participation was to the parties enforcement of the award.
[171]This clearly is the aim of such additional function.
[172]See <http://www.rcicalagos.org/downloads/Centre_Rules.pdf>; it will cost an applicant USD 750 for the Centre to act as appointing authority.
[173]There is a separate model clause recommended for use as a submission agreement for existing disputes.

the same time, the Centre retains a purely administrative role. The Centre maintains a list or panel of arbitrators composed of arbitrators from around the world.[174] In appointing arbitrators, parties can choose arbitrators from this list while the Centre must choose arbitrators from the list when exercising its appointment powers.[175] The Centre also acts in certain situations where parties fail to exercise their powers under its Rules, for example, in arbitrators' appointment.[176]

The Centre (except where there is an appointing authority) determines any application to challenge an arbitrator. It is not required under its Arbitration Rules to give any reasons for its decision to uphold or reject the challenge.[177] It also fixes and publishes the rate of fees payable as the cost of the arbitration by the parties. In addition to the initial deposit, it may require additional deposits from the parties at any time during the arbitral proceedings. After the arbitral tribunal issues the award, the Centre delivers the award to the parties upon payment of all outstanding sums.[178] The Centre thereafter provides to the parties an account of the monies it received from them and refunds any unexpended balance to them.[179] The Centre bears primary responsibility for paying the fees and expenses of the arbitrators.

All written communication to the Centre should be addressed to the Director of the Centre. The Director also makes decisions on all matters allocated to the Centre under its Arbitration Rules. The Centre undertakes not to publish any arbitral award from arbitral references conducted under its Rules without the parties' consent.[180] This must be reassuring to parties, especially where the issue of confidentiality is of importance to them. Even where parties give their consent, such awards will be published in a redacted form. It is clearly in the interest of the business community, the Centre, judges,

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[174]Article 2.2 LRC Rules.
[175]This includes where the Centre acts as appointing authority in arbitration references not under its Rules.
[176]For example, in multiparty situations and where the party-appointed arbitrators default in appointing the presiding arbitrator according to Rule 10 and Art. 8.2 LRC Rules.
[177]See Arts 13–15 LRC Rules and such decisions are administrative in nature. Note that upon challenge, the arbitrator may also decide to withdraw or the other party make join in the challenge in which case the arbitrator will have to withdraw.
[178]Article 35.5 LRC Rules.
[179]Article 44.6 LRC Rules.
[180]Article 4.3 LRC Rules.

arbitration practitioners, researchers, and students of arbitration to have such awards published. The Rules grant complete immunity to the staff and Director of the LRC for any act or omission in connection with any arbitral reference.[181] The Rules include a comprehensive confidentiality provision in Article 4, which the parties can contract out of in writing. This provision covers the parties, their counsel, experts, arbitrators, the Centre's staff and over all documents, awards and materials.[182] Very importantly, the parties can be represented or assisted by any person of their choice, whether a legal or other practitioner.

[2] The Arbitrator

Any individual appointed by or on behalf of the parties can act as arbitrator under the LRC Rules. One of the most important powers granted to the parties under the Rules is the ability to choose whomever they wish to appoint as an arbitrator.[183] In addition to the arbitrator's direct appointment, a party may nominate an appointing authority to nominate an arbitrator on its behalf for appointment by the Centre.[184] In this situation, the Centre will need to confirm the nominee. Note that where the parties themselves, the party-appointed arbitrators and the Centre appoint an arbitrator, such appointment will not be subject to the Centre's confirmation.[185] Parties can also agree on the number of arbitrators, and unlike the GAC Rules, can either choose to appoint one or three arbitrators.[186] The arbitrator appointment procedure follows generally accepted international standards. Thus, in a sole arbitrator tribunal, the parties may jointly agree

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[181]See Art. 45, which extends to arbitrators and tribunal-appointed expert witnesses. This immunity is in addition to those contained in the Headquarters Agreement.
[182]Subject to disclosure as a legal duty, to protect or pursue a legal right, or to enforce or challenge an award before the courts.
[183]To sit as arbitrator under the LRC rules, the individual does not have to have acquired any particular arbitration-related qualifications, such as membership of the Chartered Institute of Arbitrators. See Arts 8–10 LRC Rules and note that the parties can also determine the number of arbitrators to be appointed.
[184]See Art. 11 LRC Rules, and note that the Centre is not bound by such nomination to appoint the nominee as arbitrator.
[185]Note that parties do not have to appoint arbitrators from the Panel of International Arbitrators maintained by the Centre as provided in Art. 2 LRC Rules.
[186]Article 8 LRC Rules. This rule also makes provisions for the appointment of arbitrators in multiparty situations.

the appointee or the appointing authority or the LRC will make the appointment.[187] Each party appoints one arbitrator in a three-person tribunal, and the two party-appointed arbitrators appoint the third and presiding arbitrator.[188]

The Rules require every arbitrator sitting under it to be independent and impartial and to make necessary disclosures of circumstances that may affect their independence and impartiality. In addition, in international references, the tribunal's sole arbitrator or chair would be of a different nationality from the disputing parties.[189] The Rules expressly forbid the arbitrator from acting as an advocate for the parties or advising any of them on the merits or outcome of the dispute before or after appointment.[190] This provision will not prevent a dissenting arbitrator from writing a dissenting award, which a party may rely on for purposes of challenging the award in court. It is important to note that the Rules do not require an arbitrator to submit a declaration of independence form, and the Centre does not provide one.

The arbitrators may be challenged by the parties 'if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'.[191] The parties may challenge any of the arbitrators by notice in writing to the appointing authority (if any) or the Centre.[192] It is for the Centre or appointing authority to decide the arbitrator challenge; neither is required to publish the reasons for its decision.[193] The challenging party shall file a written notice with the appointing authority (if any) or the Centre within fifteen days after becoming aware of the grounds relied upon to substantiate the challenge

[187]Articles 9 and 10 LRC Rules.
[188]Where the two party-appointed arbitrators are unable to agree an appointee, the appointing authority or the Centre will make the appointment.
[189]Article 9.3 LRC Rules.
[190]Article 12.2 LRC Rules, which effectively codifies the non-availability of the office of the umpire.
[191]Article 13.1 LRC Rules.
[192]Article 14 LRC Rules. The parties can also agree a challenge procedure with a default procedure provided in Art. 14 LRC Rules.
[193]Article 15 LRC Rules.

and put the other party, challenged arbitrator and other members of the tribunal on notice.[194] Upon a successful challenge, a substitute arbitrator will be appointed.[195]

The Centre fixes the fees payable to the arbitrator in consultation with the arbitral tribunal. A three-person tribunal's fees shall be calculated based on a sole arbitrator's fees, which is applied to each tribunal member.[196] This ensures that each arbitrator will not earn less than if they acted as a sole arbitrator and is an important incentive for arbitrators.[197]

An arbitrator can negotiate a higher rate of fees than those on the scale published by the Centre.[198] Even though the arbitrator's fees and expenses are part of the cost of the arbitration that the arbitrator fixes in the award, the arbitrator is not burdened with the task of negotiating fees directly with the parties or pursuing the parties for payment of their fees. The arbitrator looks to the Centre whose responsibility it is to obtain enough money from the parties to pay them. This is a vital assurance for arbitrators, especially for a foreigner sitting under the Rules.

The arbitrators are empowered to determine objections to their jurisdiction. The 2019 Rules do not provide for the parties to approach the relevant court for a final determination of the question, leaving such recourse to the law of the seat of the arbitration.[199] Where the parties have not chosen the law to apply to the merits of the dispute or have made an ineffective choice, the arbitral tribunal will determine the law to apply. The LRC Rules mandate the tribunal to 'apply the law determined by the conflict of laws rules which it considers applicable' and always consider the terms of the contract

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[194]Article 14 LRC Rules. The notice should be in writing and include the reasons for the challenge.

[195]Article 15.2 LRC Rules and note that the arbitral reference will continue while the decision on the arbitrator challenge is awaited except where the sole arbitrator is challenged. Note that Art. 16 deals with the replacement of arbitrators.

[196]Article 42 LRC Rules.

[197]Under the Rules of some centres (such as the Kigali International Arbitration Centre), the fee payable is to the tribunal, such that for a multi-member tribunal each arbitrator earns less fee than if they were sitting as sole arbitrator.

[198]Article 42.1 LRC Rules and Table II annexed to the Rules.

[199]Article 24 LRC Rules, which includes objections on the existence or validity of the arbitration agreement, and existence or validity of the underlying contract. The application challenging the jurisdiction of the arbitrator must be raised no later than in statement of defence or reply to the counterclaim.

and relevant trade usage in deciding the dispute.[200] The arbitral tribunal may order interim measures of protection except where parties have limited or withdrawn their power to do so. Where the tribunal retains this power, it has powers to order any interim measure it deems necessary regarding the subject matter of the dispute.[201] This is an important power in international references where the subject matter that may require protection or conservation may be within a jurisdiction other than the seat of arbitration.[202]

The arbitral tribunal has control over the arbitral hearing. Parties arbitrating under the LRC Rules have a right to an oral hearing before the tribunal.[203] With the international community's experiences from the COVID-19 pandemic, this provision effectively supports virtual hearings under the LRC Rules. It is the tribunal's responsibility to ensure that all parties are duly notified of the date, time and place of the hearing. At the same time, each party's responsibility is to produce or lead evidence to prove its case or assertions. To assist it with this task, the Rules permit parties to produce whatever evidence they consider relevant or as requested by the arbitral tribunal.[204] Finally, it is for the arbitral tribunal to determine the relevance, materiality and weight to allocate to such evidence.

Note that all decisions of the arbitral tribunal must be made unanimously or by a majority. For procedural matters, the presiding arbitrator may decide on their own when so authorized by the other tribunal members or when there is no majority. In such situations, the tribunal may revise the presiding arbitrator's procedural decision.[205] The

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[200]Article 36 LRC Rules. Also note that the arbitral tribunal can decide as *amiable compositeur* or *ex aequo et bono* where the parties expressly authorize it and the law applicable to the arbitral procedure permits.

[201]Some example of such order in Art. 29 LRC Rules are for the conservation of the subject matter, security for cost of the arbitration and on a provisional basis, any order it can make in its final award.

[202]The right of the parties to request assistance from any national court will also depend on the particular court's willingness to take jurisdiction and assist the party and the arbitration.

[203]Article 28 LRC Rules and note that the parties can opt for a documents-only procedure.

[204]See Arts 27–28 LRC Rules and note that such evidence may be in the form of witnesses, documents or any form of material.

[205]Article 34 LRC Rules.

deliberation of the arbitrators is confidential.[206] Finally, Article 45 of the Rules grant the Centre staff and director, arbitrators and tribunal-appointed expert witnesses complete immunity for any act or omission in connection with the arbitral reference.[207]

[3] The Arbitral Process

Under the LRC Rules, parties have wide powers over the arbitral process, which they can exercise in agreement, especially before the arbitral tribunal's constitution. Where parties fail to exercise such powers, the Centre or the tribunal will make decisions on such matters for them, and such decisions shall be binding on them. Therefore, parties must be aware of these matters and make an informed decision whether to rely on the default provisions in the Rules or allow the Centre or tribunal to make such decisions on their behalf.

A party wishing to commence arbitration under the Rules (claimant) is required to serve on the responding party (respondent) a Notice of Arbitration, retain the proof of service and then file the proof of service with the Notice and any attachments with the Centre and pay the registration fee. In this way, the respondent becomes aware of the claimant's intention to commence arbitration before the Centre.[208] The Notice should be a written request referencing an arbitration agreement in writing that refers to arbitration under the LRC Rules. The Notice should also include a demand for arbitration, the names and contact details of the parties, a reference to the arbitration agreement, a copy of the substantive contract, the general nature of the claim, the sum claimed, the relief sought and a proposal of the number of arbitrators to be appointed.[209]

The arbitral reference is deemed to commence on the date the respondent receives the Notice of Arbitration. This explains the relevance of the claimant retaining the proof of service.[210] Parties can choose the arbitration's juridical seat, with the Rules providing the

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[206] Article 4.2 LRC Rules.
[207] See Art. 45 LRC Rules.
[208] Article 6 LRC Rules.
[209] Article 6.3 LRC Rules; the parties contact details include telephone and facsimile numbers and email address.
[210] The Notice can be served personally, through the post or courier service. It will be interesting to see if service by email attachment (possibly followed by personal service) will be valid service, since the parties' email addresses are provided.

default seat as Lagos. Also, arbitral hearings can be held in any location, with the default being the premises of the LRC in Lagos. It is important for parties involved in international references to be aware of these default provisions and ensure they choose the seat and place of the hearing.[211] On the language of the arbitration, either the parties can choose or the arbitral tribunal will determine the language.[212] Where parties make an effective choice of the law applicable to the merits of the dispute, the arbitral tribunal is bound to apply such law. As mentioned above, it is for each party to produce or lead evidence to prove its case or assertions and to defend itself against any claims or assertions made against it.

Since the parties initiate the arbitral process, they bear the burden of paying for it. The LRC Rules provide a list of what is included in the 'cost of arbitration'. This consists of the fees and expenses of the arbitrators, travel expenses of witnesses of fact and opinion, reasonable cost of legal representation if claimed and granted by the tribunal, fees and expenses of the appointing authority, registration fees, administrative charges and expenses of the Centre.[213] To assist the parties in their budgeting and preparation towards initiating the reference, the Centre publishes tables and a scale of fees as a guide. The Centre will notify the parties of a more realistic sum after filing the claim and any counterclaim. This is because the fee payable is calculated ad valorem as a percentage of the sum of the claim and counterclaim.[214] Unlike the GAC, both parties may be required to pay in equal shares the deposit determined by the Centre at the latest thirty days after receipt of the Request for Arbitration.[215] Parties must be aware that they will be required to pay a deposit on costs. Where parties fail to pay the required deposit, the arbitral tribunal, after consultation with the Centre, may suspend or terminate the arbitral

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[211]Article 19 LRC Rules.
[212]Article 20 LRC Rules; note that all documents and oral hearings will be conducted in this language while the arbitrator can order documents not in the language to be translated. This also implies that translators may be required during the oral hearings and all these will impact on the cost of the proceedings.
[213]See Art. 41 LRC Rules, and note that the arbitrator's expenses include the cost of expert advice and other assistance required by the tribunal. All costs must relate to the arbitral reference.
[214]This is in addition to the arbitrator agreeing a higher fee rate with the Centre as mentioned in section §2.03[B][2] above.
[215]See Art. 44 LRC Rules and Table I annexed to the Rules.

proceedings.[216] In addition, parties (or one of them) must pay the cost of the arbitration in full before the Centre delivers the award to them. Each party is entitled (upon payment of the cost of arbitration in full) to receive a copy of the award from the Regional Centre. Parties must be aware of an unusual provision in Article 46 affecting them and their representatives (and arbitrators), from which they cannot opt out. Under Article 46, parties, their representatives and arbitrators agree not to rely on any statement, comments (written or oral) made or used by the parties in the preparation or the course of the arbitration for an action in defamation, libel or slander or any related complaint.

At the close of hearings, the arbitral tribunal will deliberate and publish its award. The LRC Rules require the arbitral award to comply with certain formalities, including that the award should be in writing, reasoned, signed, dated and should state the place where it was made.[217] Once the award is ready, it is the sole or presiding arbitrator's responsibility to deliver the award in relevant copies to the Regional Centre, which then delivers a copy to each party.[218] This effectively brings the arbitral reference to an end. However, it is worthy of note that the LRC will assist the winning party in obtaining the enforcement of the award in any of the West African region countries.

[C] Court of Arbitration Côte d'Ivoire

This section examines the status and function of the Court of Arbitration of Côte d'Ivoire (CACI) as an arbitral institution (subsection 2.04[C][1]), the role of the arbitrator (subsection 2.04[C][2]), and the arbitral process (subsection 2.04[C][3]) under the Arbitration Rules of the CACI.

[1] The Institution

[216] Article 44.5 LRC Rules. Note that this result will be avoided under the GAC regime since it is the applicant that is required to pay the filing fees. However in practice there may not be any difference, since the claimant who wishes to vindicate its rights will be 'forced' into paying the full deposit, which it can claim as cost of the arbitration if it prevails in the arbitration.

[217] Article 35 LRC Rules, and note that the parties can only dispense with the arbitral tribunal giving reasons for its determinations in the award but not any other formal requirements for the award.

[218] Article 35.5 LRC Rules.

The CACI was established in 1997 to administer the arbitration and mediation processes in the resolution of domestic and international civil and commercial disputes per its Arbitration Rules.[219] The offices of the CACI are located in Abidjan. The CACI also accepts nomination as an appointing authority under non-CACI and ad hoc arbitration references.[220] The CACI expressly states in its rules that it does not itself resolve the dispute between the parties but administers the process by which such disputes are resolved.[221]

It is useful to note at the outset that the CACI and its various departments are actively involved in the administration of the arbitration reference.[222] The institution's organization, structure, and role are modelled after that of the Court of Arbitration of the International Court of Arbitration of the ICC. The CACI's two essential functions need to be highlighted: its role in approving the Minutes from the preliminary meeting between the tribunal and the parties, and scrutiny of the draft award. Upon constitution of the arbitral tribunal, the file containing all documents filed in the reference is forwarded to the tribunal, which must then hold a meeting with the parties and their counsel or representatives.[223] At this meeting, the arbitration agreement is confirmed, and the issues in dispute are agreed upon along with a timetable for proceeding with the reference, language of the arbitration and any translation, among other procedural matters.[224] All of this information is recorded in the Minutes drawn up by the tribunal. The Rules require the Minutes to be signed by the tribunal and the parties and forwarded to the CACI,

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[219]See Art. 1 CACI Rules. The Rules also make provisions for an accelerated arbitral procedure (Arts 39–41) and for claim of liquidated sums (Arts 42–46), which are not examined in this chapter.

[220]Article 3 CACI Rules.

[221]Article 2 CACI Rules. There are various bodies within the CACI that perform various functions identified under the Rules. These include the Secretariat, Board of Directors and the Committee of Mediation and Arbitration. For purposes of this section, they shall all be collectively referred to as the CACI. It is important to note that members of these various intra-CACI bodies can also be appointed arbitrators within the CACI regime by the parties.

[222]This is in comparison to the GAC and LRC, examined in sections 2.03[A] and 2.03[B] respectively above.

[223]The file is forwarded by the Secretariat of the CACI in accordance with Art. 17 CACI Rules.

[224]Article 18 CACI Rules.

which then approves the Minutes, following which the tribunal can duly enter into the reference.[225] This system effectively replicates the Terms of Reference procedure under the ICC Arbitration Rules.[226] Therefore international arbitration practitioners familiar with the ICC structure and procedure should have little or no difficulty working under this system.[227] For those arbitration practitioners who are not familiar with the ICC arbitration procedure, the Secretariat of the CACI provides very helpful support and guidance through the various phases of the arbitral reference.

The second notable role of the CACI takes place after the closure of the arbitral hearing. The arbitral tribunal is required to forward its draft award to the Mediation and Arbitration Committee of the CACI, which has an obligation to screen the award and call the tribunal's attention to 'matters of form or substance'.[228] The Rules expressly state that the arbitral tribunal does not have to accept the comments made by the CACI. This is clearly to re-emphasize that the arbitrator and not the institution decides the dispute. It also reassures the parties that the persons they chose to decide on their dispute have unfettered discretion to do this. It further assures the parties that the Institution maintains an oversight function over their reference and the award.

Other additional tasks appropriated by the CACI include the power to extend any of the time limits contained in the Rules where it is justified in its view to do so,[229] and ordering the consolidation of connected disputes.[230] Other more traditional tasks arbitral institutions undertake, which the CACI also undertakes, include determining the cost of

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[225]It is important to note that a party may refuse to sign the Minutes, which refusal needs to be noted in the Minutes.

[226]See Art. 23 ICC Arbitration Rules 2021. However, the Secretariat of the CACI prepares the draft Terms of Reference for comments and amendments by the arbitral tribunal before it is circulated to the parties.

[227]Even for those practitioners not familiar with the ICC system, this should not be too strange as it is a similar process to holding a management conference for example under the GAC system or preliminary meeting under ad hoc arbitration references. However, note that under the GAC, no approval is required from the GAC.

[228]See Art. 32 CACI Rules and compare this provision with the new wording of Art. 34 ICC Arbitration Rules 2021.

[229]See Art. 16 CACI Rules generally, and for one example, see Art. 8.3 CACI Rules where the time limit of fifteen days for filing a Reply to the Request for Arbitration may be extended by the CACI.

[230]Article 37 CACI Rules.

the arbitration and providing additional or certified copies of the award upon a party's request.[231] The cost of any CACI arbitration consists of the administrative fees payable to the CACI, the fees and expenses of the arbitrators, and the arbitral tribunal's expenses.[232] Schedules of various fees, which are subject to change, are annexed to the CACI Arbitration Rules. It is important to note that the CACI prohibits any direct financial agreements between the parties and arbitrators.

[2] The Arbitrator

Any individual directly or indirectly appointed by the parties can act as arbitrator in arbitration references administered by the CACI.[233] To sit as arbitrator under the CACI Rules, an individual must be capable of exercising his or her civil rights fully. In addition, he or she must possess whatever qualification the parties have requested, though the parties can waive this requirement. However, note that the individual is required to possess qualifications 'deemed necessary to resolve the dispute in light of its purpose'.[234] This generally implies that the CACI should be satisfied that the appointed individual has basic knowledge of the subject area. For example, where the issues turn on interpreting a contract, some basic understanding of the applicable law may be required as a prerequisite.

The Rules empower the parties to agree on the number of arbitrators to constitute the tribunal, subject to it being one or three arbitrators.[235] The Rules also codify the traditional arbitrator appointment procedure in default of the parties expressly agreeing to

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[231]Article 34.2 CACI Rules.
[232]The parties are liable for the costs of the arbitration in equal shares and will be required to pay some amount as deposit to the CACI.
[233]According to Art. 13.2 CACI Rules, this reference to any individual is actually limited to those individuals who can fully exercise their civil rights without any impediments and who are in possession of any qualifications required by the parties and will be available to conduct the arbitration with due despatch.
[234]This provision may be interpreted as a limitation on the autonomy of the parties to choose an individual of their choice or as a useful guide to assist the parties in making such choice.
[235]See Art. 11 CACI Rules with a default of one arbitrator and if so determined by the CACI, three arbitrators.

an appointment procedure.[236] Once appointed either by a party or the parties jointly or the CACI itself,[237] the arbitrator is required to complete and sign a Declaration of Independence form and accept his or her appointment before entering into the performance of the mandate.[238] Each arbitrator must declare any circumstance that may affect his or her impartiality or independence in the Declaration of Independence form. Where the appointee makes any declarations, the CACI will notify the parties, who will have fifteen days from the date of notification to make any comments, observations or challenge the appointee based on the declarations made. If the parties do not challenge the appointee within fifteen days, the CACI will confirm their appointment. Where the appointment is challenged at this stage, the CACI decides the challenge and where it upholds such a challenge, will notify the appointee and the parties requesting a new appointment. Parties need to scrutinize the Declaration of Independence form and conduct their independent searches of each appointee, primarily because they lose the right to challenge an arbitrator on grounds substantiated by any circumstance or information contained in the declaration form when this time lapses.[239]

After confirmation of the arbitrator's appointment by the CACI, arbitrators can still be challenged for circumstances that give rise to doubts about their impartiality or independence, where a party becomes aware of such grounds on which a challenge can be based.[240] The parties can jointly remove any of the arbitrators and notify this in writing

[236]See Art. 12 CACI Rules where the parties can jointly agree on the individual to sit as the sole arbitrator or failing which the CACI appoints while in a three-person tribunal, each party appoints one arbitrator and jointly appoints the third and presiding arbitrator failing which the CACI appoints. Note that this article also provides for the procedure for appointing arbitrators in multiparty situations.

[237]In accordance with Art. 12.2 of the CACI Rules, the CACI prepares a closed list of names from which the two party-appointed arbitrators must appoint the third arbitrator.

[238]This requirement of completing a Declaration of Independence form is another similarity with the statement of acceptance, availability, impartiality and independence under Art. 11 ICC Arbitration Rules 2021.

[239]See generally Art. 13 CACI Rules.

[240]Article 14 CACI Rules. The challenging party must apply to the CACI within fifteen days of becoming aware of such circumstance. The other party, challenged arbitrator and other arbitrators (if any) will be invited to make written comments on the challenge following which the CACI will make a determination on the challenge. The determination must be made by the CACI within one month from the date of referral.

to the CACI. An arbitrator may resign the appointment but, in this situation, may incur liability to the parties for failing to complete his mandate.[241] The effect of a successful challenge, removal, justifiable resignation or death of an arbitrator is the truncation of the arbitral tribunal.[242] This may require the appointment of a replacement arbitrator, and this will be the case where a sole arbitrator constitutes the tribunal. However, in a three-person panel, the tribunal can continue in its truncated form except where the vacancy is caused by removing the presiding arbitrator.[243]

Once the arbitral tribunal has been fully constituted, the CACI will transmit the file to the tribunal, after which the tribunal shall hold its first meeting with the parties and their counsel (if any). At this meeting, the tribunal is required to establish the existence and validity of the arbitration agreement,[244] agree on the issues for determination, the language of the hearing and translation (if necessary), powers of the arbitrator[245] and timetable for the conduct of the proceeding.[246] The tribunal needs to draw up a Minute of this meeting, which the arbitrators and parties are required to sign before forwarding it to the CACI for its approval.[247] This procedure mirrors the ICC Terms of Reference procedure and achieves the same purposes.[248]

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[241]The arbitrator is expected under the Rules to complete his mandate once he accepts appointment as stated under Art. 14.4 CACI Rules.

[242]See Art. 15.1 CACI Rules and note the other circumstances that can produce a vacancy in the tribunal especially the ex officio power of the CACI to remove an ineffective arbitrator.

[243]Article 15.2 CACI Rules. Note that the decision of the CACI on how to proceed will be influenced by the stage of the proceeding at which the truncation occurred and the advice of the remaining two arbitrators.

[244]Note that the Minutes, as under the ICC Terms of Reference procedure, may also serve as the submission to arbitration under the CACI Rules.

[245]Article 18 CACI Rules specifically refers to the power of the arbitrator to decide as *amiable compositeur*.

[246]The hearing must be held within five months from the date of transmission of the file to the arbitral tribunal though parties can extend this time limit.

[247]A party may refuse to sign the Minutes, and where this happens all the tribunal is required to do is to note this fact in the Minutes. The parties and their counsel are entitled to receive copies of the Minutes. Also note that any amendment to the timetable or issues as contained in the initial Minutes will need to be approved by the CACI.

[248]See for the Terms of Reference under the ICC: Yves Derains & Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer International 2005); Laurence

The Rules give the arbitral tribunal control over the conduct of the arbitral proceeding. The arbitral tribunal also enjoys certain clearly defined powers, such as the power to grant interim protective measures,[249] determine the relevance, materiality and weight to attach to any evidence produced by the parties, appoint experts, seek the production of additional documents,[250] and determine the applicable substantive law.[251] In addition to these powers, the Rules expressly empower the arbitrator to decide a challenge to his or her jurisdiction.[252] On the substantive dispute, where the arbitral tribunal is composed of more than one arbitrator, its decision is made by a majority. However, it should be noted that the Rules vest an additional power in the presiding arbitrator, which allows the presiding arbitrator alone, where a majority decision is not possible, to decide the substantive dispute. That decision will bind the arbitral tribunal.[253] A member of the arbitral tribunal may write a dissenting opinion, which would be attached to the draft award and submitted to the CACI for scrutiny. On its own volition or the party's application, the arbitral tribunal can correct clerical, calculation or similar errors in the award.

In contrast, either party can request the arbitral tribunal to interpret the award.[254] Arbitrators are entitled to be paid their fees and reimbursable expenses for rendering this service to the CACI and the parties. The CACI undertakes to pay the arbitrator. Arbitrators will look to the CACI to pay their fees and refund their expenses in connection with the arbitral reference. The CACI has a schedule of fees payable to arbitrators annexed to its Rules. However, an arbitrator can negotiate a higher fee rate as long as this is justifiable. It is equally advisable that arbitrators retains all receipts for

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Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, OUP 2001).

[249]See Art. 23 CACI Rules though this power can only be exercised after the file has been transmitted to the tribunal.

[250]See generally Art. 24 CACI Rules.

[251]Article 27 CACI Rules.

[252]Article 10 CACI Rules.

[253]See Art. 30 CACI Rules, which further makes the choice of the presiding arbitrator a very important task.

[254]Article 38 CACI Rules. An application by a party for any of these actions must be made within one month of the delivery of the award while the tribunal must make such correction or interpretation within one month of the request.

their expenses, which they will need to file with the CACI to substantiate their claims for refund or reimbursement.

[3] The Arbitral Process

Parties wishing to arbitrate under the CACI rules must conclude an arbitration agreement referring to the CACI and its Rules. The CACI Rules recommend the following clause for use by prospective parties:

All disputes arising in connection with the present contract shall be finally settled under the arbitration rules of the Court of Arbitration of Côte d'Ivoire (CACI) by one (or three) arbitrator(s) appointed in accordance with the said rules.

Parties must be aware that it is the version of the Rules in force on the date of commencement of the arbitral proceedings that will apply to their reference.[255] A party wishing to commence CACI arbitration needs to file a Request for Arbitration with the CACI and pay the filing fees.[256] The Rules provide that the date the CACI receives the Request is the date the arbitral reference commences, and it is only after this date that the CACI will notify the responding party.[257] The respondent must reply to the Request within fifteen days of its receipt.[258] As much as a party may decide not to participate in the arbitral proceeding, such party must be aware that such refusal will not stop the arbitration from proceeding.[259] Therefore, it may be necessary for a party to participate in

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[255] Article 9.1 CACI Rules.
[256] Article 7 CACI Rules. The request should contain the names, descriptions and contact addresses (including telephone, facsimile, telex numbers and email, if known) of the parties, a copy of the contract and the arbitration agreement referring to arbitration under the CACI Rules, statement of facts and law, supporting documents, sum (or estimate) in dispute, proposal on number and method of selection of arbitrators, the seat of arbitration, language, and procedural and substantive law applicable.
[257] The responding party will need to file a response to the Request and a counterclaim if any.
[258] Article 8 CACI Rules. The Request must be filed with the CACI and should contain the names, qualifications and contact addresses of the respondent, reply to the claim, raise any objection to the arbitration agreement or arbitration itself, add supporting documents, number and selection method of arbitrators, place and language of arbitration, procedural and substantive applicable laws, facts and legal arguments, and any counterclaims.
[259] Article 9.2 CACI Rules.

and challenge the arbitral reference or jurisdiction of the tribunal so as not to waive its rights under the Rules.[260] This is even more so since, under the Rules, the CACI may still decide to administer the reference even where the arbitration agreement does not refer to its Rules.[261]

The Request for Arbitration, Answer, and Counterclaim must be filed with the CACI using a means of communication that provides a record or receipt of the service. This may be by recorded delivery, registered postage or personal service with evidence of proof of receipt. All other documents or communication in the arbitration can be made using communication such as facsimile, telex, registered or ordinary mail with proof of receipt, or electronic mail.[262] The parties can file additional claims as long as these fall within the scope of the arbitration agreement. Such additional claims may require additional filing fees, which will be communicated to the parties by the CACI.[263]

Parties may appear in the arbitral proceeding by themselves or be represented by a duly authorized representative and be assisted by advisers at the hearing. The representative's requirement to be *duly authorized* implies that such representative should have a power of attorney to act for the party. This does not extend to such a representative being an attorney qualified to practice in the Ivory Coast or any OHADA jurisdictions.[264] Each party must put in evidence any documents, witness or material it wishes in support of its case and is assured that it shall be allowed to present its case and answer to the case against it. The Rules expressly provide for the hearing to be adversarial and in private.[265] The CACI Arbitration Rules contain the usual provisions allowing the parties to jointly

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[260]This will be on the basis of Art. 35 CACI Rules.
[261]Article 9.3 CACI Rules. The parties will make written submissions on this matter to the institution before it makes this decision. Also note that the decision of the institution is administrative in nature and so will not be subject to appeal or review before the court.
[262]See Art. 6 CACI Rules, and note that a communication is deemed made when it is received (and not when it is dispatched) by the party or his representative.
[263]See Art. 19 CACI Rules, and note that if the required fees are not paid within the specified period, the reference will be suspended.
[264]See Art. 21 CACI Rules, and note that where a party is so represented, it needs to inform the CACI, the other party and tribunal of the names and contact details of such representative.
[265]Article 26.3 CACI Rules.

agree on various aspects of the arbitral proceedings, such as the seat of arbitration,[266] language[267] and conduct of the arbitral hearing. A party wishing to preserve or protect assets can apply before any competent court for the relevant order before the file is transmitted to the arbitral tribunal.[268] However, once the file is transmitted to the arbitral tribunal, such a party must seek such an order from the arbitral tribunal, which is empowered to order 'any provisional or protective' measure.[269]

After the hearings and deliberations of the arbitral tribunal, it makes its decision in the award. The award must be in writing and contain the arbitral tribunal's decision on the issues in dispute, cost of the arbitration and be signed, dated and state the place where it was made.[270] As already mentioned above, the arbitral tribunal must submit a draft form of the award to the CACI for its observations, which are not binding on the arbitrators.[271] After making any observations, comments and suggestions the CACI may deem fit on the draft award, the CACI sends the draft award back to the arbitral tribunal. The tribunal makes the final decision and produces the final award, which the arbitrators sign. This final and signed version of the award is sent to the CACI in relevant copies for delivery to each party and one copy for the CACI. The arbitral tribunal can also make a consent award where parties settle their dispute and request the tribunal to transform their agreement into a consent award.[272] The CACI Rules expressly provide that the award is confidential and will only be published with the parties' consent.[273] Upon payment by the

[266]Article 4 CACI Rules; the default seat is Abidjan while hearings can be held at any place.
[267]Article CACI Rules.
[268]See Art. 22 CACI Rules, and where a party so applies, it needs to inform the CACI immediately.
[269]Article 23 CACI Rules.
[270]See Art. 33 CACI Rules; parties should note that the award will be deemed made at the seat of arbitration and on the date it is signed by the arbitrators.
[271]The draft award must be sent within thirty days of the closure of the arbitral hearing. The tribunal can request the CACI to extend this time under Art. 29 CACI Rules.
[272]Article 28 CACI Rules. It appears that consent awards being awards will be subject to the scrutiny of the CACI before delivery to the parties.
[273]See Art. 5 CACI Rules, and note that the arbitration proceeding is also confidential. It is not clear if this includes any public knowledge of the existence of the arbitral reference.

parties of all outstanding arbitration costs, the CACI will deliver the award to them and retain a copy of the arbitral award for ten years.[274]

The CACI Rules state that the award is final and binding on the parties who undertake to perform it without delay.[275] Parties are deemed to waive any claim for annulment before State courts and all remedies of which they may validly waive. This is a broad waiver clause, which parties should carefully consider and opt out of if necessary. Parties also consent to be held liable if they are found to have engaged in acts amounting to a tacit delay of the enforcement of the award.[276] This is also a fundamental obligation under which parties may incur contractual liabilities to the CACI and so needs to be carefully considered and, if necessary, for the parties to exercise their right to opt out.

§2.05 Conclusion

Recourse to arbitration as a dispute resolution process, especially in cross-border transactions, can be said to be settled or entrenched in the States of the West African region. These States have modern arbitration laws, which are all influenced to different degrees by the UNCITRAL Model Law, and all contain internationally accepted provisions for a valid arbitration agreement, flexible and party-centred conduct of the arbitral proceedings, and modern regimes for the recognition and enforcement or setting aside of the arbitral award. To complement this regime, the superior courts of record in these States have evidenced a healthy supportive attitude towards arbitration that it is hoped will permeate the judiciary's whole structure to cut the cost and time spent on appeals.

The level of involvement of arbitral institutions in the States of the West African region varies. For example, the GAC and the Court of Arbitration of Côte d'Ivoire are more directly involved in the arbitral process. At the same time, the LRC is less involved and essentially allows the arbitrators and parties to proceed with the reference as they wish. The arbitration rules of these institutions all provide for and regulate domestic and international references and entrench the principles of party autonomy, competence-

[274] Article 33 CACI Rules.
[275] Article 35 CACI Rules.
[276] *Ibid.*

competence and autonomy of the arbitration agreement. Arbitrators sitting under these rules have control over the conduct of the arbitral reference and no interference with their award-making powers. This is so even under the CACI, where the draft award made by the arbitrator is scrutinized. The procedural rules of these institutions are flexible, arbitration-friendly, and comparable to any international arbitral institution. There is little in the rules to surprise any international arbitration practitioner. Therefore parties, especially those involved in international arbitration, may with confidence submit their disputes to the arbitration rules of these institutions in their contracts. The institutions on their part must endeavour to publish updated and relevant statistics of their workload in an easily accessible medium (such as their websites) for use by researchers, contract drafters, transactional lawyers and prospective disputants, among others.[277]

It must, however, be recognized that it is primarily for parties from these States, particularly their State governments and agencies, to encourage reference of their disputes (in cross-border transactions) to arbitration under the rules of these institutions and to nominate their cities as seats of arbitration.[278] This will promote the use of arbitration as a mechanism for dispute resolution and increase the workload and experience of their judiciary and these institutions, with attendant benefits, such as their recognition by the international arbitration community as institutions of repute for the settlement of their disputes.

Table 2.1 Convention Status of West African States

No	*Country*	*ECOWAS*	*OHADA*	*New York Convention*	*ICSID Convention*
1.	Benin Republic	28 May 1975	17 October 1993	14 August 1974	14 October 1966
2.	Burkina Faso	28 May 1975	17 October 1993	21 June 1987	14 October 1966
3.	Cape Verde	28 May 1975	–	20 June 2018	26 January 2011

[277]Institutions such as the Cairo Regional Centre for International Commercial Arbitration, and OHADA CCJA, regularly publish their caseload on their websites.
[278]Or under the rules of other international institutions but with a seat in these States.

4.	Côte d'Ivoire	28 May 1975	17 October 1993	2 May 1991	14 October 1966
5.	The Gambia	28 May 1975	–	–	26 January 1975
6.	Ghana	28 May 1975	–	8 July 1968	14 October 1966
7.	Guinea	28 May 1975	21 November 2000	23 April 1991	4 December 1968
8.	Guinea-Bissau	28 May 1975	24 February 1996	–	Signed 1991
9.	Liberia	28 May 1975	–	15 December 2005	16 July 1970
10.	Mali	28 May 1975	17 October 1993	7 December 1994	02 February 1978
11.	Mauritania	–	–	30 April 1997	14 October 1966
12.	Niger	28 May 1975	17 October 1993	12 January 1965	14 December 1966
13.	Nigeria	28 May 1975	–	15 June 1970	14 October 1966
14.	Senegal	28 May 1975	17 October 1993	15 January 1995	21 May 1967
15.	Sierra Leone	28 May 1975	–	26 January 2021	14 October 1966

16.	Togo	28 May 1975	17 October 1993	–	10 September 1967

Table 2.2 Major Arbitral institutions in West Africa

No	*Institution/Centre*	*City, Country*
1.	Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce and Industry of Benin	Lome, Benin Republic
2.	Arbitration, Mediation and Conciliation Centre of the Chamber of Commerce and Industry	Ouagadougou, Burkina Faso
3.	Ghana Arbitration Centre	Accra, Ghana
4.	Court of Arbitration of Côte d'Ivoire	Abidjan, Côte d'Ivoire
5.	The Arbitration Centre	Conakry, Guinea
6.	Mali Conciliation and Arbitration Centre	Bamako, Mali
7.	Regional Centre for International Commercial Arbitration Lagos	Lagos, Nigeria
8.	Arbitration and Mediation Centre	Dakar, Senegal
9.	Arbitration Centre of the Chamber of Commerce, Industry and Agriculture	Dakar, Senegal
10.	Chamber of Commerce, Industry and Agriculture, Freetown	Sierra Leone
11.	The Arbitration Centre	Lome, Togo
12.	Barlavento Chamber of Commerce Arbitration and Conciliation Centre	Mindelo, São Vicente, Cape Verde