COUNCIL OF MINISTERS

UNIFORM ACT ON MEDIATION

The Council of Ministers of the Organization for the Harmonization of Business Law in Africa (OHADA),

- Having regard to the Treaty on the harmonisation of business law in Africa signed on 17 October 1993 in Port Louis**,** as amended on 17 October 2008 in Quebec, in particular its articles 2, 8, 21 to 26 and 39 ;
- Having regard to Decision No. 09/20/CM/OHADA dated 30 March 2017 regarding the agenda for Harmonisation of Business Law in Africa;
- Having regard to the advice No. 05/2017/AU/2017 dated 5 and 6 October 2017 of the Common Court of Justice and Arbitration;
- After deliberation;
- Adopts by unanimous vote of the Member States to the treaty present and voting the Uniform Act, which reads as follows:

CHAPTER 1: DEFINITIONS AND SCOPE OF APPLICATION

Article 1: Definitions

For the purposes of this Uniform Act:

a) The term "mediation" shall mean any process, regardless of its name, whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute, adversarial relationship or disagreement ("the dispute") arising out of a legal or contractual relationship, or related to such relationship, involving natural persons or legal entities, including public bodies or States;

b) The term "mediator" shall mean any third party requested to carry out a mediation, regardless of the name or profession of this third party in the Member State to the treaty concerned.

The mediation may be implemented by the parties (conventional mediation), at the request or invitation of a state court (judicial mediation), of an arbitral tribunal, or of a competent public entity.

The mediation may be ad hoc or institutional.

Article 2: Scope of application

This uniform Act shall apply to mediation. However, it shall not apply to cases in which a judge or an arbitrator, during judicial or arbitral proceedings, attempts to facilitate a settlement directly with the parties.

CHAPTER 2 : MEDIATION PROCEDURE

ARTICLE 3. Institutional mediation

Recourse to a mediation institution shall imply acceptance by the parties of the Rules of mediation of this institution.

ARTICLE 4. Commencement of the mediation procedure

The mediation procedure shall start on the date when the most diligent party implements a written or oral mediation agreement.

If, in the absence of an agreement, the party which invited the other party to mediation has not received acceptance of its written invitation within fifteen days (15) of the date of reception of the invitation, or on expiry of any other deadline specified therein, it may consider the absence of a response as a rejection of the invitation to mediation.

A state court or an arbitral tribunal may, in agreement with the parties, suspend the procedure and refer the case to mediation. In both cases, the state court or the arbitral tribunal shall fix the period of stay of the proceedings.

Unless otherwise agreed by the parties, the start of the mediation process shall suspend the statute of limitation of the action. In the event that the mediation process ends without any mediation agreement, the statute of limitation shall start again, for a period of no less than six (06) months, from the date on which the mediation process ended without an agreement.

ARTICLE 5. Number and designation of mediators

The parties shall mutually choose the mediator or mediators.

For the designation of the mediators, the parties may request assistance from any natural or legal entity, in particular a centre or an institution offering mediation services, named the "appointing authority".

For this purpose, one party may request the appointing authority to recommend persons with the required qualities and skills to serve as mediator.

The parties may also agree that the appointing authority directly appoints the mediator or mediators directly.

In order to recommend or appoint mediators, the appointing authority shall take into account the considerations which will ensure the designation of an independent, impartial and available person. It shall take into account, if applicable, the fact that it may be desirable to appoint a person of a different nationality from that of the parties, in particular when the parties are of different nationalities.

When a person is contacted to be designated as a mediator, she must report any circumstances likely to raise legitimate doubts about her impartiality or independence. As of her appointment

and during the whole mediation process, the mediator must reveal without delay to the parties any new circumstances likely to raise legitimate doubts about their impartiality or independence.

ARTICLE 6. Status of the mediator

At the time of her appointment, the mediator shall confirm in writing her independence and impartiality, as well as her availability to carry out the mediation process.

In the event that the mediator reveals to the parties after her appointment the occurrence of new circumstances likely to raise legitimate doubts about her impartiality or independence, she shall inform them of their right to object to pursue her mission. In the event that one of the parties consequently refuses to pursue the mediation, the mediator's mandate is ended.

ARTICLE 7. Conduct of the mediation

The parties shall be free to agree on the way in which mediation is to be conducted, including by reference to Rules of mediation.

In the absence of any such agreement, the mediator shall conduct the mediation as she deems appropriate, taking into account the circumstances of the case, the wishes expressed by the parties and the necessity to settle the dispute quickly.

In any case, the mediator shall carry out her mission with diligence, and ensure equitable treatment of the parties in the conduct of the mediation and, as such, take into account the circumstances of the case.

The mediator shall not impose a solution to the dispute on the parties. However, at any stage of the mediation, depending on the parties' requests and on the techniques she deems most appropriate in view of the circumstances of the dispute, she may make propositions to settle the dispute.

After consulting the parties, the mediator may invite them to appoint an expert to provide a technical opinion.

ARTICLE 8. Guiding principles of the mediation

The mediator and any institution established in a Member State offering mediation services, shall adhere to the principles which guarantee the respect of the parties' will, moral integrity, independence and impartiality of the mediator, confidentiality and efficiency of the mediation procedure. The mediator shall ensure that the solution envisaged genuinely reflects the parties' will, while respecting rules of public policy.

ARTICLE 9. Correspondence between the mediator and the parties

The mediator may meet the parties or communicate with them jointly or separately. In the event that the mediator wishes to meet separately or discuss separately with one of the parties and/or their counsel, she shall previously, or as soon as possible after her unilateral meeting or discussion with one of the parties, inform the other parties and/or their counsel.

In the event that the mediator receives from a party information concerning the dispute, she may reveal this information to any other party to the mediation. However, when a party

communicated information to the mediator under the express condition that it must remain confidential, this information shall not be revealed to any other party to the mediation.

ARTICLE 10. Confidentiality

All information related to the mediation procedure shall remain confidential, unless otherwise agreed by the parties, unless their disclosure is required by law or made necessary to implement or enforce the agreement arising out of mediation.

ARTICLE 11. Admissibility of evidence in other proceedings

Neither party to the mediation procedure, nor the mediator, nor a third party, including those who were associated to the administration of the mediation procedure, may, in any arbitral or legal proceedings, or any similar proceedings, rely on or submit any piece of evidence listed below, nor testify on this evidence:

a) an invitation to mediation sent by one party or the fact that one party was willing to participate in a mediation procedure, except when one party has to prove the existence of an agreement or that an invitation has been sent to initiate the mediation process pursuant to article 4 of this Uniform Act;
b) the views expressed or the suggestions made by one party during the mediation concerning a possible solution to settle the dispute;
c) the declarations made or facts accepted by one party during the mediation procedure;
d) the propositions made by the mediator or by one of the parties;
e) the fact that one party mentioned that she was willing to accept a settlement offer presented by the mediator or by the other party;
f) a document drafted for the sole purpose of the mediation process.

Paragraph 1 of this article applies regardless of the medium or the form of the relevant information or pieces of evidence.

Disclosure of the information referred to in paragraph 1 of this article may not be ordered by an arbitral tribunal, a state court, or any other competent public authority. If such information is presented as evidence in breach of the provisions of paragraph 1 of this article, those shall be inadmissible. Nevertheless, this information may be disclosed or allowed as evidence to the extent required by law or necessary to implement or enforce the agreement arising out of the mediation.

The provisions of paragraphs 1, 2 and 3 of this article shall apply regardless of the fact that the arbitral or legal proceedings or any similar proceedings relate to the dispute which is or was the purpose of the mediation procedure, or not.

The confidentiality obligation shall not extend to pieces of evidence which existed before the mediation procedure or were constituted without any connection with the mediation procedure.

ARTICLE 12. Termination of the mediation procedure

The mediation procedure shall be terminated by:

a) the conclusion of a written agreement arising out of the mediation, signed by the parties and, upon their request, by the mediator;
b) the written statement of the mediator stating, after consultation with the parties, that new mediation attempts are no longer justified, on the date of the statement, or when one of

the parties is no longer participating in the mediation meetings despite reminders by the mediator;

c) the written statement by the parties addressed to the mediator stating that they are ending the mediation process, on the date of the statement;
d) the written statement by a party sent to the other party or parties and, when a mediator has been appointed, to the mediator, stating that the mediation procedure is ended, on the date of the statement; or
e) the expiry of the mediation period unless the parties mutually decide to extend this period by agreement with the mediator.

The party which intends to avail itself of the termination of the mediation shall provide proof of this termination; she may do so by any means.

When the mediation procedure ordered by the judge or the arbitrator comes to an end without any agreement between the parties, the arbitral or the court proceedings shall return to normal.

When this mediation procedure comes to an end by amicable settlement of the parties, the judge or the arbitrator shall recognize this agreement which may be enforced pursuant to article 16 of this Uniform Act.

ARTICLE 13. Mediation costs

The parties shall determine, either directly, or by reference to Rules of mediation, the costs of the mediation, including the mediator's fees.

In case of a judicial mediation, the relevant state court, which appoints a mediator, shall fix the costs in agreement with the parties, and shall order the payment of advances on costs to the head clerk of the court or the competent body for the Member State. When a party fails to pay its share of the costs, the other party may pay this advance to allow the mediation to start. Absent any payment by the parties of their advances within the time limit set by the judge, its decision to refer to mediation shall be void, and legal proceedings shall be re initiated to normal.

When the state court appoints a mediation institution, it shall invite the parties to comply the schedule of fees of this institution.

The fees of the mediation shall be borne by the parties in equal shares, unless otherwise agreed.

ARTICLE 14. Incompatibilities

Unless otherwise agreed by the parties, the mediator may not act as an arbitrator or as an expert in a dispute which is or was the purpose of the mediation procedure, or in any other dispute arising out of the same legal relationship or associated with it.

The mediator may not act as counsel in a dispute which is or was the purpose of the mediation procedure or in another dispute arising out of the same legal relationship or associated with it.

ARTICLE 15. Recourse to an arbitral or judicial procedure

In the event that the parties have agreed to have recourse to mediation and have expressly committed not to initiate, for a given time period or until the occurrence of a specific event, any arbitral or judicial procedure concerning an existing or future dispute, the arbitral tribunal or the state court shall give effect to this undertaking as long as the underlying conditions are satisfied.

The provisions of the previous paragraph shall not apply when a party deems it necessary to initiate, for provisional or conservatory purposes, proceedings to safeguard its rights. The initiation of such proceedings may neither be considered as such, as a waiver to the mediation agreement, nor as terminating the mediation process.

ARTICLE 16. Implementation of the agreement arising out of mediation

If, at the end of the mediation, the parties settle their dispute by written agreement, this agreement shall be mandatory and binding between them. The agreement arising out of the mediation is enforceable.

Upon joint request of the parties, the mediation agreement may be submitted for registration under the notary's registry, with formal recognition of the submissions and signatures. The notary provides, upon request of the relevant party, an engrossment or a copy of the agreement for enforcement.

Upon joint request of the parties or, failing this, upon request of the most diligent party, the mediation agreement may also be subject to approval or exequatur by the competent court. The judge shall issue an order. He may not modify the terms of the agreement arising out of the mediation.

The competent court shall limit itself to checking the authenticity of the mediation agreement and granting the application within a maximum period of seven (07) working days starting from the date of lodging the application.

However, approval or enforcement may be refused if the mediation agreement is contrary to public policy.

Absent any decision within the period of fifteen (15) days, mentioned in the fourth paragraph of this article, the mediation agreement automatically benefits from approval or enforcement. The most diligent party refers to the chief clerk or the competent authority which shall formally enforce the mediation agreement. The opposing party, which deems that the mediation agreement is contrary to public policy may file an appeal before the Common Court of Justice and Arbitration against the approval or enforcement act within fifteen days (15) after the notification of the agreement formally enforced; the Common Court of Justice and Arbitration shall render a decision within a maximum period of six (06) months. In such event, the deadlines provided in the Rules of procedure of the Common Court of Justice and Arbitration shall be halved. The appeal shall suspend the enforcement of the agreement.

The decision of the judge granting approval or enforcement may not be appealed. The decision of the judge refusing approval or enforcement may only be appealed before the Common Court of Justice and Arbitration, which shall renders a decision within a maximum period of six (06) months. In such event, the deadlines specified in the Rules of procedure of the Common Court of Justice and Arbitration shall be halved.

The provisions of paragraphs 4, 5, 6 and 7 of this article shall apply to the agreement arising out of the mediation which was reached in the absence of ongoing arbitral proceedings. When the agreement arising out of the mediation is reached while arbitral proceedings are ongoing, the parties, or the most diligent party, acting with the express agreement of the other party, may ask the arbitration tribunal constituted to take note of the agreement reached in a consent award. The arbitral tribunal shall decide without debate, unless it deems it necessary to hear the parties.

CHAPTER 3: TRANSITIONAL AND FINAL PROVISIONS

ARTICLE 17. Application of this Uniform Act

This Uniform Act shall apply as the mediation law of the Member States.

It shall only apply to mediation procedures commenced after it has entered into force.

ARTICLE 18. Publication and entry into force

This Uniform Act shall be published in the Official Journal of OHADA within sixty (60) days of its adoption. It shall also be published in the Official Journal of the Member State to the treaty.

It shall enter into force ninety (90) days after its publication in the Official Journal of OHADA.

Conakry, 23 November 2017