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Ninth Edition

Editor
James H Carter

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CONTENTS

PREFACE......vii
James H Carter

Chapter 1 IMPACT OF CORPORATE TAXATION ON ECONOMIC LOSSES......1
James Nicholson and Toni Dyson

Chapter 2 AFRICA OVERVIEW......9
Jean-Christophe Honlet, Liz Tout, Marie-Hélène Ludwig and Lionel Nichols

Chapter 3 ASEAN OVERVIEW......20
Colin Ong QC

Chapter 4 BRIBERY ALLEGATIONS IN ARBITRATION......40
Anne-Catherine Hahn

Chapter 5 AUSTRIA......56
Venus Valentina Wong

Chapter 6 BANGLADESH......67
Mohammad Hasan Habib

Chapter 7 BELIZE......75
Eamon H Courtenay SC and Stacey N Castillo

Chapter 8 BRAZIL......84
Angela Di Franco and Rafael Zabaglia

Chapter 9 BULGARIA......99
Anna Rizova-Clegg and Oleg Temnikov

Chapter 10 CANADA......109
Rachel Howie, Chloe Snider and Barbara Capes

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Chapter 11 CHINA.....121
Keith M Brandt and Michael K H Kan

Chapter 12 COLOMBIA.....131
Ximena Zuleta, Paula Vejarano, Juan Camilo Fandiño, Daniel Jiménez Pastor, Álvaro Ramírez and Natalia Zuleta

Chapter 13 CYPRUS.....141
Alecos Markides

Chapter 14 ECUADOR.....151
Alejandro Ponce Martínez

Chapter 15 ENGLAND AND WALES.....155
Duncan Speller and Tim Benham-Mirando

Chapter 16 EUROPEAN UNION.....173
Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova

Chapter 17 FINLAND.....182
Timo Ylikantola and Tiina Ruohonen

Chapter 18 FRANCE.....192
Jean-Christophe Honlet, Barton Legum, Anne-Sophie Dufêtre and Annelise Lecompte

Chapter 19 GERMANY.....201
Hilmar Raeschke-Kessler

Chapter 20 HUNGARY.....217
Zoltán Faludi and Enikő Lukács

Chapter 21 INDIA.....226
Shardul Thacker

Chapter 22 INDONESIA.....241
Theodoor Bakker, Sahat Siahaan and Ulyarta Naibaho

Chapter 23 ITALY.....250
Michelangelo Cicogna and Andrew G Paton

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Chapter 24 JAPAN 271
Christopher Hunt, Elaine Wong, Ben Jolley and Yosuke Homma

Chapter 25 KENYA....................283
Aisha Abdallah and Mohamed Karega

Chapter 26 LIECHTENSTEIN....................293
Mario A König

Chapter 27 MALAYSIA 304
Avinash Pradhan

Chapter 28 MEXICO 320
Adrián Magallanes Pérez and Rodrigo Barradas Muñiz

Chapter 29 NETHERLANDS 328
Marc Krestin and Marc Noldus

Chapter 30 NEW ZEALAND....................341
Derek Johnston

Chapter 31 NIGERIA....................355
Babajide Ogundipe, Lateef Omoyemi Akangbe and Benita David-Akoro

Chapter 32 PERU....................358
José Daniel Amado, Cristina Ferraro and Martín Chocano

Chapter 33 PHILIPPINES 367
Jan Vincent S Soliven and Lenie Rocel E Rocha

Chapter 34 POLAND....................378
Michał Jochemczak and Tomasz Sychowicz

Chapter 35 PORTUGAL....................387
José Carlos Soares Machado

Chapter 36 ROMANIA 394
Tiberiu Csaki

Chapter 37 RUSSIA 406
Mikhail Ivanov and Inna Manassyan

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Chapter 38 SINGAPORE....419
Kelvin Poon, Paul Tan and Alessa Pang

Chapter 39 SOUTH KOREA....444
Joel E Richardson and Byung-Woo Im

Chapter 40 SPAIN....452
Virginia Allan, Ignacio Madalena and David Ingle

Chapter 41 SWEDEN....466
Pontus Ewerlöf and Martin Rifall

Chapter 42 SWITZERLAND....474
Martin Wiebecke

Chapter 43 TURKEY....493
H Ercüment Erdem

Chapter 44 UKRAINE....502
Ulyana Bardyn, Christina Dumitrescu and Victor Marchan

Chapter 45 UNITED ARAB EMIRATES....518
Stephen Burke

Chapter 46 UNITED STATES....527
James H Carter, Sabrina Lee and Stratos Pahis

Chapter 47 VIETNAM....547
K Minh Dang, Do Khoi Nguyen and Luan Tran

Appendix 1 ABOUT THE AUTHORS....561
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....597

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
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Chapter 2

AFRICA OVERVIEW

Jean-Christophe Honlet, Liz Tout, Marie-Hélène Ludwig and Lionel Nichols[1]

I INTRODUCTION

Arbitration continues to remain the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards. Notwithstanding a modest reduction in foreign direct investment into the continent in 2016, the number of African arbitrations increased significantly in 2017. Foreign direct investment into Africa saw a 3 per cent decline in 2016 to US$59 billion,[2] yet both the International Chamber of Commerce (ICC) and the London Centre for International Arbitration (LCIA) reported record numbers of African arbitrations in 2016–2017.[3]

Before investing in Africa, investors are giving increased consideration to whether the target state for investment is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and whether it has adopted the Model Law on International Commercial Arbitration (Model Law).

The purpose of this chapter is to provide an overview of the practice of resolving disputes through international arbitration in Africa. This is evidently a challenge, not least because Africa is not unitary and comprises 54 different countries with hundreds of languages being spoken. A further divide inherited from colonial years exists between countries whose legal system is linked to the civil law (mostly France and Belgium) and those linked to the common law (mostly the United Kingdom). The first section below provides an overview of arbitration in Africa, while the second and third sections examine recent developments in anglophone and francophone Africa respectively. The final section provides highlights of the recent developments regarding investment treaty arbitrations in Africa.

1 Jean-Christophe Honlet and Liz Tout are partners and Marie-Hélène Ludwig and Lionel Nichols are associates at Dentons.

2 United Nations Conference on Trade and Development, World Investment Report 2017: Investment and the Digital Economy (2017), page 46.

3 The International Chamber of Commerce has reported that both the number of cases (87) and the number of parties (153) from Sub-Saharan Africa reached record highs in 2017. These figures represent a growth rate of 35.9 per cent for cases and 40.4 per cent for parties compared with the previous year. (ICC News, 'ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes', 7 March 2018). According to the London Court of International Arbitration, 7.9 per cent of all LCIA parties were African, up from 6.4 per cent the previous year and 4.5 per cent in 2011 (LCIA, 2016: A Robust Caseload, page 9).

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II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-six African states are now parties to the New York Convention,[4] thereby providing investors in these jurisdictions with the assurance that arbitral awards will – or at least should – be recognised and enforced in any of the 157 state parties to the New York Convention. Significantly, these 36 African states include Africa's three largest economies (Nigeria, South Africa and Egypt), whose combined GDPs are in excess of US$1.1 trillion.[5] Africa is, however, the continent with the highest proportion of countries that are not parties to the New York Convention.[6] Consequently, investors will continue to encounter difficulties in attempting to enforce foreign awards in those countries. Those states that are not constrained by the limited grounds of refusal in Article V of the New York Convention may impose their own more stringent criteria.[7]

Eleven African states have adopted the UNCITRAL Model Law.[8] The Model Law provides a reliable and well-structured domestic arbitration regime that is an important consideration for investors in Africa. For example, the Model Law provides that domestic courts can only refuse to enforce an award in limited circumstances. The domestic arbitration laws of a state are particularly important where investors are considering the state as a possible choice of seat for their arbitration. In those circumstances, where the seat may determine the procedural law of the arbitration, the reliability of domestic laws will be key. As the arbitration regimes of African states develop further,[9] foreign investors may seat their arbitration more frequently in an African state, provided they have sufficient confidence in that jurisdiction's commitment to the rule of law. For large projects, however, the seat of arbitration favoured by foreign businesses is still often placed outside the African country. Although, according to one survey, 58 per cent of parties would consider having their arbitration seated in Africa, of the 966 new cases registered by the ICC in 2016, just six were seated in Africa while just three of the 253 LCIA cases had an African seat.[10] Investors are likely to continue to seek

4 Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Comoros, Democratic Republic of the Congo, the Ivory Coast, Djibouti, Egypt, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, South Africa, United Republic of Tanzania, Tunisia, Uganda, Zambia and Zimbabwe. In June 2016, Somalia announced its intention to accede to the New York Convention.

5 International Monetary Fund, World Outlook Database, January 2018.

6 This includes Chad, Gambia, Equatorial Guinea, Ethiopia, Eritrea, Guinea-Bissau, Libya, Malawi, Namibia, the Republic of the Congo, Sierra Leone, Somalia (which announced in June 2016 its intention to accede to the New York Convention: Alison Ross, 'Somalia plans reforms to arbitration framework', *Global Arbitration Review*, 3 June 2016), Sudan, South Sudan, the Seychelles, Swaziland and Togo.

7 For example, in Ethiopia and Sudan, foreign awards must comply with the respective country's moral values before they can be enforced: Steven Finizio and Thomas Führich, 'Africa's Advance', Commercial Dispute Resolution News, May–June 2014.

8 Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, South Africa, Tunisia, Uganda, Zambia and Zimbabwe. The Uniform Arbitration Act of the Organisation for the Harmonization of Business Law in Africa (OHADA) is also inspired by the Model Law. The South African International Arbitration Act No. 15 of 2017 was assented to by the South African President on 20 December 2017. The Act incorporates the Model Law.

9 Only two African states (Sierra Leone and South Sudan) do not have discernible law applicable to arbitration (Arbitration Institutions in Africa Conference 2015).

10 Legal Business, Arbitration in Africa, July/August 2015, page 108; Lexology, '2016 ICC Dispute Resolution Statistics: Record Year for the ICC', 15 September 2017.

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protection, for particularly large-scale investments, of a traditional seat of arbitration such as Paris or London, for instance, under the auspices of well-established international arbitration institutions such as the ICC or the LCIA.

Some regional harmonisation also exists, the most important example being OHADA (see footnote 8), a mainly francophone international organisation that groups together 17 African states.[11] The OHADA treaty includes a Unified Arbitration Act (UAA) and created a Common Court of Justice and Arbitration (CCJA) in Abidjan.

When negotiating arbitration clauses, parties are increasingly giving consideration to agreeing to an onshore arbitration with the logistical benefits this provides in obtaining the relevant documentation and securing the attendance of witnesses. As a consequence, there has been a steady growth in the use of regional arbitral institutions, with new institutions emerging in recent years. The oldest such institution is the Cairo Regional Centre for International Commercial Arbitration (CRCICA) which, by June 2016, had registered 1,109 cases.[12] Other smaller and more recently established institutions include the Kigali International Centre of Arbitration in Rwanda, which was established in 2011 and has already registered 52 cases,[13] the Arbitration Foundation of Southern Africa, the LCIA-Mauritius International Arbitration Centre, the Lagos Chamber of Commerce International Arbitration Centre, the Nairobi Centre for International Arbitration and the Law Society of Kenya International Arbitration Centre, with steps also having been taking to establish the Djibouti International Arbitration Centre.[14] Although there is no further publicly available data on these onshore arbitrations, it is likely that a large proportion of these arbitrations feature local government entities and companies.

III ANGLOPHONE AND COMMON LAW JURISDICTIONS

Twenty African states, including South Africa, Nigeria, much of East Africa and parts of West Africa, have legal systems based more or less on English common law.[15] Nine of these states are members of the Common Market for Eastern and Southern Africa (COMESA), an organisation of 19 states committed to 'developing their natural and human resources for the good of their people'.[16] The 470 million people under the COMESA umbrella, accounting for an export bill of US$112 billion, benefit from a marketplace that includes a free trade area, a customs union and trade promotion. Article 28 of the COMESA Treaty provides that the COMESA Court of Justice shall have jurisdiction to hear and determine any matter arising from an arbitration clause conferring jurisdiction upon it, as well as disputes submitted by Member States. In March 2016, the judges of the COMESA Court of Justice completed a

11 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, the Democratic Republic of the Congo, the Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo.

12 CRCICA Annual Report 2016.

13 KIAC Annual Report, July 2016/2017, p. 1, available at www.kiac.org.rw/IMG/pdf/annual_rept_2016_-2017_web.pdf.

14 'Vasani and Le Bars lead effort to create Djibouti centre', *Global Arbitration Review*, 14 September 2016.

15 Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, the Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

16 Kenya, Libya, Seychelles, Malawi, Mauritius, Sudan, Uganda, Zambia and Zimbabwe.

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training programme in dispute resolution and dispute settlement and in February 2017 the Judge President announced that it will be revising its arbitration rules but, to date, no cases have been referred to the COMESA Court of Justice.

Anglophone states are respectful of the system of binding precedent and have the ability to call upon a rich body of common law jurisprudence. These states may indicate through arbitration-related court judgments that they are arbitration-friendly jurisdictions. One such example is Mauritius, which, pursuant to its domestic arbitration act, has established a specially constituted three-judge branch of its Supreme Court to hear international arbitration matters.[17] Encouragingly, in one recent case, this special division demonstrated an arbitration-friendly approach by dismissing arguments that the domestic arbitration legislation was unconstitutional, refusing to reopen the merits of the dispute, and rejecting arguments based on public policy.[18] Similarly, although Tanzania has not adopted the Model Law, its domestic legislation provides for only limited grounds upon which the national courts may set aside an award.[19] The High Court of Tanzania has held that it would not be proper for it to set aside an ICC award because to do so would amount to a reopening of the issues of fact and law that the parties had submitted to arbitration for final determination.[20] Likewise, there are positive indications of the reluctance of the Nigerian courts to interfere in the enforcement of foreign arbitral awards, with the Nigerian Court of Appeal refusing to grant an injunction to restrain arbitration proceedings in one case[21] and refusing to grant an injunction to stay arbitral proceedings in another.[22]

However, the picture remains mixed across anglophone Africa. For example, recent attempts to enforce a Stockholm Chamber of Commerce (SCC) award in Kenya suggest that it is not always possible to predict how a local court will approach the enforcement of foreign arbitral awards. In that arbitration, the tribunal found in favour of a Tanzanian government authority in its dispute with a Kenyan construction company, just as the Tanzanian Disputes Resolution Board had done at an earlier stage in their dispute.[23] The Kenyan High Court, however, refused to enforce the award, citing public policy grounds.[24] The High Court found that, although the parties had agreed that their dispute would be governed by Tanzanian law, the SCC tribunal had applied English law and as such, enforcement of the award would be contrary to the public policy of Kenya and was therefore not enforceable. The Tanzanian authority appealed to the Kenyan Court of Appeal, which held that it did not have

17 International Arbitration Act 2008, Section 42.

18 *Cruz City 1 Mauritius Holdings v. Unitech Limited and Anor* [2014] SCJ 100.

19 Arbitration Act, Revised Edition 2002, Section 16.

20 *Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania) v. Tanzania Electric Supply Company Limited* (High Court of Tanzania, Misc. Civil Application No. 8 of 2011, 28 September 2011).

21 *Nigerian Agip Exploration Limited v. Nigerian Petroleum Corporation and Oando OML 125 & 134 Ltd* CA/A/628/2011, 25 February 2014.

22 *Statoil (Nigeria) Ltd, Texaco Nigeria Outer Shelf Limited v. Nigerian National Petroleum Corporation and Others* CA/L/758/2012, 12 July 2013.

23 Under the contract, if a party was dissatisfied with the result of the Tanzanian Disputes Resolution Board it could refer the dispute to SCC arbitration.

24 *Tanzania National Roads Agency v. Kundan Singh Construction Limited HC Misc* Civil Appeal No. 171 of 2012.

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jurisdiction over the matter. According to the Court of Appeal, the only 'competent court' in Kenya with the power to recognise and enforce arbitral awards is the High Court, with no further right of appeal.[25]

Not only does the number of arbitrations in Africa continue to increase, but some of these arbitrations concern some of the largest claims in the world. The US$2 billion award that ExxonMobil and Shell secured against the Nigerian National Petroleum Corporation in 2011 is well known, but it has also recently been reported that a tribunal has ordered Nigeria to pay US$6.6 billion, to a British Virgin Islands company founded by Irish nationals, the highest-value African arbitration award in history and the second-largest anywhere in the world.[26] The award concerned a gas supply and processing agreement, governed by Nigerian law and entered into by Nigeria's Ministry of Petroleum. Pursuant to the agreement, the claimant, Process and Industrial Developments, was required to build facilities to refine 'wet gas' into 'lean gas', which would then be used by Nigeria to power its national electricity grid. A majority of the tribunal, comprising Lord Hoffmann and Sir Anthony Evans QC, found that the Nigerian government had repudiated the agreement, which caused the 20-year project to collapse and the claimant to lose US$6.597 billion in lost profits. The claimants are presently trying to enforce the award in the United States, and at the time of writing the value, with interest, had increased to almost US$9 billion.

Norway's state oil company Statoil and its partner Chevron are also seeking to enforce a billion-dollar award against Nigeria in the United States. In August 2015, the majority of the *ad hoc* tribunal (Singapore's Laurence Boo and former UK Supreme Court justice Lord Saville) found that the Nigerian National Petroleum Corporation had breached a production sharing contract for the Agbami oil filed by 'overlifting' crude oil and unilaterally filing tax returns on the claimants' behalf. The majority ordered Nigeria to pay over US$941.5 million in damages, with interest taking the final quantum to around US$1 billion.[27]

IV FRANCOPHONE AND CIVIL LAW JURISDICTIONS

There are two main sub-regions here: northern Africa (essentially the Maghreb plus Egypt), as well as francophone western and sub-Saharan Africa, with many of the countries in the last two regions sharing a common adherence to OHADA.

Arbitration practice in northern Africa is somewhat disparate. Arbitration is a common dispute-resolution mode in Algeria and Egypt, whereas it is less so in the rest of that sub-region. It is noteworthy that, as far as domestic courts are concerned, Libyan courts are traditionally hostile to arbitration. All countries offer common features, such as a broad agreement on the validity of the *Kompetenz-Kompetenz* principle, which allows arbitral tribunals to determine their own jurisdiction. Although judicial intervention in the arbitration process is generally also supposed to be quite limited, Libyan law offers, for instance, broad grounds on which an arbitral award may be annulled that are similar to those applicable to domestic judgments. The other countries of the region are characterised by less stringent legislation concerning the enforcement of arbitral awards. They all recognise the requirement to file an application for *exequatur* with the relevant court as a precondition for enforcement. Domestic courts in

25 *Tanzania National Roads Agency v. Kundan Singh Construction Limited* Civil Appeal No. 38 of 2013.

26 Sebastian Perry, 'Mega-award against Nigeria comes to light', *Global Arbitration Review*, 20 March 2018.

27 Laura Roddy, 'Statoil and Chevron seek to enforce Nigerian oil award', *Global Arbitration Review*, 22 March 2018.

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Egypt adopt a rather enforcement-friendly approach, including against the state. Some other countries, such as Tunisia and Libya, are still reluctant to allow the enforcement of arbitral awards against the state.

Each of the northern African countries have distinct legislation on arbitration. They all make a distinction between domestic and international arbitration, however, in line with the traditional French approach. Another common feature is the increasing awareness of legislators concerning arbitration as an efficient dispute resolution mechanism to be promoted. With the exception of Libyan law, the main source of inspiration is again the Model Law.

Northern African countries are also parties to many arbitration-related conventions, mostly related to the rest of the Arab region, such as the Riyadh Agreement on Judicial Cooperation, the Amman Convention on International Commercial Arbitration, and the Unified Agreement for the Investment of Arab Capital in the Arab States.

Northern African countries' legislation is more specific on the definition of arbitration agreements. For instance, Article 1007 of the Algerian Administrative and Civil Procedure Code defines an arbitration clause as an agreement by which the parties to a contract dealing with rights of which they can freely dispose commit to submit disputes that may arise in relation to this contract to arbitration.[28] Arbitration clauses must be stated in writing and provide for the nomination of the arbitrator or for the modalities of their appointment.[29] The requirement of an arbitration agreement to be in writing is common to all of the northern African countries. Algerian law provides for the autonomy of arbitration agreements, but only for international arbitration.[30] It is also worth noting that Libyan law provides that arbitration agreements should expressly determine the subject matter of the dispute to be determined by arbitration.

The OHADA UAA is extremely important in OHADA countries. It applies to arbitrations having their seat in an OHADA Member State. The UAA is modelled on international arbitration instruments, and in particular the Model Law. It makes no distinction between domestic and international arbitration. It creates a unified dispute resolution system under the aegis of the CCJA, which plays an important role in fostering a harmonised approach to OHADA business law. There is room in the UAA for local arbitration institutions and *ad hoc* arbitration. The CCJA, which is officially the supreme court of the OHADA contracting states, combines a judicial and an arbitral role. Even for OHADA contracting states, domestic arbitration laws continue to apply with respect to issues that are not addressed in the UAA. However, according to advisory opinion of the CCJA No. 001/2001/EP of 30 April 2001, domestic provisions on arbitration that conflict with the UAA are deemed revoked and therefore of no effect.

28 Article 1007 of the Algerian Administrative and Civil Procedure Code: 'The arbitration clause is the agreement by which the parties to a contract dealing with rights of which they can freely dispose commit to submit disputes that may arise in relation to this contract to arbitration.' (Translation from French.)

29 Article 1008 of the Algerian Administrative and Civil Procedure Code: 'The arbitration clause must, under penalty of nullity, be stated in writing in the main contract or in a document to which it refers. Under the same penalty, the arbitration clause must, either nominate the arbitrator(s), or specify the terms of their nomination.' (Translation from French.)

30 Article 1040 of the Algerian Administrative and Civil Procedure Code: 'The validity of an arbitration clause cannot be challenged on the ground that the main contract would be null and void.' (Translation from French.)

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On 23–24 November 2017, the OHADA Council of Ministers adopted a largely modified UAA, revised CCJA Arbitration Rules and a new Uniform Mediation Act (UMA). These three texts became applicable on 15 March 2018 in all OHADA Member States.

The UMA applies to any disputes submitted to a mediator, without any restriction as to geographical location or subject matter of the relevant dispute and covers both conventional and judicial mediations. Confidentiality of the mediation and independence and impartiality of the mediator are provided for. Article 16 of the UMA provides for a regime for the recognition and enforcement of settlement agreements resulting from the mediation proceeding. The UMA is thus a welcome addition to the uniform acts enacted by the OHADA as it fills the legislative gap that existed in most OHADA Member States with regard to the amicable settlement of disputes. The arbitration reform aims to promote celerity, effectiveness and transparency within the OHADA area. The reform also aims at promoting the CCJA as a more attractive centre for arbitration and the OHADA member states as attractive seats of arbitrations. Moreover, it is now clearly stated in both the UAA and the CCJA Arbitration Rules that arbitration can be initiated either on the basis of an arbitration agreement or an investment-related instrument, such as an investment code or a bilateral or multilateral investment treaty (Article 3 of the UAA, Article 2.1 of the CCJA Arbitration Rules). This should attract investments in the OHADA region.

With regards to the revised UAA, the principle of *Kompetenz-Kompetenz* has evolved: it provides that a state court must decline jurisdiction over a dispute involving an arbitration clause when the arbitral tribunal is not yet constituted or if no request for arbitration has been submitted, unless the arbitration clause is manifestly void (as was already provided for) or, under the revised UAA, *prima facie* inapplicable (Article 13). Arbitration proceedings will be heard by default by a sole arbitrator (Article 5) and a limited time frame is now set for difficulties arising out of the constitution of the arbitral tribunal, including challenge of arbitrators before national courts and the CCJA (Article 8). An arbitrator now has an obligation to disclose at any point in the proceedings all circumstances that might create legitimate doubt about his or her independence or impartiality (Article 7). Once the award is rendered, the parties can now waive their right to seek their annulment, subject to international public policy (Article 25, Paragraph 3). The court having jurisdiction has three months to issue a decision on annulment, failing what the claim can be brought within 15 days before the CCJA, which must issue its ruling within six months (Article 27). *Exequatur* is deemed to have been granted if the national court fails to issue a decision 15 days after such request was referred (Article 31) and a decision granting *exequatur* cannot be appealed (Article 32).

With regards to the CCJA Arbitration Rules, their revision respond to most of the criticisms, including that the fact that the CCJA both makes decisions on arbitration proceedings and hear applications to set aside the awards. According to the revised Rules, members of the CCJA with the same nationality as a state directly involved in an arbitration must remove themselves from the panel in the case at hand (Article 1.1). In addition, the Court will now have the possibility to disclose the reasons for its decisions to the parties, provided that one of the parties so requests before the decision is issued (Article 1.1). The revised rules clarified the procedure for appointing the arbitrators by the Court (Article 3). It is now required that arbitrators carry out their mission with diligence and celerity (Article 4.1). The revised Rules also provide for the reinforcement of the arbitrator's power in terms of admitting evidence (Article 19), for joinder (Article 8.1) and voluntary intervention of third parties (Article 8.2), as well as for disputes involving multiple parties (Article 8.3)

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or arising out of multiple contracts (Article 8.4). Similarly to the ICC, the CCJA has now broader powers in terms of scrutiny of draft awards, which may result in modifications being proposed to the arbitral tribunal (Article 23.2).

Arbitral awards rendered in accordance with the CCJA Rules have the same binding force within the territory of OHADA contracting states as judgments of the states' domestic courts.[31] In the event of the absence of voluntary compliance with an award, its enforcement may be pursued through an application for *exequatur* by the winning party with the CCJA. According to Article 30 of the CCJA Rules, the order of the court to this effect makes the award enforceable in all OHADA contracting states.

The award can also be subject to three kinds of recourse:

a a challenge regarding validity, which is the equivalent of a request to set aside the award; under the new Rules, the failure to provide reasons for the award and an improperly constituted tribunal or improperly appointed sole arbitrator are now grounds for setting the award aside (Article 29.2, which now provides for the same annulment grounds as those set out in the UAA); the CCJA has six months to render its decision on setting awards aside (Article 29.4);

b a recourse for revision aimed at allowing the revision of the award in cases where new elements or facts were discovered by one of the parties that may have altered the decision of the arbitral tribunal had they been disclosed in due course; and

c a third-party opposition that allows third parties who were not called before the arbitral tribunal and whose rights are adversely affected by the decision to challenge the award.

Decisions on *exequatur* are issued by the CCJA President within 15 days after the request has been filed or three days for awards on interim or conservatory measures (Article 30.2). Decisions to grant *exequatur* can no longer be appealed (Article 30.4).

In the light of the recent *Getma* case, in which the CCJA annulled an award against the Republic of Guinea on the ground that the arbitrators had breached their mandate by negotiating directly with the parties over their fees instead of using the schedule of fees prescribed by the rules,[32] Article 24.4 of the Rules now provides that any fixing of fee without the CCJA's approval is null and void but that this is not a ground to set aside an award. This reform of arbitration, together with the new UMA thus provides a solid framework for alternative dispute resolution in OHADA member states.

V INVESTOR–STATE DISPUTES

The reality of investing in Africa is that investors must deal with political and economic risk and instability, as well as deeper problems.[33] Bilateral investment treaties (BITs) can be a cost-effective method of minimising some of that risk. BITs will typically contain provisions

31 Article 27.1 of the CCJA Arbitration Rules: 'Arbitral awards rendered in accordance with the provisions of the present rules shall have the force of *res judicata* within the territory of each state party, in the same manner as decisions rendered by state courts. They may be readily enforced within the territory of any of the state parties.' (Translation from French.)

32 CCJA, Plen Sess, 19 November 2015, Case No. 130/2014/PC.

33 Of the region's 44 countries (sub-Saharan Africa), 39 show a serious corruption problem, but Botswana, Cape Verde, Mauritius and Rwanda were ranked among the top 50 most transparent countries out of a list of 167: Transparency International, Corruption Perceptions Index 2016. Moreover, it takes an average

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that, for example, guarantee compensation for an expropriation, and ensure fair, equitable and non-discriminatory treatment of investments. In addition, many BITs will provide for disputes to be resolved through ICSID, under the umbrella of the 1965 Washington Convention, which has an enhanced enforcement regime.

As African states seek to attract foreign investment by providing greater protection for investors, the number of BITs to which African states are party continues to increase. African states have now concluded more than 800 BITs, including 400 BITs with developed countries. Egypt alone has entered into more than 100 BITs throughout the world. Moreover, African states are continuing to negotiate BITs with other African states. For example, in the past 15 years Mauritius has signed or ratified 19 BITs with other African states and, of the 30 BITs signed last year, half involved at least one African state.

African states continue to show strong support for ICSID as a forum for resolving disputes. Forty-five have ratified the ICSID Convention,[34] while a further three have signed but not ratified it,[35] leaving only Angola, Djibouti, Eritrea, Equatorial Guinea, Libya and South Africa as non-parties – significantly fewer than the number of African states that are not parties to the New York Convention.

To date, 35 African states have been involved in ICSID proceedings. Additionally, a significant proportion of ICSID's caseload is from Africa. Of the 613 cases registered at ICSID, 135 have involved an African respondent, representing 22 per cent of ICSID's caseload.[36] Of all the African states, Egypt has had the largest number of claims (30) registered against it following the recent registration of a dispute in August 2017 by Dutch pipe manufacturer Future Pipe International.[37]

However, two of Africa's largest economies, South Africa and Nigeria, have demonstrated a reluctance to enter into BITs as they prioritise national sovereignty and public policy. South Africa has not signed or ratified a new BIT for almost a decade and in that time it has terminated existing BITs with Austria, Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom (although some still remain in force by virtue of sunset clauses). South Africa's current intention is to protect foreign investments through domestic legislation, a common alternative approach in many African states. On 13 December 2015, South African President Jacob Zuma signed the Protection of Investment Act into law. Although the Act applies to both foreign and domestic investors, it is likely to create uncertainty for the former because it does not provide protections that are typically included in BITS, such as obligations in respect of expropriation and fair and equitable treatment. Moreover, unlike a BIT, South Africa's domestic legislation may be unilaterally amended by the government at any time. This is in contrast with the situation under a terminated BIT that, through a 'sunset clause', typically provides protection for a period of between 10 and 15 years. On the other hand, investors from countries such as the US, which have never previously had a BIT with South Africa, will benefit from protections contained within the Act.

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of two years to enforce a contract, and the cost of doing so is 25 per cent of the underlying value of the investment in North Africa and 44.3 per cent in sub-Saharan Africa (World Bank, Doing Business 2016, June 2016).

34 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2017).

35 Ethiopia, Guinea-Bissau and Namibia.

36 ICSID Caseload Statistics (Issue 2017-1).

37 *Future Pipe International B.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/17/37).

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Surprisingly, Africa's largest economy, Nigeria, has been less willing than its African neighbours to enter into BITs. Nigeria only has 11 BITs currently in force and has made public statements which suggest that it was not minded to enter into further BITs. At the 2014 World Investment Forum, Nigeria stated that the state's right to regulate in the public interest and to preserve public policy prevailed over economic losses to investors and expressed concern at the potential for increased exposure to claims.[38] In furtherance of this policy, in December 2016 Nigeria signed a BIT with Morocco that sought to balance the interests between investors and host state. While the BIT contains many of the usual protections such as those relating to national treatment, fair and equitable treatment, and full protection and security, it counterbalances these protections by also imposing obligations on investors relating to the environment, human rights, corruption and corporate governance.

In February 2017, an ICSID tribunal found Egypt in breach of the US–Egypt BIT in a politically sensitive case finding arising from pipeline attacks during the Arab Spring that interrupted the Egyptian gas supply to Israel.[39] Among other treaty breaches, the tribunal ruled that Egypt breached its obligation to protect and secure the pipelines: if the state could not have prevented four early militant attacks on the pipeline, these should have served as 'a warning' that further attacks might ensue. It also held that Egypt's security forces were responsible for failing to take preventive or reactive measures and thus to protect the claimant's investment. Aside from Egypt and in the same context, a new wave of at least a dozen foreign investors is now pursuing investment treaty-based claims against the state of Libya under the ICC or *ad hoc* rules in relation to the deterioration of the security situation following the uprisings of 2011.[40]

Apart from Future Pipe International's recent filing against Egypt, other significant ICSID arbitrations to have been filed against African respondents in the past year include a claim brought by an Italian company against Mozambique over a highway construction project,[41] a claim by a telecoms investor against Madagascar following that country's decision to revoke the investor's licence for failing to comply with tax obligations,[42] and a claim by Spanish construction group Grupo Ortiz against Algeria related to a deal to build 10,000 pre-fabricated homes.[43]

Another recent development has been the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration (Rules on Transparency), which came into effect on 1 April 2014 and were signed in Mauritius (Mauritius Convention). This treaty comprises a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor–state arbitration conducted under the UNCITRAL Arbitration Rules. The Rules on Transparency include provisions on the publication of documents, open hearings, and the possibility for the public and non-disputing treaty parties to make submissions, while also

38 Patience Okala, Speech to World Investment Forum 2014, 16 October 2014.

39 *Ampal-American Israel Corporation (US), BSS-EMG Investors LLC (US), David Fischer (German), EGI-Series Investments LLC (US), EGI-Fund (08-10) Investors LLC (US) v. Arab Republic of Egypt*, Decision on Liability and Heads of Loss, 21 February 2017 (ICSID Case No. ARB/12/11).

40 Luke Eric Peterson, 'Investigation: As fight continues over $1bil award, Libya facing at least a dozen investment treaty arbitrations – possibly more – in aftermath of Arab Spring', IAReporter, 31 March 2017.

41 *CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique* (ICSID Case No. ARB/17/23).

42 *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar* (ICSID Case No. ARB/17/18).

43 *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/17/1).

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providing robust safeguards for the protection of confidential information. They apply to all treaties concluded after 1 April 2014 unless the parties opt out. The Rules on Transparency will also apply to treaties concluded before this date if the state or the parties opt in. Through the Mauritius Convention on Transparency, states have the opportunity to agree, subject to reservations, that the Rules on Transparency will apply to all arbitrations arising under their investment treaties concluded before 1 April 2014. Ten states signed the Mauritius Convention in March 2015, including Mauritius itself, with six more signatories following in 2015, one in 2016 and one in the first months of 2017. This Convention came into force on 18 October 2017 following its ratification by Mauritius, Canada and Switzerland. This may encourage the remaining 19 signatories to also ratify.

VI OUTLOOK AND CONCLUSIONS

Given the current level of investment flowing into Africa, there is little doubt that the number of disputes involving African projects or African parties will continue to rise in future years. It is encouraging to see that most African countries are parties to the ICSID Convention. However, more effort is required to increase the number of African states that are parties to the New York Convention, as well as ensuring the judiciary appreciate how to apply the New York Convention. The holding in 2016 of the congress of the International Council for Commercial Arbitration in Africa (Mauritius) for the first time since its creation in 1963 is a sign of the times, and should help to foster the spirit of international arbitration in Africa. Speakers were optimistic about the development of international arbitration in Africa despite the difficulty of enforcing awards against states and state entities. A call was also launched for the appointment of more African arbitrators and for the 're-localisation' of arbitration on African soil.[44] In this regard, Africa International Legal Awareness, a non-profit body training African lawyers in investment treaty law and international arbitration, unveiled an online directory featuring African practitioners with expertise in these fields in March 2016.[45] Work remains to be done, however, to ensure that African jurisdictions have the stability and commitment to the rule of law necessary to ensure non-interference in the arbitral process and enforcement of international awards.

44 Sebastian Perry, 'Time to "re-localize" arbitration in Africa, ICCA told', *Global Arbitration Review*, 10 May 2016.

45 Africa International Legal Awareness, Directory, available at www.aila.org.uk/page-1381080.

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Appendix 1

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