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THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

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SEVENTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

# THE INTERNATIONAL ARBITRATION REVIEW

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# EDITOR'S PREFACE

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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 is consumed with debate over 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**

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2016

## Chapter 2

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# AFRICA OVERVIEW

*Michelle Bradfield, Jean-Christophe Honlet, Liz Tout,  
Augustin Barrier, Manal Tabbara and Lionel Nichols<sup>1</sup>*

### I INTRODUCTION

Africa is one of the world's most dynamic continents in terms of growth and foreign investment.<sup>2</sup> This has been fuelled in particular by energy, natural resources and infrastructure in sub-Saharan Africa. Encouragingly, in 2014 and 2015, sub-Saharan Africa was home to five of the 10 most improved countries for doing business.<sup>3</sup>

The number of international arbitrations regarding African projects or parties, in a broad range of sectors, is significant. According to the International Chamber of Commerce (ICC), more than one-third (35 per cent) of all state parties in ICC arbitrations are African states.<sup>4</sup> There has also been a marked increase in the number of sub-Saharan states with nationals appearing as parties before the ICC – up from 23 in 2012 to 29 in 2013.<sup>5</sup> Likewise, there has been an increase in the percentage of London Court of International Arbitration (LCIA) cases involving parties from Africa. In 2015, 6.4 per cent of all LCIA parties were African, up from 5.6 per cent the previous year and 4.5 per cent in 2011.<sup>6</sup>

International arbitration is frequently the preferred dispute resolution method for international parties doing business in Africa, offering investors the benefit of having their

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1 Michelle Bradfield, Jean-Christophe Honlet and Liz Tout are partners and Augustin Barrier, Manal Tabbara and Lionel Nichols are associates at Dentons.

2 The International Monetary Fund estimates that most countries in sub-Saharan Africa will experience a gradual increase in growth. (International Monetary Fund, World Economic Outlook, Subdued Demand, Diminished Prospects, January 2016).

3 The sub-Saharan economies that showed the most notable improvement in performance on the Doing Business indicators for 2014/15 were Uganda, Kenya, Mauritania, Senegal and Benin, World Bank, Doing Business 2016.

4 ICC Dispute Resolution Bulletin, 2014 edition.

5 Ibid.

6 LCIA, Registrar's Report 2015.

disputes determined by independent and competent arbitrators according to rules that are both predictable and flexible, and with the comfort of enforceable awards. 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 53 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 will provide an overview of arbitration in Africa, while the second and third sections will examine recent developments in anglophone and francophone Africa, respectively. The final section will provide highlights of the recent developments regarding investment treaty arbitrations in Africa.

## II OVERVIEW OF ARBITRATION IN AFRICA

Thirty-four African states are now parties to the New York Convention,<sup>7</sup> 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 156 state parties to the New York Convention. Significantly, these 34 African states include Africa's three largest economies (Nigeria, South Africa and Egypt), whose combined GDPs in 2015 were in excess of US\$1.1 trillion.<sup>8</sup> In July 2015, Comoros became the latest African state to become a party to the New York Convention. Africa is, however, the continent with the highest proportion of countries that are not parties to the New York Convention.<sup>9</sup> 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.<sup>10</sup>

Ten African states have adopted the UNCITRAL Model Law.<sup>11</sup> The Model Law provides a reliable and well-structured domestic arbitration regime that is an important

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7 Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Comoros, Democratic Republic of the Congo, the Ivory Coast, Djibouti, 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.

8 International Monetary Fund, World Outlook Database, October 2015.

9 This includes Angola, Chad, Gambia, Equatorial Guinea, Ethiopia, Eritrea, Guinea-Bissau, Libya, Malawi, Namibia, the Republic of the Congo, Sierra Leone, Somalia, Sudan, South Sudan, the Seychelles, Swaziland and Togo.

10 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.

11 Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe. The Uniform Arbitration Act of the Organisation for the Harmonization of

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, foreign investors may seat their arbitration more frequently in an African state, provided they have sufficient confidence in its judiciary. For large projects, however, the seat of arbitration retained by foreign businesses is still often placed outside the African country. Investors are likely to continue to seek protection for particularly large-scale investments through 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 the OHADA (see footnote 11), a mainly francophone international organisation that groups together 17 African states.<sup>12</sup> 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, investors 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. By the end of 2014, 1,090 cases had been registered at the Cairo Regional Centre for International Commercial Arbitration (CRCICA).<sup>13</sup> Several new arbitration centres have also been created, including most recently in 2015 the China Africa Joint Arbitration Centre, which is aimed at resolving disputes between China and African states. The Nairobi Centre for International Arbitration was established in 2013, and the LCIA-Mauritius International Arbitration Centre (LCIA-MIAC) in 2011, which is committed to offering an equivalent service to the LCIA in Africa. The Kigali International Arbitration Centre in Rwanda was established in the same year.

### **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 at least in part on English common law.<sup>14</sup> 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’.<sup>15</sup> The 470 million people under the COMESA umbrella, accounting

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Business Law in Africa (OHADA) is also inspired by the Model Law.

12 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 and Togo.

13 CRCICA Annual Report 2014.

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

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

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, as well as disputes submitted by Member States. In March 2016, the judges of the COMESA Court of Justice completed a training programme in dispute resolution and dispute settlement, which was preceded in June 2014 with a training programme in international arbitration.

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. Nigeria provides a recent positive example. In February 2014, the Nigerian Court of Appeal refused to grant an injunction to restrain arbitration proceedings, finding that the domestic arbitration legislation provided only very limited circumstances in which a domestic court could intervene.<sup>16</sup> The Court of Appeal followed its 2013 decision in which it held that domestic legislation does not empower a court to grant an injunction to stay arbitral proceedings.<sup>17</sup> These are positive indications of the reluctance of the Nigerian courts to interfere in the enforcement of foreign arbitral awards.

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.<sup>18</sup> The Kenyan High Court, however, refused to enforce the award, citing public policy grounds.<sup>19</sup> 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 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.<sup>20</sup>

This is not the only example of an international arbitration award not being enforced. It has been reported that in 2014 the Tanzanian High Court granted an interim order on an *ex parte* basis, staying the enforcement of an International Centre for Settlement of Investment

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

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

18 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.

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

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

Disputes (ICSID) award. The reasons for the Court ordering this stay have not yet been made public, but it may be that investors feel less confident in their abilities to enforce foreign arbitral awards in Tanzania as a result of this decision.<sup>21</sup>

#### **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, many of the countries in the last two regions sharing a common adherence to the 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 competence-competence 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, which 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 Egypt adopt a rather enforcement-friendly approach, including against the state. Some other countries, such as Tunisia or 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 being 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.<sup>22</sup> Arbitration clauses must be stated in writing and

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21 Kamal Shah, Matthew Harley and Rosie de Galleani, 'Tanzanian High Court reportedly issues anti-ICSID injunction', *Practical Law*, 14 May 2014.

22 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.]

provide for the nomination of the arbitrator or for the modalities of their appointment.<sup>23</sup> 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.<sup>24</sup> 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 the OHADA countries. 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.

Unlike what is found in northern African countries, in the UAA, little room is made for the regime of arbitration agreements. Pursuant to Article 23 of the OHADA Treaty, an arbitration agreement has the effect of depriving domestic courts of their jurisdiction if a dispute comprised in the scope of the arbitration agreement is brought before them.<sup>25</sup> Article 13.4 of the UAA is similar.

The CCJA Arbitration Rules provide for a rather classical mechanism for the organisation of the proceedings and bear some similarities to the Arbitration Rules of the ICC. In particular, Article 23.1 of the Rules provides that the award is ultimately submitted to the scrutiny of the CCJA, which may result in modifications being proposed to the arbitral tribunal.<sup>26</sup>

Arbitral awards rendered in accordance with the CCJA Rules have the same binding force within the territory of the OHADA contracting states as judgments of the states'

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23 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.]

24 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.]

25 Article 23 of the OHADA Treaty: 'Any state court seized of a dispute that the parties had agreed to submit to arbitration shall decline jurisdiction upon request of any of the parties, and shall direct the parties as the case may be to the arbitration procedure provided under the present Treaty.' [Translation from French.]

26 Article 23.1 of the CCJA Arbitration Rules: 'Drafts of awards on jurisdiction, partial awards ruling on certain claims of the parties and final awards shall be submitted to the scrutiny of the court before their signature.' [Translation from French.]

domestic courts.<sup>27</sup> 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 challenge regarding validity, which is the equivalent of a request to set aside the award; 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 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.

However, OHADA arbitration may be affected by a recent decision that has raised some concern in the arbitration community. The CCJA recently 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.<sup>28</sup> This was despite the fact that the parties had reportedly agreed to increase the amount of fees of the arbitrators (from an initial €60,000 in total for a €50 million dispute) and that the Secretariat of the CCJA had also reportedly agreed with such procedure in the first place. The decision was criticised by many, including – and this is quite unusual – by the arbitral tribunal itself, notably because this annulment was against the consensual nature of arbitration.<sup>29</sup> The presence of a Guinean judge on the CCJA annulment panel can also be seen as being problematic in the circumstances.<sup>30</sup>

## 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.<sup>31</sup> In terms of political risk, bilateral investment treaties (BITs) can be a cost-effective method of minimising that risk. BITs will typically contain provisions 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.

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27 Article 27 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.]

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

29 Douglas Thomson, ‘Tribunal criticises court over treatment of Guinea award’, *Global Arbitration Review*, 12 January 2016.

30 Id.

31 Of the region’s 46 countries [sub-Saharan Africa], 40 show a serious corruption problem: Transparency International, *Corruption Perceptions Index 2015*. Moreover, it takes an average of two years to enforce a contract, and the cost of doing so is 24 per cent of the underlying value of the investment in North Africa and 45 per cent in sub-Saharan Africa: World Bank, *Doing Business 2015* (June 2015).

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 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.

African states continue to show strong support for ICSID as a forum for resolving disputes. Forty-five have ratified the ICSID Convention,<sup>32</sup> while a further three have signed but not ratified it,<sup>33</sup> 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, 32 African states have been involved in ICSID proceedings. Additionally, a significant proportion of ICSID's caseload is from Africa. According to ICSID, 26 per cent of all state parties in ICSID arbitrations are African states.<sup>34</sup> The start of 2016 has seen a decrease in the number of ICSID cases involving sub-Saharan African states compared with 2015.<sup>35</sup> Of all the African states, Egypt has had the largest number of claims (28) registered against it, with the most recent case being registered in January 2016.<sup>36</sup>

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 the past six years, and in that time it has terminated its existing BITs with Belgium, Germany, Luxembourg, the Netherlands, Spain and Switzerland. South Africa's present 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 South African 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, including for physical security, fair administrative treatment and a national treatment standard.

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32 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 2016).

33 Ethiopia, Guinea-Bissau and Namibia.

34 ICSID Caseload Statistics (Issue 2016-1): sub-Saharan African parties represent 16 per cent and Middle Eastern and North African parties represent 10 per cent.

35 ICSID Caseload Statistics (Issue 2016-1): 15 per cent of the new cases registered were by sub-Saharan African countries (against 19 per cent reported in 2015) and 11 per cent by North African and Middle Eastern countries (against 7 per cent reported in 2015).

36 *Champion Holding Company (US), Mahmoud Ahmed Mohamed Wahba (US), Susanne Patterson Wahba (US), James Tarrick Wahba (US), John Byron Wahba (US), Timothy Robert Wahba (US) v. Egypt* (ICSID Case No ARB/16/2).

Surprisingly, Africa's largest economy, Nigeria, has been less willing than its African neighbours to enter into BITs. Nigeria only has 15 BITs currently in force, none of which are with the world's three largest world economies – the United States, China and Japan. 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.<sup>37</sup> Accordingly, Nigeria currently appears reluctant to enter into further BITs.

In terms of ongoing investor–state arbitrations, the most significant is that concerning Uganda's introduction of retrospective taxation, which must now be considered a key risk of investing in that state. In March 2015, Total E&P Uganda announced that it had filed a request for arbitration before ICSID concerning stamp duty imposed by Uganda on the acquisition of Total's interest in oil blocks. This follows a February 2015 UNCITRAL award in favour of Uganda in its dispute with Canada's Heritage Oil, a claim filed under a production sharing agreement following the government's decision to impose a 30 per cent capital gains tax on the company's sale of two oil blocks to UK company Tullow Oil.

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. 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 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.

## **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 a state's correct application of 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.

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

## Appendix 1

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# ABOUT THE AUTHORS

### **MICHELLE BRADFIELD**

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Michelle is a partner in Dentons' London office and has significant expertise in public international law. Michelle advises and represents private entities, states and international organisations on a diverse array of both contentious and non-contentious matters. The key areas of her practice include investment treaty arbitration (ICSID, UNCITRAL), boundary disputes between states, maritime disputes, sanctions, treaty interpretation, sovereign immunity, international commercial arbitrations (LCIA, ICC, UNCITRAL), recognition and enforcement of foreign judgments and arbitral awards, and advisory work relating to structuring investments to maximise protection under bilateral and multilateral investment treaties.

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Augustin is an associate in Dentons' Paris office. He concentrates on litigation and international arbitration in a wide array of business sectors (construction, gas, mining, joint-venture, foreign investments, etc.) in the context of *ad hoc* proceedings or under the aegis of various institutions (ICC, LCIA, OHADA, ICSID).

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Manal is an associate in Dentons' London office. She specialises in dispute resolution, and her key areas of practice include investment treaty arbitration and international commercial arbitration (ICC, LCIA, UNCITRAL). Manal trained with the firm in London, and gained contentious and transactional experience during her training in banking and finance, dispute resolution, and energy and infrastructure, and also spent three months on secondment in the Middle East. Manal has a background in civil law, and is fluent in French and Arabic.

## **LIONEL NICHOLS**

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Lionel is an associate in Dentons' London office. He is a dual-qualified English barrister and Australian solicitor, specialising in international and domestic dispute resolution. He holds a doctorate in international law, and has particular expertise in public international law and human rights.

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