

FROM FORECAST TO FIVE-CAST: THE ARBITRAL PROMISE OF AFRICA

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ABSTRACT

In 2015, the International Bar Association offered a list of key factors to assist firms and practitioners in projecting growth of arbitral institutions worldwide over the ensuing five to ten years. These factors, while useful to a degree, have proved inadequate in explaining industry growth since the Report's publication. This Comment works to identify the shortcomings of the original model and proposes two additional factors to remedy those shortcomings. Integrating these additional factors into the existing model more accurately explains recent industry growth and indicates a burgeoning strength of African arbitral institutions which, to date, has largely gone unnoticed. In light of these findings, this Comment then offers two recommendations to international arbitration firms to enhance business development and maximize the opportunities and benefits of African arbitral institutions.

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I. INTRODUCTION

In 2015, the International Bar Association Arb 40 Subcommittee prepared a report (“IBA Report”) aimed at aggregating the voices of more than 160 arbitration practitioners from across forty countries.¹ This Report discusses the key factors thought to be critical to the success of arbitral institutions and then uses those factors to develop a forecast of the future of arbitral institutions around the world. While the IBA Report highlights several significant factors, the resultant projections have not been mirrored by the ensuing reality, especially on the African continent. This Comment examines the current state of arbitral institutions in Sub-Saharan Africa and offers two additional factors that firms and practitioners should consider when predicting the direction of the international arbitration industry over the next decade.

Section II examines the IBA Report, its factors, and the Report’s projections for Sub-Saharan African arbitral institutions. Section III proposes two additional factors that, if added, would more accurately mirror outcomes observed since 2015, and improve the model’s functionality as a bellwether to firms and practitioners seeking to allocate firm resources and attention thoughtfully and proactively in this dynamic environment. Section IV examines key examples of arbitral institutions in Sub-Saharan Africa, and Section V discusses how evaluation of trends in light of these two additional factors provides greater insight for projecting growth and stability of different arbitral institutions. Section VI offers two recommendations to firms and practitioners regarding how to approach these projections and integrate these findings into their respective business models. Section VII concludes by recognizing the improved forecast generated by considering these factors and highlights other African States with institutions that may show promise but that are not discussed herein.

¹ INT’L BAR ASS’N ARB 40 SUBCOMM., *THE CURRENT STATE AND FUTURE OF INTERNATIONAL ARBITRATION: REGIONAL PERSPECTIVES* 6 (2015) [hereinafter IBA REPORT].

II. IBA 2015 PROJECTIONS FOR AFRICAN ARBITRAL INSTITUTIONS

According to the IBA Report, the use of arbitration as a means of dispute settlement has been steadily on the rise across regions.² The report discusses growing standardization of the practice and the resultant tendency for disputes to remain in a particular region “as certainty and confidence in the arbitration process within that region grows.”³ In 2015, international arbitrations involving African parties still largely occurred in Europe and, occasionally, North Africa.⁴ The IBA went on to note that while some practitioners expected regional arbitral institutions to increase their presence in the market, others expressed skepticism that these less established institutions would manage to compete against their more trusted and entrenched contemporaries.⁵

a. Key Factors for Forecasting Growth of Arbitral Institutions

The 2015 IBA Report lists several factors practitioners considered “key for growth,” including:

1. *Legislative reform* (government support for arbitration as an alternative to the national court system);
2. *Party autonomy* (procedural flexibility and the ability of parties to choose the features of their arbitration);
3. *Enforcement regime* (guaranteeing parties the ability to enforce awards resulting from the arbitral process);
4. *Time and cost inefficiencies of national courts* (the extent to which these features of a domestic system left parties dissatisfied, but success of the arbitral institution would buoy);
5. *Expertise* (inability of national courts to attend to cross-border or industry-specific disputes);

² *Id.* at 7.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 69.

6. *Neutrality* (to ensure that adjudication of a cross-border dispute is not influenced by culture, language, or bias of one party's national courts); and
7. *Confidentiality* (a particularly salient factor driving parties to prefer arbitration).⁶

b. African Arbitral Institutions: Perceived Issues and Projected Outcomes

Based on these key factors, the IBA report made several observations about the arbitral situation in Africa and offered projections for the future of African arbitral institutions. The report noted that practitioners polled had serious concerns about national court systems and the potential for political unrest, including concerns that many jurisdictions do not readily embrace—or are actively hostile toward—arbitration as an alternative means of dispute resolution.⁷ Additionally, while costs of arbitration in Africa may be lower than other institutions worldwide, the cost of arbitration compared to the already low cost of litigating in national courts in African States had in some cases hampered growth of these arbitral institutions.⁸ Given the perceived sentiment of national courts toward arbitration, some practitioners also expressed worry about reliable enforceability of awards.⁹ Separately, it was reported across regions that practitioners were increasingly reliant on technology to streamline their work case management systems.¹⁰ While some African jurisdictions possess and utilize the latest technology for dispute resolutions, other jurisdictions left some practitioners underwhelmed by the lack of technical sophistication.¹¹

The limited pool of arbitrators available across Africa was also a feature of concern, with practitioners citing the potential for delay,

⁶ *Id.* at 9.

⁷ *See id.* at 33 (“Practitioners and users from jurisdictions that have witnessed political unrest or armed conflict noted the effect of these events on the ability of national courts to function effectively, and such events are a contributing factor to the increased use of arbitration.”).

⁸ *Id.* at 40.

⁹ *Id.* at 36.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 44.

inattentiveness to preliminary issues, or potential bias favoring their appointing party.¹² This dearth of practitioners with specialized training in international arbitration had the perceived dual effect of limiting the pool of arbitrators and hampering procedural efficiency.¹³ In this vein, some practitioners expressed concern about the finality of awards because the guarantee of the awards' quality may be diminished.¹⁴ The report noted that lack of familiarity with the contours of international arbitration could, in certain instances, trade off with or be exacerbated by lack of sectoral or technical expertise of the arbitrators.

At the time, practitioners observed a limited exercise of emergency arbitrator provisions and were either silent on—or were unlikely to allow—third-party funding.¹⁵ Concerns about uneven technological advancement and a perceived lack of commercial sensitivity by national courts led many practitioners to express wariness of Sub-Saharan African arbitral venues.¹⁶ Even still, factors like cost and neutrality made arbitration palatable—to say nothing of the meaningful independence from the political and bureaucratic issues rooted in some African nations' judicial systems.¹⁷

As of 2015, African parties still preferred London, Paris, and Geneva for the settling of disputes—namely the International Chamber of Commerce (“ICC”) or London Court of International Arbitrations (“LCIA”).¹⁸ Mauritius was considered the rising star of African arbitral institutions, followed closely by Johannesburg, Kigali, and Lagos in five to ten years as jurisdictions made progress on addressing the legislative concerns and logistical challenges.¹⁹

Despite concerns and the fact that demand for international arbitration is frequently driven by international corporations, local

¹² *Id.* at 10, 15.

¹³ *Id.* at 15. It is worth noting that Rwanda had been making, and continues to make, a concerted effort to specialize practitioners quickly with the understanding that parties are unlikely to appoint practitioners without accreditation. *Id.* at 22.

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 17. One outlier in 2015 was Rwanda, which the IBA Report notes was attentive to the importance of interim relief and that the Kigali International Arbitration Centre (“KIAC”) included an emergency arbitration provision. *Id.* at 42.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 20.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 11-12.

entrepreneurs had also begun to avail themselves of arbitration.²⁰ The IBA Report divided Sub-Saharan Africa into three regions: “East Africa, West and Central Africa, and Southern Africa.”²¹ In 2015, arbitration was well-established in Southern Africa and in Western and Central Africa (in jurisdictions like Ghana, Nigeria, and South Africa) but was only beginning to take root in jurisdictions of East Africa (in jurisdictions like Kenya, Rwanda, and Tanzania).²² The development of capable practitioners was ongoing and the growth of these institutions would largely depend on the extent to which they can attract international parties and establish confidence in the legal infrastructure of these institutions and jurisdictions.²³

The report noted that several of the practitioner-respondents listed Mauritius as “safe seats” they would feel comfortable utilizing for international arbitration.²⁴ The absence of a discovery process in Nigeria was cited by some practitioners as an advantage.²⁵ Rwanda had seen dividends from recent changes to its legal infrastructure and the “supportive attitude of the courts and the government towards arbitration.”²⁶ South Africa had sought to bolster its status by increasing the number of agreements in place between South African companies and international companies.²⁷ In light of the seven growth factors discussed, the report projected significant growth of arbitration activity in East Africa in the ensuing five years.²⁸

III. TWO ADDITIONAL FACTORS CRITICAL FOR PROJECTING GROWTH

In 2018, White & Case released an international arbitration survey to provide insight into the development of the industry and associated trends.²⁹ The survey asked respondents four key

²⁰ *Id.* at 20.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 21.

²⁴ *Id.* at 12.

²⁵ *Id.* at 20.

²⁶ *Id.* at 40.

²⁷ *Id.*

²⁸ *Id.* at 20.

²⁹ See WHITE & CASE LLP, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 1 (2018) (noting that the survey is drawn

questions about what they, as practitioners, value in international arbitration:

- (1) What are the three most valuable characteristics of international arbitration?
- (2) What are the three worst characteristics of international arbitration?
- (3) What are the four most important reasons for your preference for certain seats?
- (4) What are the four most important reasons for your preference for certain institutions?³⁰

In response to the first question, practitioners listed the three most valuable characteristics as enforceability of awards (cited by sixty-four percent of respondents), avoiding national courts (sixty percent), and flexibility (forty percent).³¹ Other responses included freedom to select arbitrators, confidentiality, neutrality, finality, speed, and cost.³² The three worst characteristics of arbitration ranked by practitioners were cost (sixty-seven percent), lack of effective sanctions during the arbitral process (forty-five percent), and lack of power in relation to third parties (thirty-nine percent).³³ These were followed by lack of speed, lack of insight into arbitrators' efficiency, national court intervention, etc.³⁴ In light of practitioners' responses to these first two questions and their similarity to the IBA's seven factors for projecting growth, it seems the IBA used what parties value about arbitration itself as the tool for projecting how arbitral institutions would fair in five to ten years.³⁵ While the past five years has seen growth and success of African arbitral institutions, efforts like signing onto the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") or developing a domestic framework that mirrors the UNCITRAL Model Law are insufficient indicators for predicting the degree of growth that some institutions might

from an "unprecedented 922 questionnaire responses and 142 in-person or telephone interviews . . . [comprised of] private practitioners, arbitrators, in-house counsel, academics, experts and other stakeholders.").

³⁰ *Id.* at 7-13.

³¹ *Id.* at 7.

³² *Id.*

³³ *Id.* at 8.

³⁴ *Id.*

³⁵ See IBA REPORT, *supra* note 1, at 10.

experience when compared to their contemporaries elsewhere in Africa.³⁶ Put simply, for the purposes of forecasting growth of African arbitral institutions, these seven factors were not the most useful data points to examine – or at least, not by themselves.

While the practitioners' responses to the first two questions are certainly useful when considering the aspects of arbitration practitioners value most and are inclined to pursue, it is the responses to questions three and four that shed the most light on drivers of arbitral institution success. When asked why they prefer certain seats for arbitration, practitioners listed general reputation/recognition (fourteen percent), neutrality and impartiality of the local legal system (thirteen percent), and national arbitration law (twelve percent); they also preferred a positive track record for enforcing agreements, availability of quality arbitrators, efficiency of local proceedings, quality of hearing facilities, location of parties, cost, and language.³⁷ In response to why practitioners prefer certain institutions, they again favored general reputation and recognition of the institution (eighteen percent), high levels of administrative efficiency (fifteen percent), previous experience of the institution (eleven percent), followed by neutrality and internationalism, access to a wide pool of arbitrators, overall cost, ability to administer arbitrations worldwide, and regional presence and knowledge.³⁸

The first two questions certainly captured the tangible components parties expect to see when they opt for arbitration over litigation and that practitioners expect to deliver. However, responses to questions three and four provide guidance on two features that can meaningfully influence outcomes—features that are not captured either in the first two questions or in the IBA's list of key growth factors.

Practitioners indicated that when they are both selecting a seat for the arbitration and an institution for the arbitration, it is recognition and reputation they consider most strongly. This is

³⁶ See HERBERT SMITH FREEHILLS, *DISPUTE RESOLUTION IN AFRICA: A MULTIJURISDICTIONAL REVIEW* 9 (2d ed. 2016) (“[I]n relation to arbitrations seated within the continent and enforcement of foreign awards, the outlook across Africa is varied but certainly not bleak. Less sophisticated courts may continue to grapple with the degree of intervention they should exercise in the process . . .”). Factors that help a seat gain acceptance may be insufficient for warming practitioners to the idea of engaging the institution as an arbitral forum.

³⁷ WHITE & CASE, *supra* note 29, at 11 chart 8.

³⁸ WHITE & CASE, *supra* note 29, at 14 chart 13.

followed closely by previous experience and administrative efficiency, both of which are likely developed by an institution over the same period it is developing its reputation. It may be difficult for a new institution to develop these features and to gain recognition in a world already saturated with high-powered well-established institutions; however, one factor that could help signal both to practitioners now, and analysts working to project arbitral institutional success *ex ante*, would be to examine the relationships between new institutions and those whose reputation has already solidified.

The other factor that would be worthwhile to include is an indirect driver of several of the preferred characteristics listed by practitioners: a nation's economy. By looking at a State's GDP growth, foreign direct investment ("FDI"), and other key markers of a State's efforts to draw investment and commercial economic growth from abroad—and the trends of those factors over time—one can more readily project the need or interest a State might have in adopting a more neutral or international local legal system or set of arbitral standards. If a State is expanding its energy and construction industries and is sensitive to the dispute resolution mechanisms of those contracts, it is reasonable to infer the State may then take steps to diversify its internal dispute mechanisms to settle any disputes locally or within the region.

The seven factors on their own may help project long-term growth outcomes broadly; however, these additional two factors can help practitioners project not only that growth will occur, but can, with greater reliability, project roughly the kind and degree of the growth. If these two additional factors are integrated into the IBA's seven factor analysis, not only are the outcomes observed over the last five years more easily explicable, but the ability of practitioners to forecast growth of arbitral institutions is enhanced.

IV. CURRENT STATUS OF AFRICAN ARBITRAL INSTITUTIONS

The White & Case survey indicated that practitioners worldwide still prefer the same seven cities for arbitral seats that they preferred in 2015: London (sixty-four percent), Paris (fifty-three percent), Singapore (thirty-nine percent), Hong Kong (twenty-eight percent), Geneva (twenty-six percent), New York (twenty-two percent), and

Stockholm (twelve percent).³⁹ This is unsurprising but is likely to change in five to fifteen years.

Before exploring several African countries' government, economy, and arbitral landscape, it is valuable to consider a snapshot of a country with a robust and globally renowned arbitral landscape. France will set this baseline and serve as a control for comparing African arbitral institutions against more established seats.

France has a population of approximately 64.7 million people, a per capita GDP of \$42,877.60, a ten-year annual GDP growth of 1.2%, and a five-year average FDI inward flow representing 1.1% of its GDP.⁴⁰ From an institutional standpoint, its judicial independence is ranked thirty-sixth out of 141 countries and ranks fairly well in public sector metrics, namely in efficiency of settling disputes (twenty-sixth), likelihood of government ensuring political stability (thirty-fourth), and legal framework's adaptability to digital business models (forty-second).⁴¹ On the World Justice Project Index, France is ranked fourteenth in Europe and twentieth globally.⁴² France scores highly for absence of corruption, open government, regulatory enforcement, and civil justice.⁴³

French law is well-established and arbitration-friendly, and reforms made to its arbitration laws in 2011 further entrenched France as a welcoming venue.⁴⁴ Arbitral decisions are widely publicized, which increases parties' perception of France as a transparent and reliable host.⁴⁵ The French Code of Civil Procedure provides only limited grounds on which an award may be set aside, and courts may not review the award on the merits.⁴⁶ Though France is party to the New York Convention, French law is even more favorable; if a foreign award is set aside at its seat, such a determination does not necessarily prevent recognition and enforcement of that award in France.⁴⁷ Paris is considered a "safe

³⁹ WHITE & CASE, *supra* note 29, at 9 chart 6.

⁴⁰ WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 222 (Klaus Schwab ed., 2019).

⁴¹ *Id.* at 223.

⁴² WORLD JUST. PROJECT, RULE OF LAW INDEX 19 (2020).

⁴³ *See id.* at 23-24, 27-28.

⁴⁴ *See* Emily Fox, Peter Archer & Tiphaine Leverrier, *Choice of Arbitral Seat: Is Paris Under Threat?*, INSIDE ARB.: PERSPS. ON CROSS-BORDER DISPS., July 2019, at 13.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

seat” for its pro-arbitration reputation, and the French judiciary is recognized as “neutral, independent, efficient and experienced.”⁴⁸ As a venue that is less expensive than London, Paris is considered a more economic option.⁴⁹ And, in addition to Paris’ renown as a cultural and economic center, the country’s connection to civil law countries and the city serving as home to the ICC Court further bolster its status as a hub of international arbitral activity.⁵⁰ This is illustrated by the strength of the legal market in Paris, the bevy of specialized practitioners, and the services and infrastructure that underpin the functioning of its international arbitration market.⁵¹

a. Sub-Saharan African Regional Economy and Arbitration Overview

In 2019, Africa’s economic growth had stabilized at 3.4% and was projected to increase to 3.9% in 2020 and continue to grow thereafter.⁵² Regionally, East Africa led the continent in 2019 with an average growth of five percent, followed by North Africa (4.1%), West Africa (3.7%), Central Africa (3.2%), and Southern Africa which slowed from 1.2% to 0.7% growth due to devastation from two cyclones.⁵³

Efforts by African States to attract foreign investment includes implementing new protections for investors, namely an increase in bilateral investment treaties (“BITs”); this is well illustrated by African States now having concluded more than 800 BITs, 400 of which are with developed countries.⁵⁴ According to the 2019 World Investment Report by the United Nations Conference on Trade and Development (UNCTAD), Africa experienced an eleven percent increase of FDI between 2017 and 2018 – a period in which the global rate of FDI was in decline.⁵⁵

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² AFR. DEV. BANK GRP., AFRICAN ECONOMIC OUTLOOK: DEVELOPING AFRICA’S WORKFORCE FOR THE FUTURE 1 (2020).

⁵³ *Id.*

⁵⁴ See Jean-Christophe Honlet, Liz Tout, Marie H el ene Ludwig & Lionel Nichols, *Africa Overview*, in THE INTERNATIONAL ARBITRATION REVIEW 9, 17 (James H. Carter ed., 9th ed. 2018) [hereinafter 2018 INT’L ARB. REV.].

⁵⁵ U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT: SPECIAL ECONOMIC ZONES, UNCTAD/WIR/2019, at 3 fig 1.2. (2019).

Analysts also project an increase in FDI due, in part, to regional economic cooperation agreements (e.g., African Continental Free Trade Area (“AfCFTA”) and Common Market for Eastern and Southern Africa (“COMESA”)).⁵⁶ As of 2019, AfCFTA had been signed by fifty-two members and ratified by twenty-two members; and COMESA had twenty-one States committed to the effort—States who collectively represented 520 million people and an export bill of \$112 billion.⁵⁷ This increase in regional cooperation has also fostered more ambitious regional and cross-border trade zones.⁵⁸ Growing demand for commodities, of which Africa is a key producer, is expected to increase FDI flows across Africa; the impact of this expectation is accentuated by projected price increases to accompany heightened demand.⁵⁹

This increase in FDI has been accompanied by several well-established international arbitral institutions observing a significant uptick in the number of disputes involving African parties. The ICC, for instance, saw eighty-seven cases and 153 parties from Sub-Saharan Africa in 2017—a new record for the institution.⁶⁰ The LCIA also observed a slight uptick from eighty-two cases in 2016, which represented 6.4% of its annual caseload.⁶¹ The International Centre for Settlement of Investment Disputes (“ICSID”) saw a jump in the number of African States that were parties, increasing from just four percent of parties in 2017, to nineteen percent of parties in 2018.⁶²

In July 2018, the ICC announced plans to establish an African Commission to “coordinate its activities and continued growth on the continent.”⁶³ The ICC also intended to coordinate its efforts with

⁵⁶ See Thomas Kendra & Megan Smith, *The establishment of three new organisations points to further growth in African arbitration, The A Perspective*, HOGAN LOVELLS (Nov. 23, 2018), <https://www.hoganlovells.com/en/blogs/the-a-perspective/the-establishment-of-three-new-organisations-points-to-further-growth-in-african-arbitration> [<https://perma.cc/222T-RGQZ>]; Jean-Christophe Honlet, Liz Tout, James Langley & Marie Hélène Ludwig, *Africa Overview*, in *THE INTERNATIONAL ARBITRATION REVIEW* 1 (James H. Carter ed., 10th ed. 2019) [hereinafter 2019 INT’L ARB. REV.].

⁵⁷ 2019 INT’L ARB. REV., *supra* note 56.

⁵⁸ See U.N. CONF. ON TRADE & DEV., *supra* note 55, at 154.

⁵⁹ See U.N. CONF. ON TRADE & DEV., *supra* note 55, at 39.

⁶⁰ Kendra, *supra* note 56.

⁶¹ Andrew Mizner, *The future is now for African arbitration*, INT’L COMP. LEGAL GUIDES (May 23, 2019), <https://iclg.com/cdr/arbitration-and-adr/9573-the-future-is-now-for-african-arbitration> [<https://perma.cc/K5WQ-5HDZ>].

⁶² *Id.*

⁶³ Kendra, *supra* note 56.

the ICC Belt and Road Commission, which had been established to address disputes arising from China's global infrastructure project.⁶⁴

In addition to the increased involvement of African parties at well-established arbitral institutions, the increase of FDI in Africa has been accompanied by an increasing trend of African States revising and modernizing their legal frameworks for governing arbitration and, in many cases, establishing local or national arbitration centers.⁶⁵ By the end of 2019, there were nearly eighty arbitral institutions across Africa, which is striking given that Africa comprises only fifty-four countries in all.⁶⁶ Thirty-eight African States are party to the New York Convention.⁶⁷ This included Africa's three largest economies, Nigeria, South Africa, and Egypt, whose GDPs collectively exceed one trillion.⁶⁸ However, some countries have refused to sign onto the New York Convention (e.g., The Gambia, Sierra Leone, Ethiopia, and Namibia), and others have gone so far as to impose limitations on enforcement of awards, as seen when the Democratic Republic of Congo restricted the enforceability of awards in mining disputes.⁶⁹

Forty-eight African States have signed the ICSID Convention, forty-five of which have also ratified it.⁷⁰ In fact, by the end of 2018, 135 of ICSID's 613 registered cases—approximately twenty-two percent of ICSID's caseload—involved an African respondent.⁷¹ Eleven African States have adopted the UNCITRAL Model Law, which aims to provide “a reliable and well-structured domestic arbitration regime.”⁷²

It is worth noting that in addition to the increase in State participation in international arbitration conventions, involvement in disputes, and revision of domestic legislation, recent arbitrations involving African parties have involved some of the largest claims

⁶⁴ Kendra, *supra* note 56.

⁶⁵ See MAYER BROWN, A GLOBAL GUIDE TO INTERNATIONAL ARBITRATION 110 (2018).

⁶⁶ Gregory Travaini, *Arbitration Centres in Africa: Too Many Cooks?*, KLUWER ARB. BLOG (Oct. 1, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/10/01/arbitration-centres-in-africa-too-many-cooks/> [https://perma.cc/QG5X-E2LA].

⁶⁷ 2019 INT'L ARB. REV., *supra* note 56.

⁶⁸ 2019 INT'L ARB. REV., *supra* note 56.

⁶⁹ Mizner, *supra* note 61.

⁷⁰ 2018 INT'L ARB. REV., *supra* note 54, at 17.

⁷¹ 2018 INT'L ARB. REV., *supra* note 54, at 17.

⁷² 2019 INT'L ARB. REV., *supra* note 56.

in the world.⁷³ Among these are the two billion award secured by ExxonMobil and Shell against the Nigerian National Petroleum Corporation, as well as a recent decision ordering Nigeria to pay \$6.6 billion to a company in the British Virgin Islands – the second largest award anywhere in the world.⁷⁴

b. Mauritius

Mauritius has a population of approximately 1.3 million people, a per capita GDP of \$11,280, a ten-year annual GDP growth of 3.3% and a five-year average FDI inward flow representing 2.9% of GDP.⁷⁵ From an institutional standpoint, its judicial independence is ranked twenty-seventh out of 141 countries, and ranks well in public sector metrics, namely in efficiency of settling disputes (thirty-third) and likelihood of government ensuring political stability (twenty-fourth); it ranks less well on its legal framework's adaptability to digital business models (fifty-ninth).⁷⁶ On the World Justice Project Index, Mauritius is ranked third in Sub-Saharan Africa and thirty-eighth globally.⁷⁷ Mauritius scores highly for absence of corruption, open government, regulatory enforcement, and civil justice.⁷⁸

From 2015-2019, Mauritius' real GDP growth was steady at an average of 3.8%, with an economy centered heavily on services (seventy-six percent), followed by industry (twenty-one percent) and agriculture (three percent), and real GDP is expected to increase to approximately four percent.⁷⁹ Mauritius' primary industries are sugar, tourism, textiles and apparel, and financial services; it is working to expand into information and communications technology, hospitality, and property development, as well.⁸⁰ Mauritius is working to increase efficiency and productivity to

⁷³ 2019 INT'L ARB. REV., *supra* note 56.

⁷⁴ 2019 INT'L ARB. REV., *supra* note 56.

⁷⁵ GLOBAL COMPETITIVENESS REPORT, *supra* note 40, at 382.

⁷⁶ GLOBAL COMPETITIVENESS REPORT, *supra* note 40, at 383.

⁷⁷ WORLD JUST. PROJECT, *supra* note 42, at 105.

⁷⁸ *See* WORLD JUST. PROJECT, *supra* note 42, at 105.

⁷⁹ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 168.

⁸⁰ CENT. INTEL. AGENCY, *Mauritius*, THE CIA WORLD FACTBOOK (last updated Dec. 14, 2021), <https://www.cia.gov/the-world-factbook/countries/mauritius/> [<https://perma.cc/QQ7D-9Z2E>].

foster a “business-friendly” environment.⁸¹ The recent passage of the “Business Facilitation Act” was aimed to boost FDI inflows and situate Mauritius as a gateway between Asia and Africa.⁸² Public sector developments may be hampered by lack of significant regulatory reforms, especially with respect to strategic infrastructure subsectors like water, transport, and energy.⁸³

Mauritius is a party both to the New York Convention (1996) and the ICSID Convention (1969).⁸⁴ Its local arbitration law is the International Arbitration Act of 2008, and it is based on the UNCITRAL Model Law.⁸⁵ Mauritius has forty-five BITs (eighteen not yet in force as of 2018) and is a member of COMESA and the Southern African Development Community.⁸⁶ It has been involved in one ICSID case which is currently pending, and Mauritius is not participating in China’s Belt and Road Initiative.⁸⁷

Mauritius is the only African country classified by the DELOS Guide to Arbitration Places as a “safe seat.”⁸⁸ It received positive reviews across all categories: legal framework; adherence to international treaties; limited court intervention; arbitrator immunity from civil liability; its judiciary; legal expertise; rights of representation; accessibility and safety; and ethics.⁸⁹

Mauritius has a combination of common law and civil law legal systems, and many of the commonly expected features of international arbitration can be found in Mauritius’ domestic legal framework: observance of confidentiality clauses, freedom to choose counsel and arbitrators, requirement of impartiality, limited grounds for setting aside of the award, recognition of the kompetenz-kompetenz principle, the doctrine of separability, and the availability of interest or reasonable costs to be claimed and

⁸¹ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 168.

⁸² AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 168.

⁸³ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 168.

⁸⁴ MAYER BROWN, *supra* note 65, at 142.

⁸⁵ MAYER BROWN, *supra* note 65, at 142.

⁸⁶ MAYER BROWN, *supra* note 65, at 142.

⁸⁷ MAYER BROWN, *supra* note 65, at 142.

⁸⁸ David D. Caron & Maxi Scherer, *Overview: A Study of Safe Seats*, in DELOS GUIDE TO ARB. PLACES 1, 3 (Thomas Granier & Hafez R. Virjee eds., 2018) [hereinafter *Overview*]. It is also useful to note that Rwanda was not evaluated in the DELOS Guide.

⁸⁹ See David D. Caron & Maxi Scherer, *GAP Traffic Lights for All Jurisdictions*, in DELOS GUIDE TO ARB. PLACES 1, 2 (2018) [hereinafter *GAP Traffic Lights*].

awarded.⁹⁰ The Mauritian government also actively supports arbitration as an alternative to litigation, made clear by Mauritius' establishment of a specially constituted three-judge panel of its Supreme Court judges tasked specifically with hearing international arbitration matters.⁹¹ To be sure, this special branch has indicated an arbitration-friendly disposition, as evinced by its recent refusals to revisit the merits of a dispute, rejection of arguments based on public policy, and its dismissal of arguments that domestic arbitration legislation was unconstitutional.⁹²

In 2011, the Mauritian government and the LCIA collectively established the LCIA-Mauritius International Arbitration Centre ("LCIA-MIAC").⁹³ This collective venture was driven in large part by Mauritius's geographic position between Africa and Asia and the aim to establish the LCIA-MIAC as a dispute settlement hub and arbitral seat.⁹⁴ There are not many disputes known to have been administered at the LCIA-MIAC between 2011 and 2018, but this institution was a welcome regionalization of arbitration, and the institution gained local and international traction through references to the institution and its rules in arbitration clauses.⁹⁵ In July 2018, MIAC terminated its joint venture with the LCIA, and in November 2019, the rebranded MIAC relaunched.⁹⁶ Today, the MIAC receives financial support from the Mauritian government with a guarantee of non-interference, and MIAC continues to leverage connections with international arbitral institutions; the new manifestation of that connection is found in MIAC's secretariat,

⁹⁰ Jamsheed Peeroo, *Mauritius*, DELOS GUIDE TO ARB. PLACES 1-3 (Thomas Granier & Hafez R. Virjee eds., 2018); see also Anne-Sophie Jullienne, *Arbitration Procedures and Practice in Mauritius: Overview*, THOMSON REUTERS PRAC. L. (Jan. 1, 2019) (providing an overview of the key practical issues concerning arbitration in Mauritius).

⁹¹ See Peeroo, *supra* note 90, at 2.

⁹² See 2019 INT'L ARB. REV., *supra* note 56.

⁹³ Fidelis Oditah, *Geography of International Arbitration – Where Does the Power Lie?*, in THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 287, 291 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016).

⁹⁴ *Id.* at 292; see also Fox, *supra* note 44, at 14 ("In Mauritius, the government's support for the Mauritius International Arbitration Centre (MIAC) is part of a policy of developing the island as a dispute settlement hub and arbitral seat.").

⁹⁵ See Bilshan Nursimulu & Ben Hornan, *The Choice of a Mauritian Arbitral Institution*, KLUWER ARB. BLOG (December 23, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/12/23/the-choice-of-a-mauritian-arbitral-institution/> [https://perma.cc/SCM3-BUGU].

⁹⁶ *Id.*

which is led by co-registrars who are also Legal Counsel at the Permanent Court of Arbitration ("PCA").⁹⁷

Mauritius is also host to the Mauritius Chamber of Commerce and Industry's ("MCCI") Arbitration and Mediation Center ("MARC").⁹⁸ The MARC is designed to assist businesses on the local, regional, and international scale, and its arbitration rules mirror the UNCITRAL Model Law.⁹⁹ This forum sets a maximum time limit of six months for the settlement of any dispute and has entered into cooperation agreements with arbitral institutions throughout the world, including in the United States, Germany, and France.¹⁰⁰

c. Rwanda

Rwanda has a population of approximately 12 million people, a per capita GDP of \$791.30, a ten-year annual GDP growth of 6.3%, and a five-year average FDI inward flow representing 4.5% of its GDP.¹⁰¹ From an institutional standpoint, its judicial independence is ranked thirty-seventh out of 141 countries, and ranks well in public sector metrics, namely in efficiency of settling disputes (twentieth), likelihood of government ensuring political stability (twelfth), and legal framework's adaptability to digital business models (eighteenth).¹⁰² On the World Justice Project Index, Rwanda is ranked second in Sub-Saharan Africa and 37th globally.¹⁰³ Rwanda scores highly for absence of corruption, open government, order and security, and civil justice.¹⁰⁴

In 2019, Rwanda's real GDP was estimated at 8.7% growth, notable in services (7.6%), industry (18.1%), and construction (thirty

⁹⁷ *Id.*

⁹⁸ *About MARC, MAURITIUS MEDIATION AND ARB. CTR.*, <https://www.marc.mu/en/about-us/about-marc> [https://perma.cc/VN3L-GH3U].

⁹⁹ *Id.*; MCCI ARB. & MEDIATION CTR., *ARBITRATION AND MEDIATION GUIDE 5* (2014).

¹⁰⁰ *INT'L BUS. PUBL'NS, MAURITIUS: INTERNET, E-COMMERCE INVESTMENT AND BUSINESS GUIDE 202* (2018).

¹⁰¹ *GLOBAL COMPETITIVENESS REPORT*, *supra* note 40, at 486.

¹⁰² *GLOBAL COMPETITIVENESS REPORT*, *supra* note 40, at 486. at 487.

¹⁰³ *WORLD JUST. PROJECT*, *supra* note 42, at 130.

¹⁰⁴ *WORLD JUST. PROJECT*, *supra* note 42, at 130.

percent).¹⁰⁵ Private investment is currently low at thirteen percent of GDP and FDI averaged three percent in 2019, 0.3% below the regional average.¹⁰⁶ Rwanda was ranked second in Africa by the 2020 World Bank Doing Business Report and is projected to be able to stimulate additional growth in investment over time.¹⁰⁷ Rwanda boasts “one of the strongest economies, lowest corruption levels, and most stable governments” in East Africa.¹⁰⁸ In recent years, it has made a concerted effort to create an advantageous business environment, and some suggest that Rwanda can act as a hub for the region—akin to Switzerland or Singapore.¹⁰⁹

Rwanda is a party both to the New York Convention (2009) and the ICSID Convention (1979).¹¹⁰ Its local arbitration law is Law No. 5 of 2008 relating to Arbitration and Conciliation in Commercial Matters, and it is based on the UNCITRAL Model Law, as amended in 2006.¹¹¹ Rwanda has eight BITs (four not yet in force as of 2018), is a member of COMESA, the East African Community, and the Economic Community of Central African States.¹¹² It has been involved in one ICSID case which is now concluded, and Rwanda is participating in China’s Belt and Road Initiative.¹¹³ As a State, Rwanda is very pro-arbitration and Rwandan courts have supported arbitration both during proceedings and in the enforcement of awards.¹¹⁴

In 2012, the Rwandan government, in partnership with the Private Sector Federation, launched the Kigali International Arbitration Centre (“KIAC”) with the goal of creating a forum for

¹⁰⁵ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 174.

¹⁰⁶ AFRICAN ECONOMIC OUTLOOK, *supra* note 52,

¹⁰⁷ AFRICAN ECONOMIC OUTLOOK, *supra* note 52,

¹⁰⁸ Jeremy Cantor, *Rwanda and the Kigali International Arbitration Centre: The Future Faces of East African Arbitration and Growth*, 19 CARDOZO J. CONFLICT RESOL. 93, 94 (2017).

¹⁰⁹ Ben Rigby, *Arbitration showcased in Rwandan ADR renaissance*, *African Law & Business*, INT’L COMPAR. LEGAL GUIDES (July 9, 2017), <https://iclg.com/alb/7574-arbitration-showcased-in-rwandan-adr-renaissance> [<https://perma.cc/8JS7-5JLQ>].

¹¹⁰ MAYER BROWN, *supra* note 65, at 147.

¹¹¹ MAYER BROWN, *supra* note 65, at 147.

¹¹² MAYER BROWN, *supra* note 65, at 147.

¹¹³ MAYER BROWN, *supra* note 65, at 147.

¹¹⁴ Cantor, *supra* note 108, at 112. Bear in mind that DELOS, which prepared a “Guide to Arbitration Places,” did not evaluate Rwanda or KIAC. DELOS labels countries as either safe seats or not safe seats, so non-classification by DELOS leaves open the question of how it might assess KIAC. See *Overview*, *supra* note 88.

arbitration both in Rwanda and in the East African Community.¹¹⁵ The costs of arbitration at KIAC are significantly lower than in traditional centers, such as those in London, Paris, or Singapore.¹¹⁶ KIAC also includes an emergency arbitrator option, similar to that at the ICC, to grant quick interim relief when called for.¹¹⁷ Furthermore, the law that established KIAC includes provisions that explicitly grant it autonomy.¹¹⁸ This was made especially evident when by 2017, after KIAC had registered more than fifty cases, the majority of arbitral awards had been issued against the State.¹¹⁹

In addition to allowing arbitrations to be administered under its rules or UNCITRAL rules, KIAC assists with ad hoc arbitration and gives legal advice for the drafting of international contract clauses.¹²⁰ Parties can decide which language governs the proceedings, allows for the ordering of translations, and embraces the doctrine of separability.¹²¹ KIAC also allows parties to agree to add a mediation clause to their contracts so they might start in mediation and move into arbitration if the dispute remains unresolved after thirty days.¹²²

KIAC has also helped establish an infrastructure and knowledge to ensure that arbitrations can be locally run.¹²³ It has invested significant resources in training programs for arbitrators to address shortages in Rwanda and to foster a culture amenable to arbitration.¹²⁴ In its first five years of operation, KIAC registered more than fifty cases, involving parties of ten different nationalities with a total in dispute over \$100 million.¹²⁵ In 2019, KIAC entered into a Cooperation Agreement with ICSID to encourage “knowledge

¹¹⁵ Launch of the Kigali International Arbitration Centre: Hogan Lovells assists with the establishment of a new centre to aid efficient dispute resolution in Rwanda and throughout East Africa, HOGAN LOVELLS (Sept. 2012) [hereinafter Press Release], https://www.hoganlovells.com/-/media/hoganlovells/pdf/publication/africaseptember2012newsletterkiacarticle_pdf.pdf [https://perma.cc/6XBN-KFZ2]; Cantor, *supra* note 108, at 97-98.

¹¹⁶ Press Release, *supra* note 115.

¹¹⁷ Press Release, *supra* note 115.

¹¹⁸ Cantor, *supra* note 108, at 112 n.136.

¹¹⁹ Cantor, *supra* note 108, at 112, 120.

¹²⁰ Cantor, *supra* note 108, at 98-99.

¹²¹ Cantor, *supra* note 108, at 110, 118.

¹²² Cantor, *supra* note 108, at 123-24.

¹²³ Rigby, *supra* note 109.

¹²⁴ Rigby, *supra* note 109.

¹²⁵ *Kigali Arbitration Centre handles cases worth \$100m*, NEW TIMES (Mar. 11, 2017), <https://www.newtimes.co.rw/section/read/208774> [https://perma.cc/HSD7-8GWP].

sharing between ICSID and KIAC” and to provide “for the possibility of holding ICSID hearings at KIAC facilities”¹²⁶

Also by 2019, KIAC had registered over 100 cases.¹²⁷ This is impressive for several reasons, not least of which is its deviation from the trend of newly established centers taking three to five years to register the first case.¹²⁸ KIAC’s cases have included parties from the United States, France, China, Singapore, Switzerland, Nigeria, South Africa, Kenya, and Korea, among others.¹²⁹ Furthermore, a high percentage of KIAC’s awards were enforced within three to six months, and none had been set aside in Rwandan courts.¹³⁰ Rwanda is increasing capacity through training and certifying hundreds of professionals; it also hosts the African Arbitration Association which is committed to promoting and supporting African arbitrators and institutions and publicizing that work on a more international scale.¹³¹

d. Nigeria

Nigeria has a population of approximately 194 million, a per capita GDP of \$2,049.10, a ten-year annual GDP growth of 3.5%, and a five-year average FDI inward flow representing 0.8% of its GDP.¹³² From an institutional standpoint, its judicial independence is ranked ninety-ninth out of 141 countries, and ranks poorly in public sector metrics, namely in efficiency of settling disputes (103rd), likelihood of government ensuring policy stability (113th), and legal framework’s adaptability to digital business models (127th).¹³³ On the World Justice Project Index, Nigeria is ranked twenty-second in

¹²⁶ ICSID Concludes Cooperation Agreement with KIAC, News Releases, ICSID (Apr. 4, 2019), <https://icsid.worldbank.org/news-and-events/news-releases/icsid-concludes-cooperation-agreement-kiac> [https://perma.cc/8HBE-DGFJ].

¹²⁷ Collins Mwai, *Kigali Arbitration Centre registers over 100 cases*, NEW TIMES (Jan. 25, 2019), <https://www.newtimes.co.rw/business/kigali-arbitration-centre-registers-over-100-cases> [https://perma.cc/V3WG-CM4P].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *id.*; Mission, AFR. ARB. ASS’N, <https://afaa.ngo/page-18068> [https://perma.cc/38TB-HEE6].

¹³² GLOBAL COMPETITIVENESS REPORT, *supra* note 40, at 430.

¹³³ GLOBAL COMPETITIVENESS REPORT, *supra* note 40, at 431.

Sub-Saharan Africa and 108th globally.¹³⁴ Nigeria scores poorly for absence of corruption, open government, and order and security, but ranks better than average on civil justice.¹³⁵

In 2019, Nigeria's real GDP was estimated at 2.3% growth, mainly in transport, an improved oil sector, and information and communications technology.¹³⁶ Manufacturing in Nigeria suffers from a lack of financing, and high debt service payments were estimated at more than half of Nigeria's federally collected revenues.¹³⁷ Growth projections for 2020 and 2021 are approximately three percent per year and are largely dependent on the government's ability to diversify Nigeria's economy.¹³⁸ This insecurity is likely to dampen foreign investment, which would critically impact Nigeria's domestic economy and economic growth.¹³⁹ Nigeria's reliance on oil can be heavily impacted by developments in the Middle East and trade tensions between the United States and China.¹⁴⁰ Nigeria's oil and gas, maritime, telecommunications, and offshore construction industries are experiencing higher levels of international arbitration activity than other sectors, mainly due to higher inflow of FDI and foreign business activity in those industries.¹⁴¹

Nigeria is a party both to the New York Convention (1970) and the ICSID Convention (1966), but has entered a reservation for its participation in the New York Convention which stipulates that Nigeria will only recognize and enforce awards made in the territory of another contracting State and will only apply the New York Convention to disputes arising out of legal relationships that are considered commercial under the national law.¹⁴² Nigeria's local arbitration law is the Arbitration and Conciliation Act of 2004 (based on the UNCITRAL Model Law) and the Lagos State Arbitration Law No. 10.¹⁴³ Nigeria has twenty-seven BITs (twelve were not yet in

¹³⁴ WORLD JUST. PROJECT, *supra* note 42, at 7, 19.

¹³⁵ WORLD JUST. PROJECT, *supra* note 42, at 23-24, 26, 28.

¹³⁶ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 173.

¹³⁷ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 173.

¹³⁸ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 173.

¹³⁹ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 173.

¹⁴⁰ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 173.

¹⁴¹ Uche Nwokedi San, Asimiyu Ayodeji, Justina Ibebunjo & Pascal Anayo Ememonu, *Nigeria Law and Practice*, in CHAMBERS GLOBAL PRACTICE GUIDE: INTERNATIONAL ARBITRATION 4, 4 (2d ed. 2019).

¹⁴² MAYER BROWN, *supra* note 65, at 146.

¹⁴³ MAYER BROWN, *supra* note 65, at 146.

force as of 2018) and is a member of the Economic Community of West African States.¹⁴⁴ Nigeria has been involved in three ICSID cases, two of which are concluded and one that remains pending.¹⁴⁵ The country is not participating in China's Belt and Road Initiative.¹⁴⁶

Nigeria was assessed for inclusion in the DELOS Guide to Arbitration Places but was not classified as a "safe seat."¹⁴⁷ While Nigeria did receive positive reviews across several categories including legal framework, adherence to international treaties, limited court intervention, arbitrator immunity from civil liability, legal expertise, and accessibility and safety, the DELOS report warned practitioners to exercise caution with respect to Nigeria's judiciary, rights of representation, and ethics.¹⁴⁸

Nigeria is a common law jurisdiction, and many of the commonly expected features of international arbitration can be found in Nigeria's domestic legal framework: observance of confidentiality clauses, freedom to choose counsel and arbitrators, requirement of impartiality, limited grounds for setting aside of the award, recognition of kompetenz-kompetenz, the doctrine of separability, and the availability of interest or reasonable costs to be claimed and awarded.¹⁴⁹ It is worth noting, however, that in Nigeria, "the annulment of a foreign award at its seat constitutes a ground for refusal of recognition or enforcement of that award"¹⁵⁰ For arbitration-related matters arising in the courts, the Arbitration and Conciliation Act designates the High Court of a given state and the Federal High Court as the forums entitled to hear the claim.¹⁵¹

Nigeria has six arbitral institutions within its borders, each vying for its share of the arbitral market.¹⁵² The most prominent of these

¹⁴⁴ MAYER BROWN, *supra* note 65, at 146.

¹⁴⁵ MAYER BROWN, *supra* note 65, at 146.

¹⁴⁶ MAYER BROWN, *supra* note 65, at 146.

¹⁴⁷ See *Overview*, *supra* note 88, at 3; Isaiah Bozimo, *Nigeria*, DELOS GUIDE TO ARB. PLACES 1 (Thomas Granier & Hafez R. Virjee eds., 2018).

¹⁴⁸ *GAP Traffic Lights*, *supra* note 89, at 2.

¹⁴⁹ See Bozimo, *supra* note 147, at 1-2; see generally Uche, *supra* note 141 (discussing the landscape and contours of international arbitration in Nigeria).

¹⁵⁰ Bozimo, *supra* note 147, at 2.

¹⁵¹ Bozimo, *supra* note 147, at 2.

¹⁵² Peter Okakpu, *Arbitration Institutions in Nigeria*, LINKEDIN (Apr. 20, 2021), <https://www.linkedin.com/pulse/arbitration-institutions-nigeria-peter-okakpu-aciarb/> [https://perma.cc/CTD8-337U].

institutions are the Regional Centre for International Commercial Arbitration—Lagos (“RCICAL”) and the Lagos Court of Arbitration.¹⁵³ The RCICAL was established in 1989 under the auspices of the Asian African Legal Consultative Organization and uses the UNCITRAL Rules for arbitration.¹⁵⁴ RCICAL is an autonomous international organization—unaffiliated with any national government—and has a cooperation agreement with ICSID under which ICSID arbitration proceedings can occur at the seat of RCICAL.¹⁵⁵ The Lagos Court of Arbitration was established in 2009 and officially launched in 2012.¹⁵⁶ Its primary industries of specialty include oil and gas, finance, maritime, construction, engineering, and telecommunications, among others.¹⁵⁷

V. ANALYSIS

a. Connection Between a New Arbitral Institution and Well-Established Institutions

Mauritius offered an example of a newly established arbitral institution that largely satisfied the IBA’s seven factors and enjoyed a robust and well-advertised partnership with one of the world’s most prominent international arbitral institutions, the LCIA. Rwanda also represented a newly established institution that largely satisfied the IBA’s seven factors but did not enjoy a partnership with any prominent or well-known international arbitral institution. Nigeria offers an example of a State that does not readily satisfy the

¹⁵³ See *id.*; see also MAYER BROWN, *supra* note 65, at 146 (noting the Lagos Court of Arbitration and Lagos Multidoor Courthouse as the two main local arbitration institutions in Nigeria); Andrew Mizner, *Special Feature – Arbitration, African Law & Business*, INT’L COMP. LEGAL GUIDES, <https://iclg.com/alb/special-report/special-features/arbitration/9705-equipping-africa-for-arbitration> [https://perma.cc/V8UQ-XWRY] (stating that Nigeria is Africa’s biggest arbitration hub and is home to the Lagos Court of Arbitration).

¹⁵⁴ Okakpu, *supra* note 152.

¹⁵⁵ *Cooperation Agreements*, REG’L CTR. FOR INT’L COM. ARB.—LAGOS, <https://rcical.org/index.php/cooperationagreements/> [https://perma.cc/7XJU-HH86]; *Corporate Profile*, REG’L CTR. FOR INT’L COM. ARB.—LAGOS, <https://rcical.org/index.php/corporate-profile/> [https://perma.cc/CA55-Q3KD].

¹⁵⁶ *About the LCA*, LAGOS CT. OF ARB., <https://www.lca.org.ng/about/> [https://perma.cc/HZ67-KB6B].

¹⁵⁷ *Id.*

IBA's seven factors and hosts both a recently established arbitral institution with no broader connection to historically prominent arbitral institutions and a slightly older institution that enjoys a cooperation agreement with ICSID for the holding of proceedings.

In comparing the experience between Mauritius and Rwanda, the relevance of new institutions' connection to reputable institutions falls into more stark relief. Both Rwanda and Mauritius enjoyed an arbitration-friendly national government. Both countries also enjoyed benefits of geography—Mauritius for its position between Asia and Africa, and Rwanda for its position in the center of a region poised for incredible economic growth. Mauritius' LCIA-MIAC, which gained almost immediate acceptance on the international stage, was integrated quite quickly into commercial contracts and was not only included in DELOS 2020 Guide to Arbitral Places but was also the only African country to be labeled a "safe seat" by reviewers. Rwanda's KIAC, on the other hand, has not experienced such significant international acceptance.

While it has enjoyed significant support from some prominent international arbitration firms, KIAC has not received the attention or recognition that LCIA-MIAC has. Not only was KIAC not labeled a "safe seat" by DELOS 2020 Guide to Arbitral Places, KIAC was not even evaluated. This oversight is especially surprising given that in 2019, KIAC registered its 100th case—an impressive feat by any measure, but especially for an international arbitral institution less than ten years old. This oversight is made even more conspicuous when one recalls that in first eight years of the LCIA-MIAC, not many disputes known to have been administered by the institution despite its general acceptance by the international community.

When recalling practitioners' predilection for selecting arbitral seats and institutions based on recognition and reputation,¹⁵⁸ one might think that Rwanda and Mauritius have fared comparably. However, it is important to keep in perspective Rwanda's proximity to its neighbors and its extensive program to train arbitrators both in Rwanda and across the region. Mauritius has not established such robust programs and has no contiguous national borders, yet it has garnered international acceptance. The importance of the optical impact of relationships with established institutions in projecting growth and acceptance is further illustrated by MIAC's establishment of a dual-Registrar with the PCA following the termination of its relationship with the LCIA.

¹⁵⁸ See WHITE & CASE, *supra* note 29, at 11 chart 8, 14 chart 13.

b. Economic Forecasting

According to the 2018 survey by White & Case, arbitrators expect to see growth across several industries but listed four industries that show particular promise: the energy sector (eighty-five percent of respondents believe international arbitration will increase), construction (eighty-five percent), technology (eighty-one percent), and banking and finance (fifty-six percent).¹⁵⁹

When looking to the above review of the economic industrial strengths, all three seem poised for continued growth; however, Rwanda and Nigeria seem particularly well-positioned. While Mauritius is working to bolster its technology and banking and finance industries – both of which are expected by practitioners to result in an increased need for international arbitration services¹⁶⁰ – the growth of those industries is not as widely expected as the growth in other key industries. Nigeria's oil-centric economy will continue to require international arbitration, and even with some structural concerns, the size of awards involving Nigerian parties is likely to entice some practitioners. This is especially true if parties to disputes involving Nigeria continue to prefer more established, Europe-based institutions.

From an economic standpoint, Mauritius is unlikely to be significantly impacted in either direction. As its financial services or telecommunications industries develop, it is increasingly likely that MIAC and MARC will experience an uptick in registrations. Additionally, given Mauritius's geographic convenience between Asia and Africa, as China's involvement in Africa continues to increase, Mauritius's international arbitral institutions will likely experience modest growth.

Given analysts' projection that Rwanda is poised for a thirty percent expansion of its construction sector and its ranking by the World Bank for ease of doing business,¹⁶¹ the likelihood of significant and protracted growth in international arbitration in Rwanda is very high. Rwanda's position in the region, involvement in regional economic cooperation frameworks, and participation in China's Belt and Road Initiative also suggest marked growth for Rwanda and KIAC.

¹⁵⁹ WHITE & CASE, *supra* note 29, at 29.

¹⁶⁰ WHITE & CASE, *supra* note 29, at 29.

¹⁶¹ AFRICAN ECONOMIC OUTLOOK, *supra* note 52, at 174.

While the international arbitral institutions of Nigeria may not experience *extensive* growth—as suggested by Nigeria’s performance on the IBA’s seven factors¹⁶²—its economy does suggest that growth in the quantity, and perhaps size, of awards is likely, both for Nigeria’s local arbitral institutions, as well as for the institutions outside Nigeria that Nigerian parties tend to engage.

VI. RECOMMENDATIONS FOR GLOBAL FIRMS

a. Broaden Institutional Representation

In 2019, the Global Arbitration Review released its annual ranking of the world’s leading international arbitration practices. This list and several other rankings were aggregated by Aceris Law in January 2020, to produce a compendium of the top international arbitration firms across the globe.¹⁶³ Of the firms that specify “major international institutions” or “key institutional rules,” all but three failed to mention an African arbitral institution.¹⁶⁴ Firms who do list institutions almost invariably mention ICSID, ICC, LCIA, HKIAC, SIAC, AAA/ICDR, SCC, PCA, and UNCITRAL, but list no institutions in Africa.¹⁶⁵

If top firms do not yet have clients doing business in Africa, they will; and when they are working with their client to negotiate arbitration clauses or their client finds themselves in a dispute with an African party, a firm’s familiarity and comfort with the variety of African arbitral tribunals will be exceedingly useful.

In light of the above, adding KIAC (Rwanda), MIAC (Mauritius), OHADA,¹⁶⁶ and perhaps others, to the firm’s list of major arbitral institutions, could be useful in spurring business from both current and potential clients. Assuming these titanic firms already have

¹⁶² See IBA REPORT, *supra* note 1, at 9.

¹⁶³ See *Best International Arbitration Law Firms and Practice Groups Worldwide: 2019/2020 Rankings*, ACERIS L. (Jan 1, 2020) (comparing rankings of Legal 500, Chambers and Partners, GAR and Leaders League in 2019).

¹⁶⁴ See *id.* (reviewing the rankings of the firms, among others, Allen & Overy, Ashurst, Cleary Gottlieb, Clifford Chance, Debevoise, Freshfields, Herbert Smith, Hogan Lovells, K&L Gates, King & Spalding, Quinn Emanuel, Shearman & Sterling, Skadden, Three Crowns, WilmerHale, and White & Case).

¹⁶⁵ See *id.*

¹⁶⁶ OHADA is not highlighted in this Comment but referenced in the Conclusion as a forum worthy of attention.

familiarity with these fora, it may be prudent to feature a discussion of African arbitral institutions in its publications or to include African “safe seats” in its list of major institutions. From the perspective of business development, this would send an important signal to potential clients with business in Africa that the client’s foray into the relatively uncharted realm of African investment or commerce is not compounded by attorneys unfamiliar with the region.

Hogan Lovells’ extensive work with KIAC in Rwanda offers a potential model for firms interested in bolstering their presence on the continent.¹⁶⁷ Hogan Lovells’ written publications and press releases about their work with KIAC and with practitioner training programs in Rwanda and surrounding States shows that this model can be implemented and can offer dividends for those with an interest in expanding into this area.¹⁶⁸ The forecasted economic growth of these regions likely holds promise for the potential growth of African arbitral institutions, and firms that establish and set themselves apart *now* may attract business that would otherwise be lost to competition over the long term.

b. Bolster Efforts to Select African Arbitrators

In its 2018 survey, White & Case asked practitioners how they located their arbitrators and what factors were important to them.¹⁶⁹ Regarding factors that practitioners value in arbitrators, the highest number of respondents listed a background of prestigious awards and decisions (forty percent), a consideration of how the arbitrator approaches substantive issues (thirty-seven percent), and degree of

¹⁶⁷ See Kendra, *supra* note 56 (discussing a nonprofit organization, founded in part by a Hogan Lovells partner, that “aims to promote arbitration through the involvement of actors both inside and outside of Africa,” and that provides training and organizes events to encourage the networking and sharing of knowledge); Mizner, *supra* note 153 (noting that fifty percent of the arbitrators handling a partner’s African-related caseload were African or of African origin).

¹⁶⁸ See, e.g., Kendra, *supra* note 56; *Hogan Lovells Supports Launch of First Arbitration Centre in Rwanda*, Press Releases, HOGAN LOVELLS (May 31, 2012), <https://www.hoganlovells.com/en/news/hogan-lovellis-supports-launch-of-first-arbitration-centre-in-rwanda> [https://perma.cc/Z4A4-HJ43]; Andrew Skipper, *Africa – is it fit for the future?*, *The A Perspective*, HOGAN LOVELLS (Aug. 10, 2018), <https://www.hoganlovells.com/en/blogs/the-a-perspective/africa-is-it-fit-for-the-future> [https://perma.cc/A8ZT-233M]; HOGAN LOVELLS, *OUR INTERNATIONAL DISPUTES EXPERIENCE IN AFRICA* (2014).

¹⁶⁹ See WHITE & CASE, *supra* note 29, at 7-13.

availability of the arbitrator (twenty-eight percent).¹⁷⁰ When asked about how firms find their arbitrators, respondents said through word-of-mouth (seventy-seven percent), internal colleagues (sixty-eight percent), publicly available information (sixty-three percent), an arbitrator's online profile (fifty-five percent), external counsel (forty-eight percent), or from arbitral institutions (forty percent).¹⁷¹

The problem of under-representation by African arbitrators is well-documented both among African practitioners and practitioners globally. A 2018 survey of African arbitration practitioners indicated that even though eighty-two percent had undergone formal training in international arbitration law and practice – including twenty-three percent who studied arbitration as part of a higher degree at university – less than eighteen percent had sat as an arbitrator in at least *one* international dispute between 2012 and 2017.¹⁷²

The causes of the under-representation of African arbitrators are twofold: (1) the catch-twenty-two of developing experience and (2) the difficulty of connecting potential African arbitrators with firms seeking arbitrators. The first cause is raised when African lawyers and arbitrators find themselves without enough experience to compete for appointment but also not having enough appointments to gain the requisite experience.¹⁷³ This makes the international circuit of arbitrators a fairly exclusive group, and poses a challenge for new arbitrators to enter the international circuit.¹⁷⁴

With respect to the second cause of under-representation, it is illuminating that while an alignment of approach to locating and selecting arbitrators does seem to exist, thirty percent of respondents to White & Case's 2018 survey indicated that they do not have access to enough information to make an informed decision when

¹⁷⁰ WHITE & CASE, *supra* note 29, at 22 chart 22.

¹⁷¹ WHITE & CASE, *supra* note 29, at 21 chart 19.

¹⁷² EMILIA ONYEMA, ISALAH BOZIMO, PRINCE N.C. OLOKOTOR & CHRISTINE DJUMPAH, SOAS ARBITRATION IN AFRICA SURVEY – DOMESTIC AND INTERNATIONAL ARBITRATION: PERSPECTIVES FROM AFRICAN ARBITRATION PRACTITIONERS 8 (2018) (noting that the group of 191 active arbitration practitioners surveyed are qualified to practice in nineteen African countries and several others are dual-qualified and also practice in non-African jurisdictions); *see also* Jack Ballantyne, *African Promise aims to promote diversity on tribunals*, GLOB. ARB. REV. (Oct. 8, 2019), <https://globalarbitrationreview.com/diversity/african-promise-aims-promote-diversity-tribunals> [<https://perma.cc/L655-WVGV>].

¹⁷³ Mizner, *supra* note 153.

¹⁷⁴ Cantor, *supra* note 108, at 117.

appointing arbitrators.¹⁷⁵ This issue may be lessening, however, both as technological connectivity increases and firms and nonprofit organizations make a more concerted effort to connect the two groups. The 2018 survey of African practitioners, for example, noted that 74.3% of practitioners have their profiles or CVs available on their firm's website or other media platforms (e.g., LinkedIn or Facebook).¹⁷⁶

Additionally, several organizations have been established to reduce this gap and achieve greater representation of African arbitrators, especially given the increase in disputes involving African parties. In March 2016, Africa International Legal Awareness, a nonprofit body training lawyers in investment treaty law and international arbitration, launched an online directory of African practitioners trained in these areas.¹⁷⁷ In 2018, the African Arbitration Association ("AfAA") was launched to promote and support African arbitrators and institutions and to help publicize that work on a more international scale.¹⁷⁸ The ICC has established an Africa Commission with the remit to coordinate its "expanding range of activities and growth on the continent and expand the pool of African arbitrators."¹⁷⁹ And in 2019, the "African Promise" initiative was launched; it is aimed at encouraging signatories to "commit[] to improving the profile and representation of African arbitrators, especially in arbitrations connected to Africa."¹⁸⁰ The African Promise initiative boasts 175 current signatories including arbitration communities across African nations, as well as France, Qatar, Switzerland, the United Kingdom, and the United States.¹⁸¹

Firms and practitioners in the United States and across the globe should join in these efforts to increase representation of African arbitrators. Taking more active initiative on increasing the involvement of African arbitrators would not only provide for a more diverse and representative industry, but developing knowledge and cultural understanding of African parties could improve the outcomes and effectiveness of negotiations, mediations, and arbitrations.

¹⁷⁵ WHITE & CASE, *supra* note 29, at 21 chart 20.

¹⁷⁶ ONYEMA, *supra* note 172, at 9. This means that 25.7% of African practitioners do not have their profile of CVs appearing online.

¹⁷⁷ 2018 INT'L ARB. REV., *supra* note 54, at 19.

¹⁷⁸ Mizner, *supra* note 153.

¹⁷⁹ 2019 INT'L ARB. REV., *supra* note 56.

¹⁸⁰ ARBITRATION IN AFRICA, THE AFRICAN PROMISE (2018).

¹⁸¹ Ballantyne, *supra* note 172.

VII. CONCLUSION

When applying the seven factors for growth outlined by the IBA in 2015, Nigeria produces a mixed set of outcomes that suggest underwhelming growth of its domestic arbitral institutions. When applying the seven factors to Mauritius and Rwanda (added to France, the well-established control), these three States appear evenly matched. Independent assessments of their respective judicial systems and a review of each State's friendliness toward arbitration suggests that all three countries are on track to grow. Additionally, the apparent parity across these three States as to the robustness of each feature suggests that the extent of growth across the three States will be roughly equal; however, that is not borne out by either intuition or outcomes.

When the additional factors of institutional connection and economic forecasting are combined with the IBA's growth factors, the results suggest that Nigeria's mixed set of outcomes is likely to produce moderate growth of Nigeria's domestic arbitral institutions given the nature of its industries, but also suggests that parties will continue pursuing dispute settlement in more established seats and institutions outside of Nigeria. When these additional factors are applied to Rwanda, Mauritius, and France, the projection suggests that while yes, all three countries are likely to enjoy continued growth of their respective arbitral institutions, Rwanda will likely experience the most extensive growth of the three and that Mauritius' growth will likely prove less precipitous.

With several other countries and regional organizations boasting their own international arbitral institutions, this analysis can also be expanded and applied to a broader landscape—both within Africa and beyond. Even within Sub-Saharan Africa, several countries beyond the scope of this Comment are beginning to offer greater opportunities for international arbitration, namely Kenya, South Africa, The Gambia, and Ghana, among others.¹⁸² On the regional organizational front, the Organization for the Harmonization of Business Law in Africa (“OHADA”) has also

¹⁸² See generally *GAP Traffic Lights*, *supra* note 89, at 1-2 (offering an analysis of the international arbitration landscape of Ghana, The Gambia, and Zambia, in addition to Mauritius and Nigeria discussed *supra*).

shown promise in fostering opportunity for increased international arbitration.¹⁸³

This Comment shows that by including analysis of States' economic growth projections in key industries and FDI, as well as an examination of newer arbitral institutions' relationships with well-established institutions, firms and practitioners can more reliably project the future growth of international arbitral institutions and can be better equipped to marshal their attention and resources accordingly.

¹⁸³ See Michael W. Bühler & Anne-Sophie Gidoin, *OHADA, DELOS GUIDE TO ARB. PLACES 1-3* (Thomas Granier & Hafez R. Virjee eds., 2018).