



# GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

## Introduction to international trade in legal services and its applicability in SADC

**Jonathan Goldsmith**  
**Johannesburg, 9 October 2023**





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## The aim of this conference

- The international speakers come from the International Bar Association, and mostly from its Bar Issues Commission's International Trade in Legal Services Committee
- This is one of a series of conferences where we aim to assist local lawyers in ensuring that they receive a fair share of the work in international transactions
- This conference has a specific focus on the BRICS background and the forthcoming BRICS Legal Forum



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# What is trade in legal services?

- Multilateral rules - World Trade Organization (WTO)
- WTO agreements, designed to liberalise international trade
- For the first time, trade in services was covered, in the General Agreement on Trade in Services (GATS) in 1995
- 164 Members in total
- Members in the SADC region: all SADC members except Comoros (which is engaged in acceding to the WTO)



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## Multilateral rules - World Trade Organization (WTO)

- Four modes of providing legal services (service, client, lawyer or law firm crosses the border)
- Governments have agreed commitments on trade in legal services
- Long-term trajectory towards greater competition balanced against need to regulate profession for legitimate purposes
- Move now to regional and bilateral trade agreements, often with this structure



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# Guide to International Trade Agreements

- IBA has produced a guide to International Trade Agreements for IBA Member Bars (<https://www.ibanet.org/document?id=IBA-Guide-to-International-Trade-Agreements-for-IBA-Member-Bars-revised2023>)
- This explains EVERYTHING



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## Regional trade agreements

- WTO is having difficulty in making progress on the next round of multilateral liberalisation
- Main reaction has been for individual WTO members to shift their focus to regional and bilateral trade agreements
- Regional liberalisation permitted
- Examples in Africa: African Continental Free Trade Area (AfCFTA), East African Community (EAC) - and of course SADC
- Mutual recognition agreements (MRAs)



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## Questions for bars and lawyers

- How can an IBA Member Bar influence the negotiating proposals by its country's trade representatives?
- Do you understand what your national trade policy/trade development plan consists of?
- Do you understand what legal services-related promises your country has already made?
- Do you understand how the outcome of trade agreements are incorporated into domestic law?



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**Thanks!**

**Any questions?**



# GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

## INTRODUCTION TO INTERNATIONAL TRADE IN LEGAL SERVICES AND ITS APPLICABILITY IN SADC

**Adv Ghandi Badela**  
**Johannesburg, 9 October 2023**





## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### CURRENT STATUS QUO OF TRADE IN LEGAL SERVICES IN THE SADC REGION

- In South Africa the admission and enrolment of legal practitioners is regulated by
  - the Section 24 (the admission and enrolment of legal Practitioners) and
  - Section 25 of the LPA (the rights of appearance of legal practitioners)
- Each of the SADC member state has similar regulatory environment for admission and enrolment for practicing legal practitioners
- A legal framework sets a tone for trade in legal services nationally and internationally
- Regulatory framework is the first point of call for trade in legal services



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### BARRIERS TO INTERNATIONAL TRADE IN LEGAL SERVICES WITHIN THE SADC REGION

- Regulatory Environment is the main barrier for trade in legal services across the SADC region.
- Purpose of the barriers in general:
  - Protection of local legal practitioners against further competition;
  - Prevention of legal practitioners to practice in one member state from another member who are “*unfamiliar*” with local legal framework;
  - Protection of legal service consumers against “*incompetent*” legal practitioner
  - Ensure that certain legal work is given to local legal practitioners, etc.
- Basis for barriers is historical fear to lose out, fear for change failure to spot opportunities of liberalization of trade in legal services



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## UNHARMONISED SADC LEGAL SYSTEMS

- Each member state has established its own body of laws (legal systems (common law or civil law))
- The system of precedent applies to some countries (e.g. precedent from Namibia, Botswana, Zimbabwe is used in South Africa)
- There is a need to develop SADC Law in order to harmonize legal framework
- SADC law is yet to be entrenched in the curricula of law faculties, legal literature
- SADC Law can be used to develop the SADC regulatory framework for legal practitioners



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### SADC MEMBER STATES' LEGAL SYSTEMS

- Angola - Civil law (Portuguese language)
- Botswana - hybrid civil legal system – Civil law and Common law
- Democratic Republic of the Congo - Civil law (French language)
- Eswatini – Customary law, Roman Dutch law and common law
- Lesotho – Common Law
- Madagascar – Civil law (French language)
- Malawi – Civil law
- Mauritius - Civil law



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### SADC MEMBER STATES' LEGAL SYSTEMS

- Mozambique - Civil law (Portuguese language)
- Democratic Republic of the Congo - Civil law
- Eswatini – Customary law, Roman Dutch law and common law
- Lesotho – Common Law
- Madagascar – Civil law
- Malawi – Civil law
- Namibia - hybrid civil legal system – Civil law and Common law
- Seychelles - mixed legal system based on customary laws, English law, and French civil law



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### SADC MEMBER STATES' LEGAL SYSTEMS

- Republic of South Africa - English common-law, Roman-Dutch law, and customary laws
- Tanzania- Common law
- Zambia – Common law
- Zimbabwe – Common law
  - Common law is dominant in the region
  - English is the main language but opportunities also lie in learning French, Portuguese and Swahili



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### SADC LAW AND ABUJA TREATY

- SADC law institutionalizes four mechanisms:
  - (1) policymaking;
  - (2) oversight;
  - (3) policy implementation; and
  - (4) dispute settlement.
- Abuja Treaty - deals with
  - Free movement of persons
  - Mutual recognition of academic, professional and technical qualifications
  - Access to African market



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### AFRICA CONTINENTAL FREE TRADE AREA(AfCTA) AGREEMENT FRAMEWORK FOR TRADE IN SERVICES

- Trade, especial cross border trade, cannot effectively take place without rules of engagement, enforcement and rule based dispute resolution mechanisms
- AfCTA seeks to harmonize trade in goods and services including legal services in the Continent
- Regional bodies, like SADC, have began negotiations on liberalization and harmonization of trade among member states
- Legal regulatory environment has been left behind - Regulatory bodies are yet to meet and chart the way forward



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Negative impact arising from lack of harmonized legal framework in SADC

- Legal practitioners are unable to follow their clients
- Legal practitioners from one member state require permits to carry out legal work and to appear in another member state
- Legal practitioners in one member state do most of the works locally and instructs a legal practitioner in another member state to appear in court
- In the mean =time international law firms are able to set up branches in SADC and practice without hinderance at the expense of legal practitioners in SADC who are restricted to their state



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Need for harmonized legal framework in SADC

- AfCTA agreement provides a basis for promoting trade liberalization among SADC member states
- Regulators of legal practitioners across SADC have to embark on the creation of a single regulatory framework for legal practitioners in SADC
- Interstate trade and free movement of people with SADC will result in a variety of disputes which ought to be resolved through a rule based dispute resolution mechanism
- Mutual recognition of academic and professional training is imperative for effective dispute resolution
- Development of SADC law will enable member states to align national law with SADC law
- There is also a need to develop SADC Law (jurisprudence).



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- Thank you

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# GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

## Arbitration of international commercial disputes : how to keep international arbitration local

**NGOGA GAKUBA Thierry, ( ArbP)**  
**Johannesburg, 9 October 2023**





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# Introduction

(1) In this presentation we will be discussing (1) whether it is appropriate to impose restrictions on the choice of counsel( legal representation) in international arbitration and the implication of doing so for positioning as a “ Safe Arbitration Seat” .

(2) Using available statistical data in Africa regarding international arbitration and discuss what Lawyers and policy makers have done or should be doing to get **the “CAKE SHARED PROPERLY”** as a way to face **Globalization.**



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## International Arbitration & Legal Representation

- ❑ Limitations on the parties' choice of legal representatives would contradict the basic concept of arbitration as a flexible and self-tailored dispute resolution system.
- ❑ freedom of legal representation is recognized in most national arbitration laws, and by most institutional arbitration rules in Africa and elsewhere. The arbitration rules of many centers provide for such a freedom: **:" Any party may be represented by legal practitioners or any other representatives...**(art 26 of AFSA Int'l Rules 2021( South Africa), Art. 4 CADER rules( Uganda), 21 of NIAC rules( Kenya), Art 24 KIAC Rules( Rwanda etc..).



## International Arbitration & Legal Representation(Cont...)

- Article 26(1) of 2021 AFSA International rules( South Africa) states that :** *“Any party may be represented in the arbitration by one or more authorized representatives appearing by name before the Arbitral Tribunal (the “Party Representatives”).*
- Article 21 Paragraph 3 of the Brazilian Arbitration Act states that** *“The parties may be represented by legal counsel, and **the right to appoint someone to represent them in the arbitration proceeding will always be respected.**”*

## International Arbitration & Legal Representation(Cont...)

- ❑ Despite what have been said: laws in a few jurisdictions appear to require that counsel in locally-seated to be locally-qualified to represent in arbitration.
- ✓ **In India.** There, the law appears to allow foreign lawyers to appear in arbitration but this is have been challenged to the Supreme Court in Bar Council of India v. A.K. Balaji - SLP (Civil) No. 17150-54/2012. The position of the SC of March 18, 2018 appear to be that foreign lawyers not allowed to appear in arbitration. (<http://www.advocatekhoj.com/library/judgments/announcement.php?WID=9848>)
- ✓ **In Nigeria(Africa):** Nigeria Legal Practitioners Act define a legal Practitioner as only lawyer registered to practice law in Nigeria (**Is this mean that a foreign Lawyer not registered to practice Law in Nigeria can not?**).



## International Arbitration & Legal Representation(Precision)

- **Philippine(Asia):** Article 13 of the Philippine Dispute Resolution Center *rules of 2015* : “*the parties may be represented by persons of their choice, irrespective of, in particular, **nationality or professional qualification**” .*
- **Mauritius(Africa):** In the Mauritius Arbitration Act (section 31) " Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the arbitral proceedings by a law practitioner or other person chosen by him, **who need not to be qualified to practice law in Mauritius or in any other jurisdiction.**“
- **Tested Best Practice without Precision:** case of Rwanda with 40% KIAC International arbitration cases out 225 total cases( Parties have been represented by foreign counsels but preferred to work with local counsels since **the Seat of arbitration and applicable law to the contract were mainly Rwandan Law in the 225 cases**)

### USEFUL CONSIDERATION

- ✓ Allowing anybody is important for defining a “safe arbitration seat”
- ✓ Focus much on your Seat in contract (Applicable law) for ended share the “CAKE”
- ✓ Example of Case of two Africans parties with Swiss law Applicable: **Is this lead to share the cake? The answer in No.**



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## Second Objective of the Presentation

(2) Using available statistical data in regard to Africa and its under representation in international arbitration and discuss what Lawyers and policy makers have done or should be doing to get the **“CAKE SHARED PROPERLY”** as a way to face Globalization



## GLOBALISING YOUR PRACTICE OPPORTUNITIES AND CHALLENGES

Is Africa Present from the statistics?

Which Impact on Legitimacy of Arbitration outcome?

Do we need to continue protect our legal profession? Or other strategies are needed to share the CAKE Equitably?

### **Warning:**

- ❑ The past ICCA president Jan Paulsson in **1987**: "*when the entire centre of gravity of an investment contract from its negotiation to its performance is in an African country and has resulted in the creation of an enterprise whose physical plant, corporate records and personnel are located in that country, the concept of arbitration in Europe or North America may be not only artificial but truly burdensome*".
- ❑ **In 2016( 30 years Latter)**: 95% of arbitration involving an African party is taking place out of the continent with counsels and Arbitrators other than Africans(Justice Yusuf, ICCA 2016 Key note Speech in Mauritius)

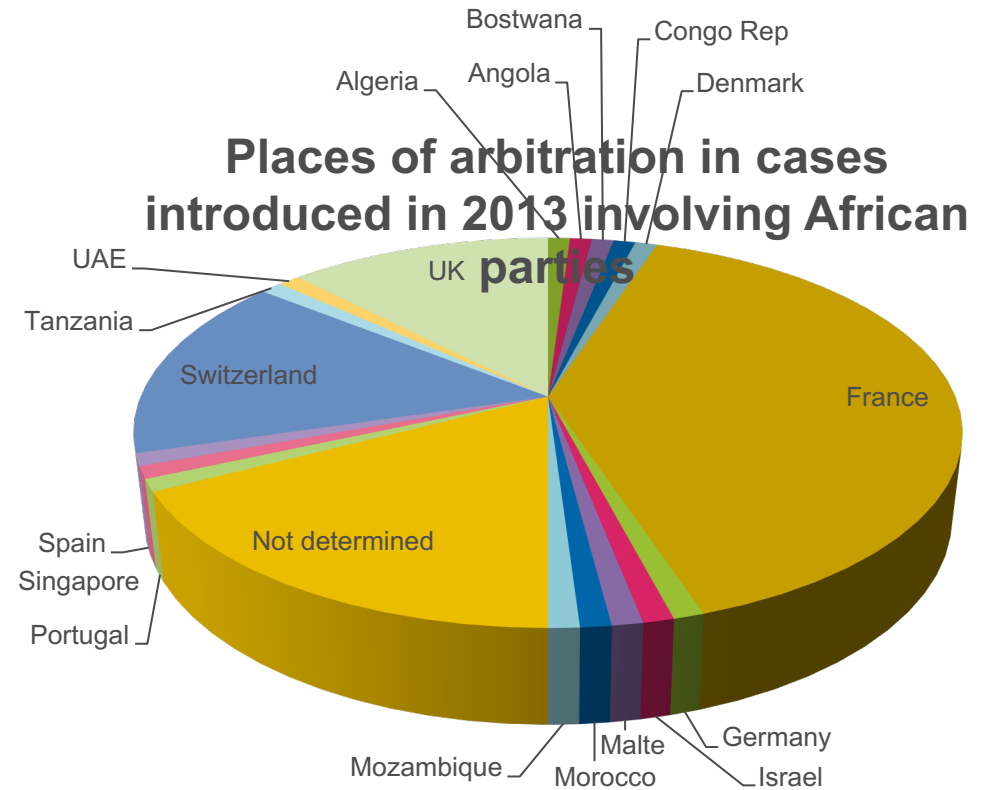
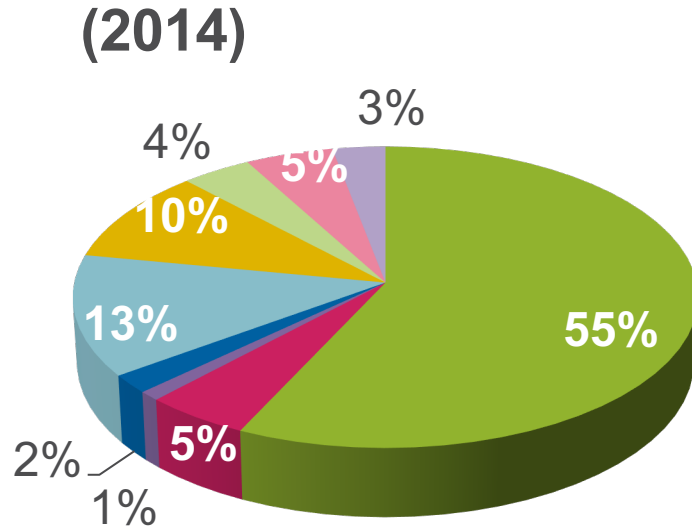


# GLOBALISING YOUR PRACTICE OPPORTUNITIES AND CHALLENGES

## Mapping Africa in Int'l Arbitration(ICC Statistics)

### ICC: Origin of Arbitrators

- North & West Europe
- Central & East Europe
- North Africa
- Sub-Saharan Africa
- North America
- Latin America & Caribbean
- Central & West Asia





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# Choice of Law in ICC arbitration 2017

In 87% of the disputes referred to ICC Arbitration in 2017, parties included a choice-of-law clause in their contracts. The laws of **England** and **USA** States remained the most frequent choices, followed by **French and Swiss law**.

**Consideration:** The choice of law (Lex Arbitri) determine the appointment and the counsel to involve( Dispute resolution clause)



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# Mapping Africa in Int'l arbitration; Are we present?

## Dealing with the influence of negative perception

### **Perception of:**

- lack of expertise;
- lack of information on skilled African arbitration practitioners; and
- lack of trust in the capability of African arbitration practitioners.

*SOAS Arbitration in Africa Survey(2018)*



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# Recent Experience of Rwanda( Safe Seat)

## NATIONALITIES APPOINTED BY KIAC CENTRE IN 10 YEARS

**In the last 10 years of Kigali International Arbitration Centre(KIAC)existence: KIAC 's administered Over 200 Cases (2012-2022) : 40% are International Cases** with parties from Burundi, China, Ethiopia, Egypt, France, India, Italy, Kenya, Korea, Nigeria, Pakistan, South Africa, South Korea, Singapore, Rwanda, Spain, Switzerland, Tanzania, Turkey, Uganda, USA, Zambia and Greece.

**AFRICA NATIONALITIES: 64.5 %**(Rwanda, Nigeria, Kenya, Ghana, Zambia, Egypt)

**THE REST OF THE WORLD : 35,5%**( Pakistan, Malaysia, Singapore, USA, France, Belgium,UK and Canada)



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## Recent Experience of Rwanda( as Safe seat)

- Enforcement of award vary between 3 to 6 months( Survey 2015).
- Only one award over 120 KIAC awards** have been set aside by the Rwandan court.
- The New civil code procedure of April 2018 and the provision on court intervention
- **Art: 21: Grounds for refusal of registration of a claim by the court Registrar( when a claim is filed without demonstrating that he/she has used amicable settlement or arbitration provided in the contract)/**



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# Current Debate: Support of existing Centres Vs Creation of Arbitration centres in Current Economic Integration's Development

## Ideas in pipeline

- African Court for International Arbitration (targeting disputes from AFCTA)
- Establishment of an arbitration centre for BRICS

## WHAT IS NEEDED TO WATCH

- The failure of the EAC treaty( Article 32 on Arbitration )and related ARBITRATION RULES OF THE EAST AFRICAN COURT OF JUSTICE( One case since 24 years)
- GETMA Case in OHADA and the perception of CCJA court composition

[\(https://hsfnotes.com/arbitration/2016/06/16/getma-v-guinea-the-saga-continued/\)](https://hsfnotes.com/arbitration/2016/06/16/getma-v-guinea-the-saga-continued/)



## GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

# What lawyers and their jurisdictions can do to appear on the map of Int'l arbitration( share the cake).

- Supportive Courts, Clear Enforcement Regime, visa policy, safety etc..).**
- Testing Arbitral Institutions (some of 90 Arbitral Institutions in Africa have been successfully tested)
- Start with Contract Negotiation & drafting ( Seat-Applicable Law, Avoid Pathological Clauses). For purpose of sharing the cake when Dispute arises.**
- Learn more than one International languages ( for young people)
- Ended: Be aware that: Arbitration is not only a legal concept or a form of justice but an industry which includes many attractive factors such as **tourism, Hotels facilities, zero tolerance to corruption, Entry facilities(visa), safety, internet facility, transport( airline) etc....**
- Example: **PRADA Report in France (2011).**
- Eg 2: Monitor the Contribution of arbitration to the economic growth( Case of Singapore, Paris etc..)
- Eg3: Rwanda 2012 Ministerial Instruction on Contract drafting , negotiation of Dispute resolution clause(Rwanda) with model arbitration clause compulsory to Government contracts.



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# Conclusion

- The Economic expansion at the continent where according to IMF report confirmed that four of the six fastest growing economies in the world will be in Sub-Saharan Africa; this need to think and rethink the Arbitration dispute resolution mechanisms especially for **future equitable share of the Cake in this globalized world.**
- Finally, the lesson from some developing countries which tested their arbitrators and arbitral centers is encouraging in how to keep international arbitration local. Additionally, what we also learned is that change is possible, it is happening, and the mission of the legal practitioners gathered here is **CONTRIBUTE FOR THE CHANGE TO HAPPEN MORE QUICKLY THAN IN THE PAST.**



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## Conclusion (Cont...)

### The Analogy of African captain & Assistant during

Turbulences



- Turbulences are directing to land out of Africa such as Paris, London or Zurich etc.. since during turbulence it is allowed to land any where ( you pay the landing cost).
- Despite the Turbulences, without fear; the captain and his Assistant pushed and landed safely in Johannesburg, Kigali; Lusaka or Cairo.

Those captains who can make it are:

**Lawyers** and the policy makers(**Attorney General/Ministry of Justice**) right from the beginning of the Contract negotiation and drafting to make sure that when dispute arises the **CAKE WILL BE SHARED EQUALLY.**



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**THANK YOU**



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# RAISING CAPITAL IN INTERNATIONAL MARKETS: THE ROLE OF THE LOCAL LEGAL ADVISOR

Juan Javier Negri  
Johannesburg, 9 October 2023





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# Welcome to the legal issues of the corporate finance world!

What we will be talking about?

How lawyers assist in bringing foreign capital  
to our domestic companies.

Companies need to raise funds to maintain operations, grow their  
product lines, or open new locations



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

A few critical terms:

“**capital markets**”: markets where securities are bought and sold, usually overseen by some state authority.

“**securities**”: negotiable instruments that can be easily traded on the capital markets, such as stocks and bonds (and their derivatives, such as futures contracts, options, or mutual funds).



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**“Bonds”**: securities allowing holders to become creditors of the issuer (whether a company or a government), taking no ownership but enjoying the right to have their money paid back with interest.

**Bonds can be issued by corporations  
or governments**

**“Stocks”** or shares: securities representing a partial ownership interest in a company.

**Governments do not issue shares.**

A bond of the Dutch East India Company, dated 7th of November, 1622, for the amount of 2400 guilders, with an annual interest of 6¼ percent.

**W**Y onderschreven Reecken-meesters vande Camere der Oost-Indische Compagnie binnen Middelburgh, Bekennen midts desen gheaccordeert te hebben, ende by den Ontfangers der voorschreven Compagnie ontfanghen te wesen, vanden Eerfamen *Jacop van der Burgh* de Somme van *Vierhondert Quert* Welcke voorschreven somme van *Vierhondert Quert* metten Interesse van dien jegens *de Compagnie* ten hond. Int Jaer gherekent, wy aen voorn. *Jacop van der Burgh* ofte den Thoonder deses, doorditto Ontfangers wederomme belooven te betalen over *sechsen* Maenden naer date deses. Sonder argh ofte liit. Actum in Middelburgh den *7. Novembri* 1622. *Jacop van der Burgh*

*2400* — *Jacop van der Burgh*  
*Commissaris*



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### **MORE ABOUT BONDS:**

Some typical bonds include:

- **Straight fixed-rate bonds:** interest rate stays uniform until maturity.
- **Floating rate notes:** interest coupons are indexed to a reference rate (like three-month or six-month US dollar prime rate)
  - **Bullet bonds:** principal and interest paid at maturity.
- **Zero-coupon bonds:** bonds bear no interest (sold at discount)



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

- **Convertible bonds** allow the holder to exchange them for a pre-determined number of shares of the issuer.
- **Bonds with equity warrants** are straight fixed rate bond with a call option, entitling the holder to purchase shares at a pre-stated price over a predetermined time period.
- **Stripped bonds** are zero-coupon bonds resulting from stripping coupons from a coupon bond, resulting in a series of zero coupon bonds.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

- **Dual currency bonds** are straight fixed rate bonds issued in one currency and paying interest in such currency, but at maturity principal is repaid in a second currency.
    - **Composite currency bonds** are straight fixed rate bonds denominated in a currency basket (SDRs, for example).
- Bonds may be also classified according to the **applicable interest rate** (London Interbank Offered Rate –now extinct--, Secured Overnight Offered Rate, etc.)



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**“Eurobonds”**: bonds denominated in a currency other than the home currency of the country or market in which they are issued. Frequently grouped together by the currency in which they are denominated:  
Eurodollar bonds, Euro yen bonds, etc.

**“foreign bonds”**: bonds issued by a foreign borrower in the capital market of country X and denominated in country X’s currency.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

Eurobonds are highly flexible because issuers may choose the country of issuance based on the regulatory environment, interest rates and depth of such country's market.

Typically, they are issued in bearer form.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

Dollar-denominated eurobonds make up over 80% of the international bond market:

The US dollar is the most “popular” bond currency;

Eurobonds are brought to market more quickly than bonds issued in the United States

(because not offered to US investors and require no registration)



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**“Sovereign bonds”** are bonds issued by a government or a governmental entity enjoying sovereign immunity (that is, they cannot be sued unless such immunity is waived)

The existence and scope of sovereign immunity is not determined by the laws of the sovereign but by those of the country where bonds are issued.

Sovereign debt is backed by a government that can tax its citizens or print money to cover the payments, these are considered the least risky type of bonds, in general.

***“Don’t cry for me, Argentina...”***



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**A crucial difference: Shareholders are *owners*,  
while bondholders are *creditors*.**

*Thus, shareholders are entitled to take part  
of the decision making process  
of the respective issuer*



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**Primary markets:** where newly issued stocks or bonds are sold to investors, often through a process called “underwriting.” This is a favorite means for governments and corporations to raise capital. These securities are often purchased by pension funds, hedge funds, sovereign wealth funds, and a few wealthy individuals and investment banks that trade on their own behalf.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**Secondary markets:** where existing securities are re-sold and bought among investors or traders, either on an exchange market (usually regulated) or over-the-counter (unregulated).

The existence of secondary markets encourages investments in primary markets because investors may quickly liquidate their investments in the secondary markets and cash in should the need arise.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**Why US securities regulations are relevant?  
Because the US market is the largest securities market**



### **What is the United States Securities Act of 1933?**

“An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes”.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

The 1933 Securities Act or “Truth in Securities Act” was issued after the 1929 stock market crash and during the Great Depression.

It mandates that any offer or sale of securities using the means and instrumentalities of interstate commerce **be registered with the SEC**, unless an exemption exists.

Since “means and instrumentalities of interstate commerce” is extremely broad, it is virtually impossible to avoid registration by attempting to offer or sell a security without using an “instrumentality” of interstate commerce.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

The Truth in Securities Act attempts to ensure that investors receive accurate and sufficient information before they purchase any security. The Act adopts a “full disclosure philosophy”: it is possible to sell a bad security as long as all factual information is accurately disclosed.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

Any issuer required to register under the 1933 Act must submit a registration statement, including a prospectus providing information about itself, its business, the particular security and its audited financial statements. The company, the underwriter and all individuals (*including lawyers*) who prepared the registration statement are liable for any inaccuracy. This extremely high level of liability exposure requires an enormous “due diligence” effort to ensure that all documents are complete and accurate.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

Not all securities offerings must be registered.

Some exemptions include:

- private offerings to a specific type or limited number of persons or institutions;
  - offerings of limited size;
- exemptions under SEC's Rule 144, permitting the public resale of restricted and controlled securities without registration.

Restrictions apply to the minimum length of time for which such securities must be held, the maximum volume permitted to be sold and the issuer's consent to future resales.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### **Rule 144A.**

Rule 144A has become the principal safe harbor on which non-U.S. companies rely when accessing the U.S. capital markets because it avoids registration requirements of the Securities Act.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Regulation S

- Another safe harbor which allows offerings of securities deemed to be executed outside of the United States not be subject to the registration requirement.
- Regulation S provides two safe harbors: an issuer safe harbor and a resale safe harbor.
- In both cases, Regulation S requires that offers and sales be made outside the United States and that no offering participant (which includes the issuer, the banks involved and their respective affiliates) engage in "directed selling efforts".
- If there is substantial U.S. market interest for the securities, Regulation S requires that no offers and sales be made to U.S. persons (including U.S. persons physically located outside the United States).



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**Having said all this...**

GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

**...What would be the role of the issuer's domestic legal advisor?**

In the event an African issuer wishes to tap international capital markets, there will be many tasks to be performed for the issuer's domestic counsel.



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## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### In general terms:

- Assisting in the selection between shares or bonds;
- Helping determine whether a foreign issue requires domestic registration
- Preparing the prospectus on all domestic legal matters (law and practice).
- Reviewing agreements between issuer and (i) investment bank; (ii) underwriters; (iii) paying agents; (iii) service of process agents, etc.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Most important:

Providing the intervening banks with a sound, unqualified, clean legal opinion regarding the legality of the transaction and its compliance with all domestic legal requirements.



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Matters typically covered by a domestic legal opinion:

- May the issuer validly select a foreign law to govern the issuance?
- Does the issuer enjoy sovereign immunity in its own country?
- May it be validly waived?
- May the issuer validly submit to foreign jurisdiction?
- Will a foreign judgment be enforced in the issuer's own country?
- Under what requirements?
- Are there exchange controls that (a) may force the issuer to bring into the country the proceeds of the issuance or (b) prevent or complicate repayment?



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### More questions to the issuer 's domestic lawyer:

- If the issuer is a state-owned entity, does it enjoy any particular benefits?
- Are there any public policy principles involved?
- What happens if issuer provides a public service?
- What would be the bondholders' position in case of bankruptcy?
- What is the tax status of payments made by the issuer?
- Do withholdings apply?

Similar matters will have to be covered by  
domestic counsel to the banks involved



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

### Philip R Wood, QC, once wrote

The law is the one universal secular religion which everybody believes in, although they may differ, and usually do, about the scope and content of the codes of this religion. Unlike many other religions, belief in the law, the role of law and the rule of law, does not require a belief in the supernatural.

This religion does not require a showing of commitment to the codes in the form of rituals or attendance at churches or temples or in the form of other outward marks of identity.

This religion is not regional or local but is universal.

Because much law appears to be driven by emotion, and because its enforcement is sometimes pugnacious and bellicose, **it is one of the primary tasks of lawyers to instil rationality, common-sense and a measured coolness, as well as tolerance.**



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# Creation of joint ventures: Different forms of international alliances and their benefits

Mickaël Laurans  
9 October 2023  
Johannesburg, South Africa



# Why cooperate?

## For foreign law firms

- provide services they cannot, or do not want to, provide – e.g. to a client wanting to invest in a country/region
- in order to advertise to clients that they have a pan-regional offering

## For local law firms and lawyers

- access to new clients/branding
- economies of scale/sharing back office
- sharing of experience/technology transfer
- growth of core competences
- growth of market power
- transfer of legal skills

# Forms of cooperation

## Law firms

- Marketing cooperation (e.g referral networks ie. Lex Mundi)
- Formal alliance/cooperation agreements (best friends, exclusivity)
- Partial integration models (joint ventures, Swiss Verein, etc)
- Full mergers/Fully integrated law firms

## Individual lawyers

- Employment of a foreign lawyer/by a foreign lawyer
- Partnership with foreign lawyers

# Regulatory issues

- Which foreign lawyers? (e.g. WTO list versus approved list etc)
- To do what? (e.g. full/limited licences)
- What kind of structures? (e.g. partnership, limited liability, ABS etc)
- Approval processes
- How to maintain regulatory oversight and to what level? – regulatory/disciplinary recognition agreements with home country bars?
- Insurance/social security/compensation fund contributions
- Fees
- Code of Conduct application and challenges e.g. names of firms
- Mix of domestic regulation and international rules (e.g. WTO, trade agreements)

# International Trade in Legal Services

- The WTO General Agreement On Trade In Services (GATS) covers trade in legal services
- 164 members (includes all SADC countries except for Comoros)
- Regional and bilateral free trade agreements (e.g. AfCFTA)
- IBA Guide to International Trade Agreements for IBA Member Bars
- IBA Guide : “What models for cross-border joint practice”
- IBA resolutions, e.g. resolution on the transfer of skills

# Models (1)

## IBA resolution on transfer of skills:

- ‘WHEREAS the extent and the modalities of Skills Transfer in cross-border legal services by Foreign Lawyers in a given Host Jurisdiction necessarily depend, inter alia, on the extent to which Foreign Lawyers in such Host Jurisdiction are permitted to practice law and to associate with Local Lawyers;
- WHEREAS a regime permitting the association of Foreign Lawyers with Local Lawyers likely provides the most efficient and effective means of Skills Transfer by permitting Local Lawyers to work with more experienced Foreign Lawyers within the same firm, thus enabling them to gain practical experience and substantive knowledge in a way that would otherwise be impermissible due to the risk of breach of confidentiality’

# Models (2)

## IBA resolution on transfer of skills (contd.)

- ‘(B) A Foreign Lawyer who is permitted to practice through an establishment in a Host Jurisdiction in association with Local Lawyers may be required, in the course of his/ her practice, to provide, directly or indirectly, individual training and mentoring in relevant legal skills and disciplines, as well as supervised work experience, to Local Lawyers with whom the Foreign Lawyer practices in such association.’

# Models (3)

EU lawyers' establishment directive (98/5/EC), Article 11

'(3) The host Member State shall take the measures necessary to permit joint practice also between:

- (a) several lawyers from different Member States practising under their home-country professional titles;
- (b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.

The manner in which such lawyers practice jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.'



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## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

**Working with large international law firms:  
What do they expect when cooperating with  
local firms on a transaction?  
What are the top tips for smooth cooperation?**

**Alison Diarra, Hogan Lovells International LLP, UK**

**Johannesburg, 9 October 2023**



GLOBALISING YOUR PRACTICE: OPPORTUNITIES &  
CHALLENGES

# Building strong relationships

- Your options
- Why these relationships are important to you and the ILF
- Be strategic
- Driven by the client
- Win-win
- Be realistic



# Top tips: From the outset

## ① Be responsive

- This is vital
- Acknowledge receipt of emails
- Meet any deadlines
- Communicate absences and a person to contact

## ② Be sure you can act

- Have you cleared conflicts?
- Do you have the relevant experience?
- Is there capacity in your team?



# Top tips: Working together

## 3 Clear plan of action from the outset

- Scope of work
- Agree timing for all deliverables
- Engagement letter
- Fees – Amount  
(fixed/capped/hourly);
- Who is paying your invoice and when
- Tracking and reporting requirements
- Who is the main contact person



# Top tips: Working together (cont'd)

## 4 Regular communication

- Ask questions/clarify
- Resourcing /timing /budgeting issues
- Update calls and emails
- Be proactive, not just reactive

## 5 Think of the 3 C's

- **Clear**
  - *well presented; avoid legal jargon*
- **Commercial**
  - *provide advice not just answers*
- **Concise**



# Top tips: Working together (cont'd)

## 6 Work as a team ...

- Equal partners
- Mutual respect
- Identify partner and associate contacts in both firms
- Connect regularly

## 7 ... but also be aware of differences

- Don't presume knowledge
- Legal and cultural differences
- Different time zones



# Top tips: Continuing the relationship

8

## Be proactive not just reactive

- Share potential opportunities
- Regular update calls
- Introduce other colleagues

9

## Develop opportunities together

- Joint pitching / approaches to mutual clients
- Client webinars/training
- Thought leadership
- Training / secondments



# Top tips: Finally

10

## Importance of feedback

- Set up a call post matter to discuss how it's gone
- Be prepared to have the hard conversations – give and receive constructive criticism
- Agree on ways of connecting/frequency of communications going forwards





GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

# Working with large international law firms: What do they expect when cooperating with local firms on a transaction? What are the top tips for smooth cooperation?

Alan Keep, Bowmans, South Africa  
Johannesburg, 9 October 2023



Any questions?





GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

# Building BRICS? The business opportunities for lawyers in international trade agreements

**Alison Hook**

**Johannesburg, 9 October 2023**





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## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

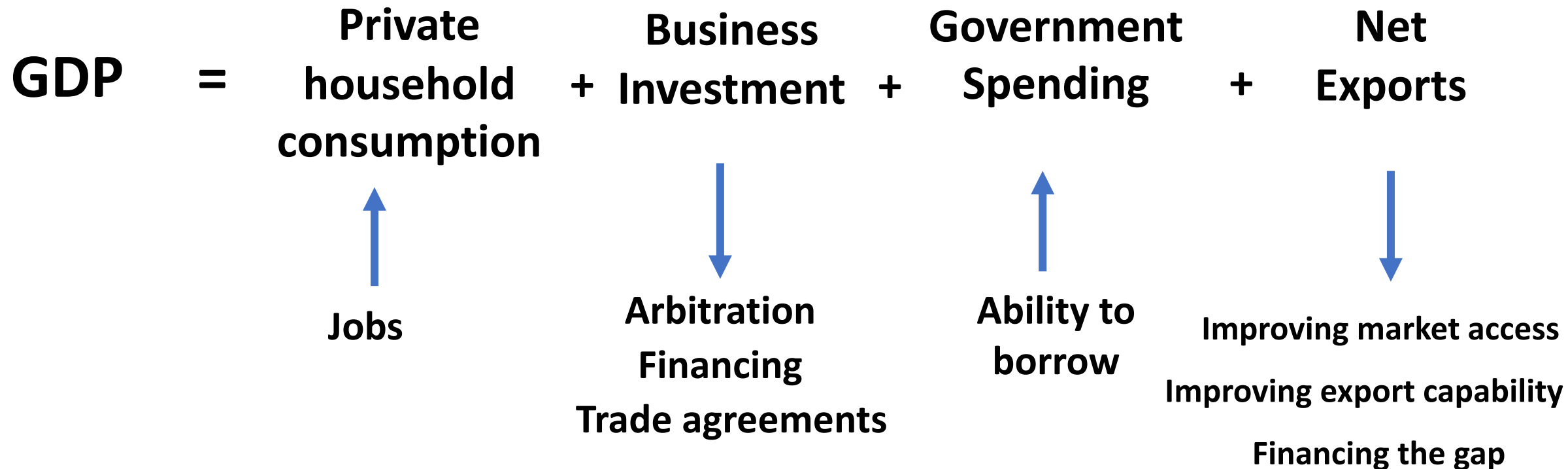
# Contents

- The question
- Possible answers?
  - The BRICS
  - Other trade initiatives
- Why does this matter to lawyers?



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# How does it all fit together?





GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

# What is the Question?

- Can we reshape globalization to make it work for all?

Subsidiary questions:

- How can (the World/Africa/Southern Africa) rise to current global challenges: Climate change, sustainable development, poverty and inequality?
- How can global economic and political architecture (e.g. UN, IMF etc) respond to changing global demographics and economics?
- What could all of this mean for lawyers?

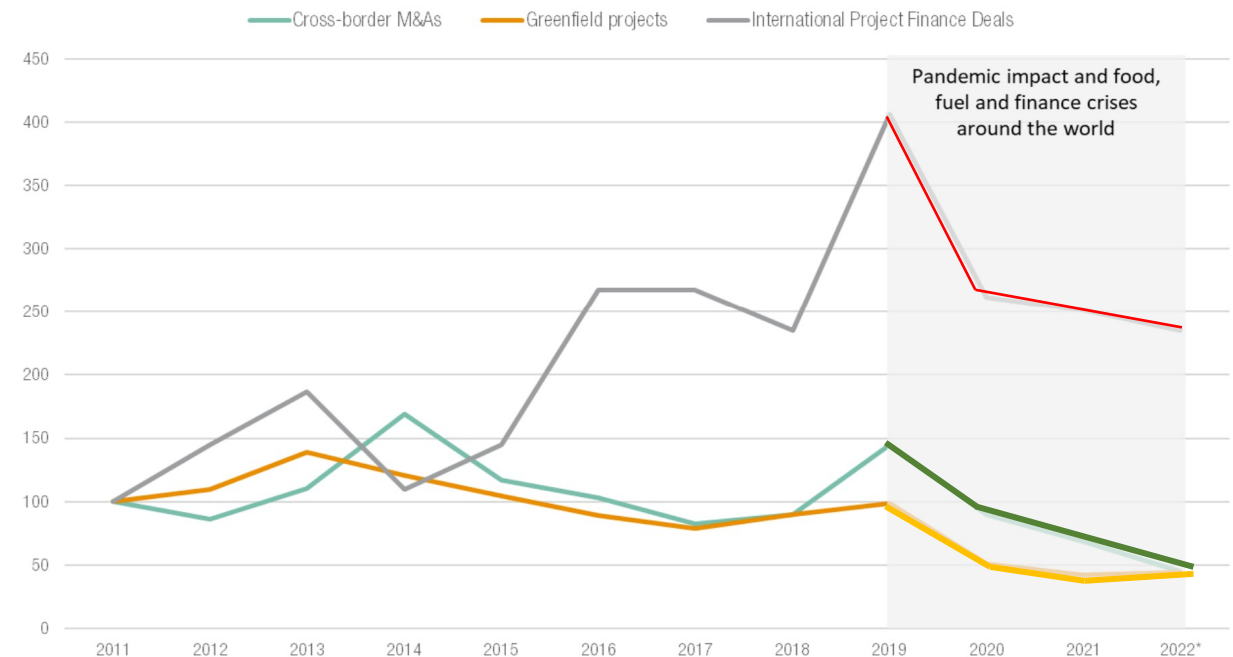


## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# The Size of the Economic Challenge

- Investment of all types in the Global South has suffered post-COVID
- But financing needs for the future are huge - over US\$32 trillion needed in 5 BRICS economies alone by 2040

Figure 3. Investment trends, 2011 – 2022 (Indexed, 2011=100)





## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# The Climate Challenge

- Climate related disasters are causing average annual losses to global infrastructure and buildings equal to \$700-800 billion per year (=14% cent of growth in Global GDP in 2022) (Coalition for Disaster Resilient Infrastructure (CDRI)).
- 30% of the annual infrastructure losses due to extreme climate events (US\$280 billion) are borne by low and middle-income nations.
- This means investment needs to be both increased to meet the needs of a growing population, but of the right quality to withstand climate shocks



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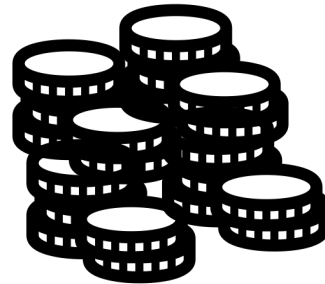
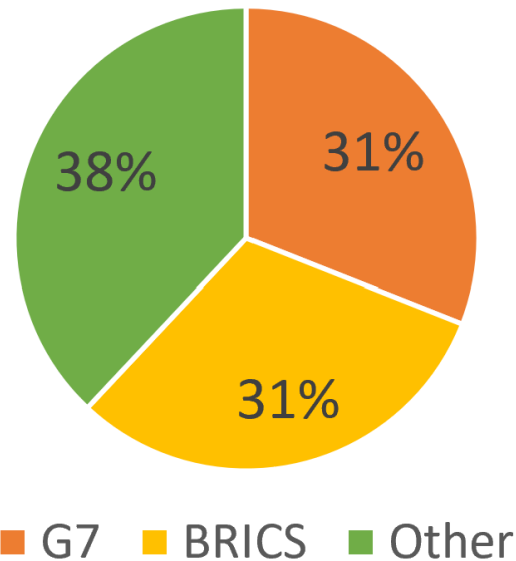
## Need to change trade patterns

- Pan African market potentially huge – 1.3 billion people and a GDP of US\$3.4 trillion (2022 – about 5% Global GDP in ppp)
- Intra-African trade currently accounts for only 15% of the continent's total trade (compared to 58% in Asia and 67% in Europe – both boosted by regional free trade)
- Transport inefficiencies cost African economies \$170 billion annually

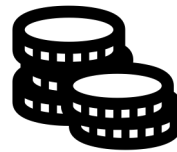


## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# Changing demographics



Average G7  
PC Income  
\$48,000



Average BRICS  
PC Income  
\$11,000



BRICS population = 3.24m;  
G7=750m



GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

## Answers to these questions needs to be different from the past

- Recognition of need for reform within global institutions (e.g Agenda 2030 - SDGs) but too slow
- Intra-African trade currently accounts for only 15% of the continent's total trade (compared to 58% in Asia and 67% in Europe – both boosted by regional free trade) (NB – 40% of intra-African trade is in manufactures cf.16% with RoW)
- More effort leading to more structural change and integration in this continent



GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

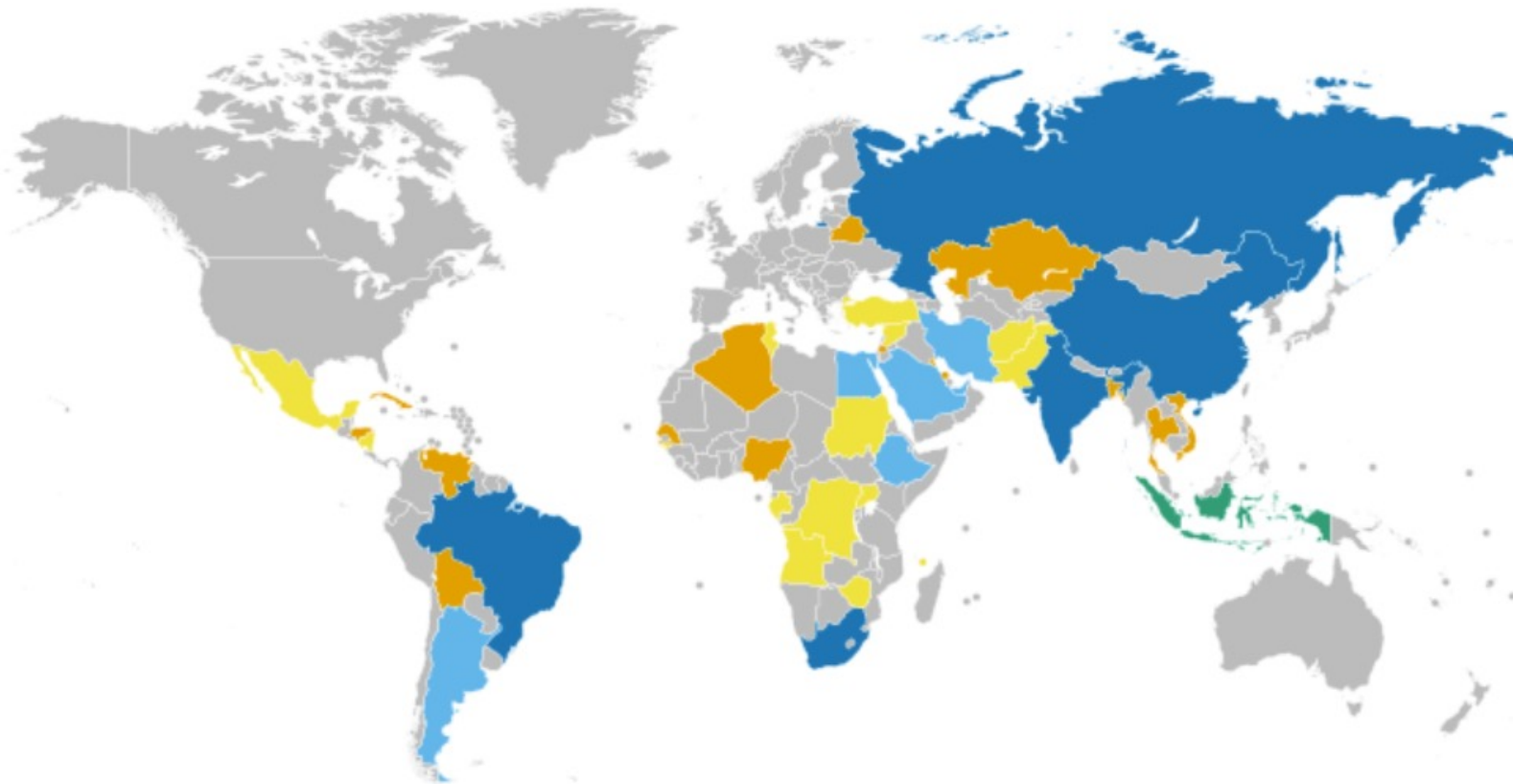
# What is the BRICS Group?

- Genesis and recognition - Goldman Sachs 2001
- Early days 2006-2009
- Increasing purpose - South Africa's membership in 2010
- Next steps – expansion and a new world order?



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# Who is involved?



### Map key:

- Member States
- Will join on January 1, 2024
- Applicant
- Expressed an interest in joining
- Rejected invitation offer
- No relationship to BRICS



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# What are some key objectives of the grouping?

- To increase the share of intra-BRICS trade to 30% by 2025.
- To establish a BRICS credit rating agency that reflects the development needs and realities of the member countries.
- To operationalize the BRICS Contingent Reserve Arrangement (CRA) to provide financial support to the members in case of balance of payments crises.
- To enhance the role and effectiveness of the New Development Bank (NDB) to finance infrastructure and sustainable development projects.
- Wider cooperation on public health, education, climate and new economy.



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GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

# BRICS Priorities under SA Chairmanship

1. Managing green economy transition and climate response
2. Transforming education and skills development for the future
3. Unlocking opportunities through the African Continental Free Trade Area
4. Work towards 2030 Agenda on Sustainable Development (UN SDGs)
5. Real reform of global governance institutions to achieve effective multilateralism (voting rights and agendas of major Bretton Woods institutions)



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GLOBALISING YOUR PRACTICE:  
OPPORTUNITIES & CHALLENGES

## What about other African FTAs and RECs?

- Africa Comprehensive Free Trade Agreement (AfCFTA) seeks to create a single market and more economic integration between economies – benefits to growth substantial
- BRICS can contribute to this process of trade and regulatory liberalization with investment



## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

# What does this mean for lawyers?

- Intra-African trade – need to build relationships regionally to support clients
- New areas of work – in trade, cross-border arbitration
- Engagement in infrastructure work
- People to people relationships through greater economic integration

# Building BRICS? The business opportunities for lawyers in international trade agreements

## GLOBALISING YOUR PRACTICE: OPPORTUNITIES & CHALLENGES

Jackwell Feris – Director at Cliffe Dekker Hofmeyr Inc  
9 October 2023

[cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)



INCORPORATING  
**KIETI LAW LLP, KENYA**

# BRICS Plus & the AfCFTA

CLIFFE DEKKER HOFMEYR

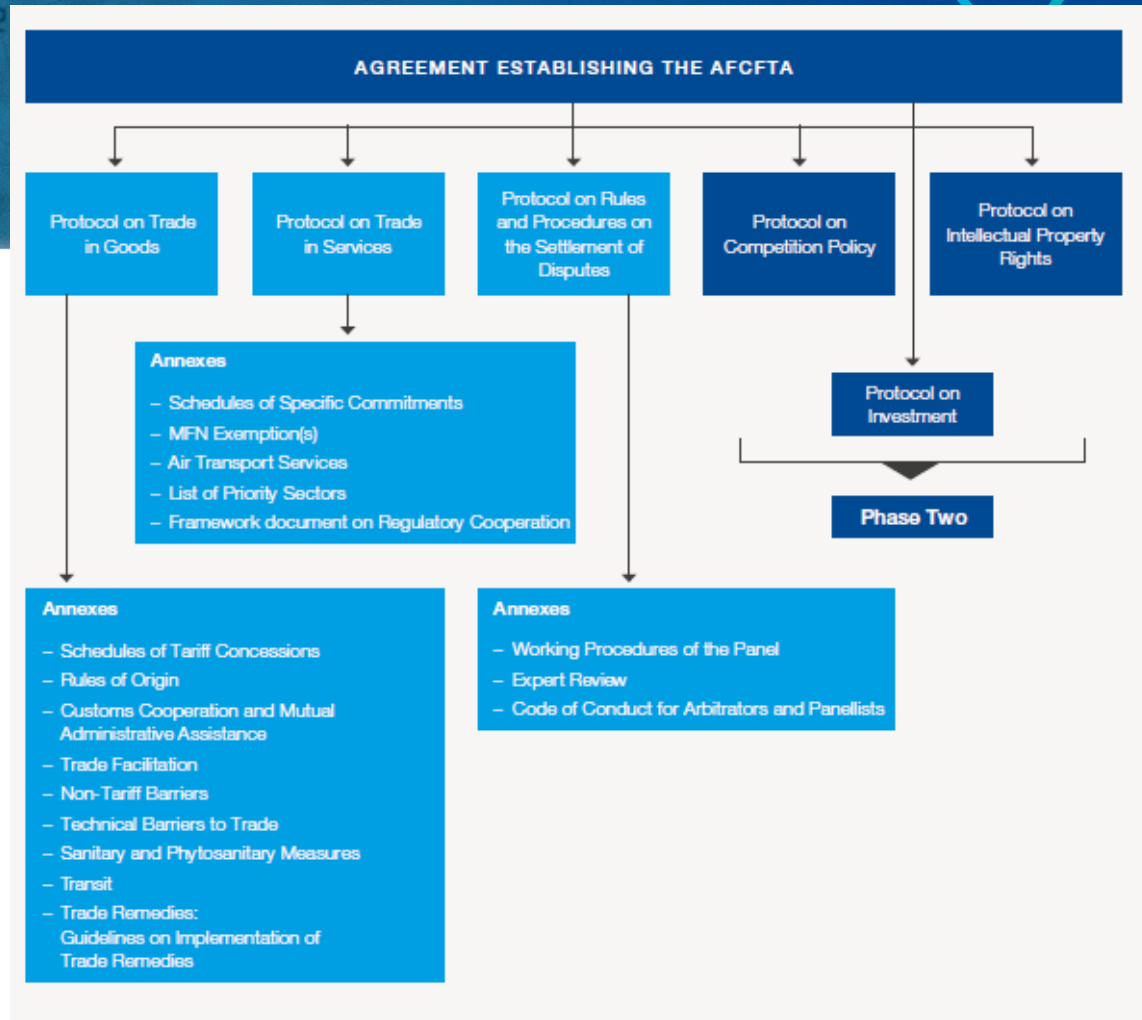
## BRICS +

- The Johannesburg Declaration – August 2023
- BRICS Business Council
- Is there a need to formalize the arrangement:
  - Trade
  - Investment/Finance
  - Technical & other



# What does BRICS mean for Africa: looking at the AfCFTA

African states recognized the need as part of the economic integration process to adopt regional investment agreements/protocols to existing Treaties to encourage and protect investments of investors within RECs.



The successful Implementation of the AfCFTA has the following benefits for African businesses

## THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)



### TRADE REMEDIES AND DISPUTE SETTLEMENT MECHANISM

- Recourse to trade remedies to ensure that domestic industries are safeguarded, if necessary.
- A rule-based avenue for the resolution of any disputes that may arise between State Parties in the application of the agreement.



### REDUCTION OR NO TARIFFS ON GOODS

The gradual phase out of tariffs by member states depending on the developmental status of each member state.



### ACCESS TO THE MARKET

- Removal of non-tariff barriers.
- Service suppliers will have access to the markets of all African countries on terms no less favourable than domestic suppliers.
- The progressive elimination of unjustifiable technical barriers to trade (i.e. technical standard, technical regulations).



### A CONTINENTAL FRAMEWORK FOR TRADE

- Establishment of a continental framework for trade in goods and services.

## HOW CAN AfCFTA BENEFIT AFRICAN BUSINESSES?



### REGIONAL VALUE CHAINS AND IN-COUNTRY VALUE ADDITION

- Regional value chains in which inputs are sourced from different African countries to add value for either intra-African trading or exporting from Africa.



### FREE MOVEMENT OF CAPITAL AND BUSINESS TRAVELLERS

- The free transfer of funds within AfCFTA.
- The free movement of business travellers within AfCFTA.



### LIBERALISED POLICIES AND HARMONISATION OF REGULATORY FRAMEWORK

- Harmonisation of trade-related policies and regulation.
- Liberalised policies on competition, intellectual property, e-commerce.
- Mutual recognition of standards, licensing and certification of service suppliers will make it easier for businesses and individuals to satisfy the regulatory requirements of operating in each other's markets.

### INVESTMENT PROTECTION UNDER THE PROPOSED PROTOCOL ON INVESTMENT (NEGOTIATED UNDER PHASE II)

- Critical for decision-making for investment in trade-related infrastructure and investments in regions on the continent considered as high-risk investment jurisdictions.



# AfCFTA INVESTMENT PROTOCOL

CLIFFE DEKKER HOFMEYR

## THE AfCFTA Investment Protocol & Key Provision

- ❑ Understanding the legal significance of international investment agreements:
  - Bilateral Investment Treaties (Namibia & Germany/ Tanzania/Canada etc.)
  - Multilateral Investment Agreements (SADC Protocol, etc.)
  - Host Country Investment Agreements (Implementation Agreements etc.)
  - Ancillary international legal instruments: ICSID Convention & New York Convention



**PROTOCOL TO THE AGREEMENT ESTABLISHING THE  
AFRICAN CONTINENTAL FREE TRADE AREA  
ON INVESTMENT**

**Draft**

Accra, GHANA  
January 2023

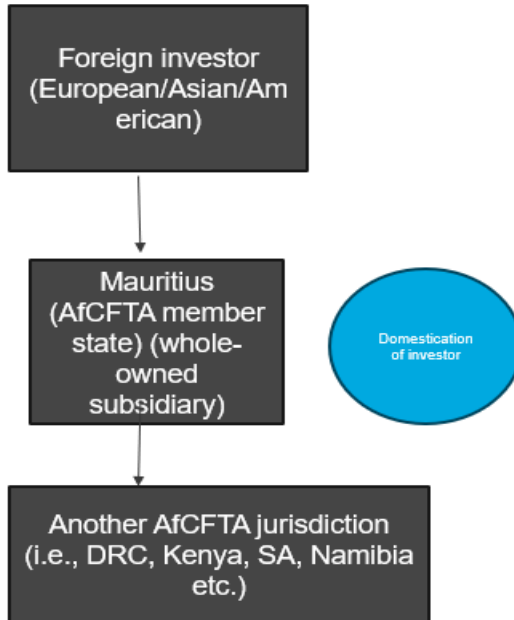
## Importance & Key Provision

- Definition for Investor - a natural person from African jurisdiction or legal or juristic person incorporated in a member state in Africa.
- Definition for Investment – ENTERPRISED BASED as opposed to ASSET BASED elements of the *Salini* test (significant contribution to host government, risk/reward, certain duration etc)
  - **Broad approach**: shares, stocks JVs, intellectual property, rights conferred by government etc
- Watered down provision: Fair and Equitable Treatment
- Guarantees:
  - Against Expropriation without compensation, Most Favoured Nation, National Treatment etc
- Robust provisions on: investor obligation: investment related to human rights (environmental, health and core Labour rights) – ESG and related
- State's right to regulate in the public interest

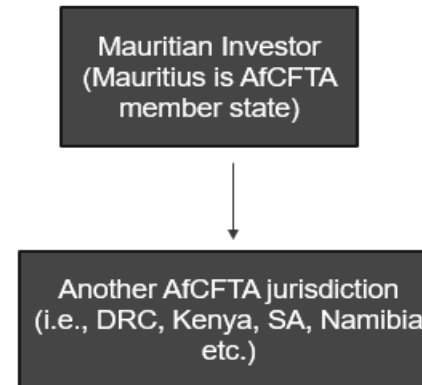
# AfCFTA INVESTMENT PROTOCOL

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## Foreign Investor



## Intra-Africa Investor



# LAWYERS SUPPORTING THE ACHIEVEMENT OF BRICS AND AfCFTA's OBJECTIVES

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- ❑ Investment | Projects
  - Infrastructure | Energy | Manufacturing
- ❑ Dispute Resolution:
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  - Judiciary



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***THANK YOU!***