KING&WOOD MALLESONS

The Power of Together

Made in Africa

Exploring international and local legal considerations for investors in, and from, Africa

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Editorial

Welcome to Issue 14 of our market leading publication "Made in Africa". Again we focus on the latest legal and market developments, with our partners in Africa, that are of interest to investors and businesses operating on the continent.

The macro-economic picture continues to influence investment. Continuing pressures on commodity and oil prices and global demand as well as weakening growth forecasts have seen a shift in investment priorities and governments looking more closely at incentivising investment in non-resource sectors as they tussle with fiscal tensions and economic balance. Certain elections have come and gone and the new governments have started to outline their plans over the next term.

Despite this backdrop, private funds have continued to be raised (approaching record levels), particularly driven by the consumer facing industries as well as power, real estate and infrastructure. The world's institutions have also continued to show their support both directly and indirectly (for example the guarantee for the recent sovereign bond issue by Ghana which includes an attractive 15 year maturity term).

Power capacity as always has been high on the agenda and we are seeing increased opportunities across both non-renewable and renewables/clean energy sectors and this in turn is seeing interest in funds focused on these sectors which follows initiatives such as Africa 50 and Power Africa. Other sectors such as financial services, healthcare, education and retail are also getting more attention.

This issue looks at these developments and corresponding legislative initiatives looking to attract increased investment. We look at key economies such as Nigeria, Ghana, Tanzania and Ethiopia as well as the latest views of experts on China's approach to Africa following slowing demand and its re-positioning into a consumer economy. We also look at key areas for investors such as protecting your brand across Africa and changes in merger controls.

In addition to these latest legal developments we also report on a number of events we have hosted including our seventh annual Africa Group Braai and Women in Private Equity as well as the latest from ILFA (International Lawyers for Africa). We hear the views of a leading investor in the Agriculture sector and our experts who attend events such as the recent visit of the President of Mali to Paris and the workshop for government officials to learn more about international energy sector investment agreements.

We would like to personally thank all our contributors, particularly our friends from African law firms and organisations, for their efforts in making this publication the must read for investors and businesses operating in Africa.

We look forward to 2016 and continuing to be at the forefront of representing clients investing in and out of Africa.

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Deal or no deal

"MANY LARGE-CAP DEALS DO NOT START OUT WITH AN INVESTOR PUTTING IN USD50-100 MILLION OF CAPITAL UP FRONT. OFTEN A SMALLER AMOUNT IS DEPLOYED UP FRONT AND THEN SUPPORTED WITH GROWTH EQUITY."
FRANCOIS VAN DER SPUY, HEAD OF PRIVATE EQUITY, INVESTEC ASSET MANAGEMENT

There has been much commentary about the amount of private equity capital being raised for investment in Africa and whether in fact there are sufficient investment targets available to deploy this flow of capital. Some industry participants believe that given the amount of capital being raised, particularly by the large cap funds, there is simply not the deal flow to sustain the deployment of capital in these funds, and this will lead to increased competition and valuations, which will make investor returns less attractive.

The concern stems from the fact that funds raised in Africa has risen exponentially in recent years. The 2007 fundraising high of US$4.7 billion has not yet been reached but the amount of capital raised in Africa has been growing steadily and all indications are that this will continue uninterrupted. Strong growth on the continent, which has arisen as a result of a young, emerging middle class and increased urbanisation, has fuelled consumer demand for fast moving consumer goods, financials and industrials and it is these sectors that are attracting private equity.

Capital raising began increasing steadily in 2013, with US$3.3 billion of capital being raised, followed by a bumper year in 2014 of US$4.1 billion (more than double the average for the preceding five years, according to data from EMPEA). This included fundraises by Carlyle (US$700m), Amethis (US$530 million) and Helios with its record breaking US$1.1 billion raising.

Fundraising in 2015 has been strong, with Abraaj closing their Sub – Saharan Africa and North Africa funds at US$990m and US$340million respectively. DPI also closed its second pan-African fund at US$725 million and most recently, the debut Indian private equity firm Ascent Capital raised US$80 million for its Ascent Rift Valley Fund (exceeding an initial target of US$60m).

Francois van der Spuy, Head of Private Markets at Investec Asset Management (IAM) believes that the concerns about the inability of private equity funds in Africa to deploy capital is founded on a slightly simplistic outlook. He explains that this view does not take into account the long term dynamic view to investing. There is an active mid-market in Africa where he believes there are substantial investment opportunities, and not necessarily a high level of competition. It is the mid- market funds which acquire and build mid-market companies into quality companies that will provide depth and breadth for the large cap market.

As van der Spuy explains, "Many large-cap deals do not start out with an investor putting in USD50-100 million of capital up front. Often a smaller amount is deployed up front and then supported with growth equity."

A case in point is IAM's investment in the mobile tower company IHS in 2011. Investec's Africa fund invested US$79 million in IHS along with two co-investors. In the 4 years since, the company has grown exponentially and raised another US$3 billion of additional capital. Looking at these figures emphasises the point van der Spuy makes about mid-market funds creating opportunities for larger funds. "Just a couple of these types of deals will swallow up substantial amounts of capital earmarked for Africa" remarks van der Spuy.

When considering whether there are enough deals to enable deployment of all the capital that has been raised, it is also important to consider that often investments are made on the basis that they will provide a key for platform level investment. "A smaller mid-market deal may form the basis for additional acquisitions to create a country specific or industry specific platform across several countries" counters van der Spuy.

Other outlets for large amounts of capital up-front include financial services and oil and gas, whether in country or across other Africa countries, dependant on the investment policy. The financial services industry in particular counts for a large proportion of PE investments in Africa as this is often where diversified, pan-African companies with skilled management is found which makes for suitable investment.

We have seen a number of larger deals in 2015. To start the year off Abraaj was active with an investment in Mouka, the Nigerian mattress manufacturer, as well as in a US$200 million consortium investment in a North African healthcare platform among others. In October, Abraaj closed the c. US$100 million acquisition of the Egyptian school operator, Tiba Group and recently closed a US$60 million investment into Careem, the regional car app service, and also an investment into a private oncology clinic. These deals show the ability for rapid strategic deployment of significant capital into the region.

In the first half of the year Helios invested US$100 million into Africa Oil (the oil exploration partner of Tullow in Kenya) in return for a 12.4% stake as well as US$276 million in Oando plc, showing its continued focus on the oil & gas sector. Helios also sold out its stake in the successful Equity Bank of Kenya investment.

In May a Standard Chartered Private Equity-led consortium invested US$175 million into Fine, a major tissue manufacturer in North Africa showing the major houses investing in North Africa post the political upheavals.

Continuing with the trend of investments in the consumer sector, in September, Actis bought the South African furniture retailer Coricraft as part of a strategy to tap into Africa's fast-growing consumer sector. Sun European, an arm of the US-based Sun Capital, acquired Finlays Horticulture, a flowers and vegetables business with operations in Kenya and South Africa, in a deal reported to be worth approximately US$154 million.

This healthy mid to large-cap deal activity augurs well for 2015 and supports the view that there are in fact plenty of investment opportunities for PE funds to deploy capital in 2016 and beyond, in both the mid-cap and large-cap targets and platform investments. There has also been a number of exits fuelling the virtuous circle of private equity investment and fundraising.

As those in the industry in Africa know, deals just take time to find, diligence, negotiate and conclude but for the right private equity team they are out there.

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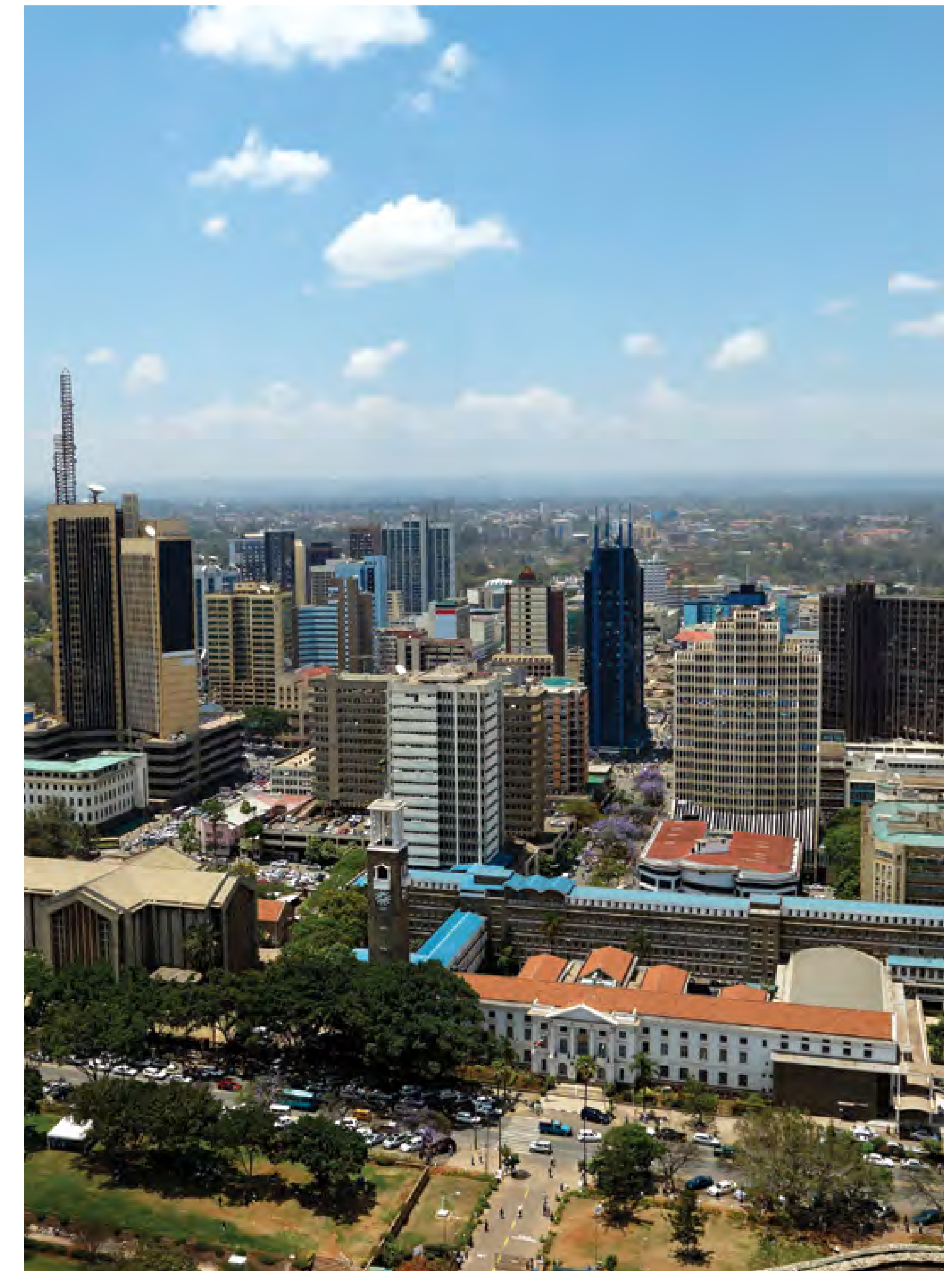

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Ethiopia

A Country on a Mission

As the world is all too aware Ethiopia was a country ravaged by drought, famine and wars, however none of these historical factors appear to deter the newly constituted government from the path commenced in 2010 with a 5-year plan to transform the economy.

From eradicating poverty to lower-middle income aspirations

According to Oxford Analytica in a recent *Daily Brief* (21 October 2015) all of the development policies and strategies of the Ethiopian government-led Growth Transformation Plan I (GTP I) were geared towards eradicating poverty, primarily with a focus on infrastructure and social development. GTP I was launched by the Ethiopian government in 2010 as a 5 year economic development plan and it comes to an end in 2015.

GTP I will be succeeded by GTP II, the goal of which is for Ethiopia to become a lower-middle-income country by 2025 and transform into a manufacturing hub, building on projects started in GTP I.

While there were anxieties due to the sudden change in government brought about by the passing of the former Prime Minister, Meles Zenawi in 2012, Ethiopia has managed to put these concerns to bed by effecting a smooth transition and successful election in 2015 culminating in the unanimous confirmation of the new Prime Minister, Hailemariam Desalegn by the House of People's Representatives in October 2015.

Commitment to drive growth

The drive for GTP II by the new cabinet shows the commitment to continue with the vision of its predecessor, a will often lacking in many succeeding African governments. Many new governments reverse existing government policies hampering economic growth.

Following the general elections in May 2015, the ruling party, Ethiopian People's Revolutionary Democratic Front (EPRDF), and its allies, have full control of the lower house. As a result, according to Oxford Analytica, the new Ethiopian government is in a strong position to push forward with its new strategy.

Further, according to Oxford Analytica, there has been a cabinet reshuffle, nine ministries have been split, restructured or newly established and 14 out of the 30 members of the Council of Ministers are first time appointees. This all appears to augur well for delivering on the governments promises.

Successes stemming from GTP I

The success stemming from GTP I are clear to be seen. According to the EY Attractiveness Survey (*Africa 2015 – Making Choices)*, in terms of recipients of foreign direct investment Ethiopia has moved up from 14th position in 2013 to the 8th largest in 2014, an 88.2% increase in FDI projects.

The International Monetary Fund in its World Economic Outlook 2015 reported a 10.3 percent real gross domestic product growth in 2014 and projected an 8.6 percent growth in 2015 and an 8.5 percent growth in 2016, though a reduction in 2017 as growth levels off, but this is still higher projected growth than other classified low income countries such as Kenya, Tanzania and Uganda.

Ethiopia was also able to successfully issue its maiden sovereign bond in 2014. According to Bloomberg Business, yields on the $1billion Eurobond have climbed to 6.77 percent from 6.625 percent when they were sold in December 2014.

Further, various projects commenced under GTP I have been completed, such as the Addis Ababa light railway. While others are in development, such as the Addis-Djibouti rail link and the Gibe III hydropower dam.

Connectivity is a main focus as a good rail and road network is integral for the land locked country in order to connect the ports to the country. Ethiopia also seeks better communication and increased number of broadband users.

There has been a boom in manufacturing and construction is also receiving both public and private attention in the form of low cost housing developments by the government and office and luxury housing developments by the private sector in Addis Ababa.

The government is also focused on increasing its electricity output with energy exportation a near future ambition. Completion of infrastructure projects, an increase in manufacturing and exports are therefore a large part of GTP II.

International focus

In its first major transaction in Africa, in 2014 the global private equity firm KKR invested approximately US$200 million into Afriflora, an Ethiopian company that grows about 730 million flowers a year for export to Europe.

More recently, Standard Bank opened its first office in Ethiopia, in the capital Addis Ababa to act as a gateway for its clients investing in the country. Ultimately the bank will reportedly open more than one office in the country, but as foreign banks are heavily regulated, it will depend how the country opens up to international finance. This is surely inevitable due to the financing demands of GTP II, but it remains to be seen.

Ethiopia is clearly determined and focused - it is a country on a mission.

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FDI in Africa

Western Europe stills leads

Chinese foreign direct investment ("FDI") in Africa is on the increase with Chinese companies being investors, predominantly in major infrastructure projects. However, new FDI figures recently reported in the Financial Times (following research by their "fdi Intelligence" and "This is Africa" service) demonstrate, that despite this growing presence, the West is still leading the way when it comes to greenfield investment in Africa (direct investment in physical projects).

In 2014 Western Europe accounted for more than half of all greenfield investment, with $46.7billion. Comparatively China contributed just 7% at $6.1billion and was ranked 7th as measured by project number with 28 projects in action. This lesser rating for 2014 is largely down to a Chinese regional preference for infrastructure projects, a slowdown in demand for hard commodities and desire to instead access new technologies and big name brands in the developed markets of Europe and the USA.

Conversely, European companies with a strong historical connection to Africa look to capitalise on the cost savings, consumer markets and export platforms on the continent that greenfield projects and African FDI have to offer.

France was the largest European investor in Africa in 2014 investing $18.3 billion of capital. This was largely driven by French oil company Total investing on the continent.

North America was the second largest source region for investment in Africa, at $13 billion. Although seeing a fall of 54% from 2013 the UK is placed as the second largest investor by number of projects (51) but only 10th largest by capital expenditure.

Despite the continuing dominance of the resource market in African FDI, these figures and emerging trends of sector diversification reflect the investor preference that we are seeing. They are a confident projection that there is further scope for greenfield investment on the continent and that Europe remains the foreign gateway for that investment.

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Post-Election Investment in Nigeria

A Brave New World

The date 28 March 2015 marked a sea change in Nigeria's political and economic history. What was widely expected to be a tense and possibly violent election proved a relatively peaceful democratic handover with General Muhammadu Buhari becoming the first Nigerian to unseat a sitting President at the ballot box.

The euphoria that followed found its way to the markets almost immediately. Shortly after President Goodluck Jonathan's concession, the Nigerian stock market recorded an unprecedented rally on gaining N904 billion, as investors reacted positively to the peaceful conclusion of the elections. In this new chapter in Nigeria's history, the All Progressives Congress (APC) not only holds the presidency but also more than 50% of the seats in the legislature, which will almost certainly assist the new administration in seeing its planned policy and legislative changes made manifest.

While this may seem to herald a positive outlook for Africa's largest economy, structural and economic challenges abound for the new government. The economy remains heavily crude reserve-dependent: oil and gas still accounts for 80% of Nigeria's fiscal revenue and 95% of its export receipts. As a result, the drop in global benchmark oil prices has seriously impacted government revenues and with them, Nigeria's currency.

The World Bank recently revised its prediction for the country's economic growth in 2015 down from 6.3 percent to 5.5 percent. Unemployment levels remain unfeasibly high, tax evasion in the informal economy frequently goes unchecked and the wealth disparity continues to create a lag in Nigeria's development metrics.

In short, President Buhari inherited a structurally challenged, if optimistic nation. The challenges cannot be addressed by fiscal or economic policy alone. It is likely that we will see significant legislative reform as an engine for the change promised in his election campaign message.

The two pillars of this message of change were an austere fiscal policy and a clampdown on corruption, which, it is hoped will lower the cost of doing business, thereby fuelling small business as well as encouraging inward investment.

While the specifics are yet to be communicated, President Buhari's economic blueprint appears to be to establish a regulatory and policy framework that stabilises the economy. He plans to further diversify the economy by investing in agriculture and mining, and ensuring job creation. In addition analysts expect him to continue with many of the Jonathan administration's priorities, such as power and agricultural reform, and liberalisation of parts of the economy.

Several leading voices in the Buhari administration have expressed a desire to use their tenure to create an enabling business environment for domestic and international investors. A survey of the horizon from an investor's perspective shows that there are four key areas that will determine the extent to which the country will remain among the fastest growing economies and continue to attract foreign direct investment: power sector reform; petroleum industry legislation; economic diversification and the rule of law.

Power Sector Reform

General Buhari's APC party manifesto included a promise to:

"Generate, transmit and distribute power from current 5,000 -- 6,000 MW to at least 20,000 MW of electricity within four years

and increase to 50,000 MW with a view to achieving uninterrupted power supply within 10 years, while simultaneously ensuring development of sustainable/renewable energy; construction of 3,000km of superhighway, including service trunks and building of up to 4,800km of modern railway lines -- one third to be completed by 2019 via Public Private Partnership (PPP) arrangements."

Following the privatisation of many of the nation's power generation and distribution assets, in 2014, Nigeria's Ministry of Power announced plans to sell Nigeria's transmission network to private sector investors in order to facilitate the development, upgrade and management of the transmission network in Nigeria. A further privatisation process is near completion with the Bureau of Public Enterprise and Niger Delta Power Holding Company (a special purpose vehicle of the Federal Government) selling ten newly developed power plants as part of the Nigeria Integrated Power Project.

Whilst the generation and distribution privatisation exercises were central to addressing Nigeria's power supply deficit, the transmission sector is all-important. Estimates suggest that if Nigeria's power plants were to operate at full capacity, its transmission lines could only presently carry 5,500 megawatts, less than a third of what the country requires to meet its electricity needs.

To be fit for purpose, the existing transmission network needs to be upgraded, expanded and properly maintained. It follows that attracting further investment in this area must be a priority for the new government.

Petroleum Industry Legislation

The incoming government has made a very clear commitment to the speedy passing of the long-awaited Petroleum Industry Bill (PIB). If successfully passed in its current form, this will trigger fundamental reforms in Nigeria's hydrocarbons sector. Among the most far-reaching legislative changes will be the introduction of production sharing agreements – private agreements between international oil companies and Nigeria's National Petroleum Corporation (NNPC) which will vest a licence or exclusive authorisation in the NNPC to explore, exploit and produce hydrocarbons.

While these changes will undoubtedly alter the investment environment for oil majors, these production sharing agreements are intended to better protect Nigeria's national interest in the areas of technology transfer, the building of local skills and capacities and the preferential use of local suppliers.

There are also proposals to split out the regulator and set up national oil and gas companies to ultimately be listed on the Nigerian stock exchange.

The PIB has unfortunately gone unpassed since 2008, which has created a level of uncertainty for international investors and led to estimated annual losses from frozen investments exceeding US$15 billion. The newly appointed head of the NNPC, Emmanual Kachikwu, and the Vice President have confirmed that it is now intended to unbundle the bill into smaller laws focused on fiscal and regulatory measures in Nigeria's energy industry in a bid to make progress.

Economic Diversification

Notwithstanding its dependency on crude oil exports, Nigeria will continue to diversify into the non-oil and services sectors. Non-oil GDP growth now outpaces oil sector growth significantly.

The re-basing exercise of 2014 brought the momentum behind non-traditional economic sectors to the fore, such as entertainment, telecoms and retail. This will likely be a legacy policy focus of the Jonathan administration, with Nigeria's 'Development Planning - Vision 2020' remaining an important set of milestones for the Buhari government.

Under this strategy, Nigeria plans to be one of the world's 20 largest economies (by nominal GDP) by 2020 through sustained socio-economic development. By necessity, this will include embedding those non-traditional sectors further and perhaps shifting the emphasis from oil and gas to mineral extraction. Many believe that the devaluing of the Naira is required in order to increase Nigerian export competitiveness and attract Forex into the country.

Rule of Law

Anti-corruption quickly became a hallmark campaign message for the APC. The incoming government is placing significant emphasis on the anti-corruption effort not least in order to contribute to a more investor-friendly business environment as well as in order to restore faith in the justice system.

Despite being accused of using this initiative to launch a witch hunt against political opponents, President Buhari has stated clearly that his administration will oversee a fair process under which those in the frame are innocent until proven guilty.

The draft Proceeds of Crime bill recently lapsed for want of Presidential assent, leaving the way open once again for concerted legislative reform in this area. It should also be noted that President Buhari has enlisted the support of his counterparts in the US and the UK in the bid to recover billions of dollars allegedly stolen from Nigeria's coffers.

Of equally pressing importance are the efforts to neutralize the terrorist threat posed by Boko Haram, so far focused on the north of the country. In addition to the loss of life and territory that has resulted, the destabilizing effects of the militants' activities on investor sentiment must not be understated.

To this end, the Buhari government has replaced all of the military service chiefs, and re-deployed other high ranking officers. Such moves are clearly intended to re-invigorate military leadership who are now rolling out new training programmes and overseeing the issuance of much-needed equipment to troops.

A deadline of December 2015 has been set by the president to defeat Boko Haram: one can only hope that the Buhari administration can finish the task that the Jonathan administration began to bring the insurgency to an end.

Without wishing to dampen the optimism surrounding the democratic handover, the business community worldwide needs to see concerted, principled action on the part of the new administration to drive the change it promised. Nigeria's macro-economic fundamentals have positive signs, and the hope remains that with new leadership, a new, more favourable investment environment will follow.

Secondment to Aluko & Oyebode, Lagos

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Earlier this year, as a senior Managing Associate in the Litigation and Arbitration Department of King & Wood Mallesons (KWM), I was fortunate enough to spend three months on secondment in Lagos. The secondment was unconventional in several respects, not least because it was the first secondment which KWM has had to Nigeria, but also in that I was placed with a leading Nigerian law firm - Aluko & Oyebode (A&O) and not a client as would ordinarily be the case.

Not only did the secondment afford me the opportunity to get to know my colleagues at A&O better, consolidate my knowledge of Nigerian law and practice and raise my awareness of how law and business is conducted in Lagos, but it was an excellent opportunity to test my legal mettle in an exciting new jurisdiction.

I worked principally with A&O's Governance, Compliance, Investigations and White Collar Crime practice, on a number of advisory projects for clients in a variety of sectors. As well as being a senior English lawyer "on the case", an extra pair of hands for the team, and a bridge between the two firms, I learned a great deal about the legal and practical differences between litigating in the English Courts and litigating in the Nigerian Federal Court – of which there are too many to note here.

My arrival coincided with a pivotal point in the nation's history as President Muhammadu Buhari became the first Nigerian to unseat an incumbent president. The mood of the nation was cautiously optimistic and the business community waited in earnest to see what material changes would follow.

From my perspective, the political change signalled a pivot towards a more business-friendly Nigeria, and reform was (and still is) very much in the air. The secondment was nonetheless busy despite the period of anticipation, and I was fully occupied preparing advice for clients.

By the end of the secondment, I felt I had a much deeper understanding of the Nigerian business environment and culture as well as a great deal of respect for lawyers serving their clients' needs in what can be a very challenging commercial environment. I intend to pass on the benefits of these lessons to my fellow lawyers here in London and throughout KWM as we increasingly work with Nigerian clients and other law firms on international and domestic matters.

Investment in Ghana

Recent Legal Developments

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Ghana has faced a series of macroeconomic challenges over the past year, with sustained depreciation of the cedi against major foreign currencies, high fiscal and current account deficits and a slowdown in real GDP growth. Despite this, the country remains one of the bright spots for investment in the West African sub-region. Attracting foreign investment continues to be a key priority for the Government and certain recent legislative developments reveal strong efforts to create an enabling regulatory environment for investors.

Energy and Infrastructure

In July 2015 the Petroleum Revenue Management (Amendment) Bill was passed into law in an effort to address irregularities and operational challenges in the management of Ghana's revenue from the oil and gas sector. The primary objective of the bill was to amend the Petroleum Revenue Management Act 2011 to provide for the re-allocation of funds to the Ghana Infrastructure Investment Fund for the purposes of infrastructure development, signalling great opportunities for investors in this sector.

In August 2015 the Ghana Nuclear Regulatory Bill was passed with the objective of establishing the Ghana Nuclear Regulatory Authority to oversee all activities in the nuclear energy sector. According to Lom Ahlijah, Legal Counsel at the state-owned electricity transmission company Ghana Grid Company (GRIDCo), "the enactment of the Nuclear

Regulatory Act 2015 is a game changer in the power sector, especially as it opens up a new frontier in the Ghana power sector. This will pave the way for the use of nuclear power in Ghana's energy mix to secure the long-term needs of the country". The Government has already signed agreements with international partners such as the State Atomic Energy Corporation of Russia (ROSATOM) for the construction of a 1000-1200MW nuclear power plant.

Nonetheless, there remains much legislative reform to be effected in the energy and infrastructure sector. Of the laws currently in place, Ahlijah observes that, "legislative intervention is needed to streamline entry requirements for investors in the sector by ensuring that the ease of doing business is greatly expedited".

Real Estate

There has been a boom in the Ghanaian real estate market in recent years due to the increasing presence of multinational companies and foreign investors in the country's oil industry, with major projects including Actis' investment in the One Airport Square development.

Despite this, the Ghana Investment Promotion Centre (GIPC) has acknowledged the significant challenges faced by investors in the sector with respect to land tenure. According to Mawuena Trebarh, Chief Executive Officer of the GIPC, "a unique combination of cultural nuances and clan ownership makes land tenure in Ghana a highly complex issue and as a result investors are often unable to carry out adequate due diligence on real estate assets". Although the existing legal framework provides a means for enforcing property rights, the process for obtaining clear title over land can be complex and electronic conveyancing is yet to be implemented in Ghana. Elikem Nutifafa Kuenyehia, Managing Partner at Oxford & Beaumont Solicitors, comments on the need to improve the efficiency of the current systems and regulations which "make business practice cumbersome and convoluted".

Legislation is to be introduced which will seek to address these problems and the GIPC is working with the Lands Commission and the Ministry of Chieftaincy to introduce a new automated system of records and filings at the Lands Commission, which aims to improve the security of documentation and quicken the conveyancing process.

Financial Services

In July 2015, the Bank of Ghana (BoG) issued new e-money regulations that establish a best practice framework for digital financial services. The regulations permit non-banks to operate e-money businesses, a significant change that secures the previously tenuous position of mobile network operators that already provide such services and aims to bolster investment in the sector from other providers. The regulations focus on minimising barriers to access for end customers whilst strengthening supervision and consumer protection. The measures include the introduction of a risk-based approach to 'know your customer' processes (as is the international norm) with clear rules on identification requirements and transaction limits that encourage the market for 'over-the-counter' services. Industry experts have called this one of the most significant interventions by the BoG to promote financial inclusion for unbanked Ghanaians.

Conclusion

Recent developments indicate that the Government is aware of the need to create a competitive investment environment in Ghana and much work is being done in this respect. A key theme amongst industry experts is the need to generally improve the opportunity and administrative ease of doing business through legislative measures and we continue to see positive signs that this is indeed being addressed.

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Ghana's Tema Port

$1.5 billion expansion poised to become one of West Africa's largest sea ports

King & Wood Mallesons has advised Meridian Port Services (MPS) on the USD$1.5 billion expansion project of Ghana's busiest sea-port terminal, Tema Port.

MPS is owned by a consortium of shareholders, among which is the Bolloré Group, a French conglomerate which is one of the 500 largest companies in the world and Africa's biggest ports and logistics operator.

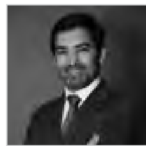
The expansion project will bring Tema's capacity from 1 million 20-foot equivalent containers (TEUs) to 3.5 million TEUs and will bring it to the most modern standards.

The expansion plans include the development of a deep water quay and an access channel able to accommodate larger vessels now entering the West African trade lanes.

The project, which will involve a total investment of $1.5 billion by MPS' shareholders, was completed by the signing of an amendment to an existing concession agreement on Friday 12 June 2015 between MPS and the Ghana Ports and Harbours Authority (GPHA). The signing ceremony was attended by the Minister of Transport Mrs Dzifa Aku Attivor, the GPHA's Director General Mr Richard A. Y. Anamoo, Bolloré Africa Logistics Managing Director Philippe Labonne, along with lead partner at King & Wood Mallesons Richard Mugni.

Richard Mugni, Energy & Infrastructure partner, said: "This project marks a significant and historical turning point for Ghana as a real economic force for both West Africa and the Sub-Saharan region as a whole. We are very proud to have assisted MPS and the Bolloré Group in bringing about this transformational infrastructure project to support Ghana's commercial growth and we look forward to providing further support on the development of the project, which will create a world class infrastructure."

The King & Wood Mallesons' cross-border team advised on all aspects of the infrastructure project including negotiating the terms and conditions of the port extension with the Ghanaian government. The full team was led by Paris partner Richard Mugni, assisted by associate Raphael Soffer and Paris partner Olivier Vermeulen for the financing.



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New Private Investment Law in Angola

As one of the most attractive emerging economies worldwide over the last decade and given its continuing high growth rates, Angola has been on the investment radar of all major multinational companies. However, the limitations imposed by the local government in terms of foreign investment have always raised several concerns and hesitations amongst foreign investors wishing to grow their operations to Angola.

Given the need to attract private investment to the local economy, particularly to certain sectors of activity which are deemed as priority sectors by the Angolan government, and being aware of such concerns and hesitations, the Angolan Government enacted the New Angolan Private Investment Law ("NPIL") with the approval of Law 14/15, of 11 August 2015, and more recently the Procedural Regulation for Implementation of Private Investments ("Investment Regulation") with the publication of Presidential Decree 182/15, of 30 September 2015.

Main features

The NPIL is applicable to both domestic and foreign private investments and differs from the former law which required a minimum threshold amount of USD 1 million for any new investment operations. The NPIL does not mention any threshold for foreign investments and the former mandatory waiting-period of 3 years before investors could start to repatriate dividends is now absent.

The NPIL also distinguishes between direct and indirect forms of making investments and creates a threshold of 50% maximum value for indirect investments against the value of direct investments. As an example, for foreign investors, supplementary capital contributions, know-how and transfer technology are deemed as indirect forms of making investments.

The NPIL creates a further special threshold for shareholder loans, with a cap of 30% of the value of the investment for this form of funding and imposes mandatory waiting-period of 3 years before investors can start to get repayments.

From a tax perspective, this new law introduces a new supplementary tax on capital investment ranging from 15% to 50% over the part of distributed dividends or profits exceeding the foreign investor's stake in the company's equity.

Sectorial Limitations

The NPIL creates an express limitation for foreign investors, imposing a local ownership requirement regarding investments made in certain sectors. In this regard new investments in the following sectors require the establishment of local partnerships, in which the local partner must hold at least 35% of the share capital and have an active participation in the management of the company: (i) power and water; (ii) hotels and tourism; (iii) transport and logistics; (iv) civil construction; (v) telecoms and IT; and (vi) media.

Tax Benefits

Under the NPIL and the Investment Regulation, investments below USD 1 million will not be entitled to any tax benefits. Tax benefits continue not to be automatically granted to the investor and will be granted on a case-to-case basis (i) depending on the quality of the investment, i.e., on the amount, location and duration of the investment, the creation of partnerships between Angolan and foreign entities and the social and economic impact of the investment; and (ii) taking into consideration the tax incentives table contained in the NPIL.

Investment Process

Putting an end to an age old tradition, the Angolan National Private Investment Agency (ANIP) is no longer stated in the NPIL as an entity with which the contract will have to be entered into. In fact, the ANIP has recently been extinguished by the Angolan Government and was replaced by APIEX (Angolan Agency for the Promotion of Investments and Exports), which is responsible for the promotion of potential investments, the legal framework and existing business opportunities in Angola.

As such, the Investment Regulation clarifies the entities which under the NPIL have authority to conduct the investment process with the investors, which are as follows:

(i) for investments of up to USD 10 million, the process should be handled by Government Ministries. The choice of Ministry will depend on the sector in which the investment will be made. Each ministry will create a specialist investment unit to handle the investments;

(ii) for investments in excess of USD 10 million, the office of the President of the Republic will set up a specialist investment unit to deal with these investments.

The investment process itself has remained quite similar to what it was previously and involves the submission of an investment proposal to the applicable Ministry, including an application form, corporate documents of the investor and a business plan of the investment.

In terms of timing, the Investment Regulation provides that upon receipt of all the required documentation in an acceptable form(which the Ministry must confirm within 5 days of receipt), clearance of the investment should be given within 20 days, during which time the investment contract should be agreed. The investment contract should be executed within 10 days of the deadline for clearance.

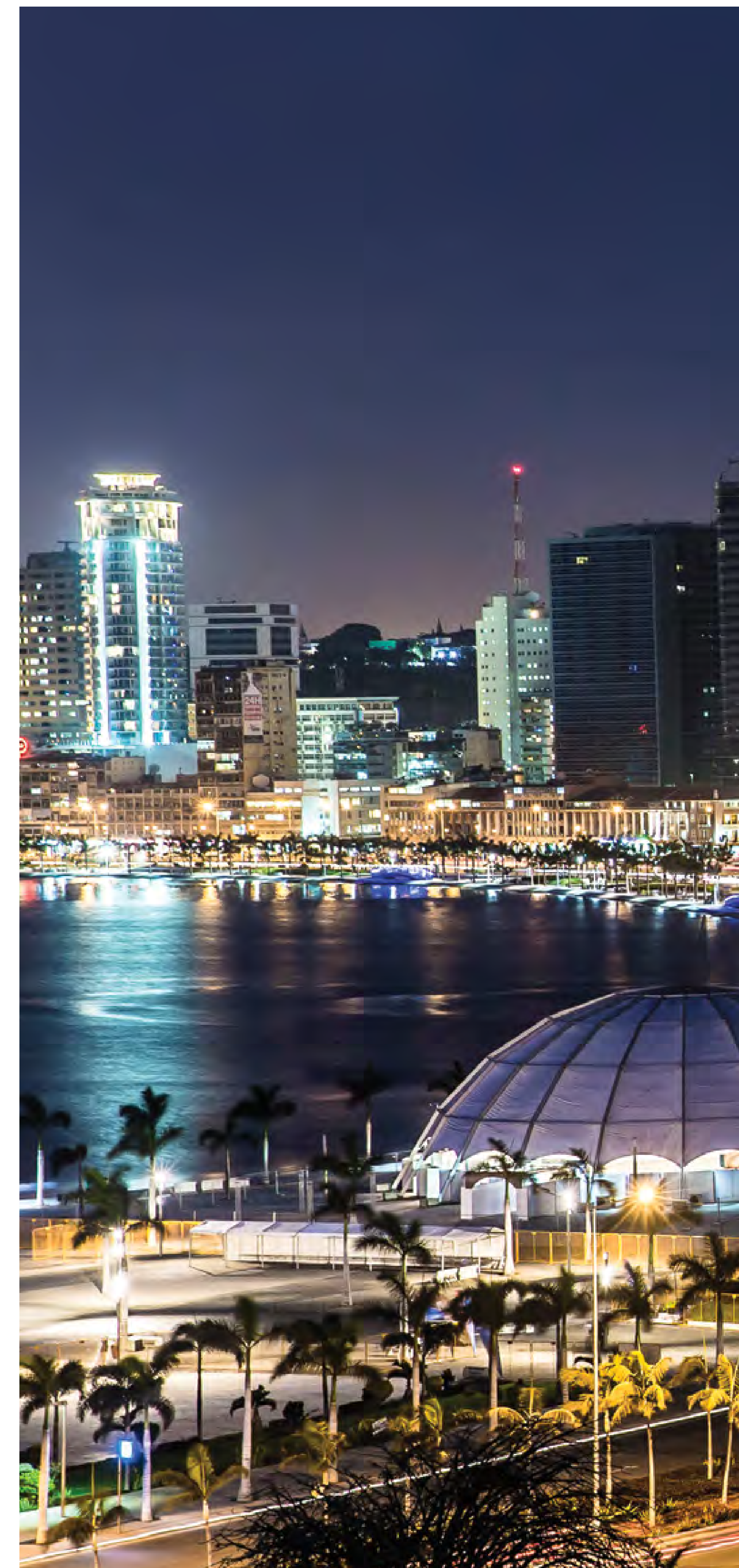
As was the case under the old law, the investor is then issued a Private Investor Certificate (CRIP), which must be sent to the Angolan Central Bank (BNA) and the Ministry of Finance.

For investments in excess of USD 50 million and that create between 200 and 500 jobs for Angolan citizens, these will be handled by a special committee to be set up by the President of the Republic and the investment contract should be executed within a maximum period of 45 days from the date of submission of the application.

Conclusions

The NPIL seems to put a greater emphasis on negotiation of the terms and conditions of investment contracts, as a number of mandatory legal requirements that appeared in the previous law have been deleted and replaced by the thresholds and ability to negotiate terms.

There is uncertainty as to how this NPIL will be implemented in practice but it is clear that this new law at least represents a new step by the Angolan Government to make the rules of private investment more attractive to foreign investors by adapting to the country's new reality and investment needs.



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Sovereign Investment Authority Nigeria

A Potential Partner in Africa

As of March 2015, sovereign wealth funds ("SWFs") had over US$6.31trillion of assets under management (2015 Preqin Sovereign Wealth Fund Review), and have long been a source of funds for fund managers. This figure includes an increasing number of African SWFs. African oil producing nations are leading the trend in an attempt to hedge against commodity cycles.

The Nigerian Sovereign Investment Authority ("NSIA") is one such SWF, established in 2012 with seed capital of US$1billion.

NSIA operates through three funds which have distinct objectives:

1. Stabilisation Fund ("SF")

SF received 20% of the US$1billion seed capital. The purpose of the SF is to act as a buffer against short-term macro-economic instability, given Nigeria's reliance on oil revenues and exposure to the commodity cycles. SF has a low return target with asset allocation split between hedge assets (25%) and growth assets (75%).

Three external fund managers currently manage the growth assets allocation, which is restricted to investment grade corporate bonds.

2. Future Generations Fund ("FGF")

FGF received 40% of the US$1billion seed capital. Its objectives are long-term (20+ years) and NSIA has a greater degree of investment flexibility which is based on a returns target. Each year NSIA develops a rolling five year investment plan for the year end 31 December 2014.

Under the current plan, 25% of FGF's assets have been allocated to Private Equity, Venture Capital and value-added Real Estate, of which 75.9% was invested at YE14.

3. Nigeria Infrastructure Fund ("NIF")

NIF received 40% of the US$1billion seed capital. Again, each year NSIA develops a rolling five year investment plan for NIF. NIF's objective is to develop Nigerian infrastructure. The current plan identifies five sector focuses: Power, Healthcare, Agriculture, Real Estate and Motorways.

Although investments are limited in geography, NIF has already paired with foreign partners. For example, the Abuja Centenary City development is a joint venture with Eagle Hills (an Abu Dhabi investment company).

4. Opportunities for foreign investment

To date, most of NSIA's investments are in Nigeria. However, there are no restrictions on SF and FGF investing abroad. As NSIA matures we expect that foreign investments will constitute an increasing portion of NSIA's portfolio and accordingly that there will be an increasing number of opportunities to partner with NSIA in the future.

Re-cycle Bikes to Africa

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In July 2015, King & Wood Mallesons EU & Competition partner Simon Holmes completed the La Marmotte Sportive cycle raising over £4,000 for *Re-cycle Bikes to Africa*.

Facing record breaking temperatures, Simon took part in the mammoth cycle event in the French Alps and successfully completed the challenge which entails a one day event riding 175km with over 5000m of climbing a fantastic achievement!

Re-cycle Bikes to Africa is a not-for-profit organisation based in the UK that provides unused bicycles in the UK to rural African communities where access to transportation can be limited. Access to a bicycle assists those who spend hours each day walking to collect water, firewood or to gain access to health care, school and employment.

Cindy Valentine wins leading award for investment funds

At the 2015 European Women in Business awards, Cindy Valentine, partner in the international funds group at King & Wood Mallesons, was awarded with the prize for 'Best in Investment Funds'.

The awards, organised by Euromoney Legal Media Group, recognise pioneering women leading the field in the European legal sector and celebrate the achievements of firms setting the standard for championing gender diversity.

Cindy, who has relocated to South Africa to better serve the firm's African focused clients, was recognised for her expertise in the private equity fundraising market as well as her strategic focus and success in expanding the African funds practice. Since her relocation, with others, Cindy has built the firm's African funds practice with over 20 African focussed fund clients.

In support of Cindy's award a client wrote: "From my vantage point it is clear that Cindy commands respect in the industry, and is at ease with private equity clients across the spectrum of size, sector specialisation and legal jurisdiction."

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France: A Gateway to Africa

"THE SUCCESSFUL LEGAL APPROACH FOR DOING BUSINESS IN AFRICA IS THE COMBINATION OF INTERNATIONAL AND LOCAL EXPERTISE. BY WORKING WITH AN INTERNATIONAL LAW FIRM BASED IN FRANCE, CHINESE INVESTORS CAN BENEFIT FROM STRONG EXISTING TIES WITH TRUSTED LOCAL LAWYERS ON THE AFRICAN CONTINENT AND THUS ADD VALUE TO THEIR INVESTMENT."

RICHARD MUGNI, E&I AND AFRICA PARTNER, KING & WOOD MALLESONS, PARIS

France shares its language with 120 million inhabitants from 31 African countries. It also shares centuries of history with Africa and its legal system exerted a strong influence over North African and Sub-Saharan Francophone countries. This influence is even perceivable in Portuguese-speaking countries like Angola and Mozambique.

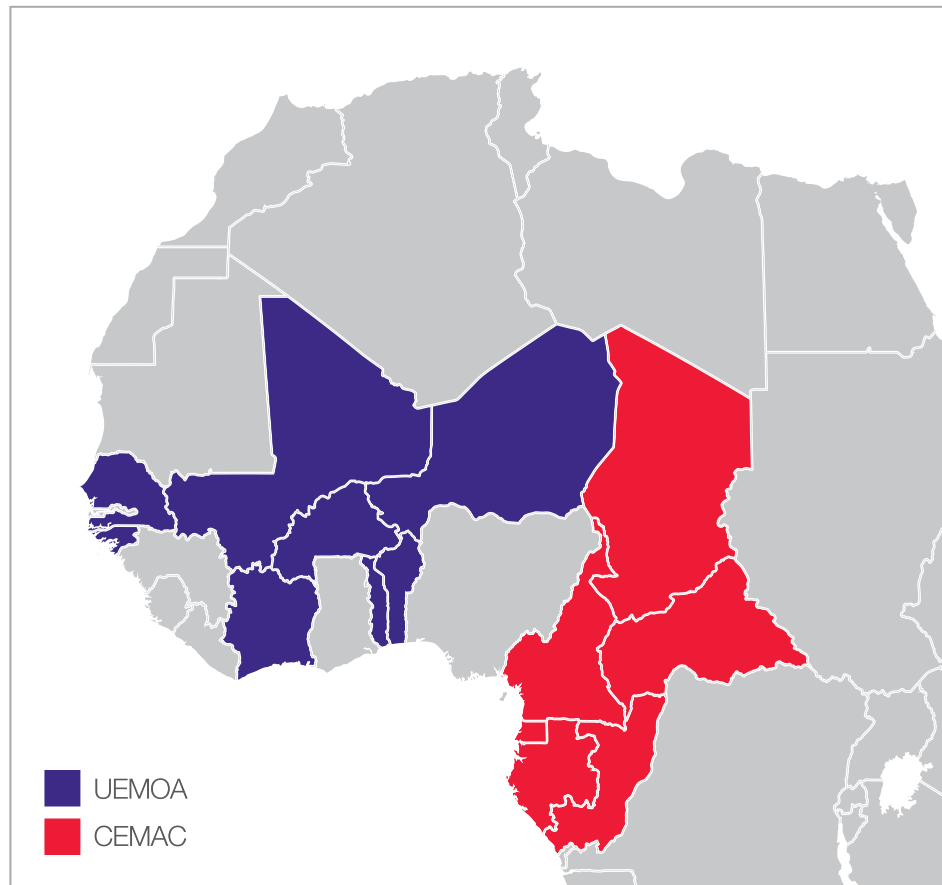
French legal concepts such as concessions for private public partnerships (PPP) in the transport, energy & mining sectors are widely used in Africa.

The unified business law (OHADA) shared by most of the Francophone African countries, which is based on the French legal system, is unanimously seen as a great progress. French law and courts decisions are regularly used for interpretation in these jurisdictions.

From a tax perspective, France has one of the largest tax treaty networks with African countries, counting about 30 tax treaties.

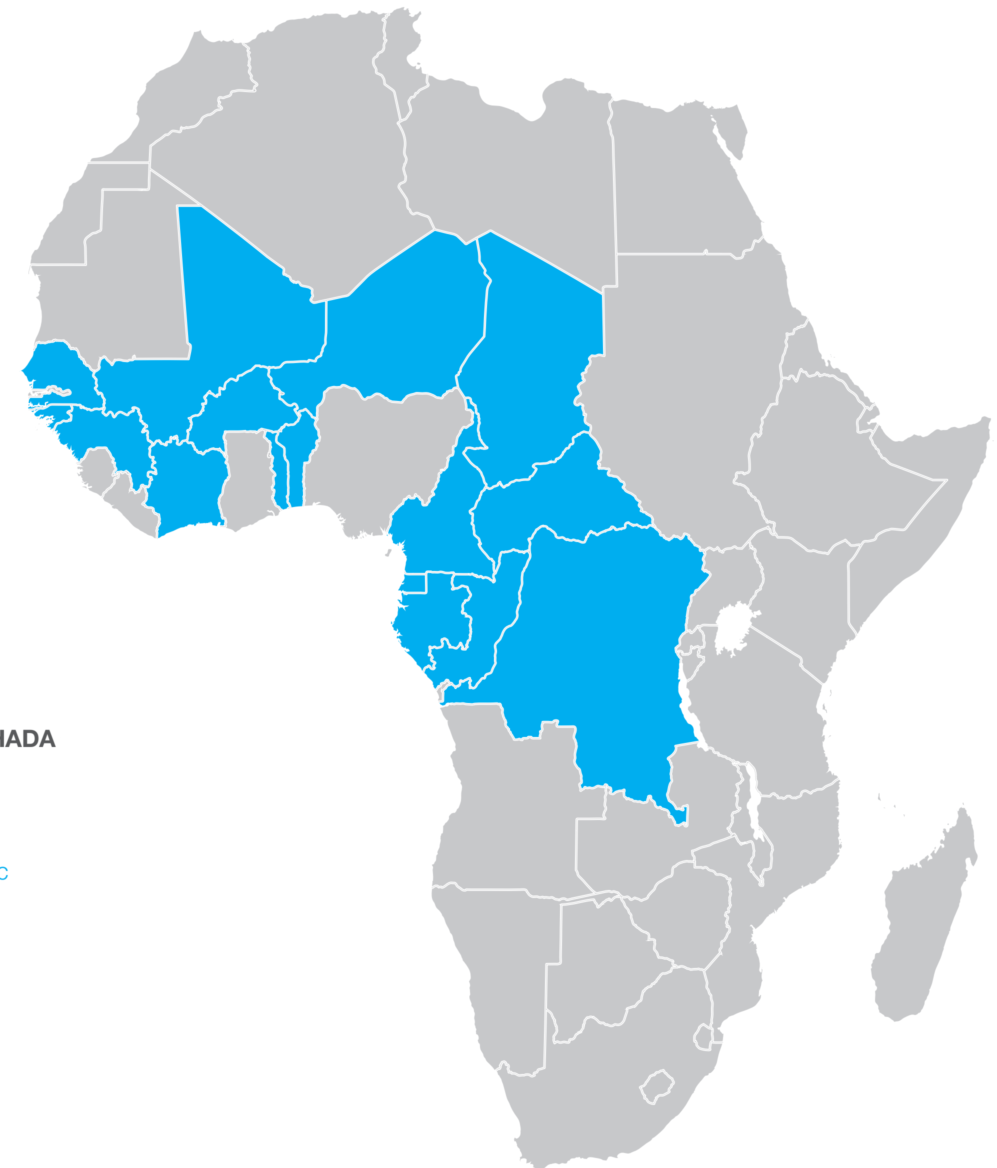
These strong legal and historical ties make France a natural gateway to Africa.

As investors' interest for the continent keeps growing steadily and new markets including retail, telecom & insurance services emerge, the African legal environment is getting more complex and African governments are getting organized to address the legal issues arising from their development. Unions such as the Economic Community of West African States (UEMOA) or the Monetary and Economic Community of Central Africa (CEMAC) become active and implement anti-trust and regulatory measures similar to those existing in France, Europe or China.



France is very active in supporting the business law organization, the expansion of the CFA Zone and the negotiation of economic partnership agreements between African States with the European Union. Private organizations such as the Council of French Investors in Africa (CIAN) maintain active business networks between France and Africa

They also cooperate closely with the other organizations including the French Development Agency (AFD), a 70 year old public financial institution which initiated the creation of a Guarantee Fund for Private Investment in West Africa (GARI).



Member states of OHADA

- Benin
- Burkina Faso
- Cameroon
- Central African Republic
- Chad
- Comoros
- Republic of the Congo
- Côte d'Ivoire
- Equatorial Guinea
- Gabon
- Guinea
- Guinea-Bissau
- Mali
- Niger
- Senegal
- Togo
- Democratic Republic of Congo

(source: http://www.proudlyafrican.info/proudly-african/ohada.aspx)

Benin and Niger Railway

King & Wood Mallesons advised Bolloré Group on the concession of the construction and operation of the railway between Benin and Niger

King & Wood Mallesons recently advised the Bolloré Group on the concession of the construction and operation of 1205 km of rail infrastructure linking Cotonou (Benin) to Niamey (Niger). The investment required by this project is estimated to be €1 billion. This project includes the renovation of the existing infrastructure and the construction of a new rail track. It also includes the development of multi-purpose areas powered by solar energy, called Bluezones that will be built alongside the rail track.

The agreements were signed on 13 August 2015 by the Beninese Prime Minister, His Excellency Mr Lionel Zinsou, the Nigerien Prime Minister, His Excellency Mr Brigi Rafini, and Bolloré Group's Railways CEO, Mr Thierry Ballard. Construction of the infrastructure is estimated to take 5 years. The rehabilitation of the railway line has already been launched.

Richard Mugni, Energy and Infrastructure partner at King & Wood Mallesons had previously advised the Bolloré group on the incorporation of Benirail Infrasructure, a company incorporated under Beninese law, for the construction and rehabilitation of rail infrastructure on the Cotonou-Niamey line.

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President of Mali in Paris

President Ibrahim Boubacar Keita meets the National Confederation of French Employers (MEDEF) and attends OECD Conference

The President of Mali, His Excellency Ibrahim Boubacar Keita and the ministerial delegation made a State visit to Paris from 20 October to 24 October 2015.

Richard Mugni of King & Wood Mallesons (Paris) attended the meeting between the Malian's delegation and the National Confederation of French Employers (MEDEF), as well as the OECD International Conference for the Malian Development and Economic Recovery.

In parallel to these meetings, Richard Mugni met Mali's Minister of the Economy and Finance, Mamadou Igor Diarra and Mr Alkeydi Touré, Chief of the Economic and Financial Cell from the Prime Minister Office, Mrs SY Fadimata TAPO, deputy of the Director in Charge of the Public Debt, and Mr MAIGA Mahamadou Zibo, Director of the Policy Framework against Poverty (CSLP).

The State visit started on 21 October 2015 at the Elysée Palace, where his Excellency has been awarded by French President François Hollande the Legion of Honour's highest rank.

Malian President Ibrahim Boubacar Keita followed by the Minister in charge of the Promotion of Investments and Private Sector, Mr Mamadou Gaoussou Diarra, and one hundred Malian businessmen, met the National Confederation of French Employers to discuss Mali's economic progress.

Economic ties between France and Mali are already strong, since no less than 125 French companies invest in the country, and more than 10% of the Malian imports come from France.

According to Vice President of Malian Employers, Seydou Mamadou Coulibaly, this meeting showed the strengthening of the economic cooperation of both countries. At the end of this meeting, several contracts were signed between French and Malian companies in the field of the solar energy and technology.

Afterwards, his Excellency came to Sorbonne Paris I University to lead a conference on the cooperation between France and Mali, entitled "From Verdun to Serval operation: France-Mali, a long standing solidarity and friendship".

A State dinner was hosted by the French President, Mr Hollande at the Elysée Palace for His Excellency Ibrahim Boubacar Keita.

On 22 October, the Malian delegation visited the OECD Headquarters, which hosted the International Conference for the Malian Development and Economic Recovery "Build an emerging Mali". It follows the meeting related to the Agreement for Peace and Reconciliation in Mali, signed in June 2015. In addition to the parties of this previous Agreement, 64 countries and international partners, Malian parties from the civil society and private sector as well, attended this event.

> "The aim is to promote Mali as a destination, and key sectors of its economy as well, such as mining and farming (…). Our country undertook courageous reforms that will help our investment sector to cope with the international standards".
>
> VICE PRESIDENT OF MALIAN EMPLOYERS, SEYDOU MAMADOU COULIBALY

A total of approximately €3 billion has been promised to Mali at the conclusion of the Conference. French President François Hollande announced a €360 million investment from France between 2015 and 2017 that includes €80 million for Northern Mali.

The French President specified this assistance will focus especially on "rural development in Ségou, health in Mopti, education in Gao, local development in Kidal." He also stressed that Mali "is a ray of light that must be sent to all the countries currently in the darkness".

After the OECD Conference, his Excellency Ibrahim Boubacar Keita concluded his visit in Verdun, the notorious First World War battlefield, where his grandfather defended France as a soldier of the French army.

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Celebrate Africa

7th Annual Africa Group Braai

Over 200 clients and contacts of our Africa Group attended this years' braai (barbeque) held in the evening of Thursday 2 July. The sun shone and the traditional food and drink flowed, resulting in a great celebration of Africa!

This year the attendees were welcomed by Barri Mendelsohn, Managing Associate in the Corporate Finance group at King & Wood Mallesons who introduced the two keynote speakers, John O'Mulloy, Managing Director at Standard Advisory London Limited, and Ian Dalglish, Head of Global Markets, at ICBC Standard Bank.

Standard bank is the largest bank in Africa by assets and ICBC is the largest bank globally and in China by assets and both have partnered to grow their businesses in Africa and internationally in key markets. ICBC holds a 20.1% interest in Standard Bank Group listed in South Africa and earlier in 2015 acquired 60% of Standard Banks' global markets business in London, forming ICBC Standard Bank.

The speakers discussed Standard Bank's position and role in developing business in Africa, and how ICBC Standard Bank envisions the interplay between Africa and China going forward. Both John and Ian gave their insights into some of the challenges as well as the opportunities for developing business on the continent, with some personal anecdotes both enlightening and entertaining the audience.

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Trade Mark Protection in Africa

An overview

Introduction

As more global businesses expand into the growing African market, protection of their brands has become increasingly important. However, gaining trade mark protection in Africa has proven to be difficult for many brand-owners. Research by the World Intellectual Property Office (WIPO) found that in 2013 only 2.4% of all trade mark applications made worldwide were filed in Africa. Whilst significant issues remain, efforts are being made to reform trade mark law and procedure throughout the continent, and there are reasons for optimism.

Applications

Businesses planning to register trade marks in African countries should be aware that there are often long delays in the application process.

For example, in Nigeria there are often delays of 12-24 months in advertising new trade mark applications (which is a key stage in the process and allows third parties to oppose applications), due to insufficient resources. The accompanying backlog means that over the course of 2013 there were 19,332 trade mark applications filed, but only 4,369 new registrations. Recently, however, there have been significant attempts to improve the situation in Nigeria by digitising databases, issuing trade mark journals more frequently and speeding up the issuance of registration certificates.

In Gambia, meanwhile, renewal fees are payable 14 years after the filing date, but there have been instances where trade mark applications are still pending after this 14-year period. This has left applicants unsure whether they have to pay a renewal fee despite not actually having a registration.

More generally, the application procedure is often less flexible in many African countries than, for example, in the EU. Businesses should ensure they comply with all deadlines as it may be difficult to get extensions of time, for example, to respond to the provisional refusal of an application; and the local Registry may not respond to an application for an extension, leading to a lack of clarity for businesses.

The political situation in some African countries can also cause unforeseen problems with filing trade marks, such as during the Arab Spring. In 2014 the Libyan trade mark office closed for several months until it was reopened under the control of the Fajr Libya Militia.

Enforcement

Trade mark infringement decisions are rare in Africa, making it difficult for businesses to enforce their marks. However, it is even harder to rely on unregistered rights, so businesses should always as a priority seek registrations for their key brands.

The scarcity of infringement decisions means there is a general absence of precedent which can make it more difficult to assess the strength of any potential claims. In addition, in some cases the Courts do not provide full reasoning. For instance, in *Weetabix v Manji Food (2013)*, the Kenyan High Court decided that Weetabix was a well-known mark but did not explain the basis for this, providing no guidance to other businesses who are unsure whether their mark will be treated as well-known for the purposes of enforcement.

Pan-African IP Organisations

There are currently two main organisations governing centralised trade mark applications, which between them represent 36 of the 54 countries: the Organisation Africaine de la Propriété Intellectuelle (OAPI) (17 members, mostly French speaking countries), and the African Regional Intellectual Property Organisation (ARIPO) (19 members, mostly English speaking countries). Countries which are not members of either organisation include Nigeria, South Africa and a number of countries in Northern Africa.

OAPI

OAPI's centralised filing system has had a reasonably good uptake and is useful for businesses wishing to protect trade marks in more than one member state. In 2013 it received 7,743 applications and granted 6,325 registrations. Registrants can file one OAPI application which covers all member states and there is no need to designate particular states where protection is sought.

When they join OAPI, each member state must renounce its national IP laws so the same laws apply in each state. These laws are very detailed and share some similarity to EU trade mark law; for example, the Nice Classification of goods and services applies, and well-known marks are given additional protection.

OAPI also recently acceded to the Madrid Protocol (which allows brand-owners to apply for a trade mark in a number of countries by filing a single international application, albeit if successful an applicant ends up owning a bundle of national rights as opposed to a unitary registration). However, there has been some debate over whether or not OAPI's accession was valid and, until this is resolved, it may be prudent for brand-owners to file an application directly with OAPI rather than designating OAPI through the Madrid Protocol.

ARIPO

ARIPO's centralised filing system has not been as well-received as OAPI's and, as yet, does not represent a particularly effective route for businesses to protect their trade marks. The uptake for filings has been very low: in 2013 there were only 593 applications and 291 registrations. One reason for this is that only four of the member states (Botswana, Lesotho, Liberia and Swaziland) allow for multi-class applications, which means that in all other member states, a separate application must be filed for each class of goods and services, which can add significantly to time and costs.

The Banjul Protocol allows for the filing of a single application to cover all member states, which can save costs in the filing process. However, the resulting registration is treated as a bundle of national rights and a member state can, within 12 months of the filing date, notify ARIPO that that mark will not be protected in that state.

One of the major issues with ARIPO is that trade mark law is not harmonised across member states so any infringement claims are conducted under the national laws of the country where the infringement occurs, which can lead to uncertainty and increased costs.

As a result of these issues, businesses should consider filing applications in each country in which they intend to launch as an alternative to filing an application through ARIPO.

PAIPO

In an attempt to overcome some of the problems associated with applications through OAPI and ARIPO (and in particular that together they cover only 36 of the 54 African countries), the African Union is preparing to launch the PAIPO (Pan African Intellectual Property Organisation), which will allow for a centralised African registration system and will apply to all members of the African Union which sign up; although it is not yet clear which states will choose to join.

A final draft of the governing statute was published in 2012 and the PAIPO is expected to be established soon (albeit it is not clear what the proposed launch date is), with its headquarters in Tunisia. In theory the ability to obtain a pan-African registration should be good news for those conducting business in multiple African countries. However, there have been some concerns over the transparency of the PAIPO consultation process, and it is not yet clear how the PAIPO will interact with OAPI and ARIPO.

Conclusion

Historically there have been significant issues with registering and enforcing trade marks in Africa, and businesses still need to be aware of these when looking at how best to protect their brands. However, recent changes at the national level suggest that efforts are being made to overcome these problems and improve the situation.

The establishment of the PAIPO could also potentially be a positive step; however, this will depend on whether the issues surrounding the PAIPO's implementation (and in particular its interaction with existing structures) can be successfully resolved.

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Permanent Capital Vehicles

The future for fundraising in Africa?

There has been much talk of over the years regarding permanent capital vehicles (PCVs) as a vehicle for private equity fundraising and investment in Africa. In Europe, PCVs have been used for a number of years by the likes of Electra, Apax and 3i to name a few. However, it is only recently that this interest in PCVs is translating into actual PCV structures being used in Africa (although PCVs are still the exception rather than the rule).

Investor feedback, particularly from Development Finance Institutions (DFIs), consistently demonstrates a preference for the Typical Fund structure (as defined below), absent good reasons for taking a different approach. This view is driven by a combination of familiarity with limited partnership structures, and in Africa in particular, Mauritian LLCs or LPs, and also the relative certainty of proceeds being distributed within a certain period of time.

The views of the DFIs are particularly relevant in Africa (and indeed all emerging markets) as DFIs tend to take the lead on backing first time managers. DFI support is generally fundamental to the success of a fund and it is important to ensure the DFIs are comfortable from the outset with the basics, such as the structure.

However, there are certain types of funds where a PCV structure is more relevant and likely to be utilised effectively. In particular, in infrastructure and real estate, there is a different investor profile split between development capital and yield investing, and time horizons are lengthier. A PCV is also more likely to be a preferred structure where investors are not necessarily typical DFIs, or there is a strategic reason for such a structure (and this reason is tested at the outset with the key investors).

Sector focus driving increasing interest in PCVs

While the number of general Africa-focused private equity funds raised far outweighs the number of funds raised for either real estate or infrastructure in Africa (by a multiple of almost 4 for the period 2005-2014)[1], we have observed increased activity for real estate and infrastructure over the past decade.

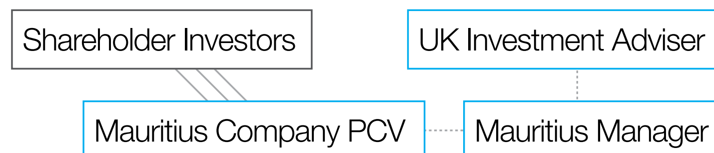
The number of infrastructure funds raised with an African focus between 2009 and 2014 is almost three times the number of funds raised between 2005 and 2009[2] and infrastructure has accounted for 17% of total fundraising for Sub-Saharan Africa in the first half of 2015.[3] Directly linked to the increased activity in the real estate and infrastructure asset classes, and the desire to realise longer term growth potential, has been a renewed focus on private PCVs, particularly for infrastructure.

PCVS in overview

A PCV is an unlimited life, open or closed ended fund, that is typically structured as an investment company, although limited partnerships are also used. An example PCV structure for a fund is set out below.

A PCV differs from the 'normal' PE fund structured as a limited life, self-liquidating limited partnership (a "Typical Fund") in several key areas (see adjacent table):

An example Africa-focused PCV structure



	Typical Fund	PCV
Fundraising period	12-18 months, after which no new commitments are sought	May fundraise either on an on-going basis or in several rounds of fundraising
Life cycle	Limited life – typically 10 years with 1 or 2 year extensions	May continue indefinitely
Proceeds	Will usually distribute realised proceeds with approval	May have the flexibility to reinvest some (i.e. the acquisition cost base) or all of these into future projects
Redemption rights	Will not usually contain redemption rights (other than in terms of an investor-driven termination)	May allow investors (often restricted) rights to redeem their interests, or at least achieve liquidity

PCVs also differ from listed funds in that they are not as heavily regulated (particularly in terms of governance and publicly available reporting), do not require up-front funding (which can lead to 'cash drag' for blind pool listed investment funds) and do not have to worry about trading at a discount to net asset value.

PCVs tend however to have investor-specific negotiated terms, which can be advantageous in attracting investment, but which can also increase the costs of fundraising (at least on the first round). They also do not offer a transparent secondary market.

Key drivers for using a PCV

PCVs can be attractive for managers in that:

- the potential longer life enables longer hold strategies and the ability to ride out short-term volatility;
- there is the ability to have multiple rounds or ongoing fundraisings, with subsequent fundraisings which may be potentially more marketable as a result of the visibility on an existing portfolio of assets;
- it retains assets under management and therefore there is relative certainty of income; and
- the manager does not have to return to the market on a regular basis to raise successor funds.

Private Equity styled PCVs, although attractive for managers, are likely a harder sell (unless there is a strategic reason for the structure) as they will need to justify to investors why they will not be adhering to the traditional buy-out or growth equity models.

Appetite in the infrastructure sector

Although not the first choice for many typical African investors (LPs), LPs do not shy away from non-traditional structures where there are good reasons for targeting a longer hold period, particularly in terms of the target assets and investment strategy. Infrastructure is therefore particularly well suited to being structured as a PCV, or at least as a longer term vehicle (see Hybrids, below).

However, real estate PCVs are, perhaps unexpectedly, relatively rare. This may in part be explained by there being relatively few real estate funds raised with an Africa focus, with none having been raised for Sub-Saharan Africa for the first half of 2015[4] and also by there being a number of prominent Real Estate Investment Trusts listed on the Johannesburg Stock Exchange.

Liquidity concerns

Satisfying investors' concerns over liquidity is a key consideration and managers need to consider whether to offer their investors the right to redeem their interests, subject to certain restrictions. The downsides of this approach are that it is less optimal for illiquid assets and, moreover, that it erodes the 'permanent' capital base. Managers therefore often look to different models, such as retaining a portion of liquid assets to satisfy liquidity demands or borrowing.

Manager incentivisation

Finally, manager incentivisation is often structured differently from Typical Funds, with management fees by reference to NAV and performance fees by reference to yield and NAV. This is an issue that may be overcome in the documentation.

Hybrids

Aside from an evergreen PCV or a fixed term Typical Fund, managers may also consider the area in-between, i.e. hybrid structures.

These may take the form of a longer life limited partnership or investment company, which is not structurally very different from a Typical Fund, but which provides for a longer life than a Typical Fund's 10-12 year term.

The general principle with Hybrids is to allow for a predefined liquidity event. This may take the form of a periodic investor vote to continue the fund and, if this vote is not passed, the fund will wind up within a certain period of time, much like the end of the life of a Typical Fund.

An increasingly popular alternative is to provide for an Initial Public Offering ("IPO") at a later date, with the fund effectively split between a first stage of behaving like a Typical Fund and a second stage involving a listing, whereupon investors may be given the flexibility to choose whether to receive cash from any available funds raised upon IPO, listed shares, or a combination of the two.

Conclusion

Although we are now seeing an increase in interest to consider PCVs, typically this is in respect of funds where the asset base is infrastructure or real estate. We are however also acting on some Private Equity PCVs, notwithstanding their focus on mid-market buyouts. Certain factors such as a specific investor base or a strategic investment is often prevalent in such instances.

The limited partnership model is a tried and tested model for private equity fundraising and our view is that it will be the preferred model, including in Africa, for many years to come. However there are some additional benefits to PCVs that are particularly attractive to emerging markets and it is therefore likely that we will see some increase in the use of these vehicles in the African market.

[1] Preqin , October 2015
[2] Preqin 2015
[3] EMPEA 2015
[4] EMPEA 2015

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Q&A with Avril Stassen, Senior Partner at Agri-Vie

BM: How would you define agri-investing?

AS: We define food and agri investing as covering the entire value chain from agri-inputs, farming, processing, logistics, services, wholesale and retail.

BM: How did you first get into agri-investing and what is your current role?

AS: My interest in agri-investing started with investing in food companies early in my career as an institutional money manager. I am currently a Senior Partner at Agri-Vie: Africa Food & Agribusiness Investment Fund.

BM: Do you think private equity is a suitable partner for long term agri projects?

AS: PE growth capital is patient capital, albeit fixed term, and agri projects require both time and patience. The limited appetite of Commercial Banks to fund agri projects also makes raising debt capital difficult, leaving equity as the major source of available capital. PE providers can also add significant value to food and agri-businesses beyond just capital and assist in building sustainable businesses by providing strategic input and support to executive teams in the areas of capital raising, M&A, industry and market knowledge and linkages and business building principles.

BM: Can you describe a project you are most proud of?

AS: We invested in a regionional value added dairy company in South Africa early on in our first Fund. Our active participation has assisted in driving both top line and bottom line performance to a level that translates into a substantial increase in the value of company. The company has also been recognised as an industry leader with several quality awards from the leading food retailer in South Africa. The company has attracted the attention of several strategic and financial buyers.

BM: Does "impact investing" work for a financial investor in the sector?

AS: The Food and Agribusiness sector is ideally placed to demonstrate good development impacts through a well executed investment programme. This is largely through to the creation of rural jobs, the promotion of small-scale grower supply chains and the creation of routes-to-markets

BM: What are the latest market trends in Africa for agri-investing? What are you seeing on the ground?

AS: More capital is becoming available, primarily from PE funds, but also from DFI's and Commercial Banks. Despite this demand still exceeds supply by a very large margin, particularly for start-up and SME opportunities.

BM: Which countries in Africa do you see the most potential for private equity in the sector and why?

AS: We are very excited about the potential in the larger countries of East and Southern Africa e.g. Kenya, Uganda, Tanzania, Ethiopia, Mozambique. PE has a very low penetration in the sector and Commercial Banks remain selective about providing debt capital at a reasonable price. In addition, imported processed food dominate the market, creating a huge opportunity for local production.

BM: What challenges do you see facing investors in the sector?

AS: The major challenges are: poorly developed supply chains, a large number of unscrupulous intermediaries disrupting markets and pricing and adding very little value, limited pool of management talent, limited supply of fairly priced debt capital.

BM: Do you think governments are encouraging foreign investment in key countries where you operate or making it harder?

AS: In the Food & Agribusiness sector it is our experience that governments are generally promoting and creating a positive environment for foreign and private sector investment.

BM: What techniques do you use when investing to protect your downside risk?

AS: We carefully select local partners in all our investments that understand the local environment. We also ensure that our interests are fully aligned with that of our local partners. We avoid highly regulated sub-sectors, particularly where governments influence supply/demand and pricing. Some of our investments benefit from exports and/or import parity pricing. We don't invest in start-up.

Women in Private Equity

King & Wood Mallesons sponsored the Women in Private Equity event with SAVCA at The Capital Hotel in Johannesburg on 19 November 2015. Keynote speaker Natalie Kolbe is a partner at Actis who focuses on consumer deals across sub–Saharan Africa. She was interviewed by Cindy Valentine, a partner at King & Wood Mallesons who specialises in private equity fund formation across Africa. Natalie and Cindy discussed the challenges and solutions facing women in the industry. The event was hosted by Erika van der Merwe, CEO of the South Africa Venture Capital Association.

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Structuring Sub-Saharan Investment Funds

A comparison between Mauritius and the UK

Introduction

When it comes to structuring funds or investment holding vehicles for investments into sub-Saharan Africa, there are some key factors to take into account when deciding what jurisdiction to use as a base. Of prime importance is the location of the investment team and the role they will take in the structure - will they take investment decisions, or advise a separate investment decision maker? This will be particularly important in determining the regulatory position, which is a key factor here.

Also important is the tax position, with the general aim being to structure investments so that the investors are not in a worse position than they would have been if they had invested directly. With an investor base which will often include non-tax paying entities, such as development finance institutions, this means that it is important that the investment structure is as tax efficient as possible.

Mauritius is for many the jurisdiction of choice, both for locating fund vehicles and investment holding vehicles, and this article looks at some of the reasons for this, by comparing Mauritius based structures against the position if investments were structured using a UK based corporate vehicle, by way of example.

We have focussed on the tax position for Mauritian corporate vehicles, as even where a Mauritius LP is used in a fund structure, investments will typically be made through a corporate investment holding company ("HoldCo").

Unless otherwise noted, this article assumes that a Mauritius based HoldCo would hold a category 1 global business licence under the Mauritius Financial Services Act 2007 ("GBL1") and therefore that the GBL1 tax regime would apply.

Treaty networks

Where the fund or HoldCo holds local investments in the sub-Saharan jurisdictions (e.g. in the form of shares in a local company) (the "Investments"), local withholding taxes may apply in respect of dividends, interest or capital gains received by Holdco, depending on the tax laws of the relevant sub-Saharan jurisdiction. Double taxation treaties ("DTTs") between the jurisdiction of the Investment and the jurisdiction of Holdco can operate to reduce or even eliminate the requirement to pay these local withholding taxes.

Mauritius has a wide network of DTTs with sub-Saharan jurisdictions (the "Mauritius DTTs"), making Mauritius an attractive location for HoldCo. To be capable of benefitting from the provisions of the Mauritius DTTs, Holdco must have sufficient "substance" in Mauritius to be considered to be treaty resident in Mauritius, by both jurisdictions (which is not necessarily the same as resident for "normal" tax purposes in Mauritius).

This means in practice giving careful thought to board composition in Mauritius, potentially hiring external directors, and considering how the investment team will be involved in the investment process and how investment decisions will be made.

By way of comparison, the UK has a similar breadth of DTTs (the "UK DTTs") in place with sub-Saharan jurisdictions to that of Mauritius. Similarly, to be capable of benefitting from the UK DTTs, HoldCo must be treaty resident in the UK, but if the investment team was based in the UK, this could be considerably easier to achieve.

Of course there are some key target jurisdictions that have a DTT in force with the UK and not Mauritius (such as Nigeria), and equally vice versa. The Netherlands has a decent treaty network with the region, but it is also worth noting that several sub-Saharan jurisdictions have no useful DTTs in force at all (such as Angola).

It can be seen that there is not much to separate the UK and Mauritius in terms of breadth of treaty network with sub-Saharan African jurisdictions, and in each case the applicable requirements for treaty residence need to be met. If an investment team is UK based then this might well be much easier to run operationally than a Mauritius based structure, so why is Mauritius more commonly used?

The answer lies in the fact that not only the general DTT coverage, but also the specific effects of the DTTs, in combination with local corporate taxes, need to be considered.

As a general rule, both the UK DTTs and the Mauritius DTTs normally operate such that the overall tax leakage in respect of income returns from these jurisdictions will be the higher of (a) the local tax withheld (taking into account any treaty rate of withholding) and (b) Holdco's applicable corporate tax on such amounts (for which see below). Even though the UK has a 'unilateral relief' credit system that can eliminate double tax even where there is no treaty in place, it is on the corporate tax side that it loses out to Mauritius.

Managers should also consider the bilateral investment treaty network which is designed to protect international investors against losses arising by illegal actions taken by government entities, such as nationalisation or expropriation of assets, but this may be more relevant to structuring the portfolio holding companies than the ultimate fund structure.

Local corporate tax rates

UK resident companies are subject to corporation tax of 20% (18% from April 2020 onwards) on taxable profits. Available deductions (including for interest payments) may operate to reduce a company's overall taxable margin, however this is subject to UK anti-avoidance rules including rules aimed at thin capitalisation and transfer pricing.

Mauritian companies are generally taxed at a rate of 15% on net income (excluding, broadly, capital gains, e.g. from the sale of shares). However, Mauritian companies that obtain a GBL1 licence can receive credits against Mauritian tax for any foreign tax paid on non-Mauritian income which may bring their the effective tax rate to a maximum of 3%.

Given then that the headline rate of corporation tax in the UK is higher than that in Mauritius, and that the availability of available deductions (e.g. for interest) is likely to be more restricted in the UK, the tax "leakage" in a UK corporate investing in sub-Saharan Africa would typically be greater than in a Mauritius corporate.

When you add this to the fact that UK withholding tax (currently at 20%) applies to UK source interest paid by companies, subject to certain exceptions and the application of any applicable double tax treaty, the UK starts to look like a significantly less attractive HoldCo destination for tax purposes. By comparison, under the Mauritius GBL1 regime there should be no requirement to withhold tax on interest paid.

> **"MAURITIUS IS FOR MANY THE JURISDICTION OF CHOICE, BOTH FOR LOCATING FUND VEHICLES AND INVESTMENT HOLDING VEHICLES"**
> LAURA CHARKIN, PARTNER, KING & WOOD MALLESONS

VAT

If HoldCo were a UK resident company, then provided that it is a relevant business person for the purposes of UK VAT law, any services that are supplied to HoldCo (including, for example, advisory or accountancy and legal services) are likely to be considered to be supplied in the UK and subject to UK VAT at 20%. By contrast, if a UK investment adviser were to provide its services to a Mauritius HoldCo, neither UK VAT nor any reverse charge to Mauritian VAT should apply.

Looking at the situation where a Mauritius based investment manager provides services to a Mauritius based entity, although Mauritius does have a goods and services tax of 15%, there is an exemption from this for certain investment management services which may apply, depending on the facts, again leading to Mauritius being more favourable than the UK in this respect.

Regulatory

The UK and EU regulatory regime will also affect the UK's suitability for investment vehicles. Funds and investment vehicles in the UK may be considered collective investment schemes and/or Alternative Investment Funds (AIFs) for the purposes of the EU's AIFMD regulations – if so, they will need to be managed by an entity authorised by the UK's Financial Conduct Authority.

The process for obtaining FCA authorisation (which may be obtained either by the vehicle itself or a third-party manager) can take several months and will involve, amongst other things, the formation of a business plan and compliance arrangements, the disclosure of financial information and ownership arrangements, the retention of a minimum amount of regulatory capital, and the payment of a £5,000 fee.

The applicability and requirements of the AIFMD will depend on the nature and size of an AIF, but requirements may include the appointment of an independent depositary (to safeguard assets) and valuer (to value assets periodically), leverage limits, the maintenance of professional indemnity insurance, a duty of the manager to abide by certain fiduciary standards, and certain transparency, disclosure and record-keeping obligations. All of these regulations and compliance hurdles may prevent start-up funds from ever launching.

Apart from a GBL1, if applicable, there are no special licences required for HoldCo to provide equity investment and mezzanine finance to projects in sub-Saharan Africa from Mauritius, thus the regulatory regime is more straightforward. To obtain a GBL1, companies will need to demonstrate that they have at least two directors resident of Mauritius who are of sufficient calibre to exercise independent judgment, must maintain a principal bank account in Mauritius, must keep accounting records at a Mauritian registered office, and must prepare and audit financial statements in Mauritius. Given the need to attract significant new capital to Sub-Saharan Africa, the lower regulatory and compliance hurdles may be attractive to managers. Of course these are minimum standards only and larger funds may have higher industry standards to adhere to in any event (or their LPs will demand more).

Use of 'offshore' structures

Mauritius is by no means the only jurisdiction used for investment in Sub-Saharan Africa and for vehicles that do not need to access a treaty network the classic offshore locations such as the Cayman Islands and the Channel Islands remain popular. Also other 'treaty' jurisdictions, such as Cyprus, are actively looking to improve the 'usability' of their local regimes to attract new business of this type. In this context, Mauritius' particular advantage lies where an 'African' based structure is required by certain DFIs. There has been a movement by the DFIs to scrutinise the dominance of Mauritius (and the use of GBL1s) and to seek alternative onshore financial centres in Africa, although no favourable alternative is available at present.

In addition, initiatives such as the OECD's moves to counter 'base erosion and profit shifting' will mean that the 'substance' of entities based in 'offshore' jurisdictions such as Mauritius will come under increasing scrutiny in years to come.

As a result, those putting in place structures now should give some thought to their future robustness both in terms of design and in terms of how they are run in practice.

Looking at the position overall, it is clear why Mauritius has proven to be such a popular choice for investments into sub-Saharan Africa. It has a local tax regime with low effective rates of corporation tax, combined with access to a good treaty network, which gives it the advantage over both the classic 'offshore' tax havens (with few tax treaties) and classic 'onshore' jurisdictions (with higher effective rates of corporate tax).

When you add to this the fact that supplies of investment advisory or management services to a Mauritius based entity from EU or SA based advisers should not attract VAT, the overall tax environment is particularly attractive. The regulatory environment there is similarly benign. All that said, managers intending to set up a fund or HoldCo in Mauritius will still need to give thought to substance tests, anti-avoidance legislation, OECD developments as well as the developments in the industry and the views of their LPs, particularly the DFIs.

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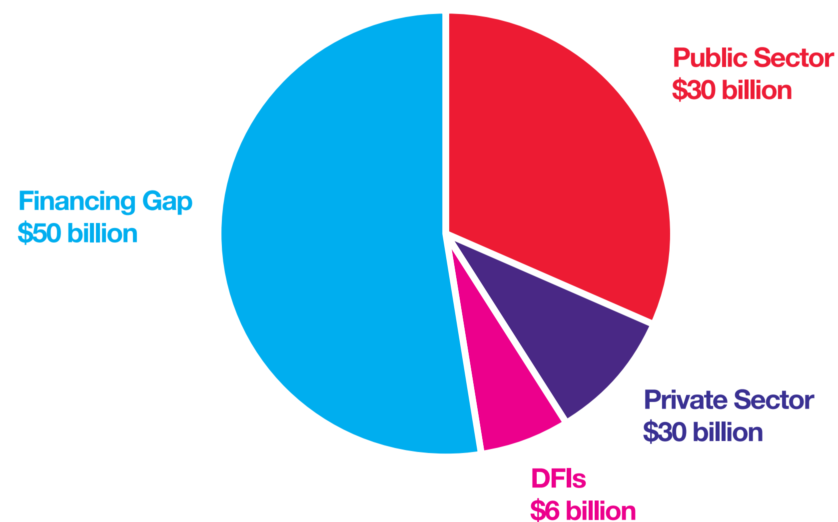
Infrastructure Funds in Africa

The Opportunity

The potential for investment in infrastructure in Africa has become a much discussed topic, from varying view points, including the actual financing needs, how investment can be increased, the risks, what structures may be used for investment and the potential returns.

In terms of the actual financing needs, according to the African Development Bank (the 'AfDB') addressing Africa's infrastructure deficit would require investment of almost US$100 billion every year for the next decade and the current shortfall in investment is more than half the required amount.



The macro-economic shift across a number of African countries has resulted in a positive view of the investment landscape in Africa in general and an emerging middle class with an increased spending power and demand has contributed towards GDP growth, most notably in the consumer goods, telecommunications and financial services sectors. Notably, such growth requires investment in infrastructure.

Although a continent made up of countries with very different economies, cultures and needs and despite recent market disruptions, where risks, political and market volatility previously impeded viable infrastructure investment, the outlook is now more optimistic and international infrastructure investors are recognizing the potential in Africa.

An enabling environment

Certain catalysts can be used to explain the shift in investor perception, which include:

- better political stability in a number of countries including certain major economies (Nigeria being a recent example of a relatively smooth change in power);
- cooperation and endeavours of national governments, supranational bodies and development agencies to initiate infrastructure projects;
- the creation of legislative and regulatory frameworks aimed at supporting infrastructure initiatives; and
- an increase in capacity in the sector both within government bodies and within professional service providers.

Focusing on viable cooperation initiatives, a high profile example includes the AfDB's 'Africa 50', with the aim of raising US$3 billion for infrastructure projects. The goal of the initiative is to mobilize 'private financing to accelerate the speed of infrastructure delivery in Africa, thereby creating a new platform for Africa's growth' with a focus on high-impact national and regional projects in the energy, transport, ICT and water sectors.

The initiative will have two business lines: project development with the objective of increasing the number of bankable infrastructure projects by providing early stage capital and legal, technical and financial expertise; and project finance which will provide financial instruments needed to attract additional infrastructure financing to the continent such as bridge equity, senior secured loans and credit enhancement.

The AfDB's Africa50 is in response to the 'Program for Infrastructure Development in Africa (PIDA)' approved by African Heads of State and Government in 2012. PIDA provides a framework for regional and continental infrastructure development consisting of 51 cross border programmes in the energy, transport and ICT sectors and also trans-boundary water management. The AfDB acts as an executing agency with a responsibility for contractual, financial, technical and administrative management of the framework as well as having a responsibility for procurement procedures.

Also notable is the US presidential initiative 'Power Africa', launched in 2013 with the objective of adding 30,000 megawatts (MW) of new, cleaner electricity generation capacity across sub-Saharan Africa. However, tangible investment borne out of this initiative remains to be seen. Better regulation, another factor that could impede investment when it is lacking, is also assisting the infrastructure investment climate.

For example, Uganda, has been able to unbundle its electricity industry and increase private investment. The Ugandan government began this process by passing its Electricity Act, removing an existing monopoly. Three new electricity companies were created for generation, transmission and distribution and also an electricity regulatory authority was created.

These enabling factors have assisted in creating some level of certainty amongst developers, lenders and investors. Although still burgeoning, international commitment to infrastructure projects in Africa are increasing.

The Investment Landscape

Amidst the general increase in fundraising for Africa investment, there has also been a marked increase in institutional capital fundraising by infrastructure fund managers seeking to invest in Africa.

As well as establish fund players like AIIM (the Old Mutual-Macquarie joint venture), ECP, Qalaa (previously Citadel), Denham Capital and Harith's various infrastructure funds, new pools of capital continue to be established focussing on new regions, such as the ARM-Harith Infrastructure Fund which announced a first closing of in February of this year and which according to the CEO of Armhill, is the first of a series of planned infrastructure funds, which is intended to provide 'much needed long-term equity capital for funding infrastructure in Nigeria and West Africa'.

Some of the larger established fund managers are also seeking to deploy money in African infrastructure projects by establishing teams that will focus on Africa and previously European focused players such as Meridiam have recently established and successfully closing funds focused on investment in Africa.

There are also other state-backed investment funds such as the Africa Finance Corporation (AFC) based in Lagos that have capital to deploy and also seek to take development risk by backing developers. Whilst data on the exact extent of Chinese investment in African infrastructure varies, it cannot be left unsaid that Chinese investment in the landscape is high, notably seen in greenfield, physical infrastructure type projects. Chinese contractors, whose motivations could be more than purely commercial, are also able to outbid western bidders for concessions awarded by public bodies.

There is also a perception that Chinese investors are more able to withstand the risks associated with African infrastructure investment and when not involved a common occurrence is the existence of the larger development finance institutions ('DFIs') to provide credit support to a project in order to make it bankable, an example is the IFC's plan to launch infrastructure debt managed accounts that will be bolstered by credit enhancement mechanisms, including IFC's provision as to first-loss capital so as to provide an investment-grade profile (announced in November 2015, PEI Infrastructure Investor).

The establishment of the Blackstone-led BlackRhino project development company focused on the development and acquisitions of energy and infrastructure projects across Africa using project finance structures is also notable. It has announced a 550 km "Horn of Africa" fuel pipeline as its maiden project. This may be the first major US-private equity led platforms for infrastructure investment in Africa.

Infrastructure Fund Structures

Whilst the need is clearly apparent, investors and those who look to raise capital for investment must also consider what types of structures are more appropriate for such projects.

A large number of the infrastructure opportunities are greenfield meaning that the returns that would otherwise be available on infrastructure assets in more developed markets (i.e. yield) are not, for now, the same. In addition, the risks associated with African infrastructure investment are generally greater, although potentially meaning higher returns, investors will seek to look at structures that will allow them to mitigate such risks.

Infrastructure funds are therefore a viable option. As with Infrastructure funds in developed markets, the general theme is to establish private equity type structures, however given the nature of the asset class (again as with developed markets) the fund life may be required to be longer than the typical 10 year term, particularly with greenfield assets.

Another consideration is the establishment of longer term vehicles such as permanent capital vehicles ('PCVs') (discussed in this edition) or for hybrid vehicles. As the market and asset class matures PCVs may become more common place to support yield type returns.

As mentioned DFIs are common investors, in accommodating this type of investor fund managers will also need to consider specific environmental, social and governance requirements. These requirements are often embedded into fund documentation and can also extend to the procurement of adherence to certain standards at project/portfolio level.

Conclusion

The enabling environment being created by (relative) political stability, governmental cooperation, initiatives by supranational bodies and development agencies and legal and regulatory reforms, certainly make for an increasingly attractive investment opportunity.

What is now taking shape within the industry is how best to tailor investment opportunities in order to deal with risk profile, to accommodate specific concerns of investors and the nature of returns being made.

Impressions of ILFA 2015

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September 2015 marked the beginning of the tenth year of the ILFA (International Lawyers for Africa) programme - an award-winning secondment initiative that aims to build legal capacity in Africa by equipping African-qualified lawyers with additional legal skills and expertise in a range of key areas including, corporate law, international dispute resolution and project finance as well as legal practice skills.

The programme, which was founded by Tim Taylor QC of King & Wood Mallesons (which continues to house ILFA in its offices) and designed to provide African-qualified lawyers with placements in top law firms and corporates in the UK and internationally, over a three month period.

This year King & Wood Mallesons, in conjunction with key client GE Capital Aviation Services is hosting three lawyers on the programme; Billen Gidey, legal counsel at Equity Bank in Kenya, Minega Isibo legal counsel at the Rwanda Development Board and Oyindamola Oyeduntan, legal counsel at the Nigerian investment company Heirs Holdings.

Perspectives on ILFA

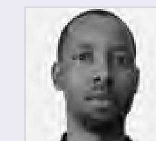
I applied for the ILFA program because I was confident that it would give me an invaluable opportunity to improve my legal skills and knowledge and enable me to become a more effective and well-rounded lawyer. I'm glad to say that the program has met my high expectations.

The various lectures given by the participating law firms were very stimulating and interesting, and we were fortunate to meet many associates and partners from those law firms at the various networking events. I was also fortunate to be placed with a knowledgeable and friendly group of ILFA candidates, and we bonded well as a group during my time in London.

For the placement section of the course, I have been working in the Dubai office of King & Wood Mallesons. I worked in the litigation section and assisted my colleague on a few interesting cases involving arbitration and covering many different types of agreements. Everyone I encountered was very helpful and friendly when I joined, and the fact that the Dubai office has a small team made it easier to feel at home in the firm.

Dubai is a fascinating city, although the extreme heat and the disorientation involving a Sunday-Thursday workweek both took some getting used to. There are countless things to do in Dubai over the weekend, and I found it much easier to get around with public transport in Dubai than I did London.

Overall, it has been a very exciting and invaluable learning experience, and one I would not hesitate to recommend for any would-be applicants. I feel that I have developed many skills which can be of benefit to the Rwanda Development Board, and I feel that the entire experience has been a very enriching one.



MINEGA ISIBO
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Dubai

Many things have struck me since arriving in London to take part in the ILFA Programme... The greatest impression made on me during this programme has been the platform given to me to meet the other African lawyers participating in the programme. I have observed my colleagues and had conversations with many of them about previous achievements and work or other initiatives they are currently involved in back home. I have been left amazed and impressed at the fact that ILFA has managed to bring together some of the brightest minds in Africa.

Before participating in this programme, I did not know too much about other African countries however, one of the first things I did after arriving for the programme and interacting with my colleagues was to download an image of the map of the world and make this my laptop screensaver. I now study Africa daily - my interest and passion for the continent has been sparked and is growing daily. I am beginning to realise more and more the great potential in my continent and the fact that I as any other African of my generation, have a role to play to enable Africa to achieve its potential.

I also realise the privilege of having brilliant lawyers from some of the top law firms in the world providing priceless hours of training for an intense two and a half weeks and the opportunity to work at a UK-based international law firm and experience first-hand working life at such institutions. My best moments were when my colleagues and I bombarded leading City lawyers with practical questions and listening to their brilliant and equally practical responses.

Another important, albeit less profound, discovery has been experiencing London not as a tourist or as a student, but as a legal professional. This has been a totally new experience - right from the commute to work to experiencing the English preference for consuming bread!

I have always nursed a dream to be part of ILFA and I am especially glad it became a reality this year. While it hasn't been an all smooth journey, battling homesickness, experiencing and managing cultural shock (both African and Western) and navigating through the new working environment in such a short time, it has all been worth it and I know that invaluable connections have been made during this period which I hope to keep and develop over the coming years. If that is all I manage to take away from ILFA then I will say the programme has been a huge success.

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Critical Path

Anti-Bribery and Corruption Due Diligence in Africa

Companies that operate in numerous jurisdictions have long faced the burden of complying with various regulatory regimes that can vary significantly and change rapidly. Increasingly, however, regulators are expanding not just the extent of the regulations but also their jurisdictional coverage.

Regulations such as the UK Bribery Act 2010 ("UKBA") and US law by the Foreign Corrupt Practices Act 1977 ("FCPA") have wide extra-territorial application and foreign companies with UK or US elements can find themselves facing vast penalties and potential criminal sanctions against itself, its employees and its directors.

The expansion of the regulatory regime has resulted in a much more visible compliance culture across the board. One area where we are seeing significantly increased levels of interest in anti-bribery and compliance requirements is at the due diligence stage of transactional work ("ABC Due Diligence").

Irrespective of whether companies are investors looking to expand their portfolios or are looking for acquisition-led growth, they are appreciating the necessity of confirming that a target company is compliant with all applicable regulatory regimes.

Many companies and investors in the West have the perception that conducting business in Africa is rife with corruption, particularly when dealing with government officials, and indeed this has some truth in some countries. There are also plenty of high profile examples of multinational companies receiving severe fines in relation to their activities in African countries to support this perception; from Alcatel Lucent in relation to telecoms contracts in Kenya, Nigeria, Angola, Ivory Coast, Uganda and Mali to BAE Systems for false statements and accounting practices in Tanzania.

However, it is important to acknowledge that Africa is not, and cannot be considered as, a homogeneous entity. There are many African countries which have developed, and are increasingly vigorously enforcing, domestic anti-bribery and corruption legislation. Whilst the risk of compliance issues means that companies conducting business in Africa need to be cautious and conduct the necessary due diligence, this is no reason to not invest.

Due Diligence Processes

A purchaser cannot assume that a target company will already be compliant with either its current regulatory regime or with any additional regulatory requirements that it may become bound by once it joins the acquiring company's group. The level and thoroughness of the due diligence that a purchaser undertakes in relation to subsidiaries / third parties is a factor that regulators will consider when they are deciding whether to prosecute alleged violations of compliance regimes. In certain circumstances, a purchaser can be found liable for the acts of its predecessor in title.

As with all due diligence processes, it is important that the parties start by determining the key compliance risks for that specific transaction. The focus of an ABC Due Diligence exercise will therefore change depending on the industry, jurisdiction and history of the target company.

It is also a dynamic process and, as it progresses and further information is uncovered, the focus may change. For these reasons, it is preferable for parties to use a cascade mechanism whereby each identified issue is put through increasingly rigorous due diligence processes (from questionnaires sent to the target up to gathering human intelligence through covert investigations).

In order to be effective, it is vital that the information gathered during the ABC Due Diligence is clearly communicated to the board of the purchaser so that key acquisition indicators are identified and can be acted upon. Key reporting lines must be established and maintained and it is common for a non-executive board member to be appointed to oversee the ABC Due Diligence process and to act as a conduit between the acquisition team and the board.

There are numerous areas which may need to be considered when beginning an ABC Due Diligence process, including political risks, dealing with state owned enterprises, corporate social responsibility, manipulation of accounts and concerns in relation to employees.

Government Licences and Fees

One area which is a specific risk and regularly causes concerns during and following acquisitions in many jurisdictions is government licences and fees. Target companies often require licences from or have to pay fees to local or national governmental bodies (for example oil and gas licences, transport licences, export / import licences and planning permissions). This is a high risk area for companies (particularly in certain jurisdictions and industries (i.e. the oil and gas sector) since the importance of these licences and the lack of transparency has traditionally resulted in significant corruption risks.

In addition to any local law requirements, the types of payments that can be made to foreign public officials are highly restricted under English law by the UKBA and FCPA which, as mentioned above, both have wide extra-territorial applicability. As such, where either the purchaser, one of its subsidiaries or the target company conducts business in the UK or US then compliance breaches in a third party jurisdiction can be enforced under these regulations.

The principle of corporate liability created in section 7 of the UKBA means that companies will be liable for their employees' actions in relation to bribery where the company does not have adequate procedures in place. Other key risks include payment of bribes (s.1 UKBA), receipt of bribes (s.2 UKBA), facilitation payments (Ss1 and 6 UKBA), Books and Records offences under US laws and facilitating transfer of proceeds of crime in breach of UK Proceeds of Crime Act.

Breaches of these laws can lead to severe penalties including unlimited fines, custodial sentences for directors and senior management, debarment from tendering for public contracts, the inability to work with or receive investment from international organisations and the imposition of a monitor.

By way of example, Mabey & Johnson, a British engineering company, self-reported to the UK Serious Fraud Office in 2008. It admitted to systematically paying bribes in numerous jurisdictions and was ordered to pay £131,201 under the Proceeds of Crime Act along with the successful prosecution of two former company officers.

Prosecutions of this nature also risk becoming highly publicised with the consequent risks to the reputation of the company and its management as well as invalidating licences and contracts upon which the company relies.

Intermediaries/Agents

Purchasers also need to be careful to investigate the role of intermediaries/agents used by the target company. Companies which are knowingly committing compliance offences often use agents/intermediaries to attempt to distance themselves from the relevant actions and, even where the target company is itself compliant/has the necessary procedures in place, this is an area where it will have the least control and may be unknowingly committing offences.

The actions of the target's agents need to be an active consideration for the purchaser since the target, and going-forward the purchaser, may potentially be liable for their actions.

Flushing Out Concerns

A multi-tiered, cascade approach to ABC Due Diligence will regularly be the most reasonable in terms of cost whilst also providing sufficient protection to the purchaser. Any concerns arising from the initial due diligence checks should indicate whether the various levels of more extensive due diligence are necessary or indeed bespoke checks.

In all situations, consideration must be had as to what would be deemed "adequate" by applicable regulators, the cost to the purchaser and what is practical. It is, for example, unlikely that the target company will provide significant (if any) access to its employees/relevant third parties at an early stage in the acquisition process.

There are a number of broad, preliminary measures that can be undertaken for each risk identified including:

- sending questionnaires to the target and related follow-up;
- reviewing relevant agreements and licences made by the target; and
- conducting general online research including publically available data.

Specific issues, for example the use of intermediaries/agents, will require the purchaser and its advisers to take issue-specific steps (i.e. review the agency agreements, understand the basis upon which agents are engaged and determine potential attributable risks). In some circumstances, it may be advisable to escalate straight to the more advanced due diligence processes for certain issues at a preliminary stage.

Where the results of the preliminary ABC Due Diligence raise concerns or are inconclusive, further steps can be taken including interviewing the target's senior management, extensive reviews of relevant agreements, extensive public record searches, screening of agents, intermediaries and third parties and the use of forensic accountants to identify red flag transactions.

Ongoing concerns can then be escalated to include interviewing employees beyond the target's senior management, sending questionnaires and/or interviewing senior management at third parties, conducting comprehensive search and analysis of online and print media in multiple languages, obtaining a financial / forensic analysis of specific risk associated with specific agents, intermediaries and/or third parties, and undertaking investigative due diligence.

Where issues are identified through the ABC Due Diligence process, the purchaser has the opportunity to take remedial steps, for example, requiring the target to formalise / amend relevant agreements, obtain legal advice and contractual protections (i.e. indemnities or escrow/ deferred payments), and / or require the target to implement new procedures.

Where remedial steps are either not available or insufficient, the purchaser can use these concerns to reduce the acquisition price or, as a last resort, to pull out of the transaction entirely.

Conclusion

It is clear that ABC Due Diligence is now a critically important element of transaction due diligence and the approach, practical steps and considerations set out herein are highly recommended to those investing in Africa.

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Merger Control in Tanzania

Need for legal certainty on when a merger is notifiable

Introduction

The past 10 years have seen a significant increase in investment in Africa. From around USD 15 billion in 2007, Foreign Direct Investment (FDI) is projected to rise to around USD 150 billion by 2015. Tanzania is now the top destination for FDI in the East Africa region, according to the United Nations Conference on Trade and Development (UNCTAD). Recent data from UNCTAD World Investment Report 2014 shows that Tanzania had USD 12.72 billion in FDI stock.

Furthermore, the Government of Tanzania generally has a favourable attitude toward FDI and has had considerable success in attracting FDI. Tanzania currently attracts approximately USD 1.8 billion of FDI inflows annually.

This large amount of FDI, coupled with an average GDP growth ranging between 6.5% to 7.8% annually from 2002 to 2014, has made mergers and acquisitions transactions a necessary next step in Tanzania becoming a global economy.

However, although the general attitude is that Tanzania is making strides towards becoming a favourable destination for inward flows of FDI, there has been a recent change in stance by Tanzania's Fair Competition Commission (**FCC**) as to how it treats mergers and acquisitions, and we look at the historical and current position below and see what effect it may have on inward investments and mergers and acquisitions.

Merger notifications under the Fair Competition Act

Tanzania is not a party to COMESA so only the domestic merger control regime applies under the Fair Competition Act 2003 (the FCA) where a merger is defined as an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

Consistent with merger control regimes in a number of other countries, the FCA provides that a merger is notifiable under the FCA if it involves assets above threshold amounts which the FCC shall specify from time to time by Order, in the Gazette, calculated in the manner prescribed in the Order.

The Fair Competition (Threshold for the Notification of a Merger) Order, 2006 sets out the threshold amount providing that a merger has to be notified to the FCC if the combined assets of the entities involved in the transaction is above the prescribed threshold amount of TZS 800,000,000 (approximately USD 380,000.00 as of today).

As such, for a merger to be notified, it has to meet the prescribed thresholds being a combined value of asset above TZS 800,000,000 of the merging parties and also result in a change of control. However, "change of control" has not been defined under the FCA nor has it been interpreted or guidance provided by the FCC.

Defining a "change of control"

What is a change of control in the absence of a definition under the FCC Act? In our view guidance can be drawn from the definition of "common control" in section 4 (2) of the FCA, which specifically excludes the section on mergers and merger notification, which provides that a body corporate shall control another body corporate if the first mentioned body corporate:

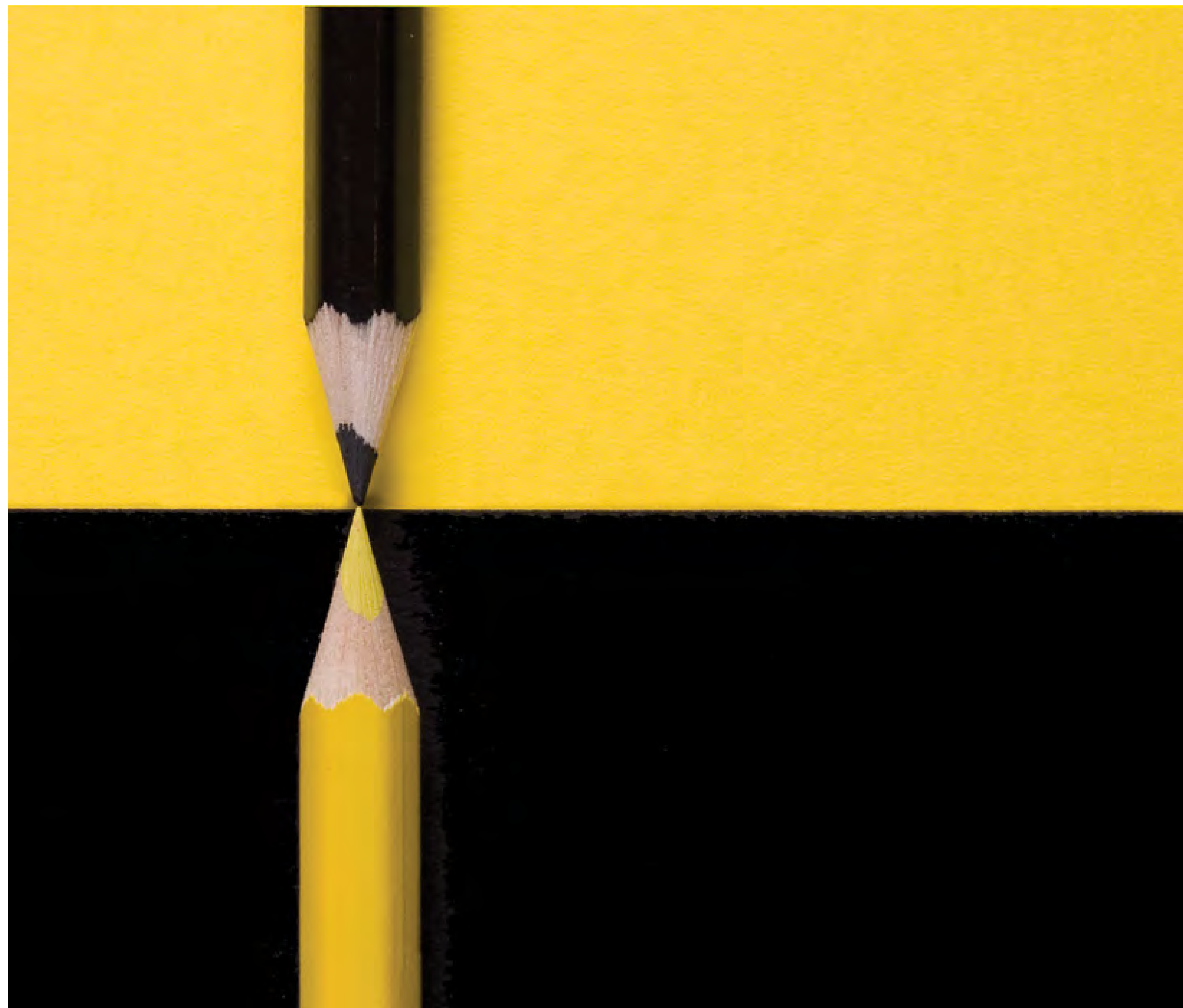
(a) owns or controls a majority of the shares carrying the right to vote at a general meeting of the other body corporate;

(b) has the power to control the composition of a majority of the board of directors or other governing organ of the other body corporate; or

(c) has power to make decisions in respect of the conduct of the affairs of the other body corporate.

The above is broadly consistent with English law and other international concepts of control. However on interpretation it applies to any interest in the control of a Tanzanian company, directly or indirectly up the corporate chain and is therefore applicable when interests in offshore holding vehicles are transferred.

Also instructive are the directions contained on the Merger Notification Form (FCC.8) which provide that "*subsidiary*", in relation to a body corporate (first body) means a first body that is controlled by another body (*other body*) because:



(a) the other body-

(i) controls the composition of the first body's board; or

(ii) is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the first body corporate; or

(iii) holds more than one half of the issued share capital of the first body (excluding any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first body is a subsidiary of a subsidiary of the other body.

Accordingly, it can be implied from section 4 (2) and the directions on the Merger Notification Form (FCC.8) that a merger will result in the change of control if it results in the change of the following:

(a) control of the majority of the shares carrying the right to vote at a general meeting;

(b) power to control the composition of a majority of the board of directors or the other governing organ; or

(c) power to make decisions generally in respect of the conduct of the affairs.

Although, section 4(1) of the FCA states that the definition of common control does not apply to mergers, our view is that in the absence of any general definition of a change of control in the FCA, the definition provided by the legislator at section 4(2) should be persuasive as to the definition of a change of control as such term appears throughout the FCA.

Given this analysis we have always been of the opinion that only mergers that (a) result in a change of control; and (b) involve combined assets above TZS 800,000,000 are notifiable under the FCA. Accordingly, if a merger does not result in a change of control, that merger is not notifiable to the FCC even when it involves an entity with assets above the threshold of TZS 800,000,000.

However in recent inquiries we have made to the FCC we were informed that **any** merger is notifiable to the Commission as long as it involves assets above the threshold of TZS 800,000,000 only. This is not in our view a correct interpretation of the law as, consistent with merger control regimes in other jurisdictions, there must also be a change of control.

A new look at "change of control"

As stated above the FCA has not defined what amounts to "change of control" and as such the FCC seems to have the discretion to decide what amounts to a "change of control" by looking at other jurisdictions and jurisprudence which often does not fit well with a particular transaction and its merits. The FCC may import a definition it deems to fit to a certain transaction and conclude that a merger ought to be notified. For example, the FCC has in some instances referred to definitions used in other jurisdictions such as the European Union, the United Kingdom and South Africa.

The FCC has recently adopted a broad definition of what amounts to a change of control albeit this definition has not been codified; or the FCA amended by Parliament to include a definition; or guidance provided by the FCC on how it interprets change of control. It has however been stressing on a case by case basis that a change of control can be:

(a) a 'de facto' change of control (through the acquisition of a majority of the voting shares or through acquiring the right to a majority of the votes on the board of directors); or

(b) a 'de jure' control where, as a result of the merger: it can still exercise decisive influence (which is the standard in the European Union); or where it can exercise material influence (which is the standard in the United Kingdom).

The new position, in our view, is perhaps not in line with international best practices and has the likelihood of discouraging investment into Tanzania as it effectively catches all investments/transactions (including transfers of indirect interests) which are upwards of USD 380,000.00. Furthermore, this means that it catches small to medium sized businesses that have assets on their balance sheet of over USD 380,000.00 and means that for any merger or sale they would have to notify the FCC and incur additional costs which they often may not be able to sustain.

The fact that Tanzania does not have a clear definition of what amounts to a change of control and the freedom of the FCC to define change of control depending on the circumstances, results in lack of clarity as to what standard the FCC might use and has led to numerous challenges not only for investors but for legal advisors as they cannot definitively advise whether a transaction is notifiable as there is no clarity to what is a change of control. Furthermore, the position taken by the FCC is that where the merger threshold is met then a merger becomes notifiable even in the absence of change of control.

In addition, we acknowledge that the term "power to make decisions generally in respect of the conduct of the affairs" in Section 4(2) is wide and open to interpretation. However, we consider that the FCA should make it clear that the minimum threshold for this to apply is the power to veto strategic decisions of the company (for example, the budget, the business and appointment of senior personnel). This would be consistent with EU Merger control.

The cost of uncertainty

With such lack of clarity on what is and what is not, a notifiable merger, investors as well as legal advisors are left in a dilemma when trying to establish if they should notify a transaction or not. The uncertainty coupled with the low notification thresholds, high penalties and high notification fees, makes one conjecture how long investors will tolerate such an environment.

The shift in the approach of the FCC has led to it going back and investigating previous mergers that took place and were not notified. As a result, the country has witnessed a number of proceedings brought against several entities that have been deemed to have infringed the provisions of the FCA, for failure to notify the FCC.

The FCC has been issuing penalties where it has investigated and finds a party guilty of failing to notify a transaction as required under the provisions of the FCA. Pursuant to the FCA, at any time within 6 years of the offence, the FCC may impose a penalty of between 5-10% of the acquirer's annual turnover for a merger that was not notified. There is also a danger of the FCC issuing an order, at any time within 3 years after the transaction has been consummated, declaring the transaction void and requiring total or partial restoration of the status quo ante.

In another move, the FCC has recently taken the position that an acquisition of less than 5% of the voting shares and the right to appoint 1 director in a public listed company is a notifiable transaction. This move leads to the question whether the acquisition of a certain amount of shares through the stock exchange would require the FCC's approval where the shares are publicaly and freely traded. This would not be the case under EU law. If yes, how will the FCC monitor this and what impact will this have on the developing stock exchange? Furthermore, how will a single director in a large board of over 10 directors be able to exercise either decisive or material influence for there to be a change of control?

The foregoing questions depict the dilemma facing investors and legal advisers when trying to establish if the FCC's approval is required in transactions.

Conclusion

There is urgent need for clarity in the law regarding what a change of control is, as it effects transactions where there is no change of control. With the current uncertainty we err on the side of caution and advise our clients to notify the FCC even if there is no change of control as long as the merger threshold has been met or alternatively to consult with the FCC to ascertain if a merger is notifiable.

Unfortunately this has in some cases proven counterproductive as the FCC always comes back and states that a merger notification filing must be made and filing fees paid and thereafter it will advise whether approval is required for the merger or not. This means that transaction completion timelines are extended by a minimum of 3 to 4 months and includes further costs of between USD 12,000.00 to USD 48,000.00 as merger notification filing fees which are non-refundable must also be paid.

We continue to consult on these matters and are working towards achieving certainty in Tanzanian merger control laws so that future FDI is not put at risk.

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Investing in Land in Mozambique

Since gaining independence from Portugal in 1975, land in Mozambique is treated as the property of the State.

Although the political system has become a multiparty system and the socialist economy has shifted to a market economy, this principle has remained unchanged and the land can not be otherwise sold, mortgaged, encumbered or alienated.

The 1997 Land Law, however, establishes a right to use land, usually known by the Portuguese acronym DUAT (*direito de uso e aproveitamento da terra*) – right of use and benefit of land – which is a secure, renewable and long-term use right. DUATs may be granted to individuals, communities or other entities (including companies).

The 2004 Mozambican Constitution, in turn, recognises the right to private property and establishes that any improvements or constructions made on land over which a private person or entity holds a DUAT are the property of such person or entity. These assets can be bought, mortgaged and sold.

Acquiring a DUAT

DUATs can be obtained through: (i) occupancy of land, by individuals or local communities, pursuant to customary rules and practices; (ii) occupancy of land, in good faith, for at least 10 years, by national citizens; and (iii) an authorisation granted by the state upon application of individuals or entities (Mozambican and foreigners).

A DUAT obtained by occupancy is not subject to a time limit and, in such cases, the delimitation of the land and the registration of the DUAT is not mandatory.

In order to be granted a DUAT under an authorisation granted by the State, the applicant must prepare a plan on the exploitation of the land, which must be reviewed and approved by the relevant government authority. Once the application is approved, the state issues a provisional DUAT for 2 years (to foreign persons or entities) or 5 years (to nationals). If the exploitation plan is fulfilled, the state issues a final DUAT for renewable periods of 50 years.

The entity deciding on the application varies depending on the extent of land sought: for parcels up to 1,000 hectares, the Provincial Governor issues the DUAT, the Ministry of Agriculture approves DUATs of 1,001 – 10,000 hectares, and DUATs of more than 10,000 hectares are approved by the Council of Ministers.

Foreign individuals or entities may be holders of a DUAT, provided they have been granted an investment authorisation, under the Mozambican Investment Law and: (i) in case of individuals, they have been residing in Mozambique for at least 5 years; (ii) in case of foreign entities, they have been duly incorporated or registered in Mozambique.

A "foreign company" is any company set up in accordance with the laws of Mozambique or any foreign law whose share capital is more than 50% held by a foreign citizen or entity.

Transfer of the DUAT

Any construction, improvement or infrastructure made on the land is private property and can be mortgaged, bought, sold or otherwise alienated, while the underlying DUAT is administratively transferred to the new owner.

However, while urban tenements can be freely transferred, the transfer of rural tenements is subject to prior approval by the entity that approved the DUAT.

Extinguishing a DUAT

A DUAT can be extinguished in the following scenarios:

- If the holder of the DUAT fails to comply with the exploitation plan without reasonable grounds;
- Revocation by the state, in the public interest, subject to fair compensation (see further below);
- Expiry at the end of its initial term or at the end of a renewal period; and
- Relinquishing by the holder of the DUAT.

The land law itself does not establish what constitutes "public interest". However the land law regulations refer to the legislation on expropriation with regards to the DUAT's revocation procedure and the calculating of fair compensation.

The land planning regulations, in turn, provide that expropriation for the purpose of land planning, shall be deemed in the "public interest" where it is for a common interest, in particular the erection of economic and social infrastructure with a significant social impact, for the preservation of biodiversity, and public or military interest infrastructure.

The land planning regulations establish that "fair compensation" must take into account, not only the current value of the assets, but also the damage and loss of profits of their owner, which is fairly favourable to the landowner/investor.

Suggested steps to invest in Mozambique

A foreign entity intending to invest in Mozambique should therefore take the following steps so as to secure its access to a DUAT and to comply with the legal framework applicable to land rights:

i) **Identify the plot of land**, involving the cadastral/utility services, the local administrative authorities and the local communities;

ii) **Prepare an investment project** to be submitted to the Investment Promotion Centre (CPI) for approval;

iii) **Incorporate a company** or establish a branch of a foreign company;

iv) **Apply for a DUAT** over the plot of land previously identified;

v) **Fulfil the investment project** in order to ensure the issue of a final DUAT.

When establishing the jurisdiction for structuring a foreign company to hold DUAT in Mozambique it is worth noting there are various Double Tax and Bilateral Investment treaties that afford a measure of protection

There are currently 9 Double Tax Treaties in force between Mozambique and each of Botswana, India, Italy, Macau, Mauritius, Portugal, South Africa, United Arab Emirates and Vietnam.

There are also 20 Bilateral Investment Treaties currently in force between Mozambique and Algeria, Belgium-Luxembourg Economic Union, China, Cuba, Denmark, Finland, France, Germany, Indonesia, Italy, Japan, Mauritius, Netherlands, Portugal, South Africa, Sweden, Switzerland, United Kingdom, United States of America and Vietnam.

Conclusion

Even though land in Mozambique is state's property, the DUAT system ensures that private investors have access to land, enabling its exploitation.

While the land policy and land law had to respect the constitutional principles, there exists a developed land rights system appropriate for a market economy.

The legal framework on land rights therefore seeks to protect the existing rights and also to promote private investment, providing secure land rights for investors.

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Africa Insight

Insolvency and Restructuring

There are challenges and risks which any investor, financial institution or international corporate might face in investing in the emerging markets of Africa. In so doing, it is important to understand the limitations, scope and efficacy of the insolvency regimes applicable in each jurisdiction and the ability to foreclose and extract value in a distressed debt or insolvency situation.

With this table we intend to share pertinent information to enhance your understanding of Kenya, Mozambique, Nigeria, Senegal and South Africa's insolvency and restructuring regimes. Although there are significant differences between individual African jurisdictions in the realm of insolvency, current reforms appear to reflect an attempt to harmonise insolvency and restructuring regimes across the continent.

The jurisdictions of Mozambique and Senegal were chosen to compare and contrast two Lusophile and Francophile jurisdictions against three major Anglophile jurisdictions, although each with different legal systems.

Information provided by Werksmans and LEX Africa Alliance members in Kenya, Mozambique, Nigeria and Senegal.

Please note that nothing in this article or table should be construed as formal legal advice. Readers are advised to consult professional legal advisors for guidance in respect of anything which may affect their business.

	KENYA	MOZAMBIQUE	NIGERIA	SENEGAL	SOUTH AFRICA
GENERAL INFORMATION					
Country Information	Democratic Republic and multiparty democracy	Democracy is exercised through elected representatives. It is a multiparty democracy	Federal Republic modelled on the United States system. The President's powers are checked and balanced by a Senate and a House of representatives, which are combined in a bicameral body called the National Assembly	The government coordinates the nations' politics under the direction of the first Minister. He is accountable to the President and the Parliament. It is a multiparty democracy	It is a Constitutional Democracy. The Constitution of South Africa entrenches a Bill of Rights. The Constitution also makes provision for an independent judiciary, executive and legislature
Legal System	Common law based	Roman and German law based	Three systems of law - (i) common law; (ii) customary law; and (iii) sharia law (Muslim law)	Civil law system based on French law	The common law runs secondary to the Constitution. Laws is based on Roman Dutch law with English law influences

	KENYA	MOZAMBIQUE
TESTS FOR INSOLVENCY		
Tests for Insolvency	A company may be wound up if it is unable to pay its debts. A company is deemed to be unable to pay its debts if (i) a creditor who is owed more than KES 1,000 has not been paid within 3 weeks after making a demand; or (ii) execution or other process levied by a judgement creditor is returned unsatisfied; or (iii) the court is otherwise satisfied that the company is unable to pay its debts	A company will be declared insolvent if (i) it does not pay on maturity, without justification, a net obligation which has materialized; (ii) having been ordered to pay any net amount, does not, within the legal timeframe, pay, deposit or list, for attachment purposes, sufficient assets to cover the debt; (iii) it entertains or engages in one or more acts prohibited by the law
Tests for Financial Distress	There are no statutory tests for financial distress	A debtor company will be held to be in financial distress if the company is experiencing a financial crisis but nonetheless complies with all requirements necessary for the initiation of business rescue
INSOLVENCY AND RESTRUCTURING PROCEDURES		
Formal Insolvency Procedures	The company, any creditor or contributory (present and certain past members) may petition the court to wind up the company on grounds specified by law but usually that the company is unable to pay its debts. The shareholders of the company may pass an ordinary resolution in which they provide that the company cannot, by reason of its liabilities, continue business and should be wound up	A judicial insolvency (liquidation) is instituted before the court by the debtor company itself, the shareholders of the debtor company in terms of the law or in terms of the articles of association of the company and/or any creditor of the company
Formal Restructuring Procedures	Schemes of arrangements involving creditors (including separate classes of creditors) and contributories (shareholders)	Judicial business rescues or extra-judicial rescues by agreement among the creditors
Informal Insolvency or Restructuring Procedures	Informal restructurings are uncommon in Kenya except when the enforcement of securities is done through the appointment of a receiver and manager	Extra-judicial business rescue is possible in Mozambique. It may be initiated by the debtor company if it fulfils the requirements for a judicial business rescue and provided the creditors agree to it

NIGERIA	SENEGAL	SOUTH AFRICA
TESTS FOR INSOLVENCY		
The tests for insolvency are (i) an inability to pay a debt exceeding N2,000.00 within three weeks after a demand has been made; (ii) a wholly or partially unsatisfied court process issued in respect of a judgment debt; (iii) a court's determination after taking into account any contingent or prospective liabilities of the company that the company is unable to pay its debts; and (iv) where the company's liabilities exceed its assets	If a receiver cannot rescue the company, the activities of the company cease and the liquidation will commence	A company will be insolvent if it cannot pay its debts as and when they fall due for payment (commercial insolvency)
There are no specific provisions that regulate financially distressed companies	No specific test for financial distress. The company's financial distress is determinative of its candidacy for rescue	A company will be financially distressed when it appears to be reasonably unlikely that it will be able to pay all of its debts as they become due and payable within the immediately ensuing 6 months (impending commercial insolvency) or it appears to be reasonably likely that the company will become insolvent (ie with its liabilities exceeding its assets) within the immediately ensuing 6 months (impending factual insolvency).
INSOLVENCY AND RESTRUCTURING PROCEDURES		
In addition to liquidation, a receiver or manager may be appointed by the court or privately by a trustee, debenture holders of the same class or debenture holders holding more than half of the total amount owing in respect of all debentures of the same class	Friendly liquidation and judicial liquidation (bankruptcy)	If a company is insolvent it should be placed in liquidation.
Arrangements and compromises	Business rescue	Business rescue and the statutory compromise procedure
A business can be restructured informally, without any regulation or oversight by legislation or the court, if agreed to between the company and the creditors	Not applicable	A company (usually with a small number of creditors) can convene a meeting of its creditors and attempt to reach an agreement with them to compromise their debt. Such an agreement would need to be accepted by all of the creditors of the company for it to be binding. A company would also need to obtain undertakings from the creditors not to make application to court to place the company in liquidation or business rescue

	KENYA	MOZAMBIQUE	NIGERIA	SENEGAL	SOUTH AFRICA
LIQUIDATION					
Court Involvement in the Liquidation Process	The courts will be involved at every stage of a compulsory winding up. Subject to any application being made to the court, the courts would usually not be involved in a creditors' voluntary winding up	The Mozambican court is involved in every aspect of the liquidation and generally in respect of insolvency procedures	The court is involved in a creditor's voluntary winding up and a winding up under the supervision of the court. The court's involvement depends on the type of liquidation initiated	The court is involved in the liquidation process	Compulsory liquidations require the involvement of the courts for their initiation, whilst voluntary procedures do not. The courts, will however, have a role to play in the winding-up process if there is any litigation in which the company is involved
Management of the Company whilst in Liquidation	The board of directors is displaced from their office, and in their stead the affairs of the company is placed in the hands of a liquidator.	The management of the company whilst in liquidation is handled by the insolvency administrator. The board of directors may however be required to assist the liquidator in the winding-up of the company	The directors cease to retain control over the company	The liquidator shall assume the role, responsibilities and powers related to the company	From the date of the commencement of a voluntary winding-up, all the powers of the directors cease except in so far as their continuance is sanctioned by the liquidator or the creditors in a creditors' voluntary winding-up or by the liquidator or the company in general meeting in a members' voluntary winding-up.
Pending Claims, Litigation and Arbitration	At any time after the presentation of a winding-up petition to court, and before a winding-up order has been granted, pending proceedings against the company may be stayed on application by the company, a creditor or contributory	The judgment declaring the insolvency of the debtor company must, among other things, order the suspension of any and all claims and executions against the insolvent company with the exception of claims instituted or executed by employees, which continue	Litigation or arbitration proceedings may be stayed following the commencement of liquidation proceedings	These proceedings are suspended, save for the claims of secured creditors	When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered with the companies office, all civil proceedings by or against the company are suspended until the appointment of a liquidator
BUSINESS RESCUE / ADMINISTRATION					
Application of Business Rescue	Other than schemes of arrangement there are no other laws, practices or procedures which facilitate the business rescue/ rehabilitation, workout or restructuring of companies or modern corporate recovery alternatives	A business rescue may be petitioned by the debtor company through its board of directors (alternatively by the heirs, executor or remaining shareholders of the company, if any) who, at the time of the petition, conducted the business of the company for more than 12 months and which company cumulatively meets the following requirements (i) is not insolvent, and if it was insolvent, its responsibilities have been declared extinct by final judgment; (ii) has not obtained, within the previous 2 years, the concession for business rescue; and (iii) has not been convicted, or is not in the process of being convicted, as director or dominant shareholder, of an offence in respect of Mozambican law	The Nigerian Companies and Allied Matters Act does not have any specific provisions rescue procedures. Business rescue/ administration may be informal and could be based on an agreement between creditors and the debtor company. Such agreements may be, or may not be, filed with the court but will usually involve negotiations between the parties. Business rescue/administration may take the form of an out-of-court debt restructuring involving a change to the composition and/or structure of the assets and/or liabilities of a company in financial distress, without resorting to a full judicial intervention and with the objective of restoring the growth of the company and minimising the costs associated with the company's financial problems	A form of business rescue is applicable in Senegal	A new procedure called business rescue has been introduced into South African law for companies or corporations that are financially distressed. It is akin to the administration process in the United Kingdom and Chapter 11 proceedings in America
Court Involvement in the Liquidation Process	Not applicable	With a judicial business rescue, the court is more involved although it does not participate in every step of the process. The process is conducted by the insolvency administrator together with any directions received from the creditors' committee	Not applicable	The relevant court actively participates in the attempts to rescue the business by fixing the date of insolvency and pronouncing on the opening of the procedure. The court can designate a judge or any qualified person to obtain all the information on the financial situation of the debtor and the composition of the recovery that he proposes. The court will appoint a bankruptcy judge (responsible for ensuring the expediency of the procedure) and/or receivers (in charge of representing the creditors)	Compulsory business rescue applications require the involvement of the courts to a limited degree, whilst voluntary procedures do not. A compulsory business rescue is initiated following an order of the court. Unless there is general litigation pertaining to a business that has been placed under business rescue, other than the initiation of a compulsory business rescue, the court should have no further involvement in the process

	KENYA	MOZAMBIQUE	NIGERIA	SENEGAL	SOUTH AFRICA
BUSINESS RESCUE / ADMINISTRATION					
Management of the Company whilst in Liquidation	Not applicable	The management of a company is placed in the hands of the insolvency administrator whilst the company is in business rescue. The insolvency administrator is appointed for his competence in (i) supervising the activities of the debtor and implementing the provisions of the rescue plan; (ii) requesting a declaration of insolvency from the court in the event that the rescue plan does not succeed; (iii) submitting a monthly report about the debtor's activities to the judge; and (iv) submitting a report about the execution of the rescue plan to the judge upon termination of the rescue process. During the business rescue process, the debtor or its directors are expected to conduct the business under the supervision of the credito's committee, if any, and under the supervision of the insolvency administrator	Not applicable	The company is placed in the hands of a receiver for the duration of the rescue process	During business rescue proceedings, the business rescue practitioner has full management control of the company and the directors, though not exonerated from their duties and responsibilities (and corresponding liabilities) are answerable to the business rescue practitioner. Any action taken by a director whilst the company or corporation is in business rescue which requires the approval of the business rescue practitioner and which approval is not obtained, will be void
Pending Claims, Litigation and Arbitration	Not applicable	When judicial business rescue commences, it suspends, for an irrevocable period of 180 days, the course of all pending claims and all actions and executions against the debtor company	Not applicable	The approval of the moratorium renders it binding on all the creditors whatever the nature of their claims	The commencement of business rescue proceedings gives rise to the operation of a general moratorium on the rights of creditors to enforce their claims against a company or in respect of property belonging to the company or lawfully in its possession. A creditor may also not continue with enforcement action against a company (ie execution of a writ). In certain instances, proceedings may be brought against a company with the written consent of the business rescue practitioner or with the leave of the court. If a claim is subject to a time limit, the claim will not prescribe during the period in which the company is in business rescue. Prescription will be interrupted
SECURITY					
Types of Security	Debentures creating fixed and floating charges; legal charges over real property; chattels mortgages creating charges over personal property by individuals and collateral security provided by shareholders is available	There are two types of security available in Mozambique: real rights such as a mortgages or pledges and personal security such as suretyships or promissory notes	There are two categories of security available in Nigeria – personal security and real security. Personal security, such as guarantees, indemnities and letter of comforts are available. Real security, on the other hand, affords a creditor certain rights over property which has been appropriated to meet the debt or other obligations of the debtor	Personal guarantees (guarantee and/or a letter of guarantee); property guarantees (right to hold the debtor's assets, lien, retained or transferred property as a guarantee and/or a pledge) and mortgages (either by agreement or by court order)	Security can be taken over immovable property, movable assets, intellectual property as well as financial instruments (shares and debt securities). Security over immovable assets is obtained through the registration of a mortgage bond. The most common forms of security for movable or intangible assets are pledges, a cession in security (including a cession in securitatem debit and an out-and out cession), general notarial bonds, special notarial bonds and a landlord's hypothec.
Taking of Security	Debentures - evidenced by the instrument of debenture creating fixed and floating charges. Charge over land - evidenced by a legal charge in accordance with the registration system under applicable law. Chattels mortgage - evidenced by the chattels mortgage instrument completed in accordance with applicable law. Collateral security provided by shareholders – evidenced by a shareholders memorandum of deposit/pledge	Real rights must be subjected to Mozambican law and made by public deed. Perfection of such security is affected by registration in the relevant public office	Real security may be created by contract or may arise by operation of the law. In the former case the security may take the form of a mortgage, charge, pledge and/or hypothecation while in the latter case it takes the form of a general lien or right of set-off. Personal security is created by contract.	Save for the personal guarantees, any other security is taken through an agreement or a court order	Security can be taken by an entity itself or though the establishment of a security special purpose vehicle or the appointment of security trustees

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African Renewable Energy Opportunities

Introduction - climate change as an investment driver

As the world focuses on the impending climax of the climate change negotiations, scheduled for December in Paris, it is useful to consider the business cases underpinning some of the necessary interventions for the global response to climate change.

There is a current and conveniently available set of information to assist. Country Parties to the United Nations Framework Convention on Climate Change (UNFCCC) have recently been submitting their Intended Nationally Determined Contributions (INCDs) to the UNFCCC Secretariat in anticipation of the finalisation of a notional "Paris Agreement" which will delimit the international climate change legal regime from 2020.

INDCs are statements of national intention for domestic actions in support of the UNFCCC's dual goals of climate change mitigation and adaption; and, they are revealing for what they indicate about a country's climate change policy trajectory, including the investment-spend required to secure national objectives.

In the mitigation context, the South African INDC reads like a summary for policymakers of the intended evolution of domestic energy infrastructure. The INDC states that the country "…is putting in place a mitigation system to realise the opportunities of a low-carbon economy while being mindful that an inclusive and just transition requires time and well planned low-carbon and climate resilient development", and claims "substantial" recent investment in renewable energy[1].

In some respects the South African INDC is interesting for what it does not say. For example, while renewables have seen a significant ramp-up in recent years it is also true that baseload electricity generation remains entirely dependent on coal which constitutes about 80% of the final energy mix. Such coal-heavy power production places the country in the global top twenty per capita emitters of greenhouse gas, a situation that will persist into the foreseeable future. The INDC anticipates that emissions will grow for the next decade, peaking in 2025, and will then plateau for a further ten years before declining in absolute terms from 2035, and elaborates a national target to achieve a decarbonised electricity sector by 2050, at an estimated cost of US$ 349 billion.

Renewable energy opportunity

An enormous renewable energy opportunity lies in the dynamic between the country's continued high reliance on fossil fuel, with coal reserves anticipated to last for hundreds of years at current usage, and the objective of decarbonising the electricity sector by the middle of the century. While it is true that recent years have seen a "substantial" increase in renewable investment, the percentage contribution of renewables to final energy consumption remains in the region of 18%, which suggests that the potential for growth of these sources of energy is exponential - provided that the facilitating environment is similarly enhanced.

Before returning to this point, the effect of renewables on the economy is interesting to observe and has been reported upon in two reports from the Centre for Scientific and Industrial Research (CSIR) in 2014 and 2015.

The CSIR's perspective considers the net savings to the South African economy resulting from increased uptake of renewables in the national grid. In 2014 these savings amounted to 800 million South African Rand (ZAR) but has increased ten-fold to ZAR 8.3 billion, so far, in 2015.[2] The reports arrive at these calculations by considering two cost savings to the broader economy arising from renewable energy investment, namely, the cost savings:

- arising from the replacement of diesel and coal generation by solar and wind energy (avoided fossil fuel generation);[3] and,
- achieved through avoiding "unserved energy" which would have occurred but for the presence of solar and wind in the grid.

"Unserved energy" is a euphemism for planned grid power outages implemented by the national power utility, Eskom (a vertically integrated state-owned entity), in order to stabilise the grid in situations where power demand threatens to overwhelm supply. The more generally used term is "load shedding", something with which South Africans have, reluctantly, had to come to terms. Winter chills have been known to stretch power demand to within only a few percent of national installed capacity, an unacceptable situation which has the potential to cause grid instability and, in worse case scenarios, failure of part or all of the grid.

Eskom overwhelmingly dominates all aspects of electricity generation, transmission and distribution and, consequently, controls the national (and only) transmission grid through which all electricity, renewable and non-renewable, must be wheeled. Consequently, Eskom is essential to the development of the renewable energy industry because grid-access is key to having renewable energy, at scale, available to consumers.

Renewable energy procurement

South Africa's power generation mix is determined in terms of the Integrated Resources Plan 2030 (IRP) which stipulates the volume of electricity that will be generated from particular fuel sources. Although the IRP is required to be updated every two years, the most recent iteration is that of 2010, which provides that new electricity generation shall be composed as follows:

- 9.6 Gigawatts (GW) of nuclear;
- 6.3 GW of coal;
- 17.8 GW of renewables; and
- 8.9 GW of other generation sources.

Notwithstanding that the IRP is a policy document without the force of legislation, the Department of Energy (DoE) relies very firmly on these determinations of new electricity generation capacity and has used the renewable energy contribution as the basis for the Renewable Energy Independent Power Producer Procurement Programme (REIPPPP).

The REIPPPP is a competitive bidding process for renewable energy developers seeking to take advantage of a government funded Feed-In Tariff (FIT) to support project implementation. After a FIT false-start under the now defunct Renewable Energy Feed-In Tariff,[4] REIPPPP has seen four bidding rounds successfully concluded with 92 projects having been approved - a total of 8.1 GW (mainly wind & photo-voltaic) - and with more bidding rounds on the way.

In May 2015 the DoE announced that an additional 6 300 Megawatts of renewable energy would be procured under REIPPPP. It is anticipated that a Request for Proposals for a fifth round will be released in the second quarter of 2016.

Local content and grid stability

While REIPPPP has been very successful it should be understood that any renewable energy procurement programme would be successful when measured against the previous zero-base of renewables in the South African grid. At present, only projects procured during the first bidding windows are coming online, but there is furious building activity underway to commission other plants as soon as possible.

Two other features of the REIPPPP are important for companies interested in following the investment opportunity:

- Firstly – on the positive side, in accordance with macro-economic policy, the objectives of which are poverty alleviation and job creation, REIPPPP has very pronounced local content requirements. For example, all projects must have South African entity participation of at least 40% and must provide audited confirmation that no more than 60% of project capital investment (debt and equity) consists of foreign currency. In addition, there are requirements for socio-economic and enterprise development. One of REIPPPP's successes regularly referred to by government is the ZAR 9.1 billion, over a period of twenty years, that has been committed for these purposes by the 92 approved projects.
- Secondly – on the negative side and returning to the abovementioned comment on the need for an enhanced facilitating environment to reach the ambitious targets – Eskom initially announced that notwithstanding the successful conclusion of a fourth bidding window, it would be impossible to permit fourth round projects the necessary inter-connection due to the grid instability that this would cause. In order to rectify this situation Eskom recently announced that it will spend ZAR 213 billion to strengthen the national transmission grid over the next decade. Unfortunately, the National Energy Regulator of South Africa has refused Eskom's request that this funding be part of its government allocation and it is unclear where the financing will be sourced.

Conclusion

Despite the challenges posed by current reduced grid interconnection capacity, it should be recognised that Eskom remains the largest and most stable power utility on the African content and that it will remain a significant player in the evolution of the African electricity landscape. The REIPPPP example of how renewable energy can be swiftly and efficiently procured is inspiring in an economy so reliant on coal and it is to be hoped that similar processes can be implemented in other African jurisdictions as the world moves into an increasingly carbon-constrained future.

With the upcoming round 5 due in 2016, information on REIPPPP, including bidding requirements on financing and required authorisations, can be found on the DoE's website: http://www.ipprenewables.co.za/

1 South Africa's Intended Nationally Determined Contribution, http://unfccc.int/focus/indc_portal/items/8766.php.

2 Approximate currency conversions: ZAR : GBP – 20 : 1; ZAR : Euro – 15 : 1; ZAR : US$ - 13 : 1.

3 The collective contribution of wind energy and solar power (photovoltaic) projects to the economy (January to June 2015) exceeded their combined tariff (of ZAR4.3-billion) by ZAR4-billion. The cost of wind energy is now between ZAR 0.6 and ZAR 0.7 per kilowatt hour (half that of new-build coal capacity), while solar comes in at ZAR 0.8.

4 The Renewable Energy Feed-In Tariff (REFIT) involved government offering a predetermined FIT for the different types of renewable energy source. REFIT was challenged on a constitutional basis as not providing for a competitive bidding process. REIPPPP was designed specifically to include competitive bidding.

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Investment in Wind Renewable Energy in Kenya

Kenya has an abundance of renewable energy sources in the form of hydro, geothermal, wind, and solar amongst others. There have been initiatives by different players to try and exploit these renewable energy resources in Kenya. Geothermal investment has been in Kenya for many years and continues to develop and expand. Wind power is newer and solar power is in its infancy with some projects having started but nothing has come on stream yet.

Wind power is currently of heightened interest and particularly so, to reduce the country's dependency on hydro power projects. This paper will focus on the regulatory compliance for investors in wind power projects in Kenya.

Wind Resource in Kenya

According to the ERC and data compiled by WinDForce Management Services Private Limited, there are high winds suitable for wind power projects in certain parts of the country. In 2013, the Ministry of Energy and Petroleum stated in an investment prospectus for 2013-2016, that it plans to boost wind power generation by 630 MW with an intention to increase electricity levels by 5,000 MW by the year 2016.

In March 2014, the Government signed a financing document for the largest private investment in Kenya - The Lake Turkana Wind Project, situated in north-eastern Kenya. In addition to this, there are other wind power projects which are underway in terms of project commencement and these include the Kipeto Wind Project (Rift Valley Province), which will have an approximate capacity of over 100 MW, the 90-MW Electrawinds project in Lamu, and the 61-MW Kinangop wind farm project in central Kenya.

The current wind power projections in Kenya are:

- **Coast area - Tana River, Lamu and Kilifi:** Good wind speed with maximum value of mean annual wind speed of 8.32, 8.26 and 8.26 m/s and potential area of 38610 sq km, 6878 sq km, and 12310 sq km respectively.
- **North-Eastern - Garissa, Mandera and Wajir:** have with Maximum of annual mean wind speed of 7.73, 7.73 and 7.75 m/s respectively over potential area of 44459 sq km, 28302, sq km and 53413 sq km.
- **Rift Valley - Turkana:** Maximum potential area of 61353 sq km with maximum of annual mean wind speed of 7.11 m/s
- **Central Area - Nyeri:** Maximum value of mean annual wind speed of 7.44 m/s over a potential area of 3359 sq km
- **Eastern Area -Marsabit:** Maximum of mean annual wind speed of 9.27 m/s with potential area of 75596 sq km. Marsabit is said to have the largest potential.

Regulatory Framework

The Government of Kenya appreciates that the implementation of renewable energy projects will enhance the country's electricity supply capacity and diversification of generation sources. It has accordingly developed policies that will help boost this process. One of the policies is the Feed-in Tariff Policy which aims at attracting investors by offering a pre-determined fixed price that is reflective of the upfront per unit cost of renewable energy projects. Currently, the policy provides for wind generated electricity at a fixed tariff of approximately USD 0.11 per kilowatt-hour for electrical energy supplied in bulk to the grid operator at the interconnection point.

In addition to this, parliament enacted the Energy Act 2006 (the "Act") to promote the development and use of renewable energy technology. This is primary legislation in the renewable energy sector. Through the Act, the Energy Regulatory Commission ('ERC') was established to regulate inter-alia, the importation, exportation, generation, transmission, distribution, supply and use of electrical energy with powers to inter-alia, issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector.

Some of these requirements and procedures for operating a renewable energy project include:

1. Change or extension of user:

Most of these wind power projects are situated in land that is described as 'agricultural land' or land with a use other than power generation. Where there is an intention to start a wind power generation project, certain approvals have to be obtained. A statutory form P.P.A.1 is completed and submitted to the local county government where the land is situated. The intended use is then advertised in at least two local daily newspapers inviting any objections of questions. These have to be received within 14 days of the date of publication in the daily newspapers and where there is no objection, an approval is granted.

It is important to note that, where the land in question is agricultural land and the prospective investor is a non-Kenyan citizen, it is necessary to obtain a change of user (as opposed to an extension of user). Foreigners or privately owned companies whose shareholders are not all Kenyan citizens are not permitted to acquire agricultural land unless where such transaction has been exempted from the provisions of the Act by the President of Kenya. It should be possible to obtain such an exemption where the project is of national interest such as a wind power project but we are not aware of any such exemptions having been granted.

2. Approval for Expression of Interest and Feasibility Study:

The approval for expression of interest and feasibility study is important to allow the Ministry of Energy and Petroleum to determine how the proposed power plant can be incorporated into the national power provider and to determine the suitability of the plant location.

3. Environmental Impact Assessment Licence

The Environmental Management and Coordination Act, 1999 ("EMCA") provides for general compliance requirements relating to environmental matters. Under the EMCA, the wind power project must before implementation undergo an environmental impact assessment study and an Environmental Impact Assessment Licence should be issued by the National Environmental Management Authority in respect of such project.

The approval for expression of Interest and Feasibility study must be obtained before applying for the Environmental Impact Assessment Licence. The assessment is important as it identifies the effects of the development not only on the environment, but on the people living in the area and their property. If the negative impacts outweigh the positive, it is unlikely that an Environmental Impact Assessment Licence will be issued.

4. Kenya Civil Aviation Clearance

The main purpose of this clearance is to ensure air navigation and safety is maintained with the erection of the turbines. The investor will submit an application in a prescribed form together with the requisite fees. The Kenya Civil Aviation Authority then considers the application taking into consideration the location of the any turbines that are erected for the purposes of wind power generation.

5. Special Use Licence

A special use licence is required only where a power plant is situated within the land under the mandated supervision of the Kenya Forest Services and allows the access to and out of where the power plant is situated. Land declared under the Forests Act 2005 as "forest area" is managed by the Kenya Forests Services. Accordingly, prerequisite approvals for any project situate in the forest areas have to be obtained.

6. Way Leave authorization

Where there are transmission lines which cut across land to get to the actual power plant, way leave agreements will be required. If the land is owned by individuals, a way leave agreement is signed by both the land owner and the project owners.

7. Negotiations with Kenya Power

The Kenya Power is a state corporation licensed to purchase electricity and to transmit and distribute electricity in the Republic of Kenya. Any investor in energy can only sell the energy produced to Kenya Power. The parties negotiate the terms on the agreement setting out the price, risk allocation and the obligations of the parties. The negotiations are important in order to secure the power offtake in relation to the energy supplied to the grid. It also ensures that energy is priced fairly.The first step in the negotiation process will see an investor seeking approval from the permanent secretary in the ministry of Energy to negotiate with Kenya Power on the anticipated project. The Permanent Secretary then grants the approval for the investor to enter into negotiations. Once the negotiations are concluded, the power purchase agreement is passed on to the Energy Regulatory Commission for approval before it is executed by the parties.

8. Electricity generation and distribution licences

The energy supplier must obtain these licences to ensure that they comply with the Act and the Electricity Licensing Regulations published in 2010. These licences are issued by the ERC and will be issued subject to the approval of the Power Purchase Agreement with Kenya Power and Lighting Company and the payment of the requisite fee.

9. Development Permit

Before any development is undertaken on land, the developer/proprietor is required to apply for development permission pursuant to the Physical Planning Act (Cap 286 Laws of Kenya). The applications are made to the local authority responsible for the particular area the land is situated. A Certificate of Compliance under Section 30(7) of the Physical Planning Act must be issued by the Director of Physical Planning before approval for Development Permission is granted. This requirement ensures the safety of the buildings erected and also helps with planning in the area.

Risks relating to land lease terms

There certain risks that may be associated with these wind power projects such as the uncertainty associated with the renewal of a lease once the term on the lease expires and death of landowners at the time of renewal of the lease necessitating (lengthy) probate proceedings.

In the case of expiration of a lease term whilst the project is still ongoing, the government can come in and acquire the land compulsorily if the land owner is unwilling to renew the term of the lease. Once the national or county government is satisfied that there is need to acquire land, the respective Cabinet Secretary or County Executive Committee submits an application or a request to the National Land Commission to acquire the land on its behalf. There is quite an elaborate process set out under the Land Act 2012 for compulsory acquisition. Once the land is vested in the government, a lease can be granted to the power project owners.

Conclusion

Kenya continues to encourage innovation in renewable energy. More investors are now negotiating with the relevant parties for these wind power and other renewable energy projects. The zero rating of imported renewable energy equipment and accessories has greatly encouraged both foreign and local investment. Africa is on a fast track to tap its wind power potential and Kenya is taking up the challenge.

Powered by Solar

Spotlight on Rwanda, Kenya, Tanzania and South Africa

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Introduction

Africa has vast land resources and is blessed with regular sunshine and solar radiation levels that makes it an attractive continent for solar power developers. However, over the last decade, only a handful of solar pv projects have actually reached financial close. African governments are focused on addressing this issue. What is becoming increasingly clear now is that solar pv projects can be part of the solution for the power crisis that continues to loom over the continent and its growing economies.

The advantages of solar pv in comparison to other forms of power generation include the fact that solar pv projects:

- can reduce the dependency on expensive sources of feedstock (such as diesel and other petroleum products),
- produce zero emissions,
- have a quick construction time (can be built in less than 12 months); and
- are easily scalable to allow for further project expansion.

Although solar pv projects are expensive if only considering the upfront capital costs, the technology being deployed is getting better and the price per solar panel is decreasing with time.

By considering some key issues when developing solar pv projects in Rwanda, Kenya, Tanzania and South Africa, this article highlights the regulatory framework and land issues within each country, briefly explore the issue of grid connection and set out some significant terms to note when negotiating power purchase agreements (PPAs) for solar pv projects across all the considered countries.

How are solar pv projects governed?

Over the past decade many changes have been made to the regulatory framework of each country. Generally speaking, the governing framework is split into (a) governmental policy makers and (b) regulators. A brief overview for each country is given below.

Tanzania

The Ministry of Energy and Minerals is mandated to develop and manage the energy sector by formulating governmental policy. The Rural Energy Agency was established in October 2007 to assist the Ministry of Energy and Minerals by focusing on developing the electricity infrastructure in rural areas. The Energy and Water Utilities and Regulatory Authority, established by the Energy and Water Utilities Regulatory Authority Act, is responsible for the regulation of the electricity, petroleum, natural gas and water industry.

Rwanda

The Ministry of Infrastructure is the primary governmental body responsible for setting overall policy and strategy for the energy sector, however there is some overlap with the Ministry of Natural Resources which coordinates and implements legislation and policies relating to the environmental impact of energy production and consumption. The Rwanda Utilities Regulatory Agency regulates the energy and gas sectors and is responsible for implementing the national renewable energy feed in tariff. Currently there is no framework for the regulation of renewable energy but the development of such a policy is integral to the current National Energy Policy.

Kenya

The Kenyan Energy Sector is regulated by two main governmental bodies; the Ministry of Energy and Petroleum and the Energy Regulatory Commission. The Ministry of Energy and Petroleum is responsible for formulating and developing energy policy and overseeing its implementation. The Energy Regulatory Commission regulates the Kenyan energy sector and its stakeholders and is responsible for issuing licences to undertake activities in the energy sector, enforce regulations, codes and standards, formulate and enforce sector standards and make proposals to the Ministry of Energy and Petroleum on regulations and policy.

South Africa

The energy sector is regulated by the Department of Energy which sets governmental policy for the energy and electricity sector including the renewable energy sector. The Department of Energy is split into two branches; the Electricity and Nuclear branch and the Energy Planning branch. Under the Energy Regulation Act 2006, the enforcement and safeguarding of the national regulatory framework relating to energy supply is granted to the National Energy Regulator of South Africa. Additionally, the Minister of Energy is empowered to establish independent power producers to fulfil the objective of increasing the supply of electricity which the government has indicated as being key to pursuing their objectives in relation to the production of renewable energy.

This is my land

With the exception of South Africa, each country has implemented restrictions on foreign investors acquiring land rights within their jurisdictions. A brief overview of these restrictions is given below.

Tanzania

Land in Tanzania is public land vested in the President as trustee for and on behalf of the Tanzanian people and consequently the “ownership of land” is not recognised in Tanzania; rather people have the “right to use and occupy the land” for an approved purpose by applying to the President for the granted right on a leasehold basis of 33, 66 or 99 years or applying to the Village Council for the right to occupy designated village land.

Under the Land Act 2002, foreigners cannot be granted a right of occupancy for land in Tanzania except for investment purposes pursuant to the Tanzania Investment Act. If the majority of shareholders of a Tanzanian registered corporate body are foreign nationals they will be considered ‘foreigners’ and subject to these land restrictions.

If a foreigner wants to obtain occupancy rights the foreigner must obtain approval from the Tanzania Investment Centre who will provide a derivative right to occupy land for a term not exceeding 99 years to the foreign investor. The land use will be restricted to the investment proposal submitted to the TIC and the TIC will have a residual right to re-acquire the land and the investor will be liable to pay compensation if the investment is not fulfilled.

A popular alternative is for foreign investors to enter into lease agreements with Tanzanian nationals who have been granted rights of occupancy. Otherwise, foreign investors can enter into joint ventures with Tanzanian citizens ensuring that the Tanzanian citizens are the majority shareholders of the joint venture vehicle so that the corporate entity is not considered ‘foreign’ and therefore can acquire a right to occupy the land directly.

Rwanda

Under the Land Act 2013 an individual can hold either freehold and leasehold title over land in Rwanda. However, foreign nationals are unable to acquire freehold title unless it is provided for by an international convention to which Rwanda is a signatory or under bilateral agreement which contain a condition of reciprocity.

Similarly to Tanzania, an alternative structure is for foreign investors to enter into a joint venture with Rwandan citizens and ensure that the Rwandan citizens hold a 51% stake in the Rwandan joint venture vehicle. Alternatively foreign nationals can hold leasehold title, however the maximum lease term is 49 years whereas Rwandan nationals can be granted a leasehold title up to 99 years.

Kenya

Pursuant to the 2010 Constitution, non-citizens or corporate bodies with foreign nationals as shareholders are limited to holding land on a leasehold basis for a term of a maximum of 99 years. Further, they cannot acquire agricultural land unless such acquisition has been exempted by the President through a notice in the Kenya Gazette.

Interestingly the restriction on corporate bodies holding land where their shareholders are foreign nationals does not extend to public companies and therefore foreign investors can legally hold land through public companies.

South Africa

There are currently no restrictions on foreign nationals acquiring land rights within South Africa. However, there are current proposals, backed by President Jacob Zuma, under the Land Holdings Bill to restrict foreign ownership of land within South Africa such that a foreign national (including corporate bodies whose shareholders are foreign nationals) will only be able to acquire a leasehold title in land for period of between 30 and 50 years.

Making the connection

Broadly speaking, the issue of grid connection is one that is being addressed across Africa. Each country on the continent has or is experiencing its country specific technical issues in relation to grid connection for renewable energy power plants.

The approach taken to resolve these issues also differ from jurisdiction to jurisdiction, with some countries considering privatising their transmission grids and others wanting to remain as operators but looking to raise financing to upgrade and maintain their networks. Regardless of the approach taken, for solar pv projects to get real traction on the continent (whether large scale or small scale), it is essential for grid operators in each jurisdiction to re-develop, upgrade and maintain their grid networks to ensure contracted electricity is properly transmitted.

In each of Rwanda, Kenya, Tanzania and South Africa , the grid owners and operators are state owned utility companies. In Tanzania, the central grid is owned and operated by TANESCO and it also owns mini grids that are responsible for distributing electricity to remote areas.

The Rwanda Energy Corporation is responsible for the operation and management of the national grid in Rwanda. Kenya Electricity Transmission Company is the national grid operator in Kenya and its main business is to plan, design, build, operate and maintain new electricity transmission lines and associated substations.

Finally, Eskom, the South African state-owned electricity utility company is mandated to manage the grid and provide services such as electricity transmission and distribution.

The onus is on the sponsor to ensure that it can get access to the grid and that the authorities are taking the necessary steps to ensure that transmission and grid infrastructure will be sufficient for evacuating the electricity generated from their solar plant.

Upon receiving a connection offer, the obligation to connect is documented by way of a connection agreement between the sponsors and the state-owned grid operator. The connection agreement sets out the necessary terms and conditions upon which the customer (i.e. the sponsor) is connected to the distribution network in that jurisdiction as well as the capacity of electricity being connected to the grid, amongst others.

For solar pv plants, the smaller projects are typically party to a low voltage connection agreement and larger projects are usually party to a high voltage generation connection agreement. However this may vary from jurisdiction to jurisdiction.

Lenders will scrutinise the technical report relating to grid connection and the connection agreement. Particular attention will be paid to (amongst others) the provisions relating to payment of monies (by whom and when), circumstances dealing with a situation where the transmission grid is not working (how is this risk compensated, if at all) and in what scenarios can the grid operator or sponsor declare a force majeure (therefore setting aside the obligation to transmit electricity or supply electricity to the grid).

Getting the PPA right

The PPA constitutes one of the more significant contractual documents that is heavily negotiated by the project sponsor and offtaker. Its importance stems from the fact that it is the agreement that governs the main source of revenue for the sponsor and therefore can determine the economic viability of the solar pv project.

In the jurisdictions considered by this article, the power offtakers are predominantly the government utility companies ("GOG Utility"). Although there are some anticipated off-grid projects with private / commercial offtakers, the majority of the solar pv projects encountered in these jurisdictions involve the GOG Utility offtaking the electricity. As such, there are a number of key provisions to pay particular attention to when negotiating PPAs for solar pv projects. Below is a list of some of these provisions and relevant points to note:

Term and termination

The PPA should be for a term exceeding the financing arrangements and should be long enough for the lenders to recover the loan amounts and for the equity investors to receive a return on their investment. On-grid PPAs can be between 15 - 25 years and off-grid PPAs between 10 - 15 years depending on the commercial intentions of the parties. The termination provisions should clearly set out the scope for which both parties can terminate the PPA and what happens on termination.

Tariff

The tariff is an important commercial consideration for lenders and equity investors and therefore must be priced correctly in order for the sponsor to cover its construction / development costs (priced over the lifetime of the PPA), the cost of operating the plant, servicing the debt financing and providing for a reasonable return on equity.

There has been a lot of debate around tariff pricing for solar pv projects in these jurisdictions and all stakeholders recognise that tariffs need to be priced in such a way that is reflective of high sovereign credit risk and higher levels of political and regulatory risk. As such, South Africa introduced the feed-in-tariff scheme ("FIT") for renewable energy projects which has provided some pricing certainty for investors.

The Kenyan government also launched a FIT policy with a set pricing regime to support grid-connected renewable projects and Tanzania and Rwanda both have their own FIT policies as well.

Force Majeure / Change in Law

Due to the risk profile of the jurisdictions considered in this article, force majeure provisions are negotiated quite carefully by the project sponsor and GOG Utility. The right balance is to agree the circumstances that constitute a force majeure and to set this out clearly in the PPA.

Force majeure provisions are typically project specific and should be drafted carefully in light of the political, regulatory and country risk. A political force majeure may also be triggered in the event that a change of law occurs and this directly/indirectly impacts the economic viability of the project. An example would be if the FIT regulatory regime discussed above was amended to lower the tariff price. As such, a sponsor will want a provision that once triggered will provide it with an appropriate tariff increase to reflect the initial commercial position of the parties.

Credit support

Regardless of whether the offtaker is the GOG Utility or private/commercial party, credit support or credit enhancement mechanisms should be agreed to provide the sponsor (and the lenders) some comfort that the offtaker has the ability to meet its payment obligations. For GOG Utility, this may take place in the form of a government guarantee which should be enforceable against the government in the relevant jurisdiction.

If the sponsor still has concerns over the credit standing of the guarantee, a partial risk guarantee from a development finance institution (such as the World Bank or Africa Development Bank) or multilateral credit agency should be sort.

It is important to note that not every government is willing or in the financial position to issue government guarantees. Other alternatives include a letter of credit which is a viable credit support option but is not always readily available (for the same reasons as government guarantees) or a letter of comfort from the host government which is usually unenforceable.

Events of default

The PPA should have a carefully defined event of default provision including (amongst others) the failure of the sponsor to deliver the contracted supply of electricity or the GOG Utility's inability to purchase such electricity (can be split into "GOG Utility Default" and "Sponsor Default"), the insolvency of the parties, the occurrence of a misrepresentation, failure to meet certain construction milestones and a material breach of the PPA.

Cure periods in respect of an event of default should be built in to give both parties sufficient time to rectify. The cure periods will depend on the nature of the default and the period agreed by the parties.

Assignment / change of control

The PPA is an important part of the lender's security package. It is usually a requirement that consent from the GOG Utility in relation to assigning the benefit of the PPA to the lenders should not be required.

Similarly, most developers may at some point want to bring in new investors into the project. The sponsor would want to implement this with little restriction from GOG Utility. As such, the sponsor will not want to include a change of control provision. However, the GOG Utility may require this in order to have some control over the introduction of new investors to the project.

Conclusion

Electricity generated from solar pv projects can be part of the short term and long term solution to the power problems facing Rwanda, Kenya, Tanzania, South Africa and many other parts of Africa. It will take time for these jurisdictions to create a workable development framework for more solar pv projects to come to market.

Absent the mainly technical problems that hinder power projects, what is required are stable regulatory systems that give investors the comfort they need to invest, the "support" of the governments to find solutions to what are usually short term political or fiscal challenges hindering new projects, and willing investors with the appetite to work through some of these challenges with their government counterparts.

We believe that getting these variables right will contribute towards creating an enabling environment for investors, governments and their citizens alike to truly benefit from the clean energy revolution, powered by solar!

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Complex Contract Negotiations in the Energy Sector

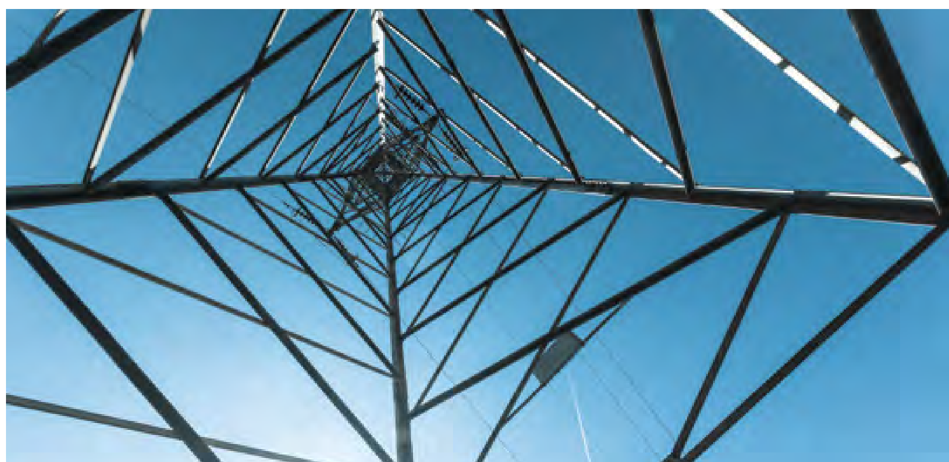
On 3 November 2015, King & Wood Mallesons (KWM), in association with the European Charter hosted a legal workshop at its Brussels offices, focussing on Complex Contract Negotiations in the Energy Sector.

Key speakers were Ramón García-Gallardo, managing partner of KWM's Brussels office, Graham Coop from Volterra & Fietta, Michael Polkinghorne from White & Case and Alvaro Galindo from Dechert, who attended via videoconference from Washington D.C.

The event was only addressed to officials within government and international governmental organisations. The list of attendants included representatives from Benin, Niger, Somaliland, Burundi and Ghana as well as officials from the European Commission, member States of the European Union and other states such as China, Turkey, Yemen and Japan.

International Investment Agreements have become one of the most used tools in public-private partnerships (PPP) in order to carry out complex energy projects. A correct negotiation and drafting of these agreements has proved to be essential in order to avoid lengthy and costly disputes, be it before national courts or more likely international arbitration.

The event commenced with a presentation delivered by Ms. Sophie Thomashausen from the Columbia Center on Sustainable Investment, during which she presented the Roadmap and Negotiation Support Portal of



that institution. Further, Mr. Alejandro Carballo from the European Charter Secretariat presented the Handbook on investment contracts in the energy sector.

After the general presentation of these projects, Ramón García-Gallardo took the floor to address the necessity of building a correct contractual structure during the negotiation phase of an international investment agreement in order to avoid future litigation. The key message was to learn lessons from previous investment agreements and the settlement of disputes arising from them but without trying to "reinvent the wheel".

Ramón Garcia-Gallardo's speech was followed by Alvaro Galindo who focused on the applicable law to be chosen while negotiating as well as the repercussions that States' immunity of jurisdiction and States' immunity of execution may have during the litigation phase.

Finally, Graham Coop addressed the issues arising from the wording of the dispute resolution clause and Michael Polkinghorne's presentation dealt with the stabilization clause and its periodic review.

The key observations from the presentations as well as audience questions were discussed and debated throughout the whole workshop. The common understanding was the fact that when negotiating any international investment agreement, both States and private counterparties should not only seek advice when it comes to litigation (when it goes wrong) but also during the preliminary drafting and negotiating phase to attempt to legislate properly how the parties wish to deal with matters when they do arise (and any means to avoid disputes where possible).

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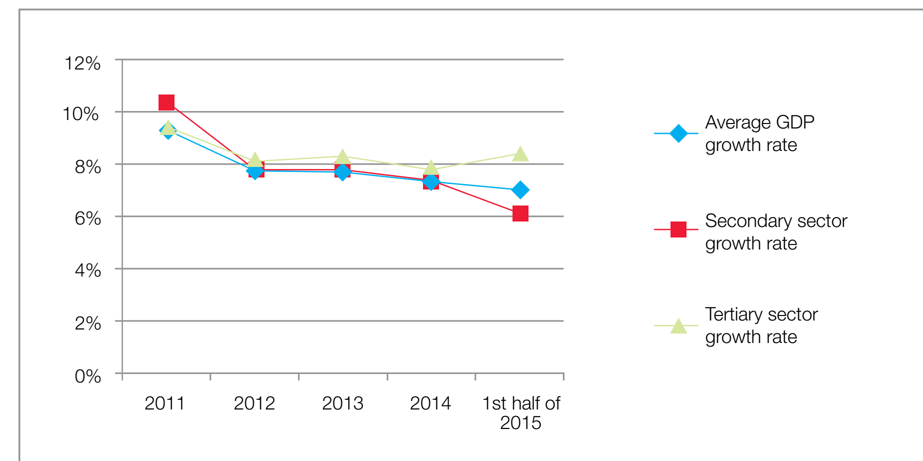
The "New Normal"

The Impact on China's Outbound Investment in Africa

At the 2015 World Economic Forum in Davos, Premier Li Keqiang stated that China is entering a "new normal" status in which its economy grows at a slower but healthier pace. However, the slowing GDP growth rate has caused concern that China's outbound investment in Africa will decrease as a result of this 'new normal' and some African countries have reportedly already experienced such effects.

After almost three decades of enviably fast growth, the world's second largest economy is slowing down

In 2014 China's economic growth slowed to 7.3%[1], the lowest annual rate since 1990. According to China's National Bureau of Statistics, the GDP growth rate in the first and second quarter of 2015 was 7.0%[2], the lowest since the second quarter of 2009. Further successive drops are now expected.



China's future demand for mineral resources from Africa

In the past 30 years China's economic growth heavily relied on the secondary sector, which includes the mining industry, has seen the greatest demand for mineral resources. However, as the Chinese government endeavors to push economic transformation forward, the tertiary industry is receiving more attention. In 2013, the total value of the tertiary industry exceeded that of the secondary industry for the first time, lowering China's demand for mineral resources.

Meanwhile, the industrial restructuring and upgrade underway in the country's manufacturing sector is also affecting its need for mineral resources. Overcapacity has been a critical issue for China, particularly in the steel industry. To solve the issue, the government has issued over 20 policies to eliminate outdated capacity.

More plans and policies, such as the Action Plan for Transition and Development of Steel Industry (2015-2017) and Structural Adjustment Policy for Steel Industry, will be published to expedite restructuring and upgrade of the steel industry. In addition mining companies have long ago become aware of the importance of increasing productivity through technical upgrade, which means same or even higher output at the same consumption of resources.

However, the government's newly-launched/approved projects and plans will to some extent increase China's demand for mineral resources. From January to September 2015, the PRC National Development and Reform Commission ("NDRC") has approved 66 infrastructure projects with expected investment reaching RMB 1,440 billion in total. On 31 August 2015, the National Energy Administration ("NEA") published the Power Distribution Network Construction and Upgrade Action Plan (2015-2020) which indicates that from 2015 through 2020 the investment in construction and upgrading of power distribution network shall not fall below RMB 2,000 billion. Those new projects and the Action Plan will for sure stir demand for mineral products.

In addition, the Silk Road Economic Belt has served and will continue to serve as a trading and investment booster. From January to July 2015, African countries along the Belt witnessed a 12.9% increase in throughput of containers handled in international waterways. In the first seven months of this year, Chinese contractors realized turnover of USD 34.46 billion and concluded USD 49.94 billion worth of contracts which mainly involves power construction, house-building, construction of transportation facilities, etc.[3]

However, overall a decline is inevitable for the economy of China, meaning less consumption of natural resource. For instance, due to severe overcapacity, weak market demand and financial difficulty, the steel industry

is getting sluggish. China Iron and Steel Association ("CISA") announced that as of the end of August 2015, the composite steel price index ("CSPI") for Chinese domestic market was at 63.36 points, down by 27.27 points or 30.09% on a year-over-year basis. In addition, China is running very high on steel inventory. Currently there are 1.1 billion tons of steel in stock[4], enough to meet China's demand for the next 5 years according to an industry insider.

Statistics from the PRC Ministry of Commerce ("MOFCOM") shows that in the first half of 2015, importation of mineral products from South Africa was $2.41 billion, a decrease of 31.7% compared to the same period of last year. Under the 'new normal', it would appear that the demand for African mineral resources will continue to decline in general as a result of economic transformation.

Will China continue to invest?

Does the declining demand for mineral resources imply reduction in China's investment in Africa's mining sector?

Investment

In November 2013, Mr. Zhao Changhui, the chief sovereign risk analyst at Export-Import Bank of China ("EXIM Bank"), declared the Central Government (including state-owned banks) would have provided Africa with USD 1 trillion in financing by 2025. BY way of example, on 22 May 2014, the People's Bank of China and the African Development Bank executed a USD 2 billion co-financing fund deal dubbed the Africa Growing Together Funds ("AGTF") to finance projects recommended by the latter. Despite this, the volume of investment in Africa is not growing as fast as anticipated. In May 2014 during his visit to Africa, Premier Li Keqiang indicated that by 2020 China's outbound foreign direct investment ("FDI") stocks in Africa should reach USD 100 billion. However, in the first half of 2015 China only invested USD 568 million in greenfield projects and in expansion of existing projects in Africa, far below targets. And the fact that big Chinese state-owned enterprises ("SOEs") are reducing their investments is perhaps the most important reason behind this fall in FDI.

The slow growth, lower demand for minerals and the Chinese government's decision to achieve economic transformation may explain why most SOEs have taken a step back, particularly from Africa's mining industry. The high failure rate of China's overseas investment has also triggered a stricter approval and decision-making process, especially within the larger SOEs. Mr. Wang Jiahua, the vice-president of China Mining Association once commented that 80% of China's overseas M&A projects in the mining area failed.[5] In March of this year, Shandong iron & Steel Group Company Limited, the minor stakeholder in the Sierra Leone iron ore project, was forced to buy out its partner and assume losses to prevent the project company being taken over by a third party or being liquidated.

However, other SOEs seem to have taken a different position. In May 2015, the state-owned Zijin Mining Group Co., Ltd declared that it had acquired major shares in the Democratic Republic of Congo's Kamoa copper mine and Porera gold mine for the price of RMB 2.52 billion and 1.82 billion respectively.[6]

Private enterprises: the emerging force

Unlike SOEs, the number of private enterprises investing in Africa and the volume of their investment is rising. The African Yellow Book: Africa Development Report (2014-2015) launched on 29 September 2015 points out that as of the end of 2013, 70% of Chinese enterprises investing in Africa are private or medium and small-sized enterprises.[7] And statistics show that in the mining industry, private enterprises have registered more overseas projects than non-private business.[8]

By way of example, Jinan Yuxiao Grop, a private company in real estate sector, has obtained over 40 exploration licenses and 4 mining licenses in Africa and Zhongsu James Mining Co. Ltd, established by a Chinese private firm, acquired mines in Mozambique with a value of over RMB 200 billion.[9]

Recently eased regulations

The recently eased domestic regulations on overseas investment and financial support help enable Chinese private enterprises to succeed in Africa. The new Measures for Administration of Overseas Investment promulgated by MOFCOM in September 2014 relaxed overseas investment procedures to facilitate outbound commercial activities. Mining projects in particular are financially demanding, which can be a huge obstacle to private enterprises investing abroad. But with various funds such as the China-Africa Development Fund, the Chinese banks support and less stringent financing conditions, private companies have more chance of obtaining external capital support. As commented in the aforementioned African Yellow Book, private companies are an emerging force among Chinese investors active on the African continent.

Diversification in Chinese overseas investment

New co-operation models

Chinese companies are changing their way of entering Africa's mining industry from acquisition of a 100% ownership stake to a diversified commercial model including holding shares instead of holding controlling shares, introducing financial investors and signing underwriting agreements. Such integrated models appeal to investors as they efficiently reduce risks in making overseas investment in mining projects.

Realization of the importance of building partnership with local and western companies in Africa is a main reason for turning towards the new model. A commercial contract is usually much more reliable than relying on government promises and grand state backed policies. By way of example CNOOC recently partnered with Total from France and Tullow Oil from the UK, both previously had obtained oil concessions from the Ugandan government.

Diversity of investors

Traditional mining enterprises now compete with mining investment funds, infrastructure companies, EPC companies and other entities on the continent. Some publicly-traded companies have also made investing in mining a part of their strategy of diversification. China Railway Group Limited and China Railway Construction Corporation Limited are actively involved in the mining industry and have acquired multiple mining assets. Meanwhile in order to acquire mineral resources by undertaking infrastructure projects, the Chinese government is also encouraging these entities to invest in the mining sector abroad.

Diversification of investment fields

PwC's *First-Quarter 2015 M&A Review and Outlook of PRC Mainland Enterprises* predicts that the focus of overseas M&A will shift to the infrastructure industry and other mining-related industries, information technology and manufacturing industries. Significant funds will be spent on high-speed trains, electricity, telecommunication, engineering machinery, automobiles and aircraft manufacturing. Agriculture is also becoming more attractive to Chinese investors - China has acquired 12 million acres of land for the purpose of grain-growing. Also with increasing participation by Chinese private corporations, more private capital is going to restaurants, retail, hospitality, medical industry, textiles and machinery.

Conclusion

The industrial transformation and slowdown of domestic demand in the 'new normal' economy will cause a reduction in China's demand for mineral resources from Africa. Consequently, Chinese outbound investment, especially those made by SOEs will be affected. However, there are private commercial entities that are making decisions from a different perspective. For such entities, the 'new normal' presents new opportunities in Africa . This diversification pushes Chinese investment in Africa to a bifurcation point, making it difficult to provide a simple forecast for either growth or decline although exciting times lie ahead.

[1] The rate is published by the PRC National Bureau of Statistics after preliminary verification of 2014's GDP.

[2] http://finance.people.com.cn/n/2015/1012/c1004-27685280.html?_t=1444612150971

[3] http://www.scio.gov.cn/ztk/wh/slxy/31200/Document/1447255/1447255.htm

[4] http://i.ifeng.com/finance/cjkhd/sharenews.f?aid=101783442&mid=&vt=5&srctag=cpz_sh_imtj_a

[5] http://fec.mofcom.gov.cn/article/xwdt/gn/201501/1851124_1.html?COLLCC=739044490&

[6] http://finance.sina.com.cn/chanjing/gsnews/20150528/104622288710.shtml, http://www.cggthinktank.com/2015-09-29/100074510.html

[7] http://www.pishu.cn/psgd/330146.shtml

[8] http://www.sinosure.com.cn/sinosure/xwzx/rdzt/tzyhz/gjtzyj/163724.html

[9] http://js.people.com.cn/n/2015/0420/c360301-24564842.html

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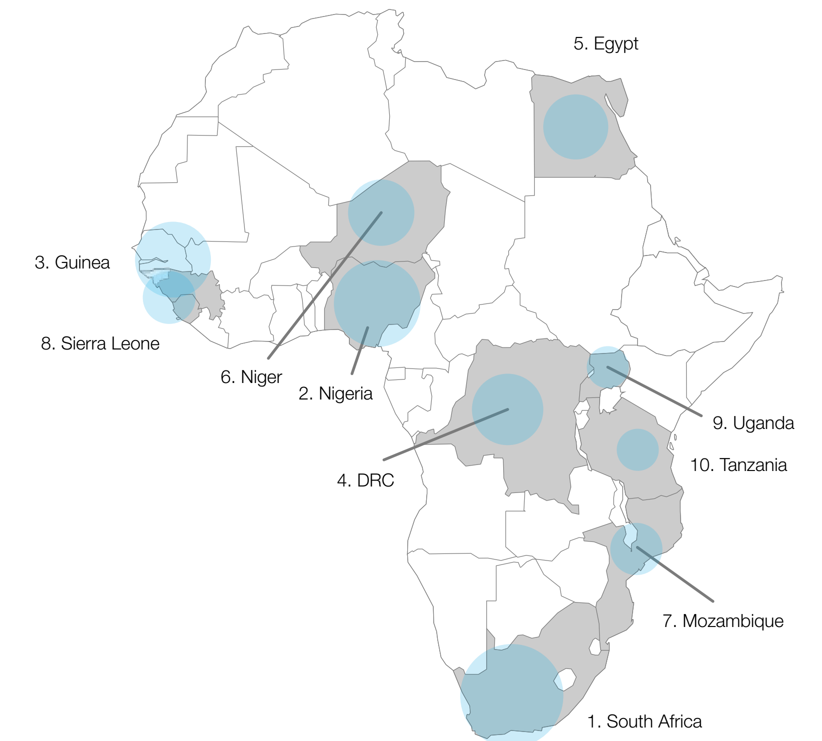
The Reception China Gets in Africa

Africa Top Ten Destinations of China FDI, 2013



Attracting Chinese investment is becoming more and more globally competitive with both developed and emerging economies vying for capital injections into their high value industries to support growth and boost productivity. However, many countries are still coming to terms with public and political debate over land ownership and allowing FDI by government owned and controlled enterprises.

Historically, one of the major challenges for Chinese investors looking to expand internationally has been the regulatory environment. There are valuable lessons to be learned from examining how other countries have responded to these challenges to send a message that Chinese investment is welcome, while still protecting their national interests.

In late 2013, China became Africa's largest trading partner, reflecting a sustained increase in investment into the continent over the past decade. Official MOFCOM statistics show that Chinese FDI flows in Africa increased six-fold from 2005 to 2012, to US$2bn per annum.

For the most part, African nations have been welcoming of Chinese investment as it contributes to economic development and builds political legitimacy. China has historically had the advantage of not being seen as a Western coloniser. In addition, African officials have been particularly receptive to China's willingness to provide soft loans and support infrastructure development, with few strings attached.

Accordingly, to date, there are only limited instances where capital-hungry African nations have established a legal framework to block foreign investment or impose conditions on foreign investors, with notable exceptions being in the banking and media industries. This is not unfamiliar to China which had similar experiences in its own economic development. China has responded to criticisms of its presence in Africa by modifying its policy.

> "Despite generally positive perceptions of Chinese investment, a number of African nations have expressed frustration with China in relation to labour conditions, unsustainable environmental practices and job displacement. With the world's youngest and fastest growing population, African governments are under pressure to provide jobs and boost the skills of their workforce."
>
> DAVID ELIAKIM,
> M&A PARTNER
> KING & WOOD MALLESONS
> (SYDNEY)

In a speech given at the 2012 Forum on China-Africa Cooperation (FOCAC), China's President, Hu Jintao, stated that China intended to redress the trajectory of trade in favour of investments that provide long-term economic benefits to Africa.

In the 2012 FOCAC Action Plan, China pledged to create more local jobs, transfer more technology, improve working conditions and increase training for African workers through scholarships and broad-based industry training programs.

Measures to improve the skills and utilisation of African workers will help China escape rising labour costs domestically as Chinese manufacturing and production moves up the value chain. Continued China-Africa cooperation is a positive sign, encouraging growth in both regions.

China has also sought to reshape its relationship with Africa and improve its image through a range of soft power initiatives. The Chinese government has maintained a robust diplomacy program, fostering educational exchanges, Mandarin language training and greater interaction between non-official state actors such as universities and think tanks.

China has also expanded the number of Chinese owned news outlets in Africa to provide the public with Chinese perspectives on topical issues and a better understanding of Chinese culture.

> "We expect that, over time, African states will increasingly impose conditions on foreign investment, including by the Chinese. This is partly because, as more countries engage with Africa, foreign investments will be evaluated with a more discerning eye. It also reflects a general trend in resources nationalism. Companies operating in the region can mitigate regulatory risks by carefully managing negotiation of necessary regulatory approvals and seeking appropriate deal protections. We also see that Chinese investments into Africa will become more diversified, migrating from natural resources to agriculture, textile, real estate and other sectors."
>
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Africa Mining Roundup 2015

All doom and gloom, or the year of preparation for post-super cycle sustainability?

The year 2015 has been tough for miners all around the world. Nowhere more so than in Africa. We tend to look at these issues through a M&A prism. From that perspective it's been a flat period for mining M&A.

Globally, depressed commodity prices coming off the back of the super cycle and capital constraints have triggered a priority shift - from capacity to efficiency. The result has been dramatic consequences for investment, employment and state coffers.

So we're generally happy to see the back of 2015 and look forward to 2016 with the expectation that new M&A opportunities will materialise from the massive infrastructure development so far.

Shrink to greatness

Seasoned mining executives have been through cycles before - they know the drill. Besides the rigorous pursuit of efficiencies to protect their income statements, they have responded by taking precautions to shore up their balance sheets.

Commentators speculated there would be distress M&A but the most popular approach for African mining companies has been "shrinking to greatness" through demergers of their second tier assets. The most high profile is of course BHP Billiton's spin off of South 32. It followed the Goldfields demerger of Sibanye and was followed by Glencore's distribution of its 23% stake in Lonmin. "Popular" may be the wrong word because AngloGold shareholders recoiled against its combination rights offer and demerger of its non-African assets.

Similarly there have been sales of none core or less profitable assets. Anglo American has sold its platinum assets and AngloGold has brought in Randgold as a partner to redevelop Obausi in Ghana). There was also the less formal cutting of the umbilical cord between Barrick Gold and Acacia.

On a positive note this is all good for M&A as we have seen the demerged entities more open to M&A than their conservative parents. For example Sibanye has gone after platinum assets in a way that Goldfields would not likely have done.

Precautionary rights offers

First Quantum and more recently Glencore have shored up their balance sheet apparently as precautions in response to concerns from investors. Lonmin's hot off the press do or die rights offer sounds more ominous.

Too little, too late

Of course in some cases it was left too late or there was no hope of saving the company. The London Mining and subsequent African Minerals insolvencies scarred AIM investors.

From a legal perspective, all these dramas have played out on the TSX, the LSE/AIM, the ASX and the JSE underscoring the global nature of the African mining industry and how flexible we as advisers have to be able to respond quickly and effectively on a global basis.

Uniquely African Challenges

All that we've said above could be equally applied to non-African mining companies. Although iron ore miners in other jurisdictions have had a lot to deal with, they haven't had to face Ebola which ultimately led to the sinking of London Mining and African Minerals.

Teasing out the other uniquely African legal developments of the year, South African uncertainty around Black Economic Empowerment requirements and the gold mine tax haven't done much for confidence. There was also the unexpected, unconsulted and unknown leadership change in the South Africa mining Minister.

The United States' SEC's willingness to enforce the FCPA for mirky South African BEE deals (Gold Fields and Hitachi/Chancellor House) should ensure a heightened sensitivity in African deals, especially where there is a US nexus.

It is encouraging to note that resources nationalism has been relatively quiet in Africa despite all the pressures on Governments. In particular, sense seems to have prevailed following threats to raise taxes in Zambia.

Private equity?

As in the rest of the world, the much anticipated tsunami of private equity investment into resources failed to materialise this year. That said, one fascinating development was KKR's recruitment of former chief executive of Africa's biggest ports and logistics network as a senior adviser (Dominique Lafont, who headed Bolloré Africa Logistics)

Reasons to be grateful - the China factor

On the positive side, despite a significant drop in the value of Chinese foreign direct investment into African resources, the scale of construction contracts with Chinese EPC companies, and associated Chinese bank financing, remained steady.

The only major Chinese mining investment in Africa this year was Zijin's 50% stake in Ivanhoe's Kamoa copper project in the DRC. Shandong Iron and Steel took control of the Tonkolili iron ore mine in Sierra Leone following its collapse in the face of Ebola and the iron ore crisis – but that was protecting an existing investment rather than an outlay of fresh cash.

Consistent with the massive levels of investment of the past few years and the promised establishment of the New Silk Road to strengthen trade connectivity between China and its trading partners - again this year billions of Dollars have been committed to rail, shipping, power and other construction contracts. The model is not yet clear but there remains significant sovereign funding from Chinese policy banks with Chinese EPC contractors building the infrastructure.

This is literally paving the way for the import of Chinese goods and services. A particularly exciting deal was China National Materials subsidiary Sinoma concluding billion Dollar cement supply contracts with Africa's wealthiest man, Nigerian businessman Aliko Dangote. This will go some way to address criticism over Chinese neo-colonialism in Africa – an African entrepreneur is leading a new way to the New Silk Road.

Importantly for the resources sector all this infrastructure investment allows the opportunity for landlocked African resources projects to be developed despite capital constraints, depressed commodity prices and over supply coming online from competing mining jurisdictions. This may make economically viable post-super cycle projects that would otherwise never have been developed.

Infrastructure investment is key to achieving efficiencies and other jurisdictions are already reaping dividends from their investment. Brazil's Vale's Valemax fleet of ore carriers allow Brazil to compete with Australia's high quality iron ore from the Pilbara.

New Institutions to facilitate growth

Good progress was made this year in the adoption of frameworks and establishment of institutions necessary to support infrastructure and development.

Africa 50

This year marked the establishment of Africa50 by the African Development Bank (AfDB). Designed to help accelerate infrastructure development in Africa. Africa50 has two main initiatives: project financing and project development. With a strong public private sector approach in the development of its business, Africa50 is founded on high corporate governance, ethical, financial, environmental and social responsibility frameworks. Twenty African countries and the AfDB have provided initial finance of US$830 million.

New Development Bank

Each of the 5 BRICS founders of the New Development Bank have agreed to commit US$10 billion to it. This represents a massive pool of capital for the multilateral development bank operated by the BRICS states to function as an alternative to the existing Western-dominated World Bank and IMF.

FOCAC

The 6th Ministerial Forum for Chinese and African Cooperation (FOCAC) and second summit is due to convene in Johannesburg on 4 and 5 December. The theme this year is "Africa-China Progressing Together: Win-Win Cooperation for Common Development". On the basis of the previous FOCAC ministerial fora and the Beijing summit, President Xi Jinping's visit to Johannesburg promises to bring a flurry of deal announcements.

Among the goals of this year's FOCAC, is the stated aim to promote three networks (high-speed rail, expressway and regional aviation networks) and infrastructure industrialization (production capacity co-operation).

The China-Africa Development Fund was announced by President Hu at the first FOCAC back in 2006 – it's been conspicuously quiet this year, so let's see if it makes an announcement at FOCAC Johannesburg.

Conclusion

Despite the tough year, we remain optimistic that 2016 will bring new investment and confidence with associated M&A opportunities. Infrastructure development is hoped to provide a solid base for growth and prosperity in the African mining sector.

Bringing South32 to market

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Africa and Australia focused resources company South32 was forged out of a demerger from BHP Billiton earlier in 2015. Led from Australia, King & Wood Mallesons ("KWM") was instructed to coordinate a multiple listing of the newly created company on the Australian Securities Exchange, the London Stock Exchange and the Johannesburg Stock Exchange. The South African attorneys Werksmans assisted with the South African elements of the process.

South32 has extensive mining and processing facilities in Africa, including an aluminium smelter in Mozambique and coal and commodity metals mines in South Africa. It also has assets in Australia and South America.

A leadership team with the metal to lead the new, multi-billion dollar revenue company was assembled with a range of geographic and industry backgrounds and KWM in Australia and London worked closely with the top brass to ensure adequate preparation for the discipline of running a listed company of this nature.

Obtaining a listing in multiple jurisdictions presents some unique challenges, given the disparate regimes applying in the three exchanges involved. The different information requirements were analysed and information refined down so that the requirements could be fulfilled without excessive duplication of work or drafting.

Equally, the continuing obligations applicable to a company with multiple listings could prove quite burdensome for those at the coal face of ongoing compliance.

Significant work was undertaken to drill down into the detail of the relevant obligations to ensure that, as far as possible, the means by which an obligation in one jurisdiction was satisfied would also fulfil an equivalent requirement elsewhere.

A good example of this concerns the disclosure of inside information, where a company with multiple listings has both the opportunity and obligation to ensure that shareholders in different markets are kept up to date in the same way with developments which may affect the company's share price.

In other instances, the rules applying to the London and/or Johannesburg listings defer to those of the primary listing in Australia. A good example of avoiding one regime being pitted against another lies in the realm of corporate governance. South32 has said that it will aim to comply with the ASX Corporate Governance Principles and Recommendations and London does not (in this case) seek to impose any separate UK corporate governance code or guidelines

However, London listed companies do still need to explain in their annual reports any instances in which the touchstones of their corporate governance regime have not been complied with.

Familiarity with the African context of South32's business was vital in preparing (together with Werksmans) the risk factors section of South32's prospectus (and equivalent documents), with the aim of presenting a comprehensive and unalloyed picture of the risks that should be taken into account by investors in the company. These included, at the time, possible amendments to the Mineral and Petroleum Resources Development Act under consideration by the South African Government and the review of compliance with the South African Mining Charter.

This was a sizeable cross-border transaction showing KWM's breadth and depth of expertise across its global offices (together with our local partners) to deliver for our client.

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The Mining Sector in Nigeria

Introduction

The mineral resources of a nation are integral to national economic development. According to the Nigerian Extractive Industries and Transparency Initiative (NEITI) Report, there are about 40 different kinds of solid minerals and precious metals in Nigeria begging to be exploited[1].

In 2008, the Minister of Solid Minerals Development (now called Mines and Steel Development) prioritized the development of seven solid minerals with strategic relevance to Nigeria's economy considering their availability in quantities that are sufficient to sustain mining operations for the long term. These minerals are coal, barytes, bitumen, gold, iron ore, lead/zinc, and limestone[2].

These resources create potential opportunities for national development. For example, coal which is richly concentrated in eastern Nigeria could serve as fuel for power generation, thus reducing the power infrastructural deficit in the country. In addition, bitumen which is an essential component of asphalts can be used for the construction of roads.

It is common knowledge that Nigeria has over the years, majorly depended on crude oil to drive its economy; with the solid mineral industry being largely neglected. According to the Nigerian- National Bureau of Statistics, the Mining and Quarrying sector accounted for 9.12% growth to the Real GDP of the country in the fourth quarter of 2014 with coal mining and quarrying & other minerals leading the growth[3].

In view of the global decline in crude oil prices and its attendant impact on the country's earnings and reserves, efforts are being made to refocus on the nation's solid minerals considering the potentials of solid minerals industry becoming a viable alternative foreign exchange earner in Nigeria. According to Corporate Nigeria, the country is estimated to have a reserve of about 42 billion tonnes of bitumen, and 3 billion tonnes of iron ore, 10 million tonnes of lead and zinc, 7.5 million tonnes of barite and 700 million tonnes of bentonite[4].

Despite this, infrastructural deficits and insufficient capitalization remains a bane to the rejuvenation of the solid minerals industry in Nigeria.

This article discusses the regulatory framework of the Nigerian mining sector with a focus on mineral titles, incentives and other salient issues prospective investors must consider in participating in the sector. The authors have drawn on their experience in advising foreign investors who have invested in the Nigerian mining sector over the last few years.

Overview of the Mining Legal Framework

Mining is on the exclusive legislative list of the Constitution of Nigeria, thus bringing it within the sole regulatory ambit of the Federal Government of Nigeria. The core legislations applicable to the sector are the Nigerian Minerals and Mining Act of 2007, the Nigerian Minerals and Mining Regulations 2011, and the Guidelines on Mineral Titles Application 2014. Other relevant legislations regulating the industry include the Nuclear Safety and Radiation Protection Act Cap N142 LFN 2004, National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations (SI No 31 of 2009), Environmental Impact Assessment Act (Cap E12 LFN 2004), The Explosives Act and Explosives Regulations (Cap E 18 LFN 2004), Land Use Act 1978, and the Nigeria Extractive Industry Transparency Initiative Act (Cap N159 LFN 2004).

According to the Nigerian Minerals and Mining Act, the entire property in and control of all Mineral Resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone[5] is and shall be vested in the Government of the Federation for and on behalf of, the people of Nigeria.

The Nigerian mining sector is overseen by the Federal Ministry of Mines and Steel Development which is headed by the Minister of Mines and Steels (the Minister). The Ministry functions primarily through the Mines Inspectorate Department, Mines Environmental and Compliance Department, Mining Cadastre Office, the Artisanal, Small-scale Mining Department, and the Mineral Resources and Environmental Management Committees established in each state of the Federation.

Solid Minerals Titles in Nigeria

The Nigerian Minerals and Mining Act provides that the right to search for or exploit Mineral Resources shall be obtained through any of the under-listed mineral titles namely:

- **Reconnaissance Permit:** This is a non-exclusive right awarded to Nigerian citizens, companies incorporated in Nigeria or mining co-operatives for a period of one year renewable annually to search, obtain, and remove surface samples of mineral resources in small quantities on any land within the territory of Nigeria available for mining purposes. This reconnaissance does not permit the holder to engage in drilling, excavation or other sub-surface technique.
- **Exploration Licence:** This is an exclusive right awarded to companies incorporated in Nigeria, a Mining Co-operative, or the holder of a Reconnaissance Permit over the subject area of the application, for a period of 3 years renewable twice for a further period of 2 years each (subject to meeting certain conditions) to conduct exploration of mineral resources, remove, export, and sell agreed samples. The right is given over an area of land not exceeding 200Km^2.[6]
- **Small – Scale Mining Lease:** This exclusive right is awarded to Nigerian citizens, companies incorporated in Nigeria, a Mining Co-operative, or the holder of an Exploration Licence over the subject area of the application to carry out small scale mining operations. This Lease is granted for a period of 5 years renewable for a further period of 5 years over an area of land not exceeding 3Km^2.[7]
- **Mining Lease:** This exclusive right is awarded to companies incorporated in Nigeria, or other legal entities that have demonstrated that a commercial quantity of mineral resources exists in the area of application and has fulfilled all the conditions in relations to an Exploration Licence over the subject area. A holder of this lease has the right among others to carry out exploration, market, sell and export mineral products resulting from the mining operations. This Lease is granted for a period of 25 years renewable every 24 years. The subject area of application shall be determined in relation to the ore body as defined in the feasibility study, in addition to an area required for the working of the deposit not exceeding 50Km2.

  For the legal entity to be entitled to the grant of a mining lease, it must have employed a person who possesses adequate professional qualification and experience in mining to supervise the mining operations and must maintain the employ of such a qualified person during the duration of the lease to be able to continue operations, otherwise it shall cease operations until a suitably qualified person is available[8].
- **Quarry Lease:** This is an exclusive right awarded to Nigeria citizens, Mining co-operatives, Nigerian companies or persons extracting construction materials for works or structures of public interest. It is granted for a period of 5 years renewable upon expiration and shall be for an area not exceeding 5Km^2. It confers on its holders the right to conduct quarrying operations in land and waters over minerals that may also be lawfully extracted under a Mining Lease.
- **Water Use Permit:** This is an exclusive right to obtain and convey water and/ or occupy land for the purpose of conveyance of water granted to the holder of the Exploration Licence, Mining Lease or Quarrying Lease at the time the water right granted will be used; or an applicant of a Mining Lease, Small scale mining Lease or Quarry Lease for which the water right will be required to be used. This permit is granted over the same area of land awarded or to be awarded to the qualified applicants and remains valid for as long as the applicant's licence or lease remains valid[9].

Mineral titles are issued on a first come, first served basis. However, the Minster is empowered under the Act to determine areas where an exploration licence and a mining lease shall be granted based on an open and transparent competitive bidding process.

An applicant for a mineral title would be required inter alia, to submit to the Mining Cadastre office an application letter in triplicate indicating the minerals which it intends to explore or mine within the lease, duly completed application form, a pre-feasibility report, prospecting plan/ reserve estimation, valid exploration licence, documentary evidence of technical capability and competence, consent from land owners/ occupiers, evidence of payment of the appropriate fees, minerals to be exploited, evidence of sufficient working capital for the mining operations within the lease area, and a survey of the lease area.

In the event that the applicant fails to satisfy the Mining Cadastre Office with respect to providing evidence of technical capabilities and competence, and availability of sufficient working capital for the mining operation, the Mining Cadastre Office shall upon consultation with the Minister refuse the application.

Royalty

Minerals obtained in the cause of exploration or mining operations are liable to the payment of royalty ad valorem ranging from 3% - 5% cutting across 52 solid minerals as provided in Schedule 4 of the Minerals and Mining Regulations 2011. However the Minister may grant a concession for the royalty payable on any mineral to be deferred for a number of years, subject to the approval of the Federal Executive Council (a body consisting of the President and his cabinet), as well as reduce or waive the royalty payable on minerals exported solely for the purpose of analysis or experiment or as a scientific specimen, not being in greater quantity than is reasonably necessary for the purpose.

Transferability of mineral title

With the exception of a Reconnaissance permit, mineral titles and permit are transferable under the Nigerian Minerals and Mining Act, subject to the approval of the Minister of Mines and Steels and the registration of the transfer with the Mining Cadastre Office. An application for an approval shall be made to the office of the Mining Cadastre Office.

However, where the transferor is an affiliate of the transferee, and the obligations of the affiliate are guaranteed by the transferor or by its holding company, the requirement for an approval may be dispensed with and the transferor may proceed to register the transfer with the Mining Cadastre office. It is always prudent to procure that a due diligence be carried out on the transferor and the tenements to confirm the actual lease holder and that the leases are in good standing and available for transfer before consummating the transfer.

The priority of Interest and Compensation

Pursuant to the Land Use Act 1978 (LUA), all land in each state of the Federation is vested in the Governor of the state who holds same in trust for the indigenes. The LUA creates a leasehold relationship between the Governor and land occupiers, granting the latter a statutory right of occupancy over the said land. However, where land is required to be utilized in the interest of the public, the Governor of a state may pursuant to the LUA revoke the statutory right of occupancy already granted over the said land.

In accordance with s. 22 of the Nigerian Minerals and Mining Act, the use of land for mining operations amounts to an overriding public interest which may result in the Governor of the state revoking any prior right of occupancy in accordance with S. 28 of the LUA. A revocation made pursuant to S. 28 of the LUA shall entitle the occupier of the mineral title area to recover compensation

from the government or the mineral title holder where the mineral title holder has been directed to do so by the Government.

However, in the event that a revocation is not granted and the community leases its land for an exploration or mining activity to be conducted on it, a mineral title holder will be liable to pay compensation for the surface rights to the owner or occupier of a land over which it has a right to mine and for any damages occasioned on the land, crop, economic tree, building or works as a result of the mining activities. This compensation is also extended to adjoining land owners or occupiers whose land or interest are injuriously affected by the exercise of the rights conferred by the licence or lease obtained by the mineral title holder.

The Minister may before granting a mineral title require the applicant to give security by depositing with the Government a prescribed sum or reimburse the Government for any compensation paid by the Federal Government to the occupier of land on which the lease or licence is given.

In addition, there is a prohibition of exploration or mining activities on areas considered to be sacred grounds, neither can any damage be done to a tree or any object of veneration within the community. Where an injury or damage is occasioned to a sacred area or revered tree, a fair and adequate compensation shall be made to persons or communities affected by the damage. Similarly in Australia, indigenous cultural heritage is protected by the Aboriginal Cultural Heritage Act 2003 (Qld) which provides that exploration and mining tenements must meet the mandated duty of care which requires that a person who conducts an activity must take all reasonable measure to ensure that the activity does not harm Aboriginal cultural heritage[10]. Thus, it is clear that there is a germane need to preserve monumental areas in a society.

Structures for Participation

Foreign participation in the mining sector may take any of the following structures:

a. An acquisition of a significant equity in an established Nigerian entity (the target) with an existing licence. This enables the foreign investor explore minerals under the existing licence of the target company, gain control of a production and distribution channel, as well as enjoy easy access to an established market.

b. Entering into a joint operating agreement with a local partner to invest in the mining sector within Nigeria. This may require the local partner to obtain the mineral title in its name and contract the exploitation operations to the foreign investor under a Technical Service Agreement. A joint venture agreement may also be entered into wherein a project vehicle is incorporated to execute the project. The project vehicle may then obtain the required licences and carry out the exploitation operations.

c. Incorporating a company in Nigeria through which they can invest in the sector. This ab initio gives the investor effective control of the investment.

Community Relations, Development & Rehabilitation

As part of the Federal Government measure to ensure that mining and exploration activities are conducted in an environmental and social responsible manner, a mineral title holder is required before commencing mining operations to submit an Environmental Impact Assessment statement to the Mines Environmental Compliance Department in respect of the Mineral operations to be conducted within the mining area, as well as submit an Environmental Protection and Rehabilitation Programme.

The Environmental Protection and Rehabilitation Programme must provide for rehabilitations and reclamation actions, an estimate of the cost and a timetable for the duration it will take to restore the mineral title area back to a safe environmental state suitable for future economic development or recreational uses. To guarantee the rehabilitation of the mineral title area, the Mineral Title holder will be required to make such prescribed contributions to an Environmental Protection and Rehabilitation Fund.

At the completion of the mining or exploration activities on the mineral title area, the mineral title holder is required to fill up any shafts, wells, holes or trenches among other activities to ensure that the mineral title area is reverted to a state suitable for future economic activities.

In addition to this, prior to the commencement of any lease operations, a Community Development Agreement must be consummated with the host community detailing the social and economic contributions of the project to the host community. These contributions shall be directed in the areas of educational scholarships, apprenticeship, technical training, employment of indigenes, support for infrastructural development, improved health care, support to SME's, and agricultural improvements. The Community development Agreement shall be subject to review every 5 years.

Incentives available to investors under the Nigerian Minerals and Mining Act

An investor participating in the mineral and quarrying sector shall be entitled to the following incentives:

- A capital allowance of 95% of its Qualifying Capital Expenditure incurred in the year of investment.
- Losses incurred are deductible from the assessable profits of the first year of assessment after that in which the loss was incurred, and in so far as it cannot be so made from such amounts of such assessable profits of the next assessment up to a limit of four years after which period any unrelieved loss shall become lapse
- Exemption from payment of customs and import duties in respect of plant, machinery, equipment and accessories imported solely for mining activities. The plant, machinery and equipment and accessories may be disposed of by the holder of Mineral title upon the full payment of customs and imports duties
- Although the Minerals and Mining Act provides that a tax holiday (pioneer status) for an initial period of 3 years renewable for a further period of 2 years shall be granted to investors, the Companies Income Tax Act does not make provisions for a renewal of tax exemption for companies enjoying the benefit of pioneer status
- Exporters of mineral products may be permitted the retention of part of its foreign exchange earning in a domiciliary account for acquiring spare parts and other mining inputs
- Free transferability of foreign currency through the Central Bank of Nigeria (CBN) for the servicing of a certified foreign loan and the remittance of foreign capital in the event of sale or liquidation of the business (this incentive is also available for all other foreign investors in Nigeria)
- Personal remittance quota for expatriate personnel free from any tax imposed by any enactment for the transfer of external currency out of Nigeria
- Actual amount incurred out of reserves made for environmental protection, mine rehabilitation, reclamation and mine closure cost shall be tax deductible, subject to certification by an independent qualified person

Challenges

Since the minimum share capital of Nigeria Banks was increased from N2 Billion to N25 Billion[11] in 2004, Nigerian banks have financed large ticket transactions especially within the upstream oil sector particularly via syndications. There was a flurry of activity in this regard during the recent divestment of the oil majors (e.g. Shell, Conocophillips) from some of their Oil Mining Leases.

However, Nigerian banks have historically been averse to financing the mining industry due to a myriad of reasons including a lack of understanding of the technicalities of the sector, unwillingness to deploy long term funding, and non-availability of bankable feasibility studies which are carried out in accordance with the Joint Ore Reserve Committee specifications[12]. As a result of this there has been a heavy reliance on foreign debt to finance the industry despite the capacity of Nigerian banks to participate in this industry.

Security challenges has also affected foreign investments in the sector. The Boko Haram insurgency predominantly in the Northern region of Nigeria has significantly affected investments in the region. According to World Investment Report (WIR) of the United Nations Conference on Trade and Development (UNCTAD), the domestic economy lost about N1.33 trillion Foreign Direct Investment (FDI), owing to terrorists' activities.[33]

Interestingly, several mineral deposits such as gold, tin ore, and uranium are found in the northern region of Nigeria. It is worthy of note that the Nigerian security forces have successfully reclaimed vast territories from the insurgent's control with the government promising to fully eradicate Boko Haram by December 2015. Related to this is the threat caused by illegal miners who, with their knowledge of the local terrain may pose security challenges to legitimate mining activities.

In addition, there is a huge infrastructural deficit in the country. Dilapidated roads, inefficient rail way transport system, epileptic power supply or the lack of it in some rural parts of the country are all infrastructural challenges which are a bane to the development of the sector. Thus, a potential investor would be required to factor the cost of providing alternatives to power, and a means of ensuring safe transportation of minerals produced to the port of export in deciding whether to invest in the sector.

Conclusion

Nigeria operates a federal system of government consisting of a Federal, States, and Local Governments. As earlier mentioned, mining is on the exclusive legislative list just like Petroleum Resources. However, stakeholders have over the years argued whether resources located within a state should be vested in and managed by the state in order to maximize the resources. For example in Australia, a leading mining country, mineral and petroleum resources are publicly owned and regulated by the federal and state governments. It is thus arguable that in order for resources which have been significantly under-exploited in Nigeria to be fully exploited to foster an inclusive economic growth, state governments should be vested with the right to deal with the resource which will require a constitutional amendment with its attendant intricacies.

Furthermore, considering that most mineral resources are found in the interior parts of Nigeria, there is a germane need to develop Nigeria's railway system to facilitate transportation of solid mineral resources to the port of export.

Undoubtedly, the potentials for mining in Nigeria remain largely untapped thus creating huge opportunities for investors who are able to navigate the sector with the right set of advisers.

1 www.vanguardngr.com/2015/06/neglect-of-solid-minerals-why-nigeria-remains-poor/ (Accessed on: 24 October, 2015)

2 http://www.nigerianminers.org/sites/default/files/Mining-Mineral-Act.pdf (Accessed on: 03 November, 2015)

3 Nigeria Gross Domestic Product Report Q4 2014, Mining and Quarrying, page 5, paras 3 and 5. National Bureau of Statistic Available at: www.nigerianstat,gov.ng/nbslibrary/economic-statistics/gross-domestic-product (Accessed on: November 2, 2015)

4 http://www.corporate-nigeria.com/assets/pdf/2010/cn-2010-solid-minerals.pdf(Accessed on: November 2, 2015)

5 Exclusive Economic Zone means the Exclusive Zone of Nigeria as defined in the Exclusive Economic Zone Act, Cap E17 Laws of Federation of Nigeria

6 Clause 2.2 of the Guidelines on Mineral Titles Application, 2014

7 Clause 2.5 of the Guidelines on Mineral Titles Application, 2014;

8 S. 48 & S. 73 of the Nigerian Minerals and Mining Act

9 Clause 2.6 of the Guidelines on Mineral Titles Application 2014;

10 Carolyn Boyle (2012): Minerals and Mining: A Practical Global Guide. Jessica Davies and Barry Irwin (Allen & Overy) (Australia Contribution) Published by Sian O'Neil Globe Law and Business Publishing Ltd (page 49, para 11.2)

11 Between about 10 Million dollars to 125 Million dollars

12 (http://www.premiumtimesng.com/business/manufacturing/185680-dangote-6-others-set-for-gold-mining-other-minerals-in-nigeria.html) (Accessed on: November 3, 2015)

13 http://transparencyng.com/news-categories/89-national-security/6431-terrorism-counting-the-costs-of-boko-haram-report.html

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Case Dismissed

Zimbabwe's government amends the law following the Supreme Court's landmark employment law ruling

The full bench of the Supreme Court of Zimbabwe (SC) comprising of 5 appellate judges delivered a unanimous ruling on 17 July 2015 which has important implications for employment law in Zimbabwe.

The ruling deals with the contentious question of whether an employer can, for no reason or fault on the employee's part, terminate the employee's contract of employment by giving the employee an obligatory notice in terms of the contract of employment, or in terms of the Labour Act (Chapter 28:01) where the contract provides a less favourable notice period.

The Judgment is also key in that it has interpreted the law by material departure from numerous rulings in the Labour Court and Labour arbitral tribunals and held that an employer's conduct in terminating a contract of employment on notice did not amount to an unfair dismissal. Given the departure from the settled law and resultant controversies, the Zimbabwean government stepped in to pass a new law to clarify the position further as set out herein.

The Facts

In the case of Don Nyamande & Anor. V Zuva Petroleum (Private) Limited SC 43/15 the appellants, Don Nyamande and Kingstone Donga, were employed by BP Shell as Supply and Logistics Manager, and Finance manager, respectively. BP Shell sold its services as a going concern to Zuva Petroleum, the respondent in the matter. A transfer of undertaking was thus concluded in terms of section 16 of the Zimbabwean Labour Act (Chapter 28:01)(hereinafter referred to as "the Act"). The appellants were consequently transferred to Zuva Petroleum on the same terms and conditions of service that they enjoyed under BP Shell.

On 21 November 2011 Zuva Petroleum offered all its employees, who included the appellants, terms of a voluntary retrenchment package. The terms were rejected by the employees, the appellants included. On 15 December 2011 the respondent then served each of the employees with a compulsory notice of its intention to retrench them. The appellants and the respondent could not agree on the terms of retrenchment and thus referred their dispute to the Retrenchment Board ("the Board") whose mandate is to fix a retrenchment package which is payable to employees should the employer insist on carrying out a compulsory retrenchment exercise.

On 16 May 2012, the Board directed the parties to carry out further negotiations regarding a fair retrenchment package for another 21 days. Two (2) days into the 21 day period, the respondent wrote letters to the appellants, advising them of the termination of their contracts of employment on notice in terms of their contracts of employment. The termination was with effect from 1 June 2012. The respondent subsequently paid the appellants cash in lieu of their serving notice and thus terminated the employment relationship.

Aggrieved by this, the appellants approached a labour officer contending that they had been unfairly dismissed. The Labour officer failed to resolve the matter and referred it for compulsory arbitration. The appointed arbitrator concluded that the termination of the contracts was unlawful because appellants had not been dismissed in terms of an employment code of conduct.

The respondent appealed to the Labour Court. The Labour Court allowed the appeal and concluded that in the Court's view, section 12B of the Act which dealt with dismissals of an employee, did not alter the employer's right under the common law to terminate an employment contract on notice. Aggrieved by the decision of the Labour Court, the appellants appealed to the Supreme Court. Their contention was that the Labour Court had misdirected itself on a question of law in upholding termination of their contracts of employment on notice, and failing to find such termination to be an unfair dismissal. In their view, in enshrining the concept of unfair dismissal in section 12B, the Act was outlawing any termination of employment for no reason (no-fault termination).

The Law

Two (2) sections of the Act were under scrutiny, namely, section 12(4) of the Act which prescribes the applicable notice period in relation to the length of a contract of employment, to be given by either party on termination of employment; and sections 12B (2)(a) and (b) of the Act, which provide that an employee will be unfairly dismissed if an employer fails to show that the employee was dismissed in terms of an employment code, or in the absence of the employment code, in terms of the model code of conduct made in terms of the Act. The Court observed that the real dispute centred on whether or not the above sections had abolished the employer's common law right to terminate an employment contract on notice, or whether that right still subsists under Zimbabwean labour laws.

The Ruling

The Supreme Court dismissed the Appeal by making a finding that an employer's right to terminate a contract of employment on notice is derived from common law (and not from the Act) and, therefore, can only be abolished by an Act of Parliament. It held that given its primary meaning, there is nothing in the wording of section 12B of the Act, either expressly or impliedly, which abolishes this common law right.

The Court further held that in the past where a relationship had deteriorated between the employer and employee to untenable levels, through no fault of either party, the relationship could be lawfully ended on notice. Similarly, section 8, which contains examples of conduct by an employer which may be deemed to be unfair, made no reference to termination by notice as being one such conduct. Lastly, the Court concluded that section 12(4) dealing with notice periods to be given for termination by either party did not actually create the right to terminate, but only regulates it.

Consequently the Court held that there are many different forms of termination of an employment contract and termination on notice or by retrenchment, being only examples, did not amount to unlawful or unfair dismissal.

Effect of Court ruling

The effect of the ruling was immediately felt with reportedly close to 25,000 permanent employees having their contracts of employment terminated on notice in the following 45 days with no retrenchment package being paid. Reactions from the parent Trade Union body were strongest. It argued that the ruling had effectively turned every employee in the country into a "temporary employee".

It also posited that the implication on the economy would be felt far and wide, from banks that advance loans to employees on the understanding that their jobs are secure, to departmental stores that advance merchandise on credit on the same understanding. Other employment bodies also argued that the effect of the Court ruling was that the employer would simply ignore the strict retrenchment procedures set out in the Act by terminating contracts of employment on notice and limiting terminal payments to the corresponding notice period.

The dramatic conclusion reached by many employees was that almost the entire Labour Act has become redundant in light of the ruling. On the other hand, many employers lauded the ruling and remarked that it had brought natural justice between the parties in the labour market.

Government Intervention

The Government of Zimbabwe, through the Ministry of Public Service, Labour and Social Welfare, swiftly intervened to stem the wave of terminations by introducing a Labour Amendment Bill. Parliament was urgently recalled from its recess. The Bill was introduced on 18 August 2015 and barely 2 days later, it had sailed through the lower and upper houses of Parliament despite an adverse legal report on some of the provisions of the Bill by the Parliamentary Legal Committee. On 26 August 2015 (8 days later) the Bill was gazetted into law as the Labour Amendment Act 5, 2015 ("the Amendment Act") and immediately came into effect.

The most important amendments introduced by the Amendment Act were:-

(a) a new section 12(4a) was inserted which specifically outlawed the employer's common law right to terminate a contract of employment on notice unless the termination is in terms of a registered employment code of conduct, or is by mutual consent of the parties, or if the contract is a fixed term contract, or if the termination is in pursuance of a retrenchment exercise;

(b) the old retrenchment provisions in the Act were repealed and replaced by a new section 12C which sets out a mandatory minimum retrenchment package to be paid by an employer as being not less than 1 month's pay for each 2 years of service by the employee (and proportionate payments for lesser periods of service);

(c) a "transitional" provision was inserted, which backdates payment of the mandatory minimum retrenchment package to all permanent employees whose contracts of employment were terminated on notice following the Supreme Court ruling of 17 July 2015.

The new law has not found much favour with either the employees or the employers. On one hand, the employees are of the view that the mandatory minimum retrenchment package of 1 month's salary for every 2 years of service is too little compensation as the employers will now only feel compelled to pay that minimum retrenchment package and nothing more. In the past, a retrenchment package would likely incorporate payments for medical aid and relocation allowances, among others.

The employers, on the other hand, have mounted a Class action under the Employers Confederation of Zimbabwe (EMCOZ) to challenge the "transitional provision" and other amendments to the Labour Act which they state have the inadvertent effect of making the amendments to the Act difficult, or even absurd, to implement. One such example is the requirement for an employee who has been dismissed following disciplinary proceedings for misconduct, to be paid a retrenchment package.

Conclusion

The Court ruling is indeed a "landmark" decision in many respects. It elicited strong reactions from both employers and employees, as well as the Government, even though the Court has, in the past, come to similar conclusions on related matters. This can be explained by the fact that the 17 July 2015 ruling was highly publicised in the media, and also that in its past judgements, the Supreme Court's position was not as emphatic and clear-cut as the Court pronounced in the Zuva case. More importantly, the ruling has also led to a change of the employment law landscape in Zimbabwe with the enactment of the Labour Amendment Act 5, 2015 with its sweeping provisions.

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Developing Nigeria's Secondary Mortgage Market

Introduction

The development of Secondary Mortgage Markets (SMMs) is becoming an increasingly important objective of global economies. While mortgage loans are originated in the Primary Mortgage Markets (PMMs) and involve raising capital through the use of property as security, SMMs provide a platform where mortgage originators are able to sell the receivables from the loans before maturity in return for capital. Mortgage loans may either be sold individually on the SMM or packaged into pools before being sold to increase investor participation by offering group investment options. The capital raised from these sales is used to originate more loans and thus, create immediate liquidity in the PMM. Associated rights such as servicing the loan, which includes payment processing, collections and foreclosure may be transferred alongside the receivables or retained by the mortgage originator.

The United States and Malaysia are prime examples of Countries with successful SMMs. The development of Malaysia's SMM was driven by the National Mortgage Corporation of Malaysia Cagamas Berhad with a principal objective of increasing the level of home ownership in the country. Cagamas utilized, amongst others, a Purchase with Recourse (PWR) model which ensured that all liability associated with the loan remained with the mortgage originator. The PWR scheme allowed for large-scale investments, at good rates and longer terms, to be made at the infancy stage of the SMM; thereby creating liquidity in a non-matured market. In the United States, the Government created the Federal Housing Administration (FHA), which aimed to ensure mortgage originators are repaid in the event a borrower defaults. In addition, FHA established standardized software to assist lenders in the underwriting process allowing for publication of uniform and widely available mortgage rate benchmarks and increased competition.

Benefits of Secondary Mortgage Markets

There are immense benefits associated with an established and fully functional SMM. Principally, it creates and maintains liquidity in the PMMs; thereby increasing the rate of mortgage origination in the PMM and consequently access to housing finance generally. This, in turn, creates employment opportunities across the housing value chain. Finally, an established and fully functional SMM attracts foreign participation in the country's capital market and fosters overall economic growth.

Criteria for a Functioning SMM

The following are key criteria for a functioning SMM:

1. Internationally defined standards to govern the origination of mortgages and nurture quality mortgage loans and assets;
2. Strong regulatory framework that offers, amongst others, investor protection and promotes transparency;
3. The establishment of protocols regarding the servicing of mortgages;
4. A capital market easily accessible to international investors; and
5. A healthy PMM.

Nigerian Secondary Mortgage Market

The current development of Nigeria's SMM is a consequential benefit of the housing reform under the Federal Governments 7-point agenda of the previous administration. Over 80% of Nigerians lack access to conventional accommodation; principally due to the barrier in accessing finance for home acquisition; while developers are unable to access long-term finance for construction and are compelled to take on short term loans at high interest rates. In 2012, the President launched the National Housing Finance Program to tackle the housing deficit, with the particular agenda of increasing access to finance on both the demand and supply sides of the housing sector.

In 2013, the Nigerian Mortgage Refinance Company Plc (NMRC) was incorporated to improve accessibility to affordable housing for Nigerians through the raising of long-term funding from the capital market and channeling these funds to improve liquidity of the mortgage markets. The funds will be provided to mortgage originators/private mortgage institutions as consideration for the purchase of their existing mortgage pools. The NMRC is pioneering the development of the Nigerian Mortgage Market from two principal focal points – (1) standardization of the PMM and (2) the development of an adequate regulatory framework to monitor and facilitate the origination process and the mortgage markets as a whole.

Standardization

Standardization of the PMM plays a critical role in achieving the key aspects of a SMM. By setting a firm foundation for originating loans, the quality of mortgages originated is enhanced thereby reducing the likelihood of delinquent and non-performing loans being created. A quality enhanced PMM also makes the process of securitizing and trading loans on the secondary market simpler; while opening up channels for international investments and long-term finance.

1. Underwriting Standards

Underwriting standards are the set of criteria developed and used to guide investment decisions. These are designed to ensure mortgage loans achieve a homogeneous status at the point of origination; thereby providing the necessary assurance needed to purchase an interest in the pool at the lowest risk possible. Where mortgage pools contain a variety of mortgages, each with their own unique terms and documentation, the cost of due diligence will be high and competition of sale on the secondary market will be low. Uniformity of mortgage loan characteristics; such as tenure of property, loan maturity period, interest rate and the type of property eligible, reduces the overall transaction costs of evaluating and processing mortgage loans in preparation for creating mortgage-backed securities for sale.

As part of its standardization process, the NMRC, with input from the World Bank/IFC, has created a robust set of Uniform Underwriting Standards (UUS) which, when conformed to, will qualify mortgage loans as eligible for refinancing on the SMM. The UUS outlines the criteria for mortgage loans and lender eligibility to loan; thereby ensuring key features are in place for enforcing legal mortgages, including quality collateral, adequate property title and proper registration and procedures.

2. Documentation

Documents governing the relationship of all participants in the SMM are an important part of standardization. In Nigeria, the development of uniform documentation spans across all parts of the mortgage securitization process and include standardizing the following - Mortgage Lending Documentation and Refinancing Documentation. This simplifies the registration processes; clearly delineating each party's responsibilities and mitigating investor risks. In addition, many developed SMMs have a title report or title insurance

policy as part of the documentation for trading on the market. This reduces administrative costs, in the form of title searches, indicates ownership and status of the property being used as security and, with the inclusion of title insurance, investors are protected against the risk of the mortgagee having false title or other encumbrances which rank higher than the security being provided.

Servicing of Mortgages

The servicing of mortgages refers to the ancillary activities attached to mortgage loans such as the actual collection of the mortgage payments and the periodic remittance of these payments to the investor. Those servicing the mortgages may either be originators or third parties and act as the primary source of information on the loans thereby are tasked with ensuring the information on each mortgage loan or pool is accurate. They have the obligation of keeping investors informed, through timely reports, on the status of the mortgage loans/pools including balances history and performance.

An important part of servicing, tied in with the UUS and standard documentation, is the procedure and guidelines for collection of mortgage payments. As part of its guidelines on collection, the UUS make provision for a deduction at source payment scheme and a credit enhancement structure, which includes an employment and income verification report. An ICT infrastructure to aid in the management, processing and dissemination of all mortgage loans to be traded is also a critical component of an SMM as it ensures accurate monitoring and record keeping processes.

Regulatory Framework

A strong regulatory framework enhances mortgage markets by addressing the obstacles typically faced in loan origination, such as high administrative costs and lengthy timeframe for the registration. In addition, it monitors the general conduct of the market, creates fair and effective settlement procedures by ensuring a balance of interests amongst all market participants and promotes transparency by adequately controlling the level of disclosures required for creating mortgage pools. The main elements of the regulatory framework are the Central Bank of Nigeria (CBN) Regulations, the Investment & Securities Act and Rules of the Securities and Exchange Commission ("SEC Rules") and a new Model Mortgage and Foreclosure Law being drafted with a specific aim of developing the PMM.

1. Central Bank of Nigeria (CBN) Regulations

CBN has established a regulatory and supervisory framework, pursuant to the provisions of the Central Bank of Nigeria Act (CBN Act) Banks and Other Financial Institutions Act (BOFIA) and the Investment & Securities Act (ISA), all which govern the operation of a Mortgage Refinance Company (MRC) and, in turn, shapes the mortgage markets. The framework prescribes the basic regulatory requirements that govern the MRC's operations, including its minimum paid-up capital, maximum leverage limit and types of collateral used and sources of funds to be used for its operations. It further highlights the MRC's corporate governance requirements, by setting out the duties and responsibilities of its Directors and senior management. CBN ensures the MRC's compliance with the guidelines by granting approvals-in-principle, final licenses and issuing penalties for any violations under the regulations.

2. Investment & Securities Act and Rules of the Securities and Exchange Commission

The ISA and SEC Rules impose obligations on the MRC that promote accountability and transparency; thereby allowing regulators in the capital market monitor liquidity. Examples of obligations include registering all securities with the Securities and Exchange Commission ("SEC"), the filing of annual reports with the SEC, which must also disclose the level of compliance with the SEC Code of Corporate Governance. As a result of such obligations, individuals/corporations are given the desired comfort to invest; which increases the level of activity in the market.

3. Model Mortgage and Foreclosure Law

The NMRC is also driving the development of a model mortgage and foreclosure law; to be adopted by each state in the country. The major objectives of the law are to fast track the process for creating legal mortgages; ensure the timely resolution of land disputes and create an efficient foreclosure process in the event of a borrower default. A more practical addition to the regulatory framework is the establishment of a mortgage registry in each state.

The Nigerian Capital Market

The Nigerian Capital Market (NCM) plays an important role in the development and sustainability of a SMM, with its main participants being the Securities and Exchange Commission (SEC), Nigerian Stock Exchange (NSE), stockbrokers, trustees, issuing houses and registrars. The NCM has experienced steady growth since the 1960s with several key milestones including the appointment of the panel to the Review of the Nigerian Capital Market by the Federal Government; whose functions included reviewing the roles of regulatory agencies in particular, their oversight functions and suggesting recommendations of improvement; and the enactment of the Investment and Securities Act, which became the principal legislation concerning conduct and operation of the NCM.

With the establishment of the NSE, the NCM has experienced stable development into a solid platform necessary to support the activities of both a PMM and SMM and the continued growth of each.

Conclusion

While the pursuit of a robust Secondary Mortgage Market in Nigeria has been rejuvenated by the establishment of the NMRC on international best practice principles; it will be several years before the Nigerian Secondary Mortgage Market will become self-sufficient - with mortgage originators creating securities over their own mortgage loans without the need for mortgage liquidity institutions. The Secondary Mortgage Market however potentially has the impact of improving the sources of finance available for affordable housing, as cheaper loans with longer maturity become more popular in this jurisdiction.

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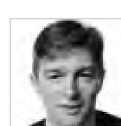
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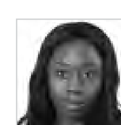
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