Hogan Lovells

Africa Newsletter

JANUARY 2015

Contents

Introduction

Welcome to the January 2015 edition of the Hogan Lovells Africa newsletter.

In this edition of the newsletter we start in East Africa with an article about the steadily changing landscape of competition law in Kenya. We then go to Zimbabwe to take a look at some of the reforms in their energy sector.

We include two articles from our South Africa office. The first one looks at the recent publication of the COMESA Merger Assessment Guidelines. The second asks whether the "social license to mine", environmental compliance, and compensation and accommodation of employees following occupational injuries and diseases has become the new "triple bottom line".

We also feature two articles following on from our very successful breakfast seminar, Hit the Ground Running: Perspectives on Joint Ventures in Africa, which was held in our London office on 25 November 2014. The first one examines the key things to consider in respect of African joint ventures, and the second deals with how to avoid and resolve joint venture disputes.

We end this edition by including a short report on a recent pro bono event held in our London office, details of a recent award for Hogan Lovells, and we summarise some of our recent African transactions in our Recent Work in Africa round-up.

We hope you enjoy this newsletter, and as always, please get in touch with any questions.

Best wishes

The Hogan Lovells Africa team

Visit us at: www.hoganlovells.com/Africa

To subscribe to the Africa newsletter, please email africadesk@hoganlovells.com

Competition law in Kenya – a steadily changing landscape

In the recent past, there have been a number of notable changes to competition law in Kenya. On 14th September 2014, the Finance Act 2014 was assented to introducing a raft of new measures to broaden the scope of Kenya's Competition Act, 2010.

To achieve this objective, professional associations have been included in the body of entities that must apply to the Competition Authority of Kenya (CAK) for exemption from the application of the Act; the CAK has further been given powers to create block exemptions and to create and operate a leniency program; a raft of new definitions touching on concerted practice, abuse of dominant position and unwarranted concentration of economic power has also been introduced. Moreover, clear time provision has been made for appeals to the Competition Tribunal as well as the demarcation of what falls within restricted use of intellectual property rights.

Broader definitions

As a result of the amendments, any business activity carried on for gain whether intended or proposed will be included in the definition of "*undertaking*". Previously, this definition was limited to any business activity carried on for gain without the element of what is intended or proposed.

It is also noteworthy, that the amendments have captured the existence of cross-directorships between two distinct undertakings or companies under a new definition of "*unwarranted concentration of economic power*". The other elements of the definition include the entities having a combined market share of more than 40% as well as the production of substantially similar goods or services. No definition of unwarranted concentration of power existed previously, although the CAK had powers to investigate various factors to ascertain the presence of unwarranted concentration of power in any economic sector through assessing the market structure, ownership patterns as well as sales percentages.

Significantly, the new definition only refers to cross-directorships and is therefore arguably limited in this respect.

Nonetheless CAK may determine the existence of an unwarranted concentration of economic power in matters stipulated under the Act as prejudicial to the public interest or the economy.

In respect of concerted practice, new definitions of "*agreement*" and "*concerted practice*" have been included to reinforce CAK's powers against cartel conduct which conduct has the effect of distorting or preventing competition in the provision of any goods of services. An agreement is not required to be legally enforceable to be recognised as falling within restricted practice. "Agreement" therefore now includes contract, arrangement or understanding.

On the other hand, "*concerted practice*" is defined as co-operative or co-ordinated conduct between firms, achieved through direct or indirect contract, that replaces their independent action but which does not amount to an agreement. Moreover, "*Market Power*" now means the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independent of its competitors, customers or suppliers. This is significant as the meaning of a dominant firm now includes an undertaking which, though not dominant, controls at least 40% but not more than 50% of the market share, unless it can show that it does not have market power; or controls less than 40% of market share but has market power.

The effect of the above is to compound the prior existing definition of a dominant entity, which stipulated that an undertaking will be deemed to be dominant if it controls not less than 50% of goods or services, produced, supplied or distributed in Kenya.

Broader inclusion

Following amendments to the 2010 Act, professional associations which wish to impose any rules, creating in restrictions that result in distorting, preventing or lessening competition in the market will be required to seek exemption from the CAK. Failure to seek such exemption will result in the association's rules being prohibited.

With respect to exemptions, Section 30 of the 2010 Act has been amended to allow the CAK, with the approval of the Cabinet Secretary to exclude any category of decisions, practices or agreements by or between entities, from the Act's provisions against restrictive trade practices. This differs from the previous position when exemptions were on an individual basis.

Significantly, in further provision against cartels, a leniency programme has been introduced enabling the CAK where an entity voluntary discloses the existence of a prohibited agreement or practice and co-operates in investigations not to impose all or part of a fine. This will be operationalised through guidelines issued by the CAK.

Clear timelines for appeals to the Competition Tribunal have also been introduced by the amendments. Appeals from decision of the CAK must now be lodged within 30 days of that decision.

Another significant change relates to the application of the Act to the use of intellectual property rights. Previously, restricted trade practices relating to IP concerned the use of the right beyond the scope of "legal protection". To remove the ambiguity and broad interpretation of this phrase, it has been replaced with "fair, reasonable and non-discriminatory use", therefore giving the CAK greater latitude to determine what constitutes restrictive trade practices in this area.

Conclusion

The Finance Act, 2014 not only broadens the application of the Competition Act, it also significantly increases CAK's powers and seals loopholes previously exploited because of their ambiguity. It remains to be seen how the new provisions will be enforced.

Cindy Oraro
Associate, HHMOraro
Nairobi, Kenya
T +254 20 2713636
coraro@hhmo.co.ke

Powering up the grid: reform in the Zimbabwean energy sector

After a difficult period in the country's history, Zimbabwe's energy sector is now fast moving towards stability and security. The Zimbabwean Government (GoZ) has attempted to eliminate power shortages and attract private investment by 'unbundling' the energy market and shifting the focus away from ageing and inefficient conventional infrastructure towards alternative renewable sources.

A series of recently commissioned large-scale projects attests to the success of these measures which together, will go a long way towards meeting Zimbabwe's energy needs.

Issues confronting the sector

Zimbabwe's national electricity grid has suffered chronic power shortages for a number of years. The grid has a maximum capacity of 1.19 GW and struggles to cope with daily demand that ranges between 1.9 and 2.2 GW.

Rolling blackouts are enforced for up to eight hours of shedding time a day, with consumers either barred from using electricity from 5am to 1pm or 1pm to 9pm. Such blackouts prohibited many from watching the most recent World Cup due to games falling within shedding times. The Zimbabwean winter typically entails regular power outages, but depriving Zimbabweans of football – the nation's favourite sport – acts as a powerful reminder of the country's power problems.

Shortages in power supply can be primarily attributed to the following issues:

- **Ageing power infrastructure.** After years of underinvestment in maintenance and upgrade works, the majority of power-producing plants in Zimbabwe are operating substantially under capacity. In November 2013, for example, the Warren bulk power station experienced a systems failure which resulted in sustained loss of supply to half of Harare. Such incidents are commonplace throughout the country. The GoZ has highlighted the need for the rehabilitation of the national network infrastructure which, if delivered, will reduce inefficiency and the frequency of breakdowns.
- **Insufficient installed capacity to meet the energy needs of a growing population.** An already under-capacity energy infrastructure will be further challenged by greater demand for power in coming years. Zimbabwe's population grew by 4.38 per cent in 2013[1] and is becoming increasingly urbanised. Even if all Zimbabwean energy assets operated at full capacity, output would not be adequate. The only long-term solution to power supply in Zimbabwe lies in the expansion of its generation capacity.
- **Policy restricting capital investment into Zimbabwe.** Despite the need for increased generation, investment into the Zimbabwean energy industry has not been forthcoming. ZESA Holdings (**ZESA**), the state-owned utility ultimately charged with generation, transmission and distribution of electricity nationwide, has struggled to raise the required capital to invest in new projects. Restrictive policy and state monopolies have starved foreign investment – particularly during the post-millennium years.

Addressing the issues

The increasing gap between energy production and consumption in Zimbabwe has led to acceptance by the GoZ that wholesale changes are required. In October 2013, the Energy and Power Development Minister, Dzikamai Mavhaire, publicly recognised the energy deficit and the critical need to expand power generation capacity. Power sector reforms in Zimbabwe have long been anticipated but implemented at a disappointingly slow rate. Nevertheless, the combined impact of the reforms is beginning to have an impact.

A new framework

Previously ZESA had sole responsibility for the transmission and distribution of electricity. Reform through the Energy Regulatory Act 2011 (the **Act**), and amendments to the Electricity Act 2002 and Petroleum Act 2006, have led to the unbundling of ZESA and the creation of successor subsidiary companies, each of which is responsible for different aspects such as regulation, transmission, distribution and investment. Whilst remaining under the umbrella of ZESA, each of the successor companies is required to independently manage and improve accountability, profit levels, efficiency, reliability and product and service quality:

1 Source: CIA World Factbook.

- **Regulatory.** The Zimbabwe Energy Regulatory Authority (**ZERA**) was formed with the primary function to regulate the energy industry in Zimbabwe and create an enabling environment for competition, thus promoting an efficient electricity supply industry. The Act confers upon ZERA the authority to operate independently in regulating the electricity supply industry as well as providing that no entity can generate, transmit or distribute electricity without a licence from ZERA. ZERA is also the only legal authority that can approve a tariff increase.
- **Transmission and distribution.** The reforms have led to the formation of the Zimbabwe Electricity Transmission and Distribution Company (**ZETDC**). ZETDC is mandated under the Act to plan, construct and operate the Zimbabwean transmission grid. ZETDC is the entity responsible for the distribution and sale of electricity to final end users, including marketing and pricing. ZETDC engages in electricity trading through the buying and selling of power from local and external generation entities and performs system operations functions.
- **Investment.** In addition to the unbundling of ZESA, the Act and subsequent initiatives have been implemented with the intention of opening the energy sector to private investment from Independent Power Producers (**IPPs**). In October 2014, ZERA announced the finalisation of an IPP framework with the goal of incentivising and promoting investment in the renewable energy sector. The scheme is anticipated to attract extensive private investment into Zimbabwean energy and is just one example of how the GoZ hopes private investment can spur economic growth and expansion of renewable energy.

Targeting renewables and private investment
Zimbabwe has abundant potential for renewable energy, and the GoZ has targeted development of renewables sources through the National Energy Policy 2012 (the **Policy**) and renewable energy feed-in tariffs (**REFITs**).

The objectives of the Policy are to ensure efficient utilisation of domestic energy resources and to accelerate economic development. Further, the Policy serves as an indicator of the measures the GoZ targets for implementation in the renewables sector by 2020, including the establishment of a fund to address power shortages and the establishment of feed-in tariffs.

Pursuant to the long-term aims stated in the Policy, REFITs were announced in October 2013 in an effort to boost greater private sector power generation from renewable energy sources. The main objective of the REFITs is to make it mandatory for energy companies or utilities responsible for operating the national grid to purchase electricity from renewable energy sources at a pre-determined price that is sufficiently attractive to stimulate new investment in the renewables sector. Whilst REFITs will mean higher electricity prices for consumers, they will also serve to attract much-needed investment through cheaper costs and reduced financial risks for investors.

The REFIT programme is aimed to promote the development of renewables projects with capacity from 100 KW to 10 MW. The tariffs for projects with capacity greater than 10 MW will be negotiated on a case-by-case basis. In March 2014, ZERA concluded a period of reviewing the relevant operational and capital costs of current renewable energy projects and determined the appropriate tariff levels and structures. These proposed tariff levels currently await adoption by the GoZ.

The GoZ is aware that new projects and investment alone will not achieve its desired outcomes, and the reforms coincide with a drive towards greater utilisation of existing infrastructure. It is estimated that a well-implemented energy efficiency policy could create a further 300 MW in capacity. ZERA is currently leading consultations with stakeholders across the energy spectrum for the drafting of such an energy efficiency policy. Such measures are imperative to boost capacity in the immediate future whilst waiting for the current large-scale construction projects to come online.

New projects
Whilst the reforms have not revolutionised the landscape of the Zimbabwean energy sector – the GoZ maintains control over the entire decision-making process, the transmission grid and distribution – they have facilitated market participation for a number of IPPs. These IPPs have in turn prompted a substantial rise in levels of investment in Zimbabwean energy production.

The long-term solution to power supply problems in Zimbabwe lies in the expansion of generation capacity. As the power sector is liberalised and the participation of IPPs in power generation grows, it is then incumbent upon ZERA to duly licence the projects.

A number of recent projects which have received, or are in the process of receiving, ZERA approval demonstrate its commitment to this process. They include:

- Kariba South hydroelectric power plant (300 MW) – in January 2014, Sino Hydro – a Chinese state-owned hydropower manufacturer – signed a US$355m contract to expand capacity at the 750 MW hydroelectric power plant at Kariba to 1.5 GW over the next four years. Construction began in September 2014.
- Hwange coal-fired power station (600 MW) – in June 2014, Sino Hydro won a US$1.3bn contract to add an additional 600 MW of capacity to the Hwange coal-fired power station over the next four years.
- Zhenfa proposed investment (up to 2 GW) – in March 2014, Zhenfa New Science and Technology, a Chinese energy company, received approval for its plans to invest US$250m in a 100 MW solar PV project. Zhenfa has announced its ambition is to invest in 2 GW of solar PV projects in Zimbabwe within five years.
- Batoka Gorge hydroelectric power station (1.6 GW) – the Batoka hydroelectric project is planned on the Zambezi River across the Zambia-Zimbabwe border, and is being implemented by

both governments through the Zambezi River Authority. Construction is expected to commence in 2014, with estimated costs of US$2-3bn.

- Gwayi thermal power plant (600 MW) – in June 2014, China Sunlight Africa Energy announced plans to construct a US$1bn thermal power station located at its coal mining concession in the Gwayi area, together with a US$52m dam and the laying of a 240km power line connecting the project to the national grid. In its first phase, the project is expected to contribute 300 MW to the national grid (with the remainder to power mining operations). Construction is due to commence in late 2014.
- Gwayi thermal power plant (1.2 GW) – in September 2014, the GoZ signed a memorandum of understanding with Southern Africa Shanghai Energiser Company to construct a US$3-5bn thermal power station in Gwayi. The power plant will be built in three phases, with the first phases expected to provide 300 MW by 2017.
- Thompson Cole solar farms (600 MW) – in September 2013 it was announced that the Thompson Cole Consortium had signed an agreement with Zimbabwean solar developer Twalumba Holdings to develop eight solar farms totalling 600 MW at a combined cost of US$1.6bn. It is anticipated that the projects will be operational in 2015.
- De Green Rhino Energy solar projects (up to 2.5 GW) – in April 2014, De Green Rhino Energy, a joint venture between Green Rhino Energy (a UK-based solar company) and De Opper Trading (a Zimbabwean investment company) – announced a US$400m solar farm at Marondera. The proposal is currently in the final stages of receiving ZERA approval. The Marondera solar farm is the pilot project for De Green Rhino Energy and will initially contribute 50 MW before being expanded to 150 MW. De Green Rhino Energy intends to invest US$5.2bn in Zimbabwean solar projects by 2030, and generate up to 2.5 GW of power via several power stations.

Conclusion

The number of recently commissioned projects is clear evidence that energy sector reforms are having the desired effect. As the environment has become more investor friendly, international investors are committing large amounts of capital to diversified projects with lengthy operational periods, demonstrating the long-term ambitions of many companies investing in Zimbabwean energy. It is clear that the market is buoyant and bears exciting prospects. However, further loosening of the GoZ hold on the energy industry is viewed by many as a necessity in order to maintain this momentum, and will be required if the Zimbabwean energy market is to fully satisfy domestic market needs and ultimately compete as an exporter in the region.

Edward Humphries
Of Counsel, London
T +44 20 7296 2056
edward.humphries@hoganlovells.com

COMESA merger assessment guidelines

The COMESA Competition Commission (CCC), on Friday, 31 October 2014, published its long-waited Merger Assessment Guidelines, in which it has sought to augment and clarify a number of the provisions of the COMESA Competition Regulations (the Regulations) that have been the subject of some criticism and debate between practitioners and the regulator. At the same time, the CCC has addressed a number of topics that are less controversial but in respect of which, given the novelty of the regional regulatory regime, the CCC has not, previously enunciated clear policies.

A significant feature of the Guidelines is an attempt to clarify and refine the category of transactions in regard to which notification is required. The Regulations provide that a merger is notifiable where:

- either or both of the acquiring firm and the target firm operate two or more Members States
- the threshold of combined annual turnover or assets prescribed in terms of the Regulations is exceeded.

The threshold is currently set at US$0.00, which has the effect that technically, every transaction involving one or more parties that operate in at least two member states, irrespective of value, is notifiable. The CCC has attempted to narrow the application of these provisions to those which, as required by the Regulations, have "an appreciable effect on trade between Member States and which restrict competition" by indicating that it will regard a merger as notifiable only if:

- at least one merging party operates in two or more Member States, and an undertaking will only be considered to "operate" in a Member State if it has an annual turnover in that Member State exceeding US$5,000,000.00
- a target undertaking operates in a Member State
- not more than two thirds of the annual turnover in the region of each of the merging parties is achieved or held within one and same Member State.

The threshold itself has not been amended as an amendment to the Rules of the CCC would be required.

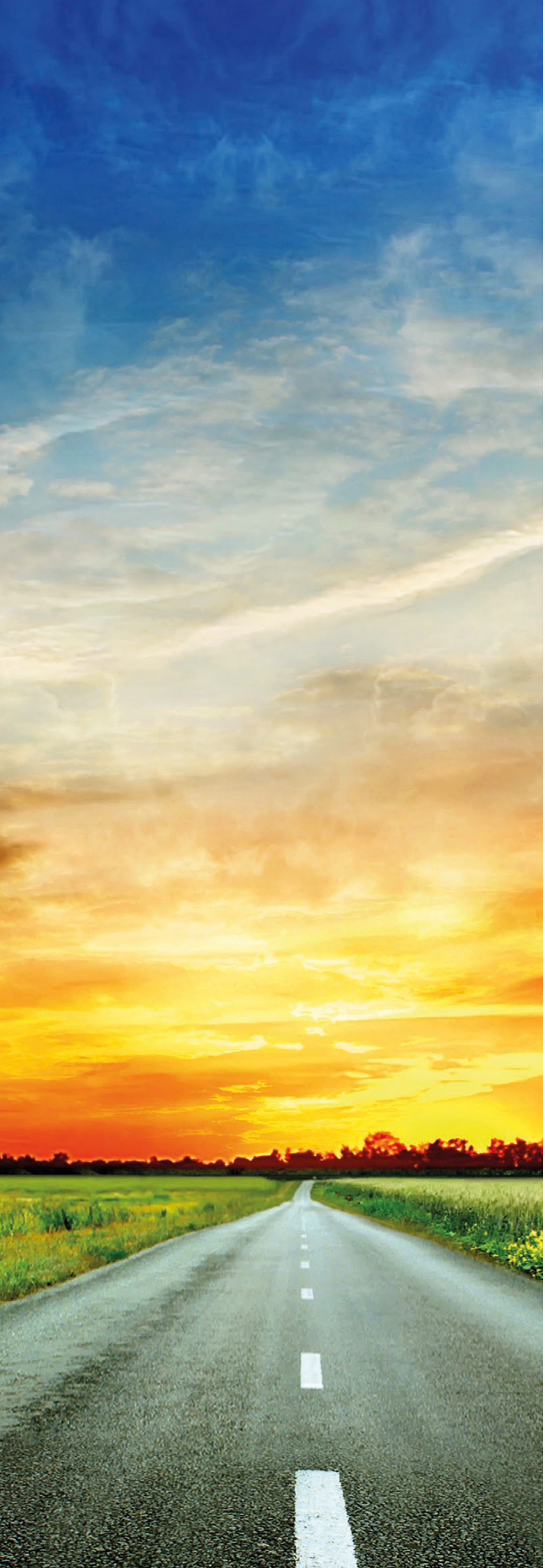
In addition, the Guidelines provide clarity as to the types of transactions that the CCC considers as notifiable mergers. In this regard:

- in definition of a "merger" in the Regulations, a "merger" is defined as the "direct or indirect acquisition or establishment of a controlling interest" by the acquiring party in the target. The CCC has defined "control" as the ability to exercise a "decisive" influence over the target
- the establishment of a joint venture will not be considered to be a merger unless the joint venture is capable of sustainable long-term operation as an autonomous entity
- an acquisition of assets will only be a "merger" where the assets concerned constitute the whole or part of a business.

A practice previously informally adopted by the CCC, that of allowing parties to request and obtain "comfort letters", exempting them from filing complete notifications, has now been formalised in the Guidelines. This will allow the CCC to dispose, in a less costly and time consuming way, of those mergers that are technically notifiable in terms of the Regulations but in truth will not have "an appreciable effect on trade between Member States".

Other significant features of the Guidelines are:

- the introduction of a two-phase merger review process, whereby mergers that do not raise significant issues and can be easily determined may be reviewed within a period of 45 days, while those which raise more complex issues will be subject to a more thorough review process and may take up to the full 120-day period provided for by the Regulations
- the provision of guidelines for the calculation of turnover and assets, especially when merging parties are members of groups, and the turnover and assets of other group companies must be taken into account



- clarification of the CCC's analytical approaches and methodologies with regard to the assessment of issues such as whether a merger will result in substantial prevention of lessening of competition, market definition, theories of harm and efficiencies.

The publication of the Guidelines is a welcome development, and is likely to go a long way in assisting enterprises and their advisors and in ensuring that only those mergers that the Regulations are intended to control, and which in fact have "an appreciable effect on trade between Member States and … restrict competition" are subjected to detailed analysis by the CCC.

Ian Jacobsberg
Partner, Johannesburg
T +27 11 523 6091
ian.jacobsberg@hoganlovells.com

Janine Reddi
Senior Associate, Johannesburg
T +27 11 523 6229
janine.reddi@hoganlovells.com

Has the "social license to mine", environmental compliance, and compensation and accommodation of employees following occupational injuries and diseases become the new "triple bottom line"?

At the recent International Bar Association conference held in Dar es Salaam on *Mining in Africa: Opportunities and Legal Challenges* the message could not have been clearer – the exploration and mining world is changing, with the strongest possible emphasis on the so called "social license to mine", which takes into account the full spectrum of potential impacts of exploration and mining activities particularly in relation to host communities.

In this article we explore the notion that the typical or common "triple bottom line" used in determining the feasibility of a prospective project or activity should be broadened to include a general consideration of three aspects: the "social license to mine", substantive compliance with applicable environmental laws, and consideration of the unfortunate consequences that sometimes flow from the activity or operation in relation to injuries and diseases.

Before exploring each of these aspects in further detail, it is appropriate to consider the multiplicity of challenges facing the South African exploration and mining industry, which can be summarised in eight key challenges:

1. The global financial crisis and the impact that this has had on global demand.
2. Regulatory and legislative uncertainty.
3. Infrastructure (ports, rails, water, roads and electricity).
4. Labour uncertainty.
5. Health and safety.
6. Environmental compliance requirements.
7. Illegal mining operations.
8. Community activism.

Collectively, these challenges have created a need for exploration and mining companies to review their approach to legal compliance, and to move beyond substantial legal compliance to the situation where there is sustainable development of the communities in which mines operate.

It is only within the context of these challenges that the notion of the new "triple bottom line" can be effectively explored.

The need for a social license

Along with CSR, the concept of a social license has gained prominence in the mining, natural resources and energy sector, as the sector, either voluntary or, as a result of legislation, recognises the various communities effected by their mining activities.

Historically, the social licence has been based on the acceptance of the fundamental that host communities are empowered and can effectively withhold or provide support for an intended operation and for this support, once granted, to be revoked or reduced based on the response from the relevant companies.

Societal expectations play a significant role and this is clearly evident in the exploration and mining industry, where the level of support from a community is often dependent on the extent to which the company meets these societal expectations.

Importantly, while a community level agreement could be entered into with the community, addressing various aspects governing the relationship, the social license is generally intangible and is normally always subject to the specific geographic location, and the cultures, beliefs and expectations of the host community.

There are, of course, critics of companies that actively foster the social license, who express the view that mining companies engage in CSR and foster social licenses for self-preservation purposes and, in the extreme, for profit.

What seems certain is that, while there are differences of opinion between companies and communities on the methods of engaging with one another, the most efficient and effective methods and approaches appear to be those that are more collaborative in nature.

As communities become more and more empowered the social license will play a critical role in determining whether projects can get off the ground and operations can continue, successfully and sustainably.

Unlike regulatory authorisations, the social license is not issued and, importantly, reflects the status of the relationship between the mining company and the community, at any given point. An analysis of the status of the social license will provide the mining companies with a useful indication of whether it is meeting the communities' expectations from time to time, and the level of risk that this status presents to the mining company.

Compliance with environmental laws
Compliance with environmental laws must be read within the context of the general challenge relating to regulatory uncertainty. The best example is the uncertainty that remains, despite several amendments to the relevant legislation regarding environmental authorisations within the mining industry.

There has been a long standing debate regarding whether, in addition to the environmental management plan or environmental management programme, environmental authorisations were required for the so called "listed activities" under the National Environmental Management Act, 1998 (NEMA), which were carried out on prospecting or mining areas and, ultimately, who has the final say with regard to environmental aspects in relation to prospecting and mining operations.

In the matter of the *City of Cape Town v Maccsand Proprietary Limited* the court held that environmental authorisations for activities listed under NEMA were required, in addition to the mining permit held by the company. While the company held a mining permit, as opposed to a mining right, it appears that the principles applied equally to the circumstances where the company holds a mining right.

Under the "One Environmental System", which came into effect on 2 September 2014, the Minister of Mineral Resources will issue environmental authorisations and waste management licenses in terms of NEMA and the National Environment Management Waste Act, 2008. The Minister of Environmental Affairs would be the appeal authority in respect of these environmental authorisations. However, the implementation of the "One Environmental System" remains uncertain, despite these attempts.

Compensation for occupational injuries and diseases
High profile claims for occupational diseases and the number of persons being fatally injured in the mining industry appears to have prompted, to some extent, proposed amendments to the compensation mechanisms and, in particular, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

Compensation for occupational injuries and diseases is regulated, in respect of the mining industry, by COIDA and the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA).

In terms of COIDA and ODIMWA, compensation is administered and paid, generally speaking, through the office of the Compensation Commissioner. However, COIDA contemplates the establishment and licensing of mutual associations. In the case of the mining industry, a mutual association has been licensed, namely the Rand Mutual Assurance (RMA).

The Minister of Labour, Mildred Oliphant, approved the draft Compensation for Occupational Injuries and Diseases Amendment Bill. However, it has not yet been presented to the Cabinet for approval.

The proposed amendments are far reaching and focus on administrative and substantive amendments, including the onerous obligations aimed at reintegrating employees who have been injured or who contract occupational diseases, into the workplace.

Conclusion
With the significant emphasis on the social license, compliance with environmental laws, and the proposed amendments to extend the responsibility of an employer in relation to occupational injuries and diseases, it seems that there needs to be a fundamental shift in thinking, possibly to a new concept of the "triple bottom line".

A comment in the Model Mine Development Agreement issued by the International Bar Association summarises the situation as follows: "MMDA 1.0 is based on the belief that mining investors, and countries, and civil society share some fundamental interest, and all interests benefit from long term stability of investment conditions. Long term stability comes when all interests benefit from an agreement, and when the agreement contributes to both business success and the sustainable development of the societies in which mines operate."

Warren Beech
Partner, Johannesburg
T +27 11 523 6076
warren.beech@hoganlovells.com

African JV arrangements – key considerations

Despite the challenges and difficulties of the last couple of years, Africa continues to be a particularly attractive investment destination for many of our clients.

In many cases, a traditional whole-control acquisition or stand-alone investment structure may simply not be feasible (or legally permissible), so we continue to see high levels of interest in the JV route as a means of accessing these markets.

Joint Ventures – Market Background
Joint ventures offer our clients a particularly interesting avenue for accessing investment opportunities in Africa.

Recent research commissioned by us in association with the Financial Times reviewed sentiment amongst leading M&A heads and Board members globally for short and medium term strategies. A significant number of the individuals surveyed were Africa based or focused, and it was clear that in planning routes to market, strategic alliances and joint ventures were front of mind.

No less than 81% of African based or focused respondents considered such alliances or joint ventures to be an important part of their overall toolkit (compared with less than 60% of respondents on a worldwide basis).

Why use a Joint Venture Structure
The term "Joint Venture" has no precise legal definition. They are flexible constructs and can be structured as anything from a simple contractual agreement to collaborate in specific respects, right through to being a totally separate corporate vehicle which the JV partners will own together pursuant to a formal Joint Venture or shareholders agreement.

Many of the common commercial reasons for partnering with another entity which might be applicable anywhere else in the world apply just as equally to African investment opportunities. These are considerations such as cost and risk sharing, the availability of synergies and the ability to rapidly access new markets.

However, in the African context, there may also be compulsive factors at work. Many African jurisdictions have either codified or unwritten local content/ localisation requirements which may dictate a minimum level of local ownership or board representation, for example. In addition, a number of African jurisdictions operate restrictions on foreign ownership of assets. These types of laws and regulations are gaining traction across the African continent and will almost certainly be a feature across Africa in the short to medium term.

Perhaps equally important in markets where personal connections can often play a significant role, being aligned with a partner who is able to legitimately open doors, who is accustomed to the local operating and regulatory environment and can help to navigate political risks will usually provide a decisive advantage.

Whilst tax remains an important consideration for structuring a joint venture in Africa, this is often trumped by those relating to foreign exchange controls. Many African jurisdictions operate some form of currency control and as a result, the ability to trade in hard currency, both on the ground within the jurisdiction and outside it and to extract proceeds cannot be taken for granted in the usual way.

Common Due Diligence Considerations
Previous research has shown those who undertook a high level of legal due diligence tended to structure well considered joint ventures and as a result were satisfied or very satisfied with the overall experience.

Whilst due diligence on the identity of a joint venture partner and the assets they are contributing is important, for international investors making investments into African joint ventures a potential partner's knowledge of local politics was rated as being of particularly high importance. Political risks are always a concern for international companies when entering a new market, especially in Africa and heavily regulated sectors where there have been previous high profile government expropriations of the assets of major international companies.

Perhaps slightly surprisingly, whilst understanding differences in culture between potential partners is important for all the obvious reasons, having a similar culture is often not a decisive factor. Studies suggest that ventures between partners who are culturally distant often survive for long periods and are often more stable. Perhaps, in part, because these parties place a greater emphasis on getting to know one another and understanding each other's cultural approach.

Compliance

An area of concern which is always high up the agenda for both M&A transactions and Joint Ventures in Africa is compliance due diligence.

The principle legislation which is of relevant here is the US Foreign Corrupt Practices Act of 1972 (the "**FCPA**") and the UK Bribery Act of 2010 ("**BA2010**"). While these acts are respectively of American and English origin, in reality, due to their breadth, it is safe to assume for most international businesses that at least one, if not both of these acts, could be applicable to their operations.

The FCPA is primarily focused on the prevention of bribery of non-US public officials the newer BA2010 is much broader, extending to the bribery of private individuals and the receiving (as well as giving) of bribes. Importantly, the BA2010 also includes a strict liability corporate offence of failure to prevent bribery.

There have been a large number of high profile cases recently in which large multinational companies have been subjected to significant fines in respect of corrupt behaviour, including those of BAE, GSK, Rolls Royce and, most recently, Smith & Wesson. It seems clear to us that in the current climate, enforcement is high up the political agenda, both here in the UK and the US, but also in other places less traditionally associated with stringent enforcement in this area, such as China.

In the context of an African JV, the risks outlined above can often be particularly relevant and are often magnified by the local operating environment. Local cultures are often significantly more driven by personal connections and economies are still in many cases in large part, cash based. The ability to exercise controls in local operating companies over how money is being spent and where it is going cannot be taken for granted and must often be carefully provided for.

Importantly, from a UK law point of view, as far as liability under BA2010 is concerned, lack of control over a Joint Venture vehicle does not necessarily provide a defence of itself. The only safe means of protection available to companies and their directors is to ensure that from the outset, the Joint Venture has "adequate procedures" in place to prevent and manage the risk of bribery.

Governance

Governance is important for any joint venture, not just African JVs. Having a robust and well considered governance system in place will improve the functioning of the board of the Joint Venture company and, importantly, greatly reduces the likelihood of the parties finding themselves in dispute in the future.

Governance is most commonly expressed through control of the Board, which is generally calibrated to each partner's capital contribution to the Joint Venture. As a general rule of thumb, the greater the level of capital contribution, the greater the level of control. In many African jurisdictions, however, this picture may be more complicated due to local restrictions, such as local content requirements. Tax considerations may also impact on the way in which board governance is exercised. It may be necessary to ensure that board meetings and decisions are held in a particular country for tax residence purposes which could place a practical limitation on how many appointees a joint venture partner may have.

In many African jurisdictions, it can sometimes be difficult to get reserved matter mechanics to work from a local law perspective, for example, local laws may not always recognise the concept of weighted voting and in some cases, a casting vote may be a local law requirement, making the structuring of a traditional 50/50 Joint Venture harder to accomplish.

In circumstances where a joint venture has ceased to function properly, there can be the potential for very rapid value destruction. The quality of the job done by all parties at the outset when the joint venture was being structured really comes under the microscope at this point.

Whilst in some cases, JV partners may agree to not attempt to stipulate any mechanics for the resolution of commercial disputes on the basis that the threat of mutual value loss should bring them to the negotiating table whenever necessary, in many cases, parties will consider at least some of the mechanisms set out below.

Such provisions will typically provide for the parties to first attempt to resolve their dispute through negotiation at the board of the joint venture.

If the parties have not been able to resolve their dispute through that channel, there would typically be provision for the matter to be escalated to a senior individual from each of the parties who has sufficient authority to decide on the right course of action for the joint venture, to try and agree the dispute.

If a dispute between parties has been addressed through the abovementioned escalation procedures but has not been resolved, the provisions in the Joint venture agreement will typically stipulate that the issue should be referred to an expert for independent determination. This can be difficult in the context of an African JV, where it may be difficult to find a large enough number of experts who have sufficient familiarity and experience in the market to ensure that it will be possible to select an expert who is independent and free of conflict.

By the same token, in jurisdictions where the legal systems can often be uncertain, the thought of embarking on litigation with a well-connected local is often a daunting one, so many will see formal litigation/arbitral proceedings as being an unattractive option.

Where the parties to a Joint Venture are unable to achieve an acceptable solution to their dispute, their options tend to become quite binary, being to either (i) terminate the Joint Venture and liquidate its assets or (ii) seek to exit through one party buying the other party out or a sale of the interests in the Joint Venture to a third party.

It is worth bearing in mind that in the context of African Joint ventures, many of these mechanisms may have limited application, simply due to the more limited universe of potential purchasers where one party is looking to divest the stake that it holds.

It is also necessary to think about a couple of other very relevant issues on an exit, such as, what happens if a local operating partner is to be replaced, but localisation requirements dictate that a replacement partner must be introduced, or what happens where due to ownership of asset rules, it is simply not possible to buy a local operating partner out outright. Such issues would need to be considered carefully and provided for in detail in any exit or buy-out mechanism which might be included in the Joint Venture arrangements.

Conclusion

While Joint Venture arrangements in African jurisdictions often come with additional local complexities, these structures remain an important vehicle for international investors in structuring and executing African investments and, as such, an understanding of the pitfalls and traps for the unwary which can be associated with these structures, together with sound local operating knowledge and access to the best local legal advice will often be important factors in determining whether it will be possible for the Joint Venture to proceed smoothly or not.

Keith Woodhouse
Partner, London
T +44 20 7296 2786
keith.woodhouse@hoganlovells.com

David Harrison
Senior Associate, London
T +44 20 7296 2917
david.harrison@hoganlovells.com

Avoiding and resolving joint venture disputes

Joint ventures are important in Africa
In a survey earlier in the year conducted with the Financial Times, Hogan Lovells reviewed sentiment amongst leading M&A heads and Board members globally for short and medium term strategies. A significant number of these were African based, and it was clear that, in planning routes to market, strategic alliances and joint ventures were front of mind. Indeed 81% of African based respondents considered them to be important (this compared with less than 60% worldwide).

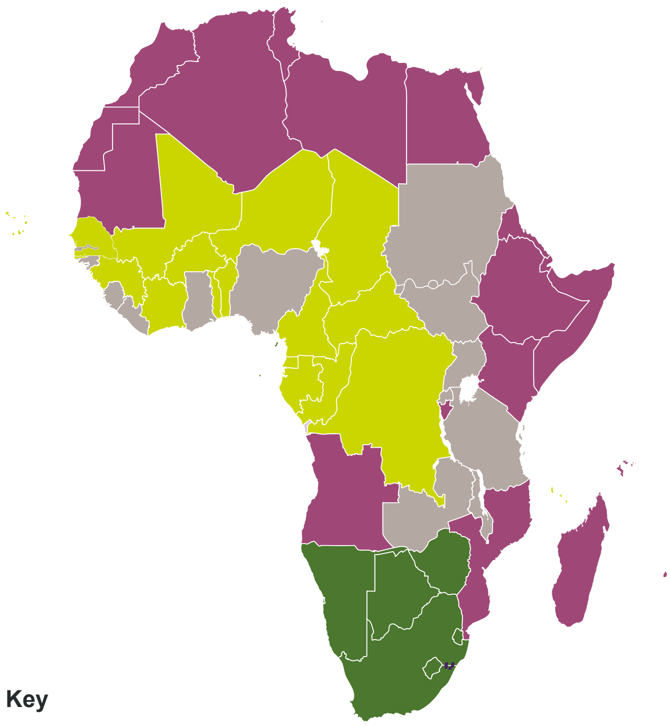
When establishing a joint venture it is important for parties to consider ways to future-proof the joint venture by putting in place appropriate mechanisms to deal with problems that may arise in the future and to facilitate an exit or unwinding of the joint venture at the end of its life-cycle. This article considers ways in which joint venture parties can reduce their risks and protect their rights.

Structuring a joint ventue to benefit from investment treaty protection
At the outset of a joint venture, it is important for the parties to identify potential risks early and determine ways to reduce or manage those risks.

One way in which parties can protect their rights is to structure their investment so that it benefits from protection available under relevant investment treaties. Investment Treaties provide protections for investors from certain actions of the host state and generally provide a mechanism for investors to enforce those rights directly against the host state. In the last edition of the Africa newsletter Markus Burgstaller, Jonathan Ketcheson and Clare Dundon explained how investment treaty protection works and issues to consider in structuring investments to benefit from such protection.

Choice of governing law
An important consideration for parties negotiating joint venture is the law to govern the relevant joint venture agreements. This is particularly so in African joint ventures where parties may come from different legal systems. Within Africa there are four different types of legal system including common law, mixed Roman-Dutch and common law, traditional Napoleonic and OHADA Napoleonic.

The map below gives a high-level snapshot of the types of legal systems in Africa.



Key

- Common law jurisdictions
- Mixed Roman-Dutch / common law jurisdictions
- OHADA Napoleonic jurisdictions
- Traditional Napoleonic jurisdictions

The legal tradition of each party is likely to inform or influence the way that they approach agreeing the terms of a joint venture and their expectations regarding interpretation of those agreements. Accordingly, it is important for parties to be aware of such differences and to obtain appropriate legal advice when contracting under a law with which a party is unfamiliar.

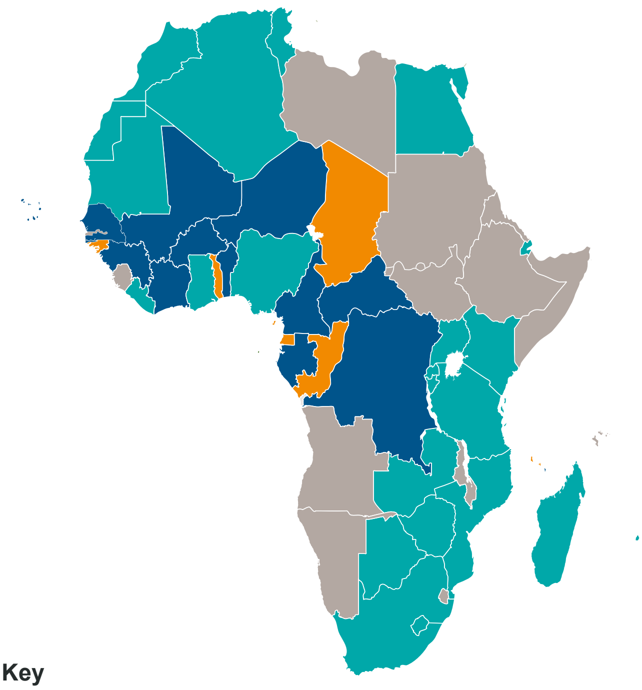
The differences between the various legal systems also provide the parties with an opportunity to be flexible in the way they structure their agreements. For example, parties may choose parts of their agreement to be governed by one law but choose another law to govern other parts because that law is more favourable to the commercial outcome the parties are seeking to achieve.

Choice of forum

Another important issue to consider when negotiating a joint venture agreement is the forum in which future disputes will be resolved. International arbitration is the dispute resolution method of choice for investors in Africa and is well-suited as a way to resolve joint venture disputes. This is particularly so where joint venture parties are from different jurisdictions or legal traditions, as arbitration provides a neutral forum for the resolution of disputes and enables the parties to choose who will determine any disputes.

In addition, there are a number of international treaties which govern recognition and enforcement of arbitral awards. The two most important conventions in the context of African joint ventures are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Uniform Act of Arbitration made pursuant to the OHADA Treaty. The New York Convention applies to over 150 states and provides for the enforcement of arbitral awards by the courts of the contracting states subject to limited exceptions set out in the convention. The Uniform Act of Arbitration under the OHADA Convention provides for the enforcement of arbitral awards made in one OHADA state in other OHADA states.

The map below shows the countries in Africa who are parties to the OHADA Treaty, the New York Convention or both. It is important for parties to joint ventures to consider whether either of the OHADA Treaty or New York Convention apply when selecting a dispute resolution mechanism, to ensure that the requirements of the relevant treaty would be met to facilitate enforcement. Where neither treaty applies, local law will generally provide for enforcement of arbitral awards, however, it will be important for the parties to understand the local law requirements for enforcement to ensure that their dispute resolution clause is compliant with those requirements.



Key

- New York Convention only
- Both OHADA Treaty & New York Convention
- OHADA Treaty only

Plan with an exit in mind

Just as it is important to identify and manage risks at the negotiation stage of a joint venture, it is also important at the outset of a joint venture to plan an exit route. The joint venture agreement should therefore clearly identify the triggers for either party to exit the joint venture and articulate the consequences for termination in each scenario.

It is common for parties to provide for a joint venture exit if one of the joint venture parties defaults on its obligations under the joint venture arrangements. Typically, the innocent party has a right to sell its stake at a premium or call the default. If such clauses are governed by English law it will be important for the parties and their legal advisors to consider whether they are enforceable. This is because in some circumstances, where the premium or discount does not constitute a reasonable estimate of the innocent parties' losses or is commercially justifiable, under English law the clause may be an unenforceable penalty.

Conclusion

The market recognises that joint ventures have a large number of advantages as a route to market in Africa and the number of joint ventures is Africa will continue to grow. It is important that, at the outset of negotiations, joint venture parties plan with the future in mind and seek to structure their joint venture to include appropriate safeguards and mechanisms to minimise risk, provide for protection and enforcement of their rights.

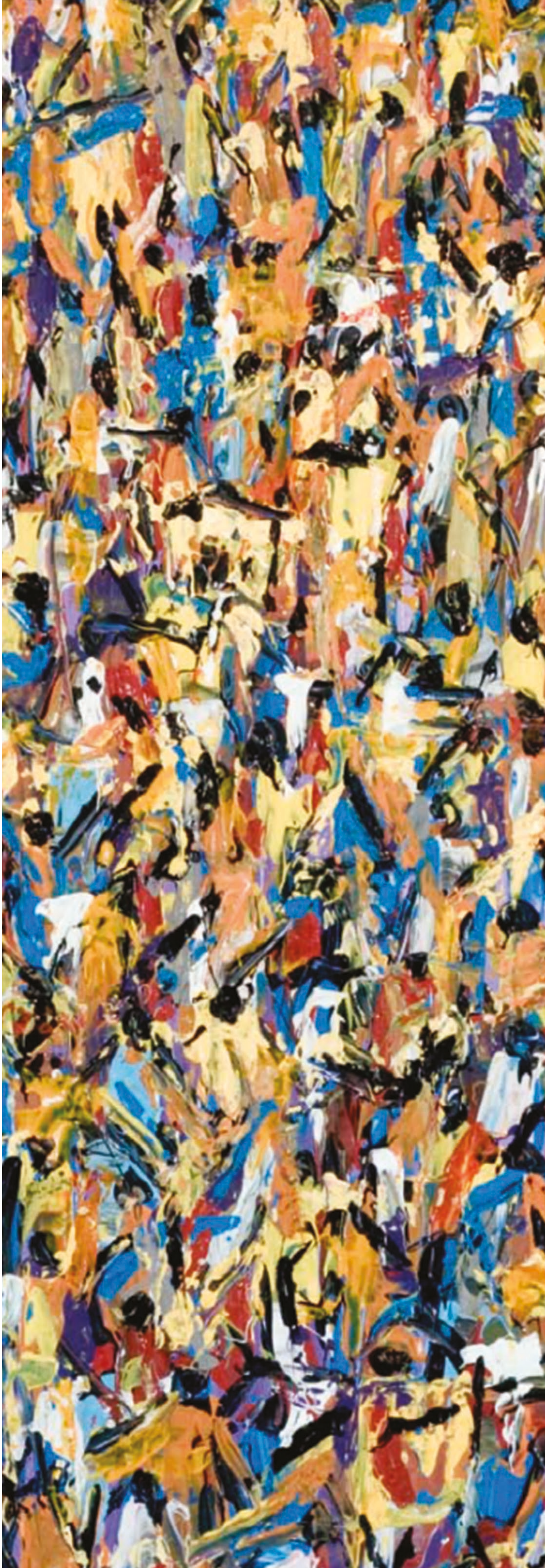
Hogan Lovells' experience

Hogan Lovells' team has substantial experience advising clients on mitigation of risks in the context of joint ventures and acting for clients to resolve strategically important and complex joint venture disputes in Africa and around the globe.

If you have any questions or would like further information, please contact Nathan Searle (London) and Clare Dundon (London). The authors would like to thank Andrea West for her assistance with preparing this article.

Nathan Searle
Of Counsel, London
T +44 20 7296 5233
nathan.searle@hoganlovells.com

Clare Dundon
Associate, London
T +44 20 7296 5556
clare.dundon@hoganlovells.com



Hogan Lovells hosts event on Sierra Leone Law and Constitution in a Time of Ebola

On 19 November 2014, Hogan Lovells London office co-hosted a panel discussion event with the Women's Response to Ebola Sierra Leone (WRESL) on the constitutional and human rights issues arising from the ongoing Ebola Virus Disease crisis in Sierra Leone. The event featured 4 experts panelists from Sierra Leone and the UK, with a keynote address by His Excellency Edward Turay, High Commissioner of Sierra Leone.

The Ebola Virus Disease outbreak in West Africa has brought almost all aspects of life to a standstill: markets and commerce have been disrupted, free movement severely curtailed and private hospitals have closed their doors to sick people. The Sierra Leonean government has instituted unprecedented measures in their attempts to stem the transmission and spread of the deadly virus and concerns have been raised about the legality and efficacy of various measures. These measures and other issues arising from the crisis were explored by the panelists, including the government's use of emergency powers and the protection of the rights of women and health workers.

The event has had the desired goal of stimulating further public discussions on the legal, constitutional and human rights issues arising from the on-going EVD crisis, and the way forward for Sierra Leone, post-Ebola.

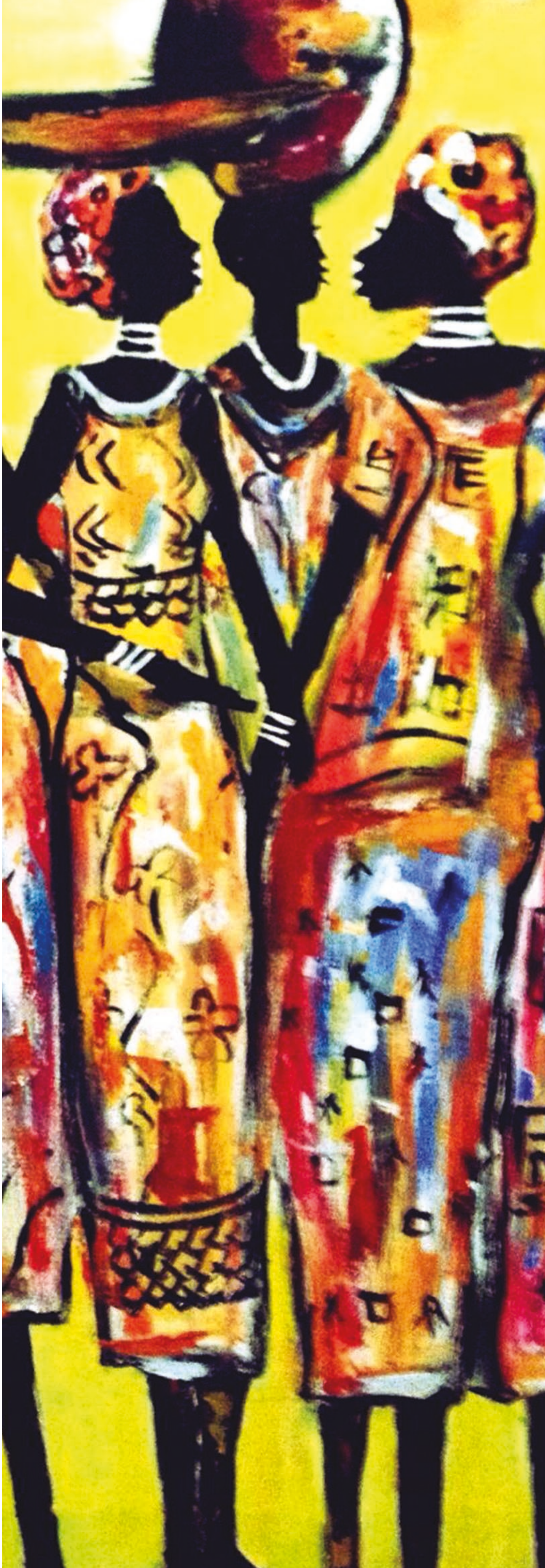
Andrew Skipper
Partner, London
T +44 20 7296 2923
andrew.skipper@hoganlovells.com

Rashida Abdulai
Associate, London
T +44 20 7296 5966
rashida.abdulai@hoganlovells.com

Islamic Finance News – Africa Deal of the Year 2014

Hogan Lovells advised the arrangers in relation to the Republic of Senegal's inaugural CFA100 billion (approximately US$200 million) sukuk issuance, the first major sukuk by a sovereign in Africa, which has recently been awarded 'Africa Deal of the Year 2014' by Islamic Finance News. The first-of-its-kind deal intends to enable Senegal to attract new funding using Islamic financing principles and sets a benchmark for domestic and regional CFA transactions.

Islamic Finance news Awards
Deals of the Year
2014



Hogan Lovells recent work in Africa

Hogan Lovells has recently been involved in the following work in Africa:

- advising Jabi Mall Development Company Limited, in relation to the financing for the construction of a shopping mall in Nigeria
- advising Afreximbank on a reserve base lending facility of US$680 million to Eroton, a consortium of Midwest Oil and Gas and Mart Resources, to enable Eroton to acquire OML 18 in Nigeria from Shell and others
- advising Afreximbank on an acquisition financing and working capital facility of US$282 million made available to Heritage Bank for the acquisition of Enterprise Bank in Nigeria from AMCON
- acting for a Chinese policy bank on the US$218 million loan to the Republic of Zimbabwe
- acted for Shell's Nigerian subsidiary, SPDC, in the Bomu-Bonny Oil Pipeline Litigation, seeking damages arising out of two operational oil spills which occurred in 2008 in the Niger Delta from a pipeline operated by SPDC. The matter was the subject of a settlement. (It had been set down for trial of an unprecedented number of up to 50 lead cases, and involving up to 14 expert witnesses, commencing May 2015.)
- Hogan Lovells team in South Africa acted for BP in an urgent application where one of BP's dealers sought to declare BP's fuel supply practices as contractually unfair and the Controller or Petroleum Products within the Department of Energy ordered the parties to attend an independent arbitration to determine the dispute. The arbitrator found that the practice was not contractually unfair and that BP was entitled to not only terminate the supply agreement for breach by the dealer but to also seek the eviction of the dealer from the site.

Colleges and Universities
Africa activity of university clients continues to grow. In the past few years Hogan Lovells has handled university initiatives to 22 African nations. The work has related to medical research and sponsored projects, online education, study abroad, joint and dual degree programs, branch campuses, experiential learning, telemedicine, public-health services, and recruitment of students and faculty. Recent work includes:

- drafted agreements between two universities to offer a collaborative degree program in Central Africa
- advised a university on preparations for a new campus in West Africa
- advised on compliance obligations associated with a university's HIV/AIDS research and construction project in South Africa and Uganda funded by the U.S. Agency for International Development (USAID) and the National Institutes of Health (NIH)
- represented a university in connection with negotiation of contracts with an education company to provide online education programs to students in Africa
- advised various universities on Ebola relief efforts in Liberia and Sierra Leone.

Key contacts

Head of Africa practice

Andrew Skipper
Partner, London
T +44 20 7296 2923
andrew.skipper@hoganlovells.com

Africa Network Coordinator

Alison Diarra
Africa Network Coordinator, London
T +44 20 7296 2845
alison.diarra@hoganlovells.com

South Africa

Rajen Ranchhoojee
Partner, Johannesburg
T +27 11 523 6234
rajen.ranchhoojee@hoganlovells.com

Lavery Modise
Chairman, Johannesburg
T +27 11 523 6011
lavery.modise@hoganlovells.com

Danielle Magidson
Partner, Johannesburg
T +27 11 286 6996
danielle.magidson@hoganlovells.com

Regional contacts

North Africa
Jeremy Brittenden
Partner, London
T +44 20 7296 5156
jeremy.brittenden@hoganlovells.com

U.S.
Keith Larson
Partner, Washington, D.C.
T +1 202 637 5597
keith.larson@hoganlovells.com

Continental Europe
Olivier Fille-Lambie
Partner, Paris
T +33 1 53 67 47 33
olivier.fille-lambie@hoganlovells.com

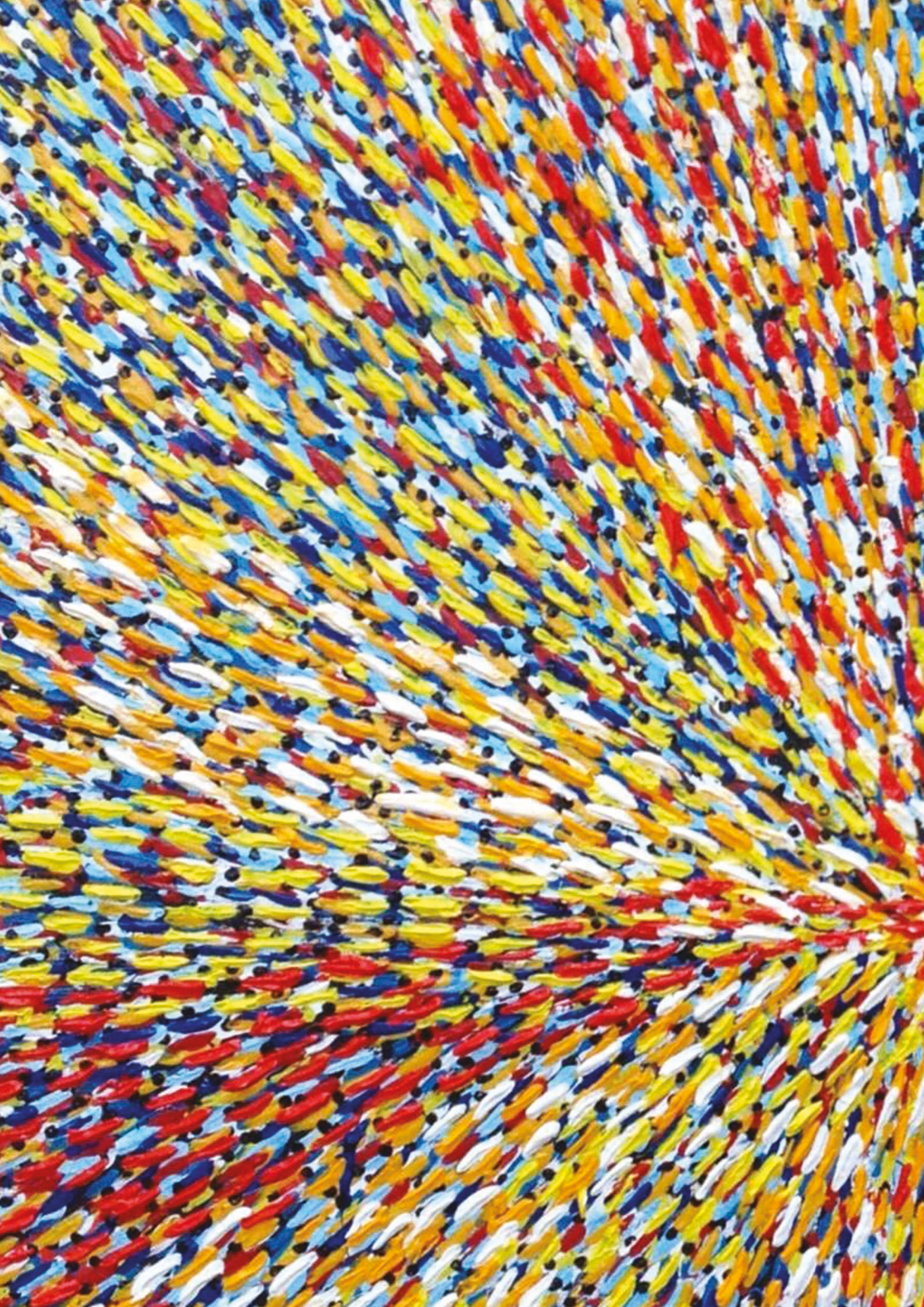
South America
Claudette Christian
Partner, Rio de Janeiro
T +1 202 637 5650
claudette.christian@hoganlovells.com

Middle East
Christopher Cross
Partner, Dubai
T +971 4 377 9319
christopher.cross@hoganlovells.com

Asia
Jun Wei
Partner, Beijing
T +86 10 6582 9501 ext.2501
jun.wei@hoganlovells.com

Notes

Notes



The artwork used throughout these materials has been licensed from Tony Cyizanye, an artist based in Rwanda.

About the artist

Tony Cyizanye was born in Bujumbura, Burundi, and later moved to Rwanda. He comes from a family of artists, with a musician as a father. His inspiration comes from his family as he was growing up, he saw his uncle, Adolphe Bigirimana painting and making music, his aunt is a fashion designer, and another uncle is a musician.

Being surrounded by the art and music inspired his passion and dedication to his art. In 2010 he exhibited in FESPAD in Rwanda, in the University of Colombia, New York, at the UN day in the Milles Collines Hotel Kigali Rwanda, and for the launch of the Ivuka magazine 'Rwanda Art' at the Novotel Hotel, Kigali, Rwanda.

In 2011 he has exhibited in the 'Survival' exhibition in Kigali, Rwanda and in Belgium, he has painted with street children in the Nyamirambo market, Kigali, Rwanda.

www.hoganlovells.com

Hogan Lovells has offices in:

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest*
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Jeddah*
Johannesburg
London
Los Angeles
Luxembourg
Madrid
Mexico City
Miami
Milan
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Philadelphia
Rio de Janeiro
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Silicon Valley
Singapore
Tokyo
Ulaanbaatar
Warsaw
Washington, DC
Zagreb*

* Associated offices