Hogan Lovells

Africa Newsletter

September 2016

Welcome to the September 2016 edition of the Hogan Lovells Africa Newsletter.

The articles in this edition are evenly split between those that give you our usual commentary on various issues of current interest to those working on the continent, and those that focus more on recent Africa events that we have been involved in.

We kick the first section off with an article co-authored by Nathan Searle (Counsel, London) and Fred Fedynyshyn (Chief Legal and Compliance Officer, BitPesa, Kenya) where they give us seven tips to help engage effectively with African regulators. After that we shift to the francophone part of the continent and see how OHADA law is helping to facilitate transactions and encourage investment in that zone.

We then take a look at the UK Modern Slavery Act and how this affects business and supply chain transparency in Africa. Finally, this section concludes with an article from our financial services team in London and Johannesburg examining the "twin peaks" approach to regulation and whether that is a suitable model for South Africa.

Our recent events section starts with an interview that first appeared in the Nigerian press. In it Jerome Finnis (Counsel, London) discusses what can be done to make Nigeria a more attractive seat for arbitration in Africa.

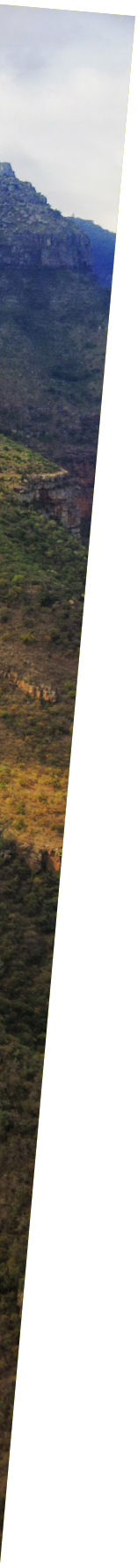
Our biggest event of the past 3 months was our third Africa Forum, held in the London office on 30 June. This newsletter features a short article providing a summary of that event, and then there follows a more detailed article on the interesting discussions that arose from the Power and Energy Infrastructure panel.

We conclude the events section in a social mood, with a short write up about the Cocktail Event that we held with clients and local lawyers when we went to Nairobi in August to speak at the LMA Conference. Watch out for more networking events when we are visiting other African countries!

Also included in this newsletter are our usual features: The A-Perspective (our Africa blog); View from a Secondee (this time featuring Pointer Chinyerere from the African Development Bank); Up-coming events and Recent work.

We hope you enjoy this edition of the newsletter. As always, please get in touch if you have any questions.

The Hogan Lovells Africa team



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Getting the deal through

Working with regulators in Africa

Working with regulators is key to doing business in Africa. Whether it is obtaining a licence, addressing compliance issues or discussing the impact of regulation on your business, engaging with regulators is critical. So how do you engage effectively with African regulators?

Tip 1: Find a local guide

It is important to engage with a local law firm, consultant or business partner who understands how the regulator works and has a successful track-record in dealing with the regulator. Obtaining an early understanding of who is the relevant decision-maker and how the process for obtaining the relevant approval works in practice will save much frustration and delay. Experience shows that the way things operate on the ground often cannot be found on websites or in an easily accessible manner. Accordingly, having a local guide is critical and can potentially save months of delay.

Tip 2: Be proactive: Engage with the regulator early and often

Engaging with regulators should be a top priority when thinking about entering a new market or launching new products, particularly as the process of obtaining approvals can be lengthy.

Consider engaging with regulators before making formal written submissions. Opening a dialogue early improves the regulator's understanding of the reasons behind your application and your understanding of the issues that are most relevant to the regulator. It can also help to ensure that your written application is directed to the correct decision-maker when it is submitted.

Once submissions have been made, keep in touch with the regulator regularly. Regulators are often thinly stretched, so this helps keep your application on top of the regulator's to-do list.

Tip 3: Meet in person

African regulators place a high value on relationships. Arranging an in-person meeting with a regulator shows that you respect their views and are serious about engaging with them. Further, regulators engage much more in a face-to-face meeting than with glossy detailed written submissions. If a regulator makes time in their diary to meet, then they will be engaged with you and your issues during that meeting. It is much harder to guarantee the same level of engagement with a written submission, which is just one of many on their desk.

Tip 4: Be patient

Expect the unexpected and plan for some delays. It is important to recognise that many African regulators operate in a politically dynamic environment that can cause unexpected delays. For example, a Minister or key official may leave or move and it can often take weeks or months to appoint a replacement. It can also be difficult for a regulator to make decisions during an election period.

Tip 5: Show the regulator the benefits of acting and the harms of not acting

Companies operating in African countries often encounter inertia when it comes to regulatory decisions, particularly with respect to issues that the regulator has not encountered before or which could set precedents for the future. It is important to discuss and understand the regulator's priorities and to show how making a decision in your case aligns with those priorities. It also helps to discuss the potential negative consequences for the regulatory environment if a decision is not made.

Tip 6: Get it in writing

While it is important to meet in person with regulators to show respect, build trust and get full engagement, it is equally important to get decisions recorded in writing. Political sensitivities, either about the decision itself or about potentially setting a precedent for future transactions, may make a regulator reluctant to commit a decision to writing, but it is worth persevering, even if this means some delays. A written decision helps to protect you against the risk of the regulator changing their view in the future, as a result of personnel changes or for political or other reasons, and to reassure your partners, counterparties and home country's regulators that you have the local regulator's formal approval.

Tip 7: Take a long term view –help the regulator shape future policy and regulations

African Governments and regulators are keen to encourage investment and generally welcome discussion regarding how regulatory and legal frameworks could be improved and how existing frameworks may be applied or adapted to cater to new markets or products. Businesses can make a significant contribution to a regulator's perspective of the market and how policy can be adapted to facilitate investment.

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OHADA law

Facilitating transactions and encouraging investment in Africa

From OHADA's inception, its purpose has been to encourage investment into the area, including foreign investments, and thus to support economic development. Its creation results from a political will to remedy the legal and judicial insecurity that prevailed in contracting States by modernizing and harmonizing their business law, and also from this idea (which is deeply rooted nowadays in Africa) that the legal environment can be a powerful development tool.

OHADA is now made up of 17 member States, from Central to West Africa, members of the Monetary and Economic Community of Central Africa (MECCA) and Economic Community of West Africa (ECOWAS), even if some member States of ECOWAS are not members of OHADA (e.g. Nigeria, Ghana, Sierra Leone and Liberia, which are English speaking and common law countries). From the outset, this organization was created by the former French colonies, members of the franc zone. However, from a legal perspective, all member States of the African Union (i.e. in fact almost all African countries) can accede to this Treaty and some countries like Nigeria or Ghana are considering this opportunity.

OHADA has so far adopted 9 Uniform Acts directly applicable in 17 Countries in various areas of business: (i) corporate law, (ii) commercial law, (iii) security law, (iv) insolvency proceedings, (v) debt recovery, (vi) cooperative companies, (vii) carriage of goods by road, (viii) accounting and (ix) arbitration.

Its Institutions

One of its key institutions is the Common Court of Justice and Arbitration (CCJA) which is based in Abidjan. The CCJA is the Supreme Court for all OHADA related matters. The decisions of national courts of appeal relating to the application of the Uniform Acts or the construction of any OHADA law provision can be referred to the CCJA. However, the court cannot make pronouncements on decisions regarding criminal sanctions made by the national courts. For investors and economic stakeholders in general, the role of the CCJA is important in order to preserve the uniform interpretation and application of business law in all 17 member States.

OHADA has also created a trade register, which receives the registration of all companies, branches, business and all security over movables. For example, any security over movables governed by OHADA law needs to be registered before becoming enforceable against third parties. In fact, there are three levels of data collection: (i) local registers kept by the registrar of each local court, (ii) national register, which centralizes information from the various local registers of the country and (iii) the regional collection, which centralizes information from all national registers, kept by the registrar of the Common Court of Justice and Arbitration in Abidjan. One of the main objectives of this system is to increase use of electronic process in the collection and disclosure of information, in order to enhance the certainty and accessibility of this information in the area.

Investment climate

In terms of enhancement of investment climate, this is actually one of the main objectives of OHADA. For example if we look at the last Doing Business reports we can note that OHADA member States have made significant progress in the ranking. Why?

– foreign group's expansion strategy in this area can now be elaborated on the basis of a clear, uniform and predictable corporate law, applicable in 17 countries;

– OHADA is also promoting lending and the protection of the lenders' rights by a modern and efficient security law which is ahead of French law on various matters. For example, the creation of a security agent (it is an hybrid institution between the civil law agency (mandat) and the well-known security trustee; again, it demonstrates that it is possible to find a common approach between civil law and common law principles), which may certainly be considered as the main illustration of the modernisation of the OHADA security law; and

– on alternative dispute resolution, OHADA is promoting the arbitration as an efficient and confidential mode of dispute resolution – It is an open secret that foreign investors look the national courts suspiciously.

Another illustration: if we look at the financial market in central African, one can note that the insufficient depth of this market and the weak market culture of the zone represent some of the main challenges to overcome (in addition to what remains to be done in terms of the market's infrastructures). Financial and accounting information remains the Achilles' heel of most local companies. For example in Cameroon, the general inventory published in 2013 by the National Statistical Institute revealed that 57.7% of the 93,963 Cameroonian companies do not keep written accounts, while this is necessary in order for their securities to be quoted on the DSX. They should thus be capable of complying with the required standards of information in order to gain access to the financial market and therefore, to give that market depth. These companies already benefit from a unified normative framework related to corporate law and accounting standards, to the extent that the member States of the MECCA are also parties to the OHADA treaty.

Upcoming discussions...

In terms of upcoming discussions, practitioners are talking about extension of the scope of Uniform acts, for example to contracts, labour law, consumer sales, lease, etc. Some of these subjects may go beyond what is traditionally deemed as business law. However, these subjects can also be deemed as being essential to business activities and can enhance the investment climate.

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UK Modern Slavery Act

Business and Supply Chain transparency in Africa

New disclosure requirements under the UK Modern Slavery Act 2015 (MSA) are pushing companies across all sectors to identify and interrogate human rights risks in their businesses and supply chains. As business supply chains have become more complex and international, the risk of labour abuses at some stage along the economic chain has increased for businesses across all sectors and in every country. Ongoing conflicts, poverty, high levels of corruption and the impact of resource exploitation increase the risk of modern slavery in many African countries, and the MSA will have an impact on all companies with activities or suppliers in the continent.

The Global Slavery Index estimates that there are 6.4 million victims of modern slavery in Africa, with most engaged in the agriculture, fishing and natural resources sectors. A UK parliamentary motion in November 2015 criticised the Eritrean government and international mining companies from the UK, Canada and Australia (no companies were named) for using forced labour from the Eritrean national service programme. The International Labour Organisation estimates that there are 59 million children between the ages of 5 and 17 engaged in hazardous work across the continent.

The MSA requires companies to publish an annual statement of the steps taken to eliminate modern slavery and human trafficking in their business and their direct and indirect supply chains. The requirements apply to companies with an annual turnover exceeding £36 million (including turnover from any subsidiaries) which carry on business in the UK. Companies with activities primarily in Africa may therefore be caught if they are carrying on any part of their business in the UK. The meaning of "carrying on business" has caused some difficulties although the same term is used to define the scope of the UK Bribery Act. A company listed on the LSE or AIM which carries on most of its activities in Africa would not be covered solely on account of its listing in London, but will be covered if it has what guidance describes as a "demonstrable business presence" in the UK. A UK office or UK-based employees would likely satisfy this test.

The MSA is likely to have some impact on all companies with activities or suppliers in Africa, whether or not they are themselves caught by the MSA. The MSA and guidance published by the UK government expect companies to undertake due diligence on suppliers, and exert influence on their supply chains. This, in turn, means that suppliers are likely to face increased scrutiny and demands from companies up the supply chain who are required to report.

Statements are required for each financial year ending on or after 31 March 2016 and are expected to be published within six months of year end. Senior management will be expected to engage with modern slavery and trafficking issues as the MSA requires the statement to be approved by the board of directors and signed by a director. The MSA was intentionally drafted to provide companies with flexibility as to the contents of statements. This, however, has led some to some uncertainty as to how the new requirements should be approached.

Mining companies will already be familiar with supply chain transparency legislation to combat trade in conflict materials, including the US Dodd-Frank Act. The mining sector has led the way in human rights due diligence for supply chains, and extensive guidance produced by the International Council on Mining and Metals (ICMM), OECD and other organisations is available. The Electronic Industry Citizenship Coalition (EICC) has also taken an active role and has published guidance that can assist companies across all sectors, particularly in relation to supply chain due diligence.

If an obligated company fails to publish a statement, there may well be stakeholder interrogation and criticism. In addition, the MSA provides the UK government with powers to obtain a civil injunction to compel publication. The MSA creates new slavery, trafficking and related offences – even if a company does not directly commit such offences, it is possible to commit a money-laundering offence by acquiring or receiving financial benefit from criminal conduct. Public scrutiny and reputational impact will, however, remain the primary drivers for compliance.

The MSA is part of an accelerating trend towards a more transparent and thorough analysis of where and how goods and services are produced. The EU Non-Financial Reporting Directive is required to be implemented by December 2016 to require certain large companies to disclose information on environmental and social matters; and in June 2016 a new EU conflict minerals regulation was proposed to establish a system of supply chain self-certification for importers, smelters and refiners of minerals originating in conflict affected and high-risk areas.

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Twin peaks

The summit of financial regulation

Introduction

Jurisdictions such as Australia, the United Kingdom and the Netherlands have substantially reformed their financial regulatory systems by adopting a "twin peaks" approach to regulation. Such reforms aim to ensure the stability of the financial system through the creation of two separate agencies which, broadly speaking, are responsible for prudential regulation and financial conduct. South African legislators are also in the process of implementing a "twin peaks" model, which will largely mirror the system introduced in the United Kingdom. Given the contrasting nature of the economic environment in each jurisdiction, is "twin peaks" a suitable and effective regulatory regime for this sub-Saharan country?

The facts

In the UK, the "twin peaks" model has been in place since 1 April 2013, when the previous tripartite system of regulation centred on the Financial Services Authority ("FSA") was replaced. Under the new "twin peaks" model, the Prudential Regulatory Authority ("PRA", part of the Bank of England) is responsible for prudential regulation of key institutions, including banks, insurers and systemically important investment firms. The Financial Conduct Authority ("FCA") is responsible for prudential regulation of all other firms, and for regulating the conduct of all firms, including PRA-regulated firms.

In South Africa, the Financial Sector Regulation Bill is nearing its promulgation and is currently in the National Assembly before the Standing Committee on Finance. As stated in the preamble of the Bill, the ultimate aim of the anticipated legislation is 'to preserve and enhance financial stability.' This fundamental objective is largely to be achieved through the introduction of two new bodies, the Prudential Authority (which will be housed within the South African Reserve Bank) and the Financial Sector Conduct Authority. Such reform represents a significant shift away from the existing framework whereby prudential and market conduct regulation is shared between the South African Reserve Bank, Financial Services Board, the National Credit Regulator and the National Consumer Commission.

Why was "Twin Peaks" introduced?

In the UK, the reform was implemented as a response to the financial crisis, following which the tripartite model was criticised as being "ill-conceived and badly executed" and the general consensus was that the FSA had not focussed sufficiently on its prudential responsibilities. The concerns about the previous tripartite model included structural issues such as the risk of "underlap" because no one regulator was looking at the UK's financial system as a whole; and the risk that issues might be overlooked because of the potential conflict between the FSA's responsibilities as conduct regulator and prudential regulator.

In South Africa, the implementation of "twin peaks" has been justified in three key ways: (i) South Africa's system of financial regulation has always been broadly modelled on countries to which it is historically linked, e.g. the United Kingdom and the Netherlands (which adopted the model in 2002); (b) South Africa is aligning itself with the global trend towards "twin peaks" regulation; and (c) "twin peaks" is the least disruptive approach to financial regulation, according to a 2011 South Africa Treasury paper, A Safer Financial Sector to Serve South Africa Better.

Is it suitable for the South African market?

Whilst the economic environment in each jurisdiction is very different, the implementation of "twin peaks" in the UK looked at the structure of the financial markets, rather than the health of the economy. A reason that "twin peaks" was championed in the United Kingdom was the fact that it satisfied two conditions: first, that banks did not dominate the UK's financial sector (in that there are a number of non-bank financial institutions in the market); and secondly, that the UK has a highly developed consumer protection framework.

In testing these two conditions in relation to South Africa, whilst accepting that there are still some issues

to be addressed (e.g. the role of the National Credit Regulator), it would appear that the fundamental reasoning behind the implementation of the "twin peaks" model is sound and logical.

In relation to South Africa, the contribution of non-bank financial institutions to the South African economy is currently around 10% of South Africa's GDP, but is expected to increase. The Financial Services Board currently oversees the regulation of the non-banking financial industry, which includes retirement funds, short-term & long-term insurance companies, funeral insurance schemes, collective investment schemes (unit trusts and stock market) and financial advisors and brokers. As indicated by the 2011 National Treasury paper, the regulators and National Treasury alike are aware of the requirement to regulate non-banking financial intermediaries as a result of the liquidity and credit risk they pose to the financial system.

The consumer protection framework is also robust, with the National Consumer Commission playing a key role in enforcing and carrying out the functions assigned to it in terms of the Consumer Protection Act No. 68 of 2008. This legislation aims to, amongst other objectives, promote a fair, accessible and sustainable marketplace for consumer products and services; establish national norms and standards relating to consumer protection and provide for improved standards of consumer information and education.

Conclusion

To date, the PRA and FCA have completed joint enforcement actions in three cases, and the enforcement side of the "twin peaks" model appears to be working smoothly. This said, all three cases related to breaches which occurred prior to the introduction of the "twin peaks", and so did not test the rigour of the new model.

As to the ultimate effectiveness of the "twin peaks" model, the true indicator of success for both the UK and South Africa is whether the change in the regulatory model will prevent a future financial crisis.

In both cases, the answer is that it is too early to tell - it is important to recall that the FSA appeared to be working well for ten years until the last financial crisis struck. There is also a risk that structural changes to regulators may divert attention from their core role, which is that of supervision. The biggest risk to the success of the "twin peaks" model therefore, may not arise from the changes to the regulatory structure, but from ensuring the initial smooth implementation of changes and the on-going resourcing and empowerment of supervision and enforcement teams.

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Arbitration in Nigeria

Prospects and challenges

Jerome Finnis is Counsel in Hogan Lovells International Arbitration Group in London. He advises on all aspects of international arbitration, with a strong focus on oil and gas and Africa-related disputes. He was in Nigeria as a speaker at the just concluded 1st International Chamber of Commerce Africa Regional Arbitration Conference, where he spoke to Akinwale Akintunde on what can be done to make Nigeria a more attractive Arbitral Seat for the African sub-region.

As an arbitration expert who has been involved in arbitration around the world and has seen different jurisdictions develop their arbitration practice. What is your opinion on the evolution of Arbitration and ADR in Africa and Nigeria in particular?

My perception is that leading Nigerian arbitration practitioners and users are working very hard to further develop Nigeria's arbitration law and institutions, and that there is a strong impetus to drive that process forward. Key aspects of this process include bringing the Nigerian Arbitration and Conciliation Act fully up to date, and at the same time, ensuring that Nigerian courts recognise their statutory duty not to intervene in the arbitration process, which is a free-standing dispute resolution regime. And continuing to foster the existing strong community of practitioners who specialize in the conduct of arbitration, and don't treat it as a poor relation to court litigation.

What in your opinion should be done to make Nigeria a more attractive Arbitral Seat for the African sub region?

The priority must be to ensure that the Nigerian Arbitration and Conciliation Act is brought fully up to date and that it is completely aligned with the needs of its users.

What would you suggest should constitute Nigeria's policy on arbitration?

The policy should be non-interventionist – in other words, it should recognise that commercial parties are free to agree how their arbitrations should be conducted, where, and according to what rules – subject only to such safeguards as are strictly necessary in the public interest. And that the issuing of an arbitral award is the final step in the process, rather than the prelude to a lengthy battle before the Nigerian courts..

As an arbitrator with a verse knowledge in practice, which would you favor, institutional or ad-hoc arbitration?

It depends on a variety of factors, there's no "one size fits all" approach. But the key factor is the identity of the arbitrators themselves. And that is usually more important than whether the arbitration process is conducted on an ad-hoc basis or administered by an arbitral institution such as the ICC. If you select the right arbitrators, in many cases there's no need for an arbitral institution to be involved. That said, even with the best arbitrators in the world, sometimes it is very helpful to have an arbitral institution such as the ICC involved, because it can ensure that if the arbitration runs into difficulties, it gets back on track quickly. If there's a problem with the arbitrators themselves, the institution can fix that.

Despite Arbitration's obvious effectiveness, litigation remains the most used in resolving commercial dispute. Why do you think this remains the case in Africa and in Nigeria particularly?

First of all, I would query whether litigation is more widely used than arbitration. At least in the context of international commercial disputes, most sophisticated clients recognize that international arbitration is really the only game in town – in particular, because the widely adopted New York Convention provides a simple and effective mechanism for enforcing arbitral awards in many countries around the world. Whereas, if you're litigating in a national court, the court's judgment will usually have far less "international currency" – because court judgments are usually much more difficult to enforce internationally.

There can be a perception that arbitration is more expensive than litigation, but it should not be. When you have the right alignment of relationships between clients, counsel, arbitrators and institutions, you can tailor-make a procedure that is more cost effective, rapid, and binding than litigation. It is important to remember that, in court litigation in Nigeria, if my client win its case completely, it will usually only be an awarded a minimal amount in respect of its costs. Whereas, if my client is 100% successful in an arbitration seated in Nigeria, it can (and often will) be awarded 100 percent of its costs. So that's a really important difference between arbitration and litigation.

Usually, litigation and arbitration are regarded as mutually exclusive dispute resolution methods, is it possible to combine both forms of dispute resolution to develop an effective strategy?

No, I think it's dangerous to try to do that. You have to recognize that they are completely different processes. Commercial contracts need to make a clear election as between arbitration and litigation. If you choose arbitration, there should be no need to go anywhere near the courts, because arbitration is a self-contained process.

In general, what is your assessment of this ICC conference going on?

This is a very important conference – not only for users of arbitration in Nigeria, but also more widely for arbitration in Africa. And, I think that this conference is going to give real impetus to the reform of the Nigerian Arbitration and Conciliation Act.

This interview first appeared in This Day on 12 July 2016 and is reproduced with the kind permission of the publishers.

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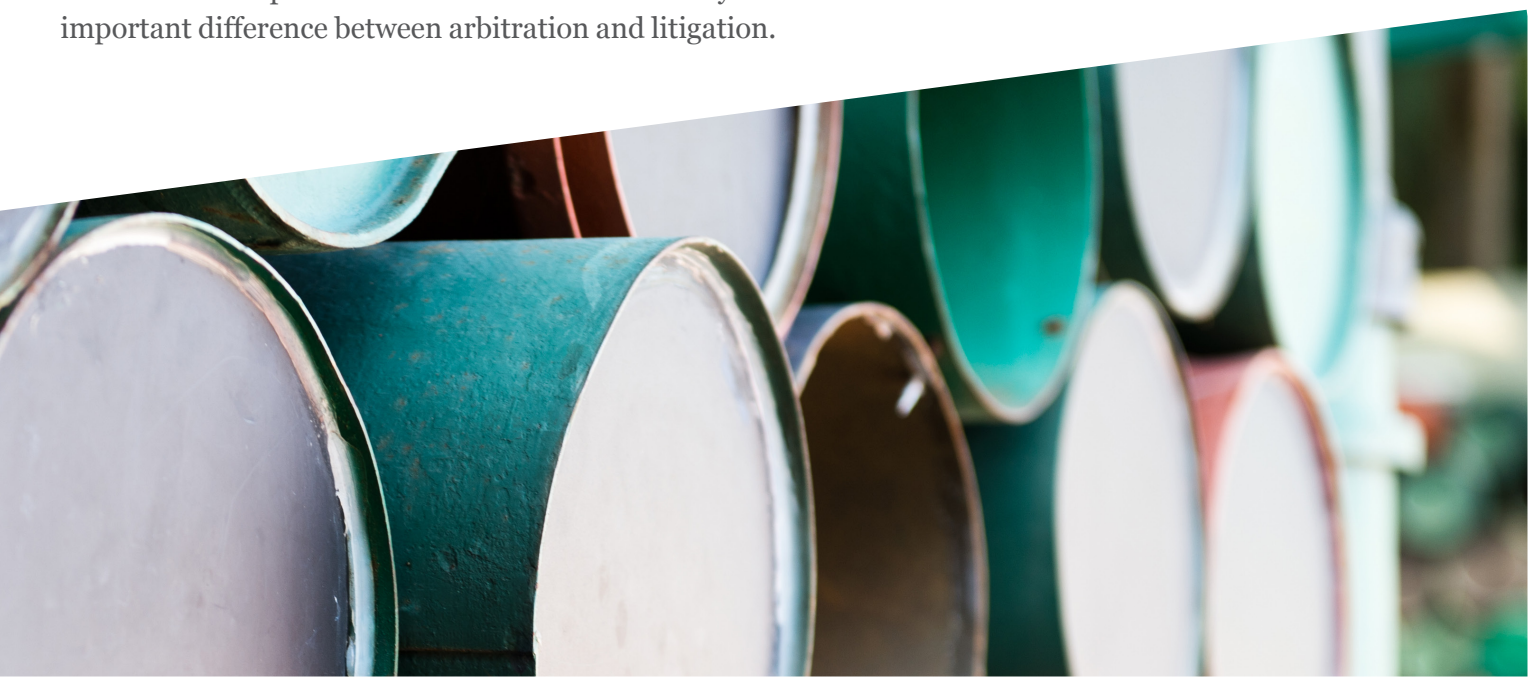

Africa Forum

Disruption and Innovation

On Thursday 30 June we hosted our third Africa Forum where we looked at the forces of disruption and agents of change and innovation that are shaping the Africa narrative. Over 170 people attended and the Forum was well received by the media.

Guests attended the following sessions:

Transforming African economies

Whilst it has been impossible for African economies to avoid the effects of falling commodity prices, it has accelerated discussion and action for countries changing and repositioning their economies. This panel session looked at what opportunities this is creating for investors and corporates looking to operate in Africa, and what African governments are doing to encourage investment.

Managing bribery and corruption in Africa: it's not as easy as ABC

In this interactive session experts provided insights into the unique corruption risks that organisations face when doing business in Africa, as well as best practices for managing those risks.

Solving the infrastructure conundrum

This breakout session, asked "what are the disrupters?" We explored ideas that could counter these and help release infrastructure pipelines to deliver to Africans the very things they need to ensure future economic growth, prosperity and security.

The changing face of finance

Our final panel session of the morning looked at the changing face of finance. Many, if not all, African countries have ambitious plans to grow and develop their economies, but with the economic headwinds faced across the continent, how is the finance market adapting to meet and defend against these difficult times?

Power on and power up: solving Africa's energy crisis

After lunch we all focused on the challenges faced by governments and the energy sector in closing the "energy gap" and meeting Africa's burgeoning demand for power, set to increase fourfold by 2040.

Africa: a breeding ground for FinTech

Our first breakout session of the afternoon looked at FinTech. Mobile money and payment solutions are contributing to a seismic change in the personal wealth and lifestyles of many Africans, facilitating financial inclusion on the continent. However, there is still more innovation to be seen in the payments sector, from microfinance, credit scoring and biometric identification to Blockchain and Bitcoin. We discussed the here and now for investors and developers and asked what's next in African FinTech.

New horizons: future trends for international arbitration in Africa

The other breakout session looked at arbitration in Africa. Arbitration remains the dispute resolution method of choice for investors and their state-owned counterparts, and a significant effort has been made of late to further develop Africa's arbitration capacity. The panel discussed this trend, focusing on the increasing use of arbitration in Africa and the recent proliferation of regional arbitration centres.

The day ended with a keynote speech from Alex Vines, Head of Africa Programme at Chatham House.

If you would like a full report of the Forum, please contact africadesk@hoganlovells.com

Our next Africa Forum will held in Johannesburg, South Africa on 7 October 2016.

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Power and energy infrastructure in Africa

Financing for the future

We recently held our Africa Forum in London, where a panel of experts considered the question of why, in the context of Africa, with both the (overwhelming) need and the (ample) means available, the delivery of infrastructure is not happening as quickly as Governments and the ultimate beneficiaries ofnew infrastructure might like. In the context of power and energy infrastructure, this question is amplified particularly given the acknowledged power deficit which exists on the continent coupled with the fact that the absence of an adequate and reliable power supply is holding back economic development.

Of course, the answer isn't always as simple as having a need and the means available and there are any number of articles and commentators that are more than happy to lambast their audience with the reasons why investing in African infrastructure can be difficult. That is not the focus of this article. Rather, this article shares some of the views of the Hogan Lovells panel which, while speaking in the context of infrastructure generally, are equally relevant when considering the power and energy infrastructure sectors.

Project targeting and structuring

It almost goes without saying that choosing the right project, at the right time, to be delivered using the appropriate structure, is key to ensuring the successful delivery of infrastructure projects. However, history on the continent is littered with examples of where Governments have fallen at this hurdle. Getting these fundamental aspects of project development and delivery correct is vital to ensuring the long term success of projects. As a result, many countries are now looking to better analyse their markets and identify projects which are capable of being delivered successfully.

In the energy and power sectors, this basic planning for project implementation assumes even greater importance as there are so many moving parts which need to come together in order to make a project successful. For example, not only do the power generation assets need to be considered, but so too to the necessary transmission and distribution networks and revenue collection processes (the latter being vital in ensuring energy generated can be paid for). If any one of these elements are missing or not up to standard, the long term viability of energy and/or power projects can be compromised.

The added bonus of this early planning and project identification is that it gives a project the best chance of success and nothing breeds success, like success. Getting some early wins in terms of successfully letting projects in the market will build reputation for delivery and enhance a Government's credibility as it looks to get its pipeline of projects away in the market.

Government capability

Following from the preceding point is ensuring that officials involved in the development, procurement and management during the operational phase of a project are up to the task. This means ensuring that officials have the right skill sets and are properly resourced in order to deliver projects. This does not mean that Governments should not expect to need to engage external advisers (these will always be required) but it does mean that officials involved with the project should have sufficient knowledge of understanding of the project and what is needed to successfully implement it, but also the authority to make the required decisions within a timely manner.

Sources of funding

There are a number of points to consider under this heading. Bank debt (if that is to be the funding source) can be more expensive than debt from other sources and organisations traditionally funding into African infrastructure (World Bank, AfDB, for example) can tend to be less dynamic and not able to lend if the target project is not structured in a particular way or does not deliver minimum returns. Another concern is the issue of tied funding, where funds are made available but in return for the borrower complying with conditions placed on it by the lending organisation or Government.

Where investors are from overseas, there is also the issue of currency fluctuation risk which in turn increases the cost of the project.

One way to address these issues is, of course, to obtain funding in-country, rather than from international lenders. In many cases funding is available from local investors, including Government backed infrastructure funds and pension funds. In relation to the former, a number of African countries have established investment vehicles which could be (or in some cases – such as the Ghana Infrastructure Investment Fund – which are designed to be) used for investing in local infrastructure projects. Accessing these sources of funding removes any foreign exchange risks. It also means that a lender, knowledgeable in local market risks and requirements is lending into the project. This intimate knowledge of local conditions often removes a number of due diligence roadblocks encountered by international lenders.

Alternative solutions

The type of solutions which may be available to host Governments in order to deliver on power and energy for its consumers needs to be considered. Much has been said recently of the need for African governments to deliver off-grid solutions in order to help address the power deficit. Following this approach will, among other things, relieve the need for Governments to develop extensive power grids which will absorb vast resources for little return. Whether these off grid solutions are city, town, village or even household based will not matter as long as the appropriate solution is chosen – and this is the important factor: choosing appropriate solutions will deliver the best outcomes which in turn will help with attracting appropriate financing.

Conclusion

Much of what is written above may seem like common sense and these comments are only a taster of the issues which need to be taken into consideration in order to ensure long term financing for power and energy projects. One thing is certain – if project fundamentals are sound and procuring authorities and/or sponsors can demonstrate that projects will be funded in the long term, half the battle is over in terms of generating long term financing and project viability.

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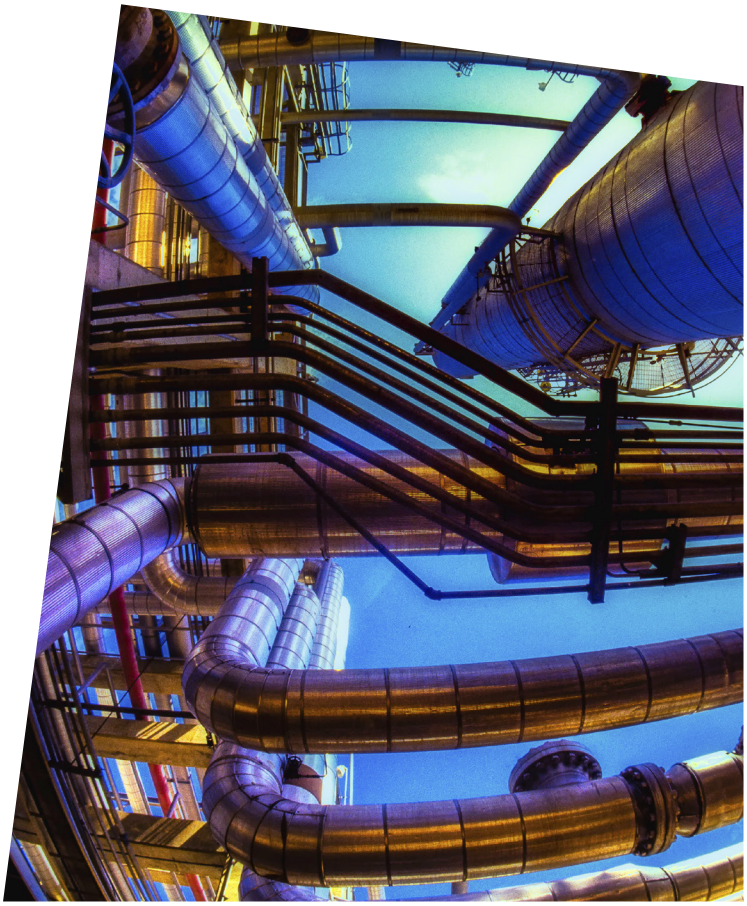

Cocktails in Nairobi

Three members of our finance team from London and Johannesburg, Shalini Bhuchar, Lodewyk Meyer and Laurie Hammond, hosted a successful cocktail event in Nairobi on the evening of 15 August ahead of the East African Loan Market Association conference.

Over 30 clients, contacts and Kenyan lawyers were there, with most being active in the banking and finance sector in East Africa. There was a particularly good turnout from our contacts at PTA, SCB and Afreximbank and it was good to meet with a number of our preferred Kenyan advisers. It is clear that there is a lot of activity in Nairobi and in East Africa in general and we left Kenya with a number of opportunities to quote on upcoming deals.

Shalini subsequently participated in and spoke at the East African Loan Market Association conference and training day, which was very well received. This event was open to all professionals operating in the syndicated (and wider corporate) loan markets in East Africa, and is one of the largest conferences in East Africa dedicated to syndicated lending. The all-day conference had a specific focus on the syndicated loan markets in the region and in Sub-Saharan Africa more broadly. Speakers consisted of senior market practitioners from local and pan-African commercial banks, as well as non-bank investors, advisors and law firms active in the region. Shalini Bhuchar, Banking and Finance Partner, represented Hogan Lovells and chaired a panel of leading lawyers, discussing the risks of cross border lending in East Africa. Shalini also provided training on extra-territorial issues in African deals, addressing sanctions, FATCA and Article 55 of the EU Bank Recovery and Resolution Directive.

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The A Perspective

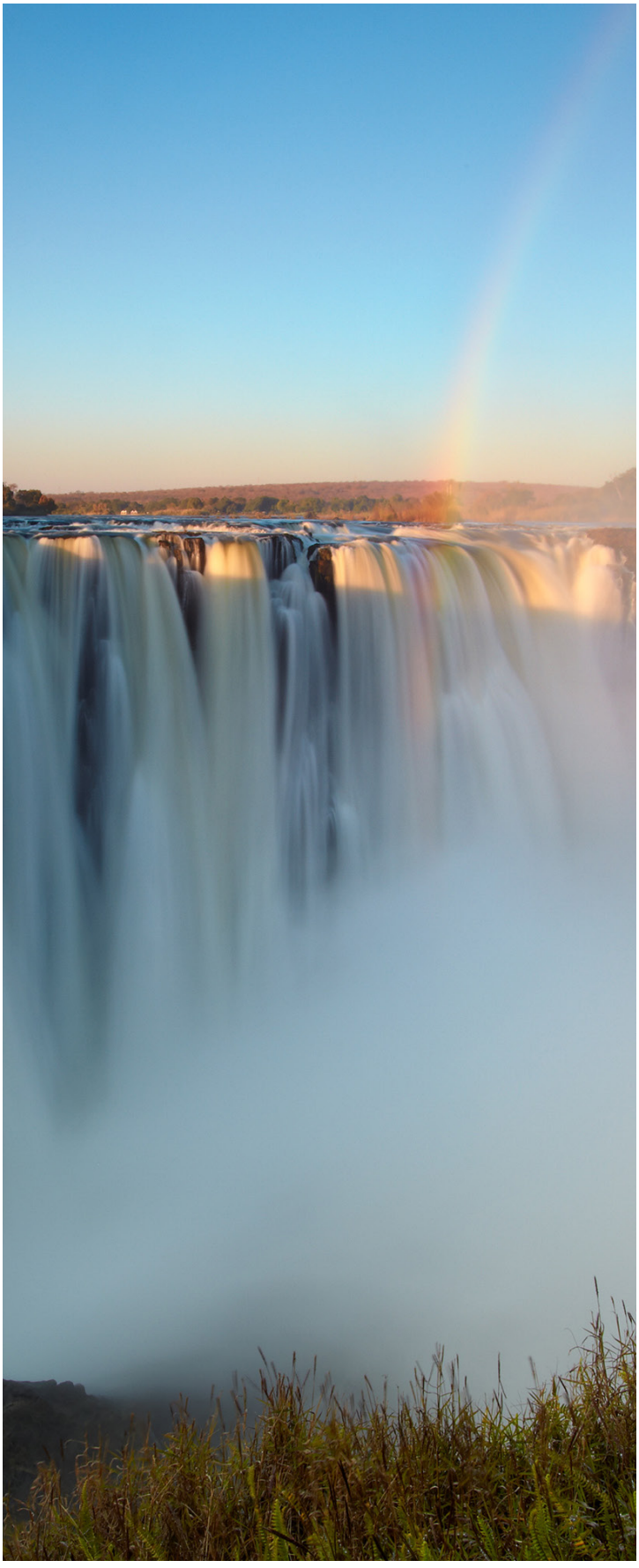
We are delighted to inform you about the positive reception our new Africa Blog has been getting.

The A Perspective launched its In Conversation series – a collection of interviews with leading industry and legal experts to share their views and experiences of working in Africa and the effects of global events on African markets and businesses.

Other posts include the following:

- Brexit: Britain sneezes – will Africa catch a cold?
- Nigeria floats the Niara: Winners and Losers
- Building Blocs to Free Trade in Africa
- The Fight for Power
- Africa – The land of opportunity
- Angola Accedes to Arbitration Treaty
- Blockchain in Africa
- Nigeria: The Fight in the Niger Delta
- Using OHADA law to facilitate transactions in Francophone Africa

For an analysis of the hot topics and key issues affecting African affairs you should take a look at The A Perspective. You can find it at http://www.hoganlovells.com/the-a-perspective



View from an African secondee

Pointer Chinyerere

At Hogan Lovells, we are committed to the training and development of both our own lawyers and those we work with on the continent. In this effort, we run a number of secondment programmes where we work closely with lawyers from Africa to exchange knowledge and build stronger relationships.

In our London office we take up to six African lawyers each year on secondments for a period of up to three months. Pointer Chinyerere, a Zimbabwean lawyer currently at the African Development Bank in Cote d'Ivoire, spent three months with us from mid-September to mid-December 2015. Alison Diarra, our Africa Network Coordinator, asked him to share with us a little about his experience.

Why did you apply for a secondment?

I had been an in-house counsel for 5 years and so I was looking for an opportunity to take a break and reconnect with life in a law firm. Hogan Lovells was a good fit for me because it is a best-in–class global law firm with a developing footprint in Africa.

Was the work at Hogan Lovells very different?

I spent the first half of my secondment in the Infrastructure, Energy, Resources and Projects (IERPP) practice group where I had a very good experience. The main difference was that, in addition to the traditional in-house counsel responsibilities, lawyers in firms also 'hold the pen' and take a key role in driving the transaction (i.e. process management). At HL I had the opportunity to produce the first draft of an EPC contract of a large energy project and also worked on other project documents using both FIDIC and JCT base templates. This is something I don't get to do often in my current role.

In terms of substance of the law, there was not much difference. I am a project finance lawyer working for an international finance institution which invests in very large infrastructure projects in Africa in sectors such as energy and transport. The key project finance principles are the same except that I had to often switch and provide legal advice that is pro contractor or borrower unlike the usual lender perspectives that I am used to taking together with our investment teams

Overall, it is a real experience to be in a firm that has such depth, cutting edge knowledge, internal technical capabilities and a global reach that can only be paralleled by a few.

What did you get the most out of your secondment?

I managed to make connections with many great lawyers across the practice groups. I hope the future will present opportunities for us to work together. I would not have managed to establish this network if it were not for the secondment.

A crucial lesson I learnt from the transactions I was involved is that in the corporate world it is no longer enough to just know the law and provide straight jacket legal advice. Corporate clients now tend to prefer lawyers that are very knowledgeable about their company, competitors, industry and the national and global factors that affect their operations. So instead of being stuck in legalese, clients are looking for commercially minded and solution oriented counsel. It was a pleasure to observe HL's thrust towards meeting the needs of their clients in this regard.

Did you enjoy living in London?

I've been coming to London a lot over the past 10 years – so it was not a new city to me. However living in the city for three months gave me an opportunity to do many more things that I never got round to doing before. I watched the Michael McIntyre show at O2, Manchester United and Chelsea matches, went on a road trip to Bath, attended London Jazz Festival and spent time on an Airbus A380 simulator at Emirates Aviation Experience amongst other things.

What advice would you give future secondees?

1. Network - During the secondment you will develop many professional relationships that could be valuable for your career in the future. You never know what can come out of interactions with the many lawyers you meet at the firm and across the city.
2. The firm has a lot of lawyers, with different interests, perspectives, inclinations and appreciations of your background. You will meet many lawyers that will immediately connect with you, your experience and background. You will meet others that will place a very low value on your background and experience. Use your tact and politeness to gravitate towards those that can expose you to interesting work otherwise you'll spend your entire secondment receiving orders from junior associates looking for extra pair of hands.
3. Make the secondment mutually beneficial – In my experience you will learn a lot and be exposed to more transactions, legal materials etc. by lawyers and practice groups that are also keen to learn about your own experiences. Don't underestimate the value of your own experiences. Be willing to share legal knowledge and experiences from your own firm back home and more broadly the laws in your country that will be of interest to your audience.

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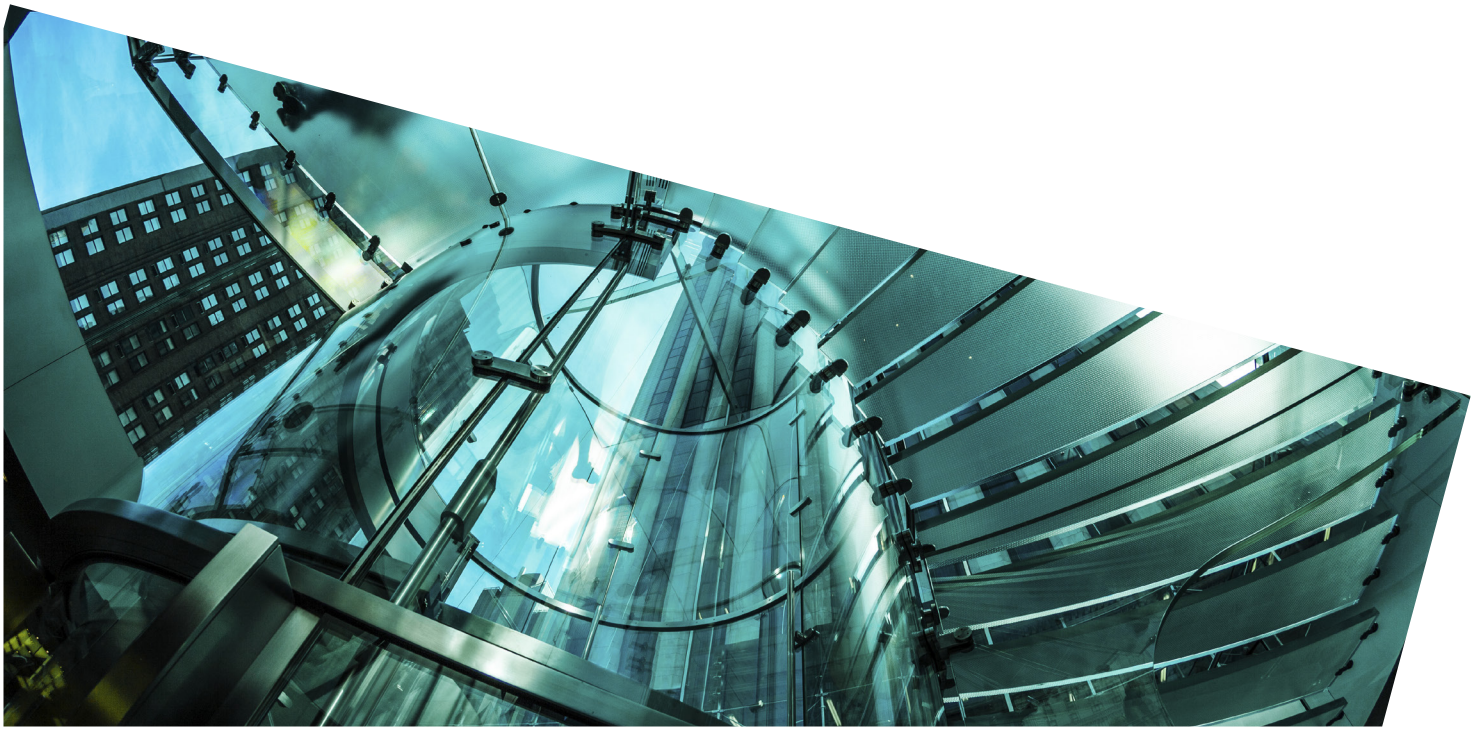

Upcoming Events

September – December 2016

1-2 September: Powering resilience with renewables

Venue: Addis Ababa, Ethiopia

Time: All day

Hogan Lovells is lead sponsor of the Powering Resilience With Renewables conference. This event attracts Ministers, Senior Government Officials, utilities, NGOs, agencies and donors leading large projects across the Energy Sector on the continent. These leaders will be highlighting and announcing fully-funded and ready-for-funding projects in their respective countries, and making themselves available for high-level one-on-one matchmaking discussions with global operators, with the express aim of transforming Africa's Power Resilience. Thus, the Powering Resilience With Renewables conference provides a rare and valuable opportunity, for international companies to meet with Ministry Officials and Utility Senior Management from across the Africa.

For more information on this event, visit http://www.grvglobal.com/PRAfrica16/Overview

8-9 September: East Africa International Arbitration conference

Venue: Kampala Serena, Uganda

Time: All day

International Arbitration Partner, Richard Kiddell will be speaking on the topic of Enforcement of International Arbitration at the East Africa International Arbitration Conference in Kampala, Uganda. This is the 4th instalment of this event attracting over 150 lawyers from Kenya, Tanzania, Rwanda and Uganda as well as all the main arbitral institutions, law societies and CIArb branches.

For more information on this event, visit http://www.eaarbitration.com/4th-east-africa-international-arbitration-conference-to-take-place-in-kampala-uganda/?v=79cba1185463

13-14 September: LoanMarket Association: Southern Africa syndicated loans conference

Venue: Meikles Hotel, Harare, Zimbabwe

Time: All day

Our international Banking and Finance Partners Anina Boshoff (Johannesburg) and David Leggott (London) will be speaking at the LMA's first ever Southern Africa Syndicated Loans Conference in Zimbabwe.

This event is open to all professionals operating in the syndicated (and wider corporate) loan markets in Southern Africa. An all-day conference, it will have a specific focus on the syndicated loan markets in the Southern African region (excluding South Africa). Speakers will consist of senior market practitioners from local and pan-African commercial banks as well as advisors active in the region.

For more information on this event, visit www.lma.eu.com/events/southern_africa_conference_?p=1

15 September: Celebrating African art and culture: A private view of Bruce Onobrakpeya at the LCA

Venue: Lagos Court of Arbitration, Nigeria

Time: 14:00-17:00

Hogan Lovells Africa team will be hosting a private viewing of celebrated Nigerian artist, Prof. Onobrakpeya's works spanning more than 50 years. The exhibition presents over 180 works by leading and emerging African artists, showcasing the best of the Harmattan Workshop, curated by Sandra Mbanefo Obiago.

An unmissable opportunity to receive a guided tour by the artist himself before the exhibition opens to the general public.

This is an invitation only event; however, if you wish to see the free exhibition, it will be open every Friday until 15 December 2016.

For further information on this event or the free exhibition, please contact africadesk@hoganlovells.com.

5-6 October: Johannesburg Mining Indaba

Venue: The Inanda Club, Johannesburg, South Africa

Time: All day

Hogan Lovells are proud sponsors of the Johannesburg Mining Indaba which has over the last few years established itself as a critical platform where mining industry leaders engage in strategic conversations that are open, honest, and to the point. Our international team of senior mining specialist will be at the event. If you would like to arrange a meeting with our mining team, please contact Ashleigh Pelser at Ashleigh.pelser@hoganlovells.com.

For more information on the Johannesburg Mining Indaba, please visit http://www.joburgindaba.com/.

7 October: Hogan Lovells Africa Forum

Venue: Johannesburg, South Africa

Time: All day

Following on from our successful event in London, we will be hosting our inaugural Hogan Lovells Africa Forum South Africa, where we'll be exploring the most topical issues facing African businesses today. We have an exceptional agenda that will be looking at the forces of disruption and the agents of change and innovation creating a new Africa narrative, from an African perspective. Our keynote speaker will be Mr David Makhura, the Premier of Gauteng. This will be a day of insight, discussion and debate, with speakers from some of the world's leading organisations and institutions active in Africa.

Topics will include:

- New horizons – how African businesses are transforming the continent and transcending borders
- A new age of funding. The rise of alternative investments in Africa
- Solving the infrastructure conundrum – lessons from China
- Leaping ahead? How technology is transforming Africa

This is an invitation only event. If you would like further information on how to register, please contact Ashleigh Pelser at ashleigh.pelser@hoganlovells.com.

20 October: Hogan Lovells Africa breakfast briefings 2016 (Q3)

Delivering projects: Procurement rules shocks and strains

Venue: Hogan Lovells, London

Time: 08:00-10:00

Please join us for our third quarterly Africa breakfast briefing, where we will delve deeper into the impact of procurement rules on delivering large infrastructure, energy and transport projects in Africa. Using recent case studies we will look at the shocks and strains of how changes to procurement laws can interrupt a business' usual approach to DFI investment.

Specialists from the our Johannesburg office will give a brief outline of the key requirements of South African procurement rules and identify issues to keep in mind when bidding for projects in that jurisdiction.

We will also provide our top tips for managing a procurement challenge in the unlikely event that one is brought by a disgruntled bidder. Come and hear from our experienced team and learn how to mitigate the shocks and strains of procurement rules.

This is an open event. To register, please contact africadesk@hoganlovells.com.

November: East Africa business leaders round-table

Venue: Capital Club, Nairobi

Time: 18:00 – 21:00

We will be hosting a private event for business leaders and senior industry professionals at Kenya's premier private members club. This will be an opportunity to network and discuss new opportunities for business in an informal and relaxed environment. With East Africa continuing to demonstrate its resilience in an otherwise touch economic global market, Kenya remains the hub of activity and a symbol of progress.

Further details of this event will be published shortly.

This is an invitation only event. If you would like further information on how to register, please contact africadesk@hoganlovells.com.

December: Hogan Lovells Africa breakfast briefings 2016 (Q4)

Venue: Hogan Lovells, London

Time: 08:00 – 10:00am

Join us at our quarterly breakfast briefings where we offer insight and commentary on the key industries, sound out market developments, and provide an overview and update on the regulatory environment in Africa. If you are currently doing business or thinking about investing in Africa, this is one breakfast occasion you won't want to miss.

This is an open event. To register, please contact africadesk@hoganlovells.com

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Recent work in Africa

- Advising a **large Dubai family** conglomerate on the expansion of their construction projects and trading businesses into Africa from its base in Dubai, U.A.E. with a focus on North and East Africa.
- The Washington, London and Paris offices are jointly advising **FMO, the Dutch Development Bank** as lender to a solar powerproject in Senegal.
- Advising **Proparco** regarding its financing of the Senergy solar power plant in Senegal. The nominal capacity is 30kMW making it one of the largest solar power plants in West Africa.
- Advising an **international company** based in the Middle East in relation to negotiations with a leading international telecoms company concerning distribution agreements in West Africa.
- Advising a **leading South African telecoms company** in relation to potential debt claims.
- Advising a **leading international fashion company** in relation to potential claims against distributor in South Africa.
- Advising an **international bank** in relation to potential proceedings to seize assets in West Africa.
- Advising **Chrometco**, a JSE listed company, on an acquisition by commodity trading company Sail Minerals of just under 90% of the company, in return for cash, a controlling stake in two fully financed chrome projects and a stake in Sail.
- Advising **U.S. energy fund EIG and development finance lender Africa Finance Corporation (AFC)** as the principal senior lenders on a US$425 million loan facility for New Age (African Global Energy) Limited, a Jersey-incorporated oil and gas group focused on the development of upstream oil & gas fields in Africa.
- Advising **Persistent Energy Capital LLC** on the structuring of the world's first off-grid solar securitisation. We designed a scalable structure that enabled a Kenyan solar energy company to obtain alternative and more affordable financing. This was needed to facilitate investment in instalment sales of solar panels in Kenyan villages and to expand its operations.
- We have been appointed to the **panel of South32** for a two year period commencing September 2016.

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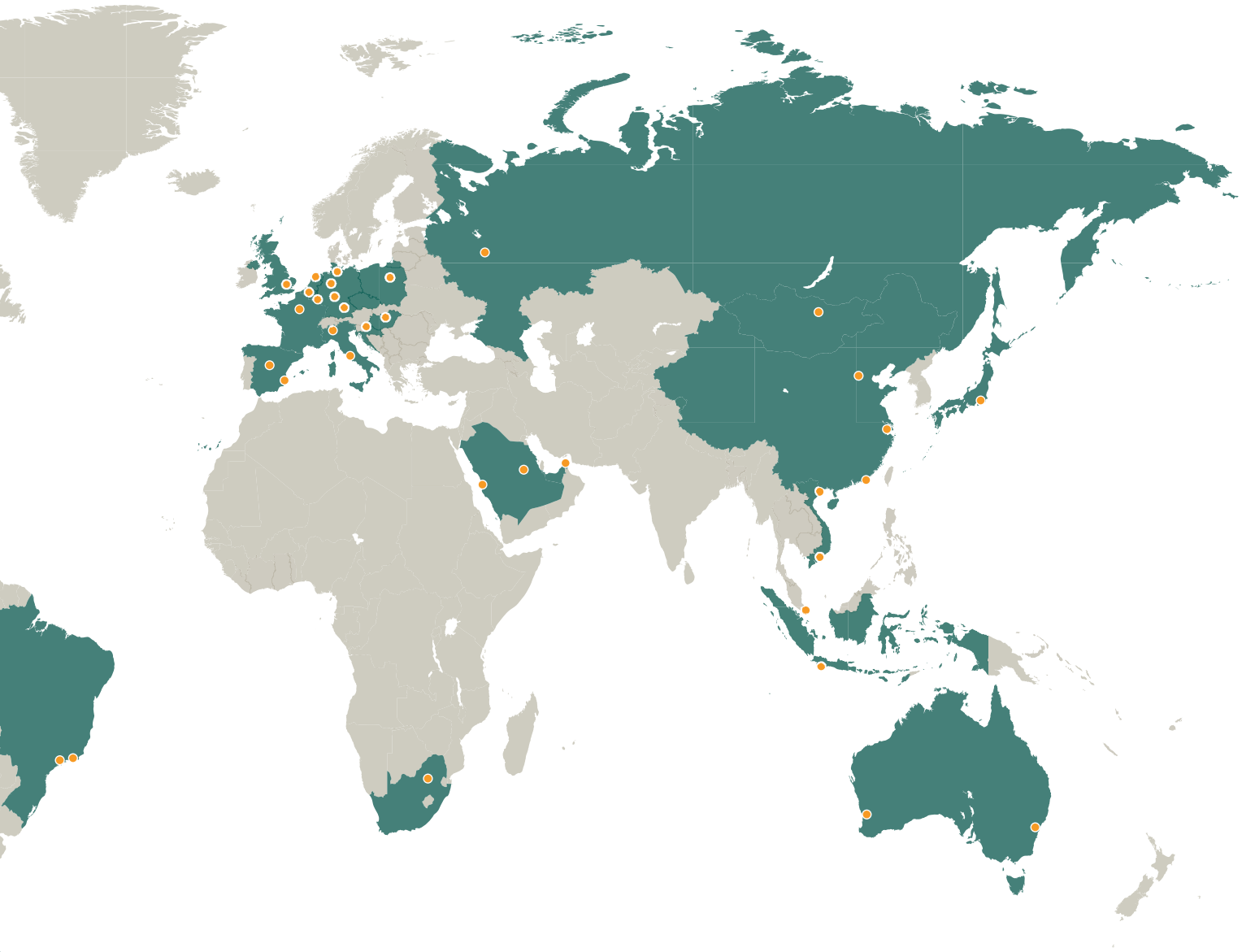

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