Hogan Lovells

Africa Newsletter

SEPTEMBER 2014

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Introduction

Welcome to the September 2014 edition of the Hogan Lovells Africa newsletter.

In this edition of the newsletter we report on the changes in relation to the London Court of International Arbitration (LCIA), a popular choice for African parties as a means of dispute resolution. We take a look at the private equity market in Africa and discuss the challenges that Africa-focused fund managers face in reaching their fundraising goals. We also consider investment protection for Asian investors in Africa.

We include an article in relation to transfer pricing in Africa and look at the role the Stock Exchange of Mauritius plays in relation to connecting investors to Africa.

From South Africa we bring updates on the consequences of the protracted mining strike that took place earlier in the year and look at important considerations in relation to international franchising.

In a roundup of our work in Africa, we summarise some of our recent African transactions and bring you details of a special presentation from Dr Gus Casely-Hayford on the 'Lost Kingdom of Mali', to be held in our London office in October.

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

Best wishes

The Hogan Lovells Africa team

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The LCIA in Africa and its new Rules

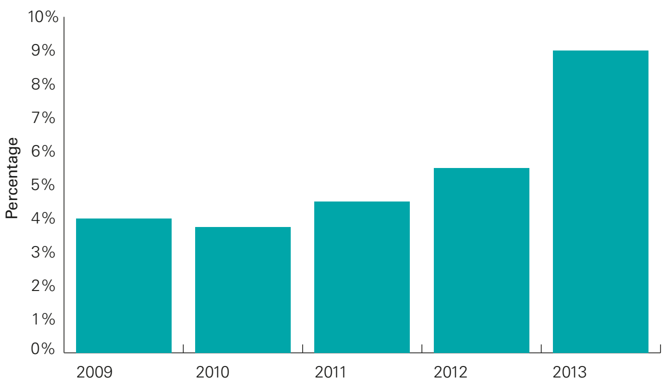
Introduction

On 1 October 2014, new LCIA Arbitration Rules will come into effect. Unless otherwise agreed by the parties, the new rules will apply to all LCIA arbitrations commenced after 1 October 2014. This is an important development, as the LCIA Arbitration Rules are a popular choice among African parties and investors for resolving their disputes and have been included in many existing contracts for projects and investments in Africa. The new rules are the result of a review by the LCIA in consultation with practitioners and users of arbitration to meet their developing needs. One of the key features of the new rules is that they seek to reduce the ability of reluctant parties to disrupt or delay the arbitral process.

Africa and the LCIA

The increasing popularity of international arbitration for resolving Africa related disputes is shown by the steadily-increasing caseloads at LCIA. The LCIA also saw a significant increase in its African casework in 2013, with almost 1 in 10 cases involving African parties.

African users of the LCIA



A similar trend was seen in the 2013 statistics released by the International Court of Arbitration of the International Chamber of Commerce ("ICC") which revealed that the proportion of ICC arbitrations from Africa and the Asia Pacific was at a five year high.

Improving arbitration efficiency

Arbitration is attractive to many users because it is faster and more efficient than court proceedings in many jurisdictions due to having more flexible and streamlined procedures. The new LCIA Rules have made changes aimed at further improving the efficient conduct of arbitrations. In particular, the new rules increase transparency regarding timing of the Tribunal's deliberations and delivery of the award.

Some of the key changes aimed at improving efficiency include:

- requiring prospective Tribunal members to declare their readiness and ability to devote such time as may be necessary to the arbitration, which mirrors the existing requirement for prospective arbitrators under the ICC Rules to make a declaration of availability;
- expressly requiring the Tribunal to render its award as soon as reasonably possible after the last submission from the parties;
- requiring the Tribunal to notify the parties of the time set aside for deliberations and the anticipated timetable for rendering the award;
- encouraging early communication between the Tribunal and parties, by expressly providing that the parties and the Tribunal must make contact with each other within 21 days of the Tribunal's constitution;
- facilitating the use of electronic documents by stating that the request and the response may be submitted in electronic form, and making a standard electronic form available on the LCIA's website;
- changing the period for serving a response to 28 days from the date of commencement of the arbitration (rather than the date of service of the request for arbitration on the respondent) and changing the periods for submitting statements of case to a 28 day deadline (to increase the likelihood of a deadline falling on a business day); and
- in accordance with established arbitration practice, stating that the Tribunal may take into account the conduct of a party in the arbitration when awarding costs (and in particular, where any failure to cooperate resulted in undue delay and unnecessary expense).

In order to avoid any disruption by a party tactically changing legal counsel late in the proceedings in an attempt to compromise the composition of the Tribunal, the new rules provide that if a party changes its legal representatives during the arbitral process, such a change must be notified to the Tribunal promptly and is subject to the Tribunal's approval (which may be withheld if such change may compromise the composition of the Tribunal or the finality of the award).

Multi-party arbitrations

As the size and complexity of projects and transactions in Africa grows, so does the complexity of the disputes arising from those transactions. In recognition of the increasing number of multi party and multi-contract disputes, the LCIA has updated its rules in relation to consolidation and joinder.

Under the old Rules, a respondent was only permitted to commence a counterclaim against the claimant. Accordingly, under the old Rules a respondent could not start a counterclaim against a co-respondent (such as a claim for contribution); this would have needed to be made in a separate arbitration, which may or may not have been possible to consolidate with the principal claim. Addressing this issue head-on, the new Rules allow for "cross-claims" – that is, a claim brought by a respondent against a co-respondent, as well as against the claimant.

The new Rules also contain provisions to enable the consolidation of two or more arbitrations into a single arbitration.

The Tribunal may order consolidation of two or more arbitrations so long as all the parties agree in writing. The Tribunal may also order consolidation where separate arbitrations have been started under the same agreement or any compatible arbitration agreements between the same disputing parties (provided that no Tribunal has yet been formed in the other proceedings, or, if formed, that Tribunal must be composed of the same arbitrators). The LCIA Court also has the power to consolidate separate arbitrations started between the same disputing parties under the same arbitration agreement, before formation of the Tribunal.

Emergency arbitrator provisions

It can often be important for parties to major projects or transactions to be able to obtain urgent injunctive relief from an arbitral Tribunal. The LCIA has retained its procedure for expedited appointment of the Tribunal in such cases. In addition to expedited formation of the Tribunal, the new LCIA Rules have followed in the footsteps of other leading arbitral institutions (such as the ICC, Stockholm Chamber of Commerce and the International Centre for Dispute Resolution) by introducing an emergency arbitrator provision.

Under the new provisions, if a party requires urgent interim relief (such as an injunction) before the Tribunal is formed, that party may apply to the LCIA for the immediate appointment of a temporary sole arbitrator (an "emergency arbitrator"), who will conduct proceedings pending the formation of the Tribunal. If the application is granted, the LCIA will appoint an emergency arbitrator within three days of receiving the party's application.

An application for the appointment of an emergency arbitrator can only be made after the Request (in the case of an application by the claimant) or the Response (in the case of an application by the respondent) has been filed, and must be made on notice. The emergency arbitrator is not required to hold any hearing with the parties (whether in person, by telephone or otherwise) and may decide the claim for emergency relief on available documentation if deemed appropriate in the circumstances. The relief sought and/or obtained by a party from the emergency arbitrator is without prejudice to a party's right to apply to a state court or other legal authority for any interim measure, however, any such application made during emergency proceedings must be notified to the emergency arbitrator and the other parties.

The emergency arbitrator will decide the claim for emergency relief no later than 14 days after his or her appointment and his or her award relating to the emergency relief may then be reviewed by the subsequently-constituted Tribunal, which may confirm, vary, discharge or revoke it.

This new rule will not apply to arbitration agreements signed before 1 October 2014 unless the parties have expressly agreed that it will apply. Parties entering into arbitration agreements after 1 October 2014 may agree that the emergency arbitrator provisions do not apply. For example, where the courts at the seat of the arbitration have powers to grant urgent relief, including on an ex parte basis, before the formation of the Tribunal (such as in England) the parties may consider that it is more efficient and cost effective to rely on the Courts rather than the emergency arbitrator provisions.

Ethical guidelines and conduct of legal representatives

A unique feature of the new LCIA Rules is the inclusion of ethical guidelines for parties' legal representatives in the Annex to the LCIA Rules. These guidelines apply to all arbitrations under the new rules and the parties are obliged to ensure that their representatives agreed to comply with them.

Due to the international nature of arbitration, Tribunal's often have lawyers from different jurisdictions appearing before them in a case. The guidelines will help to facilitate the application of a consistent set of ethical obligations to counsel from different jurisdictions, who may be subject to different professional duties. For many lawyers, the professional duties they have in the jurisdiction where they are admitted will be stricter than those set out in the ethical guidelines and where that is the case, the guidelines will not relieve the lawyer from his or her professional duties. However, the guidelines will provide the basic standard which all counsel must observe.

The guidelines prohibit the following conduct by legal counsel:

- engaging in activities intended to obstruct the arbitration, or jeopardise the finality of the award, including repeated unfounded challenges to an arbitrator's appointment or to the Tribunal's jurisdiction;
- knowingly making false statements, or procure, assist the preparation of, or rely on, false evidence;
- knowingly concealing or assisting in the concealment of any document ordered to be produced by the Tribunal; or
- making, or attempting to make, undisclosed unilateral contact with Tribunal members.

If a party's legal representative breaches these guidelines, the other party – or the Tribunal, on its own initiative – may make a complaint. If the complaint is upheld, the Tribunal has power to sanction the offending legal representative by:

- issuing a written reprimand;
- issuing a written caution as to the legal representative's conduct in the arbitration; or
- taking any other measure necessary to satisfy the tribunal's general duties to act fairly and impartially as between the parties and adopt procedures to avoid unnecessary delay or expense.

Conclusion
The changes to the new Rules maintain the flexibility that makes arbitration popular with African parties and investors, while seeking to improve overall efficiency. They are a very positive development for arbitration and will be welcomed by many arbitration users. In light of the recent changes, we expect the LCIA Rules will continue to be a popular choice for resolving disputes in African related projects and transactions.

Hogan Lovells' experience
Hogan Lovells has acted, and continues to act, in numerous LCIA arbitrations for different clients from a range of legal backgrounds. Our experience includes:

- Acting for the Nigerian affiliate of a European oil and gas major in two parallel LCIA arbitrations concerning the sale of a participating interest in Oil Mining leases in Deep Offshore Nigeria and the provision of interim services to producing oilfields during the handover period.
- Acting for two international banks in three complex multi-party arbitrations under the LCIA Rules and ICC Rules relating to secured commodities transactions in East Africa.
- Acting for a listed international brewer against another large multi-national in four arbitrations under the LCIA Rules and ICC Rules, and related injunction proceedings in the English Courts, concerning a joint venture dispute relating to the beer markets in Tanzania and Kenya.

If you have any questions or would like further information, please contact Nathan Searle (London) or Rashida Abdulai (London). The authors would like to thank Julian Harding-Richardson for his assistance with this article.

Live webinar
Hogan Lovells will be delivering a 60-minute webinar on the LCIA in Africa and its new Rules in October 2014. Please contact Fiona Ellis at fiona.ellis@hoganlovells.com if you would like to register your interest in attending the webinar and receive further details.

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Fundraising

With abundant natural resources, GDP growth expected to rise again from 4.7% in 2013 to 5.4% in 2014, and over 300 million people now having discretionary spending power, sub-Saharan Africa should be primed for a flood of private equity (PE) investment. The reality, though, is that PE investment remains at modest levels and the capital raised by African-focused funds is low, especially when compared with the BRIC countries. Raising money for African-focused funds remains challenging and here are some of the reasons why.

DFIs (development finance institutions) remain significant investors into African-focused private equity funds. Having a marquee DFI as a key investor can significantly help raise additional funds, enabling funds to reach their proposed targets with the DFI being a sign of approval or quality. But this can come at a cost, with tighter controls and restrictions around what the fund can and cannot do, as well as additional reporting requirements (such as ensuring compliance with the DFI's ESG principles).

It is perhaps the lack of alternative investment sources that forces African focused funds down the DFI route. While South Africa, Namibia and Botswana have changed pension legislation to allow pension funds to increase their allocation to private equity, they remain the exception rather than the rule across the continent. Certain institutional investors will remain sceptical about investing into a country or continent if the local investors are not prepared to also invest into funds dedicated to the country or region.

Also, Africa is given a bad image by the press. It is rare to see good news stories, such as the growing political stability. Instead, the press focus on civil war, famine and humanitarian crises, not to mention terrorist activity. For those investors that have travelled to Africa, the bad news stories will probably be in marked contrast to their first-hand experiences. However, for those that do not travel, the stories only add to their risk assessment of investing in an African-focused fund.

Moreover, while sub-Saharan Africa is huge, there is no consistent legal system or language, not to mention significant political differences and lack of infrastructure. In addition to this diversity, due diligence providers are not generally considered to be satisfactory, so global firms are brought in on transactions to satisfy international investor requirements. All this adds to the cost of doing deals, which makes the level of return less certain.

After making a commitment to a fund, investors want to see their capital deployed. However, there is very limited venture or seed capital investment in sub-Saharan Africa, which typically provides a steady pipeline of small to mid-market deals. Local businessmen typically have had little exposure to private equity, so do not seek it out when they exit or look to raise additional capital.

Conversely, there are numerous private equity firms operating at the high end of the PE market in Africa – in part because they can absorb the costs associated with doing deals in the region. However, large deals are very infrequent and very competitive, which could lead to some funds overpaying for assets.

The lack of traditional institutional investors (whether African or international) has encouraged African fund managers to seek alternative sources of finance. Family offices, high-net-worth individuals and sovereign wealth funds now form part of the pool of investors these fund managers often turn to for commitments. African PE does not always fit the standard "2 and 20" (2% management fee and 20% carried interest) model or the 10-year fund life, and these alternative investors can typically take a longer view, which institutional investors are not prepared to take.

Private equity in Africa is only in its infancy. African-focused fund managers have needed to be flexible and resourceful, coming up with alternative sources of funds and alternative products to meet challenges of raising money and doing deals in Africa. Whether or not these products will survive, only time will tell, but where there are opportunities institutional investors will always follow.

This article was first published in Africa AM Asset Management.

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Investment protection for Asian Investors in Africa

Introduction

Over the past three decades, Africa has attracted a significant amount of Asian outbound investment. As States such as Japan and China race to engage with Africa, it is prudent for investors to consider whether protection of their investments under international law is available and how they may structure their investments to reduce the risks involved. However, investors may also be able to restructure existing investments to take advantage of investment treaties.

Investment protection

Investment treaties provide a way for investors to mitigate sovereign risk problems, including those arising from changing regulatory frameworks. Companies investing in Africa may be able to structure their investments, or restructure existing investments, to take advantage of the protections provided by over 400 bilateral investment treaties ("BITs") which African countries have entered into. For example, Egypt has entered into over 100 investment treaties, 14 of which are with Asian States. Further, Ethiopia has entered into more than 20 such treaties, including with China and Malaysia. Asian and African States have entered into close to 100 BITs.

Investment treaties typically provide investors with a means of obtaining compensation where their investments have been expropriated, or where a State has failed to accord an investment "fair and equitable treatment". Key to this latter standard is the requirement for a State to respect the legitimate expectations that an investor might have when making its investments. Such expectations might arise from explicit or implicit government assurances. Investors also have a legitimate expectation in a stable and predictable legal and administrative framework that meets certain minimum standards.

Investment treaties typically contain an offer by a State to arbitrate investment disputes with investors of the other contracting party to the investment treaty. By commencing arbitration, a foreign investor can accept this offer, without the need for further agreement. This is a powerful remedy, as it allows an investor to bring a claim before an international forum. This may be particularly important where there are concerns as to the functioning and independence of the domestic legal system where an investment is made.

Structuring and restructuring investments
The protections provided by the network of investment treaties vary from country to country, and from treaty to treaty. It may be that an investment is already covered by an investment treaty. However, if investments are not covered by such treaties, an investor will be left only with remedies before local courts, or perhaps a contractual arbitral mechanism, if this has been negotiated. Existing investments may be restructured to take advantage of investment treaties where investors are concerned about sovereign risk. If investors wait until a dispute has arisen, it will be too late to take advantage of the protections offered by such treaties. When making investments in countries where sovereign risk is an issue it is prudent to take into account the protections afforded by investment treaties.

Problems for Japanese investors
A Japanese company considering investing in Africa needs to be aware that, currently, Japan only has one BIT in place with an African State; the Japan-Egypt BIT. A Japan-Mozambique BIT was signed in September last year; however, it has not yet entered into force.

Depending on other issues such as tax, it may therefore be beneficial for a Japanese company to structure its investment through companies incorporated in a jurisdiction which has a BIT in place with the recipient State. For example, if a foreign investor based in Japan wanted to invest in Sierra Leone, it may be able to take advantage of the UK-Sierra Leone BIT by structuring its investment through the UK.

The scope of investment protection in the UK-Sierra Leone BIT is broad. It includes the core international standards such as "fair and equitable treatment" and prohibits expropriation, except where accompanied by prompt, adequate and effective compensation. Further, the coverage extends to investments made directly and indirectly in Sierra Leone and contains an offer by Sierra Leone to arbitrate disputes with UK investors.

Problems for Chinese investors
China has already entered into BITs with 14 African States. Assuming that there is a BIT in force with the recipient State, the challenge for foreign investors in China is to ensure that the protection provided by the relevant BIT is adequate. For example, a number of China's early BITs such as the China-Ghana BIT only provide for arbitration of disputes involving the amount of compensation for expropriation. In practice, this significantly limits the investment protection available.

As explained in relation to Japan above, foreign investors based in China may also be able to access a greater level of investment protection by structuring their investments through a third State.

Checklist
As Asian investment in Africa increases, an important consideration for the investors will be how to reduce sovereign risk. In order to help foreign investors navigate the route to investment protection, we have compiled a checklist which can be used to analyse both future and existing foreign investments. The checklist should be an integral part of your corporate due diligence process – no different than analysis of tax treatment – when a merger, acquisition, restructuring, or new venture involves foreign investment.

If you would like to receive a copy of the checklist or have any questions please contact Markus Burgstaller (London); Jonathan Leach (Singapore); Patric McGonigal (Tokyo); or Jonathan Stoel (Washington, DC).

Experience of Hogan Lovells
Hogan Lovells has advised a range of clients in relation to investment protection, in Africa and elsewhere. We have also acted, and continue to act, in numerous investment treaty arbitrations, both for investors and States.

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All eyes on transfer pricing

Africa's economy has shown high growth potential in the past decade. The continent's biggest trading partners in terms of value are either the European Union or, to a lesser degree, the US.

In the past decade, trade between Organisation for Economic Co-operation and Development (OECD) countries and Africa has doubled in nominal value. Even though trade between Africa and OECD member countries has grown and will continue to grow, the rapid pace at which trade between Africa and non-OECD countries grows, through the likes of China, Russia and Brazil, signals that the emerging economies might surpass the OECD member countries in the imminent future.

Accordingly, we have seen numerous European member companies trying to tap into the profit potential in Africa. In doing so there are a lot of uncertainties regarding the tax and legal regulations of entering and extracting the expected profits to be repatriated.

Asian countries such as India and China were often the targets for low-cost and low-risk manufacturing and service arrangements as part of tax efficient supply chain structures. However, the tax authorities both in China and India have become more aggressive and increasingly have been attacking the low margins left in the Asian jurisdictions. Africa offers an alternative location to large multinationals due to its low labour cost and less mature transfer pricing systems and regulations.

Transfer pricing has been a focus of revenue authorities worldwide and we expect this focus will also move into Africa given the increasing number of groups setting up operations in the Africa region. It has been said that transfer pricing is the lowest-hanging fruit, because it can be subjective and most companies do not have adequate documentation to back up their in-house policies.

Over the past two decades Africa has moved into the transfer pricing age and recently many African countries have adopted the OECD guidelines on which to base their transfer pricing regulations. Almost all European countries have transfer pricing regulations in place.

There are a number of opportunities in Africa for large multinationals to achieve a more cost efficient structure and reduce the risk of being attacked by more aggressive tax authorities like in India and China. However, most African jurisdictions are putting in place OECD-compliant transfer pricing regulations. Therefore, it is important to look at the transfer pricing arrangements when moving functions or risk to Africa. Documentation is key.

Transfer pricing regulations might not be as advanced and tax authorities do not have the same level of experience as in other European jurisdictions, but African tax authorities are trying to up their game. As in most cases where regulations are in an infant state, documentation and compliance become the major focus, so it is important to put in place, test and document transfer pricing policies in case of an inquiry.

Trends show a number of multinationals expanding into Africa, which offers a growing market and a low cost-base for operations. However, when planning efficient supply chain structures, groups should learn from previous mistakes. Many of the structures currently under fire are the result of companies taking advantage of transfer pricing regulations that are not as advanced.

It is important to plan new structures with the view that, eventually, most African transfer pricing regulations will align themselves with the rest of the world. It is also true that the arm's length principle will not change. Therefore, transactions should always be priced based on functionality, risk and substance to reduce risk of future disputes.

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Connecting Investors to Africa: The Stock Exchange of Mauritius (SEM)

The strategic position of the idyllic Indian Ocean island of Mauritius ideally suits its relentless drive to become the conduit of investment into Africa. The 'awakening giant' that is the African economy is increasingly open for business and is allowing the island to become the centre of the "golden triangle of growth" between the Middle East, Asia and Africa. Mauritius is rigorously pushing to market its appealing investment climate, and with this effort has been named the top business friendly destination in Africa, placed twentieth globally in the World Bank Doing Business Survey 2014, and just recently, thirty-ninth in the World Economic Forum's Global Competitiveness Index 2014-2015 rankings.

Important Developments & Overview

The Stock Exchange of Mauritius (SEM), set up in 1989, is currently one of the leading exchanges in Africa. Having started out with five listed companies and a market capitalisation of nearly USD 92 million, as of 29th August 2014, there are currently 42 companies listed on the Official Market, with a market capitalisation of nearly USD 7.5 billion. Additionally, there are currently 47 companies listed on the Development and Enterprise Market (DEM), the market designed for Small and Medium-sized Enterprises (SME's) and newly set-up companies, launched on 4th August 2006, with a market capitalisation of nearly USD1.6 billion.

Having had the goal of becoming an international jurisdiction for listing and raising capital, Mauritius has certainly been very proactive over the last couple of years to ensure that it is at the forefront of international stock exchange developments. In January 1997, it brought about a successful and efficient Central Depository System (CDS). In 2001, the SEM upgraded and implemented a modern electronic trading system (SEM's Automated Trading System (SEMATS)), with a "state-of-the-art" electronic trading system. Today, the SEM is connected live to a series of recognised vendors, among which Thompson Reuters, Interactive Data, Financial Times, Factset, Bloomberg and Inet Bridge provide greater visibility on a real-time basis. Index Data providers, namely Standard & Poors, Morgan Stanley, Dow Jones and FTSE have also recently included SEM in a number of indexes to track the evolution of key frontier emerging markets.

The SEM has been listed as a "full-fledged member of the World Federation of Exchanges" (WFE) since 2005, having established itself as an extremely well regulated and internationally respected exchange. Furthermore, in 2010 the SEM was also made an Approved Stock Exchange by the Cayman Islands Monetary Authority (CIMA) due to its membership status under the WFE. The progress the Exchange has made in recent years is highlighted by it being awarded with the "Most Innovative African Stock Exchange of the Year Award" for two consecutive years in 2011/12 and being designated by the United Kingdom's Her Majesty's Revenue and Customs (HMRC) as a "recognised Stock Exchange".

The Advantages of the SEM to Foreign Investors

With the lifting of exchange control in 1994, the stock market doors were opened to foreign investors, who today represent approximately 40% of daily trading on the SEM. Since then, the SEM has made an impressive effort to ensure that the Mauritian exchange is as attractive for foreign investment as possible. Its array of unique, highly competitive, and value-adding benefits and features, as detailed hereunder, sets Mauritius apart and ahead, adding to its already established, growing and vibrant International Financial Centre:

- Changes made to the SEM's Listing Rules with the aim of attracting the listing of Global and Specialised Funds;
- To focus on the thriving global business company platform, a new chapter was added to the SEM's Listing Rules, in 2011 to cater specially for global business companies, and other specialist companies, incorporated in Mauritius and investing into Africa and India;
- Introduction to the Listing Rules, in April 2012, to cater for Depositary Receipts and Mineral Companies on the Official Market, as well as a dedicated framework focusing on the requirements of Junior Mineral Companies and Exploration Companies on the DEM
- With its multi-currency trading and listing platform, it is the only exchange in Africa to allow a company/ fund/ any other financial product to choose to list in USD, GBP, ZAR, MUR, EUR. Companies are able to raise capital in any of these currencies, trade

products in any of these currencies, and settle the transaction in any of these currencies;

- The SEM is also attractive because of its framework for depositary receipts focused on Africa. This is advantageous as it allows for an easier process in the buying of shares in foreign countries, as the shares of the company do not have to leave the home state;
- Dual-listing is fast becoming a trend, with the advantage of shares being able to be traded on two exchanges, and with Mauritius being an ideal jurisdiction for primary listing.

Mauritius offers a wide array of incentives, protections and opportunities for foreign investors through a range of tax friendly incentives and policies, including free repatriation of revenue on sale of shares, no withholding tax on dividends, and no tax on capital gains.

Listing applications are straightforward due to its thin regulatory requirements and are able to be processed quickly within an efficient timeframe. An attractive benefit lies in Mauritius' substantial and growing number of Double Taxation Avoidance Agreements (DTAAs) with other African Nations. As of 2014 Mauritius holds thirty-eight treaties with a further nine awaiting ratification and five awaiting signature. A further fifteen treaties are currently being negotiated with other countries within and outside Africa. Mauritius also holds numerous Investment Promotion and Protection Agreements (IPPAs) with other African countries. Together, these arrangements offer a real competitive edge for investors with a strong focus on Africa.

In addition to these advantages of the SEM, Mauritius itself as a country offers enormous benefits for foreign investors – low income and corporate taxes of 15%; a growing and vibrant offshore and global business sector; preferential market access through regional trading blocs such as the African Regional Communities (SADC, COMESA), the Indian Ocean Commission (IOC) with countries including the Union of Comoros, France/ Reunion Island, Madagascar, and to the European Union and the USA through the Africa Growth and Opportunity Act (AGOA); political and socio-economic stability, high standard of living, good governance, and a well-developed infrastructural network; an educated workforce and sophisticated service industries; a hybrid legal system, combining both civil and common law practice, with the highest court of appeal being the Privy Council of the House of Lords; an encouraging 'work and live' environment for foreigners with regard to occupation and residence permits; and a favourable timezone, well-positioned between Africa and Asia.

Concluding Remarks

According to the SEM's aims, the listings on the exchange are expected to overwhelmingly consist of international funds, international issuers, specialised debt instruments, Africa-based ventures, African-focused exchange-traded funds and other structured products. Coupled with these, the SEM is very focused on supporting global business companies, in particular companies holding category 1 licence , to raise capital to fund their investments into Africa.

In view of the foregoing and having regards to the investment tailored legislation, treaties and rules Mauritius has developed, the country is well set to take a leadership position for capital raising and investment in the African continent.

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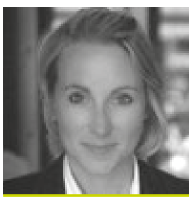

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Unprecedented consequences of the protracted mining strike

In the last week of June, the South African mining industry ended an unprecedented five-month strike that has had crippling consequences. The compromise achieved between organised labour and their employers demonstrates neither a capitulation nor a spectacular victory by either party. Some say that it will take striking workers years to recoup their loss of income sustained during the strike. It is now up to the employees, their extended families and the employers to undertake the painstaking task of picking out the shrapnel from their wounds.

It is not too difficult to predict that the strike will eventually take its toll on the macro economy. We have already seen the dramatic effect on the micro economy of surrounding settlements and on the economic heart of the North West Province, Rustenburg. The loss of approximately R24bn in revenue by platinum producers over the past five months represents just about 6% of the country's gross domestic product (GDP) and, singlehandedly, could have wiped out this year's annual growth in the economy so desperately needed to meet the growing demands of a better life for all.

Nor is it too difficult to predict that platinum producers will have to rethink their business models if they are to meet the demands of shareholders and returns on investment in a depressed world economy. Dare I say it: we will most likely soon hear the rumblings of intentions to close less profitable shafts with the inevitable depressing consequence of job losses.

However, the mining industry is unlike any other. It is highly regulated and the decision to scale down operations may not be taken only in the interest of profit. In this industry, the Department of Mineral Resources (DMR) takes a keen statutory and regulatory interest in the comings and goings of mining companies.

Section 52 of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA) provides that where a mining right holder intends to downscale its operations by 10%, or to the extent that 500 employees would lose their jobs, the mining company is obliged to inform the board of the DMR before any such decision is taken. Upon such notification, the DMR may appoint a judicial manager to make recommendations as to measures to prevent downscaling and job losses. This reporting obligation stands separate and distinct from the obligation to consult recognised trade unions under the Labour Relations Act (66 of 1995) (LRA) to avoid and minimise job losses.

Over and above this, mining companies are obliged, under the MPRDA, to continue mining their mineral resources under their existing and finite mining rights. Each mining right holder is required to present to the DMR for approval a mine works programme (MWP), which dictates and stipulates the mining pace.

Together with this, mining right holders must also adopt and implement a social and labour plan (SLP) intended to uplift the local mine community by providing education, employment and economic upliftment.

Any mining right awarded by the DMR is subject to its terms and conditions. Both the MWP and the SLP are conditions of the mining right and, as such, their terms must be complied with for the duration of the mining right. Where mining operations are to be scaled down, or temporarily suspended, mining companies are obliged to apply to the DMR for the amendment to these conditions. Failure to do so will not only invoke the wrath of local communities unable to derive a benefit from scaled down or suspended mining operations but will also attract the attention of the DMR. Within this context, mining companies will also be alive to the increased strength and solidarity of the trade unions (as we have come to learn over the past year) who may do everything in their power to prevent job losses, including knocking on the door of the local DMR office for help.

Section 47 of the MPRDA affords the Minister of Mineral Resources the power to revoke a mining right where the holder fails to meet any of its conditions. The obligation to continue mining operations and not to "stockpile" mining reserves is central to the new mineral dispensation of custodianship ushered in by the MPRDA. To employ a rugby metaphor, mining companies must "use-it-or-lose-it".

It remains to be seen what attitude the new Minister of Mineral Resources and his administration will adopt in the aftermath of the strike. Will the Minister adopt a sympathetic stance to mining companies that mothball shafts in an effort to regain profitability or will he insist on maximum extraction, under pain of threat to revoke mining rights and award them to other eager candidates? It is unclear how the custodianship of the nation's minerals will be exercised in such unprecedented circumstances.

However, smaller mining companies may even consider the provisions of Chapter 6 of the new Companies Act (71 of 2008), which provides for a method of preserving ailing companies. The so-called business rescue provisions of this chapter allow companies that are in financial distress to invoke business rescue proceedings. Financial distress includes where a company will be unable to meet its financial obligations as and when they fall due during the following six months.

Under business rescue, the ailing company is given breathing space to adopt a business rescue plan in an effort to avoid liquidation and to preserve the business. Business rescue practitioners appointed in these circumstances have an obligation to develop and implement a business rescue plan.

Although payment obligations to creditors are suspended during these proceedings, the statutory and regulatory conditions attached to mining rights are not. It is very important that business rescue practitioners properly and timeously engage the local communities and the DMR in the development of business rescue plans; failure to engage the DMR appropriately and to obtain the amendment of mining right conditions timeously, may derail this process.

South Africa, unlike territories in the northern hemisphere, does not generally experience particularly harsh winters. Although the fields may be covered in frost in the early morning hours, the African sun soon thaws the land into mild sunny days. However, for the most part, winter is a dry white season, parched and dusty.

I think the mining industry has entered such a dry white season, one to be endured before we may smell and sense the invigorating aromas and crisp morning air of spring, which it is to be hoped will soon come.

This article was first published in *Without Prejudice*

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International franchising: Important considerations

With increased economic globalisation, as well as economic shrinkage in domestic economies, many businesses, large and small, have been seeking new (and hopefully greener) pastures, beyond the borders of their home countries. For businesses, particularly in the retail, hospitality and services sectors, seeking to expand, franchising is an attractive option and offers several benefits over the standard direct investment models of expansion. A franchisor entering a new market will often face certain new challenges in addition to those generally faced when franchising a business format domestically, such as:

- "Indigenisation" or other laws restricting foreign ownership of local businesses, may present an absolute block, or present a considerable administrative burden, to the establishment of an owned subsidiary in many jurisdictions.
- The capital outlay requires establishing a complete business infrastructure in a distant location. This will be carried, at least partially, by the local franchisee or franchisees.
- The unfamiliar local circumstances, including the legal system, business culture and economic environment, which will be, literally and figuratively "foreign" and different to those in which the brand has previously operated and enjoyed success.

Franchisors looking to expand their businesses into new markets need to be alive to these challenges. In order to cater for them, different types of arrangements have been used in international franchising. These typically take one of three forms:

- Area development agreements, in which the franchisor grants the franchisee the right to set up multiple franchise outlets, but not the right to sub-license to other franchisees.
- Master franchising agreements, in which the franchisor grants to a sub-franchisor or master franchisee the right to sub-license to franchisees within a given territory.
- Joint ventures, in which the franchisor enters into a joint venture with a firm based in the country in which the franchisor wishes to expand.

Each of these forms of relationships raises various issues that franchisors and their advisors need to take into account.

In area development agreements, the franchisee will be given the right to open and operate multiple franchise outlets under license directly from the franchisor. Important issues to consider would be whether the franchisee will be required to meet target numbers, either of turnover generated or of outlets opened, and what the consequences will be if these are not achieved. They could range from cancellation of the agreement to a loss of the exclusive right, the franchisor then becoming entitled to appoint other franchisees in the territory.

In a master franchising agreement, the issues to consider include:

- The fees payable by the master franchisee to the franchisor. These could include an upfront license fee in respect of the right granted to the master franchisee, as well as a share of the revenue realised by the master franchisee from each unit franchisee that it signs up. Alternatively, the unit franchisees may pay their royalties directly to the master franchisor, which will pay the master franchisee a commission or service fee for each unit franchise it signs up.
- The respective responsibilities of the franchisor and master franchisee. These would cover issues such as unit franchisee recruitment, site selection, training and ongoing support for franchisees, as well as marketing of the brand in the territory. Part of the attraction of a master franchise arrangement for the franchisor is that its capital outlay is reduced to the extent that these obligations are taken on by the master franchisee. It is therefore in the franchisor's interests to ensure that the master franchisee takes responsibility for as much of the local marketing and administration as possible, but it is also important that the franchisor maintains control over the manner in which its brand, know-how and trademarks are exploited in the territory. The master franchisor may, in this regard, retain a right of approval in respect of each unit franchisee that the master franchisee might wish to appoint and insist on regular reports and audits of the master franchisee's business.
- Whether the master franchisee is required to achieve target numbers of unit franchises opened, sales, etc.
- Whether the master franchise will be entitled to operate individual outlets in its own name in the territory and what the fees that it will have to pay.

- The period for which the agreement will endure and whether either party will have a right of renewal.
- The arrangements on termination; for example, will the franchisor be obliged to purchase the master franchisee's business on termination of the agreement?

In a joint venture agreement, some of the questions to be addressed are:

- What will the precise nature of the relationship be; will the parties form a joint venture company, carry on business as a partnership, or will the joint venture take some other form?
- What assets, tangible or intangible, will each party contribute, who will own them while the joint venture lasts, and how will they be distributed on dissolution?
- What rights and obligations does each party have in respect of the intellectual property and confidential information belonging to the joint venture, both during the period that it endures and thereafter?
- What responsibilities will each partner have in respect of management and control?
- How will deadlocks and disputes be determined?

In structuring an international franchise, it is important for the parties to recognise the particular changes posed by the multi-national nature of the relationship. It is important for both parties that the rights and obligations assumed by each of them are valid and enforceable by each of them and in the jurisdictions where each of them carries on business. The franchisor will have developed its concept in its local jurisdiction, and will have taken the necessary precautions to protect its brand and intellectual property there. However, this will not necessarily mean that it will be protected in other territories, or that the obligations that it will require its franchisees to take in those territories will be enforceable. International legal advice in regard to the law of each territory into which the franchisor wishes to expand is essential, for both parties, to ensure that they have properly protected their investments.

This article was first published in *Without Prejudice*

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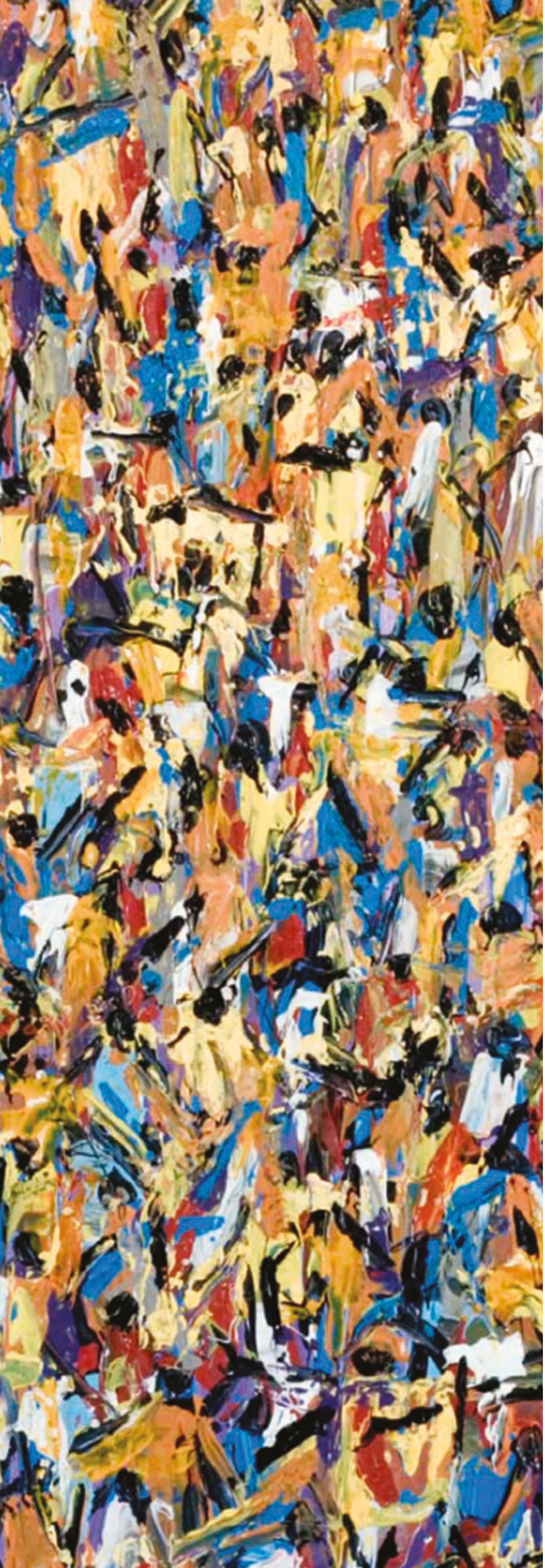

'Lost Kingdoms of Africa' with Dr Gus Casely-Hayford

Hogan Lovells is hosting, at their London office, a special presentation in the evening on 6 October 2014 from Dr Gus Casely-Hayford on the 'Lost Kingdom of Mali'; a region of unimaginable importance hosting the medieval city of Timbuktu.

Dr Gus Casely-Hayford is well known for his major BBC TV series 'The Lost Kingdoms of Africa'. Using new archaeological and anthropological research he explores the precolonial history of some of Africa's most important kingdoms. Presented in a colourful and informed way, Gus helps the audience to understand that the African continent is far more diverse, creative and culturally rich than is popularly assumed.

Gus is an art historian who writes widely on African culture. He is currently a Research Associate at the School of Oriental and African Studies and Kings College, University of London.

Please note that this evening event is strictly by invitation only. If you would be interested to receive further details, please contact Alison Unsted.

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Hogan Lovells recent work in Africa

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

Hogan Lovells Advises Private Equity Sponsor LeapFrog Investments on Formation of Social Impact Investment Fund
Hogan Lovells recently advised LeapFrog Investments, the leader in profit-with-purpose investing, in connection with the formation of LeapFrog Financial Inclusion Fund II, LP, LeapFrog's second investment fund. The fund closed at US$400 million, reaching its fund raising target. LeapFrog, which seeks to maximize both financial and social returns, intends to invest the fund in high-growth companies that offer empowering financial tools, such as insurance, savings, and investment products, to emerging consumers in Africa and Asia.

Hogan Lovells advises PPC Limited
Hogan Lovells (South Africa) is currently acting as lead legal counsel to PPC Limited on the following transactions:

- Advising PPC Limited in its acquisition of 49% shares in an Algerian cement company, which holds various mining rights in Algeria. This acquisition will ultimately result in PPC Limited developing a cement plant in Algeria, with a project value in excess of US$200 million;
- Advising PPC Limited in its acquisition of 69% shares in a DRC company. This acquisition will result in PPC Limited developing a cement plant in the DRC, with a project value of approximately US$300 million. Hogan Lovells (South Africa) is lead counsel on both the Equity transaction (Commercial department) and the Funding transaction (Banking and Finance department). IFC and PTA bank are the senior lenders to the transaction;
- Advising PPC Limited in its acquisition of shares in a Congo Brazzaville company. This acquisition will result in PPC Limited developing a cement plant in Congo Brazzaville, with a project value of approximately US$200 million.

Hogan Lovells (South Africa) advises Safika Holdings on disposal of Safika Cement

Hogan Lovells (South Africa) recently advised Safika Holdings (Pty) Limited in the disposal of a controlling stake in Safika Cement to PPC Limited for approximately R350 million.

Hogan Lovells (South Africa) advises the Blackspear Group in the acquisition of Mooiplaats Mining Limited and Langcarel (Pty) Limited

Hogan Lovells (South Africa) is acting as lead attorneys for the Blackspear Group in its acquisition of the entire issued share capital of Mooiplaats Mining Limited and its subsidiary, Langcarel (Pty) Limited, from Coal of Africa Limited. The value of the acquisition is approximately R250 million.

Hogan Lovells advises SABMiller on Disposal of US$1 Billion Interest in Tsogo Sun Holdings Limited

Hogan Lovells recently advised SABMiller plc on a fully marketed secondary placing to institutional investors of approximately 305 million ordinary shares in Tsogo Sun Holdings Limited as part of the disposal by SABMiller of its 39.6% shareholding in the JSE-listed gaming, hotel and entertainment group. The disposal is valued at ZAR11.7 billion (approximately US$1.09 billion).

Hogan Lovells advises on The Republic of Senegal’s inaugural sukuk issuance

Hogan Lovells recently advised the arrangers in relation to the Republic of Senegal’s inaugural CFA100 billion (approximately US$200 million) sukuk issuance, the first major sukuk issuance by a sovereign in Africa. The first of its kind deal intends to enable Senegal to attract new funding using Shari’a compliant principles.

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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

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