Hogan Lovells

Africa Newsletter

June 2016

Africa Newsletter

We start this newsletter with two articles concerning Francophone Africa. The first one discusses the effect of three recent decisions published by OHADA's Supreme court. The second goes behind the scenes of the West African Rail Loop Project that won our Paris Team the Transport and Infrastructure Team of the Year Award at the African Legal Awards 2015.

We then move down to South Africa for a look firstly at some of the main points of the Draft Reviewed Mining Charter. The focus then shifts in the next article to an examination by two of our Johannesburg colleagues of the regeneration of African inner cities.

Reliable power is essential for economic development and we continue with an article from our Washington office about the Obama administration's "Power Africa" initiative.

Our focus then moves from discussions and debate to two articles that highlight some of our recent African events. The first looks at two of our recent Africa Practice initiatives that took place in our Dubai and Paris offices. The second focuses on Nigeria and a trip around our sponsorship of the Economist's Nigeria Summit 2016.

We conclude this edition with a look at Hogan Lovells through the eyes of a Nigerian lawyer who recently spent three months on secondment with us.

You can also see some of our recent work in Africa - and don't forget to take a look at our new Africa blog, *The A Perspective*.

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

The Hogan Lovells Africa Team

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Arbitration proceedings again upheld by OHADA's Supreme Court

The CCJA publishes new decisions

The Common Court of Justice and Arbitration (CCJA), the Supreme Court of the OHADA and its 17 African State members, has recently published three decisions relating to arbitral proceedings. The publication of these decisions, coming shortly after a previous raft of publications, will be welcomed as another positive step towards the transparency of the OHADA Courts. Furthermore, the decisions themselves indicate the CCJA's on-going support for the arbitral process, helping to encourage the use of international arbitration as a means of dispute resolution within the OHADA region.

In one particular decision, the CCJA (which also serves as an arbitral institution in its own right) upheld an arbitral award, firstly, despite the fact that the tribunal awarded part of the damages calculated on a basis that neither party had argued. On this issue, the arbitrators were found to have acted within their discretion on the issue of damages, and not deemed to have exceeded their powers. Secondly, the CCJA also found that the award could stand even though the tribunal rendered the award after the deadline set by the arbitral institution. Such a procedural failing was not deemed sufficient to render the arbitral process invalid.

The decision confirms that the requirements for an annulment within the OHADA region are, like in most arbitration friendly jurisdictions, set at a high threshold. This shows the support for arbitration and annulment proceedings in the OHADA region, at a time when arbitral proceedings around the world are increasing, thus supporting the competitiveness of the CCJA as an arbitral institution.

The arbitral process is upheld

The case involved a claim brought in arbitration by International Business Corporation S.A., a Cameroonian entity, for damages against the Cameroonian National Oil Company for breaches of company law in relation to, amongst other things, abuse of the minority and the validity of certain board decisions. The tribunal, composed of well-respected lawyers, two from France and one from Cameroon, found in favour of the Respondent and awarded it damages. The Claimant applied to the CCJA to annul the award.

The CCJA accepted to hear the annulment request. This was despite a novel argument by the Respondent which claimed that the request for annulment was inadmissible as the Claimant had waived its right make such a request. The ability to waive the right to request the annulment of an arbitral award is something that is only possible in a small handful of jurisdictions, including, amongst others, France, Belgium and Sweden. Any such waiver would render a request for annulment inadmissible under Article 29.2 of the CCJA Arbitration Rules which states that a "challenge to the validity of an award is only admissible if, in the arbitration agreement, the parties have not waived [that right]".

The Respondent alleged that the Claimant's Company Statute expressly waived the right to request an annulment by using the term "as a last resort" in reference to initiating arbitral proceedings. It argued that the last resort was the arbitration itself and therefore, once the tribunal had issued its award, the Claimant no longer had recourse to any other procedure.

However, the CCJA held that the request for annulment was admissible. Use of the phrase "as a last resort" alone did not equate to an express waiver of the right to apply for an annulment. The CCJA did not venture an opinion on what actions or wording it would consider to constitute an express waiver.

With the request admissible, the CCJA went on to decide on the Claimant's various grounds for annulment. Of the grounds decided, the central issue argued was whether the arbitrators had exceeded their powers. The Claimant made two main submissions on this ground.

The first was that the tribunal had published the award later than 90 days following the end of the exchanges between the parties, which is the time limit prescribed by Article 15.4 of the CCJA rules. The CCJA, however, held that the timetable under the CCJA rules was merely a provisional indication of when the tribunal ought to publish their decision and was liable to change. A change to the calendar made in accordance with Article 15.4 of the CCJA rules was not therefore an example of the arbitrators exceeding their powers.

The second was that, as part of the breakdown of the calculation of damages by the tribunal, it had apportioned a certain amount of the damages awarded to the Respondent based on grounds of mistaken prejudice created against the Respondent due to the arbitration. However, neither party had submitted this as a ground on which they were seeking damages. The CCJA held that this was not sufficient evidence that the arbitrators had exceeded their powers under Article 30.6 of the CCJA Arbitration Rules. As a result, that line of argument was rejected.

Clarity breeds confidence

At a time when arbitration in Africa is becoming increasingly widespread, the publication of this decision is significant on two grounds.

First, it represents the general support for arbitration under the OHADA regime. The CCJA demonstrated that it respected the decision of the arbitrators. Although criticisms could legitimately be made, in arbitration friendly jurisdictions, issues such as procedural deadlines tend not to be found to endanger the validity of the award itself, unless there are extreme examples of gross abuse. The CCJA has followed this line, tending towards freeing the arbitrators from its close supervision. This is a strong indication of support for the arbitral procedure, suggesting that the court will not intervene or overturn arbitral decisions lightly. As such, it will be welcomed by arbitral practitioners, and help give encouragement to those considering selecting arbitration as their manner of dispute resolution.

Secondly, this is the second time in a couple of months that the CCJA has published decisions that have been rendered recently. This is certainly an encouraging sign, as the Court has in the past been criticised for a lack of transparency, as it has not always published its decisions regularly and consistently. If this continues, then the confidence of investors, which will have greater visibility and certainty regarding their investments, can only be increased.

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The West-African Rail Loop Project: Behind the scenes

The Infrastructure, Energy, Resources and Project team of the Paris Office of Hogan Lovells, led by Bruno Cantier, has strengthened its position in Africa, in advising, with the support of Olivier Fille-Lambie on banking law aspects and Xavier Doumen on corporate law aspects, the Republics of Benin and Niger in the negotiation of the €2,500M long demand-based concession agreements with the Bollore Group relating to the Cotonou –Niamey section of the larger West African Rail Loop connecting Abidjan to Cotonou via the Sahel countries.

Judging by the figures relating to the West-African Rail Loop, this project is without contest an exceptional one: about 3,000 kilometers of railway line, crossing four countries (Benin, Niger, Burkina Faso and Ivory Coast), which has been expected for more than 80 years by the inhabitants and governments of this region, and which should over the medium to long term transport an estimated freight traffic of more than four million tons/year and thousands of passengers.

Beyond the figures, the West-African Rail Loop also reveals to be an outstanding project if we consider its sophisticated legal and financial structuration and the nature of the financial resources the governments of Benin and Niger have mobilized to negotiate the terms of the concession agreements entered into with the Bolloré Group.

Many issues were at stake during those multilateral negotiations, such as the gaps and discrepancies between the national laws, regulations and institutions of the countries involved in the project, the uncertainties relating to the financing of the project, as well as the risks associated with the creation of a monopoly which could have benefited to the Bolloré Group as single rail transport operator on this strategic axis in the West African region.

First, the governments of Niger and Benin, assisted by their legal counsels, negotiated and entered into a bilateral agreement to secure and harmonize the legal framework of the project, and settle the issues relating to governance and ownership of the railway infrastructure to come, as well as tax and customs aspects.

Second, the States sought to secure and strengthen the undertakings of the Bolloré Group regarding the technical and financial aspects of the future railway line. If Vincent Bolloré himself had publicly given his word to the Presidents of the Republics of Benin and Niger to finance and realize the Rail Loop, those undertakings had to be detailed into precise technical specifications, in accordance with the requirements of the UEMOA and UIC standards, and to be translated into standard financial agreements to secure the complete corporate financing of the project.

Moreover, given that the Bolloré Group already held strong positions in the transport of materials and goods by road as well as in the port sector in the sub-region, it would have been very sensitive to provide this group with a full right to operate rail transport services on this axis. To prevent such risks of abuse of a dominant position, the States particularly focused on imposing clear rules regarding the operation of the future railway infrastructure and services. In particular, they established a separation (based on the European practice) between the financing, construction and operation of the railway infrastructure on the one hand, and the operation of the railway transport services, on the other hand, in order to enable a gradual opening of transport services on the line to the competition of other railway companies. The States also obtained the establishment of regulatory mechanisms to monitor transport services tariffs and punish any abuse of dominant position regarding freight transport, through levels of exclusivity of varying intensity throughout the duration of the concession.

Finally, it is worth noting that the governments of Benin and Niger used funds allocated by the African Legal Support Facility (ALSF), which is an affiliate of the African Development Bank, to finance the services of their legal, financial and technical advisors. Since 2010, ALSF has been supporting African governments in relation with the negotiation of complex commercial transactions (PFI, contracts relating to the extraction of natural resources, disputes with trade creditors, etc.), in order to correct the asymmetry between the capacities of negotiation of African governments and international investors, and ultimately prevent the risks of litigation.

ust and October 2015, concession agreements, which comply with the international standards of project finance, have been signed between the Bolloré Group and the States of Benin and Niger to realize the Cotonou-Niamey section of the larger West-African Rail Loop. Those agreements provide for the operation of regular transport services of passengers, which shall respect specific performance objectives in terms of frequencies, schedules and quality, those public services being financed without public subsidies, through the expected revenues of freight transport services.

In 2015, Hogan Lovells has won the African Legal Awards as "Transportation and Infrastructure Team of the Year" for its role in advising the governments of Niger and Benin in relation with the West African Rail Loop project.

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Mining Charter 3 – The end of mine ownership as we know it

On Friday, 15 April 2016, the Minister of Mineral Resources, Mosebenzi Joseph Zwane, without fanfare and, seemingly without any of the usual engagement and consultation, published the Reviewed: Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Draft Reviewed Mining Charter).

The publication of the Draft Reviewed Mining Charter resulted in extensive and robust debate among all stakeholders, with the initial responses varying from support to outright criticism, both of the manner in which the Draft Reviewed Mining Charter was published and its content.

Minister Zwane has indicated his desire for robust debate and a possible extension of the 30-day period for commentary on the Draft Reviewed Mining Charter. There is an expectation, certainly from certain stakeholders in the industry, that this should be viewed positively and that changes can be made to the Draft Reviewed Mining Charter.

For those extremely robust investors, the Draft Reviewed Mining Charter, in its current format and with the current targets and requirements, could be regarded as providing key insights into Government's medium to long-term thinking, and can be used to plan accordingly.

Timing of the publication

Many commentators expressed surprise at the timing of the publication of the Draft Reviewed Mining Charter without prior engagement and consultation.

In retrospect, publication on 15 April 2016 makes sense, in light of the Policy Statement that accompanied Minister Zwane's Budget Speech on 19 April 2016.

When considering the Draft Reviewed Mining Charter, it therefore also seems appropriate to have regard to both the Policy Statement and Minister Zwane's Budget Speech.

The key message – Transformation

Minister Zwane's Policy Statement and Budget Speech focused, significantly, on transformation of the mining industry (or in his view, the lack thereof).

In our view, the Draft Reviewed Mining Charter is the clearest message yet that Government is not satisfied with the pace and extent of transformation of the mining industry. There will, of course, be extensive debate as to whether or not the mining industry has achieved the transformation objectives and targets contained in the Mining Charter, 2010, with the various stakeholders, holding different views.

Some of the key proposed amendments

Ownership and the transitional arrangements

While the ownership target is retained at 26%, there are a number of fundamental proposed amendments, namely:

- The target of 26% ownership is a minimum target.
- The minimum target of 26% ownership is per mining right, that is there can no longer be any "trade-offs" in group companies or among multiple holders of mining rights.
- The minimum target of 26% ownership must represent "meaningful economic participation", which will be a defined term. Most notably, the definition provides that some of the dividends should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders must engage the financing entities in order to structure the BEE financing in a manner where a percentage of the cash flow is used to service the funding of the structure, while the remaining amount is paid to the BEE partners.
- A minimum allocation is specified in relation to three key stakeholders, namely, (a) workers, (b) black entrepreneurs and (c) the relevant community. Each of these three key stakeholders must be allocated a minimum of 5% ownership. It is unfortunate that the term "black entrepreneurs" was used, without being defined. It would perhaps been more appropriate to make use of the term "black industrialists", which is more commonly understood.
- The community participation and the worker participation must be held in trusts.
- The community and workers' trust must include representation from the traditional authorities and trade unions respectively.
- A Special Purpose Vehicle (SPV) must be established to manage the 26% Black Economic Empowerment stake.
- Each empowerment transaction must register an SPV.
- There must be a BEE transaction for each mining right that has been granted, and one SPV for each empowerment transaction.
- The only off-setting that is permissible under the ownership element is against the value of beneficiation, as provided for in section 26 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), up to a maximum of 11%.

The transitional arrangements, which are contained under element 2 of the Draft Reviewed Mining Charter, that is under the ownership element, contains two provisions. Firstly, all existing mining right holders, that is holders of mining rights at the time of the coming into force and effect of the Draft Reviewed Mining Charter, are required to align historical BEE transactions, concluded prior to the coming into operation of the Amended Mining Charter 2010 with the Draft Reviewed Mining Charter. This means that empowerment transactions will need to be reviewed and brought into compliance with element 2 of the Draft Reviewed Mining Charter.

Secondly, the transitional arrangements address the situation where a BEE partner has exited or shares have been transferred to a non-BEE company. In these circumstances the mining right holder must within three years, from the date of publication (coming in force and effect) of the Draft Reviewed Mining Charter, review (and amend) its empowerment credentials consistent with the Draft Reviewed Mining Charter.

With a stroke of the pen, Minister Zwane does away with the "once empowered always empowered" argument. Essentially, even if the "once empowered always empowered" principle applies, it can only apply for a maximum of three years under the transitional arrangements.

Procurement, supplier and enterprise development

Targets on procurement, supplier and enterprise development, have been changed, substantially.

With regard to capital goods, a mining right holder is required to procure a minimum of 60% locally manufactured capital goods from BEE compliant manufacturing companies. 30% of the 60% must "preferably" be given to small business developments that are BEE compliant, and a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development.

With regard to consumables, a mining right holder must procure a minimum of 70% of locally manufactured consumables from BEE compliant manufacturing companies. A minimum of 30% of the 70% must be given to small business developments that are BEE compliant, and a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development.

With regard to services, a mining right holder is required to procure a minimum of 80% services from BEE compliant and locally based companies. A minimum of 40% of the 80% must be given to small business developments that are BEE compliant, and a minimum of 10% of the 40% must be reserved for BEE compliant enterprise development.

Mining right holders are required to utilise South African-based facilities for the analysis of 100% of each company's mineral samples across the mining value chain. Sample analysis may not be conducted using foreign based facilities without the prior written consent of the Minister.

Multinational suppliers of goods must annually contribute a minimum of 1% of annual turnover (not profit) generated from local mining companies towards socio-economic development of local communities, capacity building for BEE suppliers of goods, and services into a Social Development Trust Fund established by the Minister.

Employment equity

Significant targets are set in relation to employment equity. In relation to executive management (board), a minimum of 50% black people with exercisable voting rights and proportionately representative, 15% of which must be black females in line with the employment active population, is required. A minimum of 50% black people proportionally represented at the executive directors level as a percentage of all the executive directors, of which 25% must be black female in line with the employment active population, is also required.

With regard to senior management (EXCO), a minimum of 60% black employees in senior management as a proportionally representative percentage of all senior management, which 30% is black females in line with the employment active population, is required.

With regard to middle management level, a minimum of 75% of black employees in middle management as a proportionally representative percentage of all middle management of which 38% is black female employees in that category in line with the employment active population, is required.

With regard to junior management level, a minimum of 88% black employees in junior management has a proportionally representative percentage of all junior management of which 44% is black females in that category in line with the employment active population, is required.

With regard to employees with disabilities, 2% of black employees with disabilities as a percentage of all employees is required.

Core and critical skills are specifically identified, and mining right holders are required to ensure that a minimum of 40% black people are represented in the mining companies' core and critical skills. To achieve this, mining companies are required to identify and fast track existing polls for core and critical skills, proportionately to the workforce.

Human resource development

Extensive human resource development contribution targets are set, which will increase the "cost of doing business".

Mine community development

Mine communities have, again been identified as requiring special attention. A minimum of 1% of annual turnover (not profit) towards local community development and labour sending areas will be required. This is in addition to any amounts that are contributed as part of, for example, the programmes under the social and labour plan.

Housing and living conditions

Various requirements are set out in relation to housing and living conditions, with the emphasis on low occupancy rates, contribution towards home ownership options, and family accommodation.

Period for submission of comments

The Draft Reviewed Mining Charter has been published for public comment and a period of 30 days has been specified. While Minister Zwane may extend this period, stakeholders should not expect such an extension, but should actively engage on the Draft Reviewed Mining Charter.

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Regeneration of Africa inner cities

It is said that the shift from rural to urban population is the most significant phenomenon since independence in most African countries. Lagos is reported to have recently joined the ranks of the world's megacities, which is Africa's second after Cairo, while Kinshasa is also rapidly approaching mega city status.

Projections indicate that by 2030 Africa's population will exceed that of Europe, South and North America combined. The actual realisation of such population distributions will depend on the rapidity of Africa's infrastructure expansion to unlock sparsely populated areas, and its ability to create livelihood opportunities in these locales. Southern Africa, the most urbanised region in sub Saharan Africa, is projected to reach an overall region wide urban majority around the end of the current decade. Africa's urban transition is proceeding rapidly with the accumulated relative growth rate of its cities now among the highest in the world.

Between now and 2050, it is projected that the number of Africa's urban dwellers is to increase from 400 million to 1.26 billion. Africa's urbanisation level is projected to increase by 50 per cent around 2035 and may increase further to almost 58 per cent by 2050. More specifically it is projected that by 2025 Africa's ten largest cities will be classified as three megacities, those cities being Lagos, Cairo and Kinshasa. Dar es Salaam, Khartoum and Abidjan are likely to reach megacity status within a generation from now if current growth trends persist.

It is well published that African cities are burdened by high infrastructure deficits and shortages in access to technologies and services. To overcome the deficit the economies of scale in production, large markets for labour and goods, and the ease of information flows in urban environments may enhance productivity and innovation. Moreover, the density and diversity of cities can encourage the emergence of progressive values and institutions that promote social cohesion. Urbanisation could be a major driver of this.

Urbanisation is said to have progressed unevenly within the African countries. While Lesotho has recorded a decline in urbanisation levels since 2001, other capital cities, such as Maputo and Luanda, have been experiencing construction booms linked to foreign investment and increased trade. Key tourist centres such as Cape Town, with distinctive urban niches in the world economy, have experienced growing prosperity. As with Cape Town, urbanisation in African cities is encouraging a growth within Africa's construction industries.

Property trends in South Africa's central business districts are being driven by rapidly changing urban lifestyles. City dwellers are generally spending less of their disposable income on their gardens, for example, and more on lifestyle oriented activities such as art and food markets, gym memberships, health services and eating out.

Urbanisation in Johannesburg has taken an innovative turn, which is seeing young professionals living and working in the Johannesburg city centre. It is said that a new breed of developers in Johannesburg are ushering in a new residential dimension that is turning past housing trends, of having a garden and a white picket fence, and transforming once shunned locations into trendy properties. Security considerations and the advent of disposable living are fuelling the new trends, which are attracting property investors and young home buyers into the inner city. Mixed use residential units located in the Johannesburg city centre no larger than 36 square metres are selling at a rapid rate.

Mixed use precincts such as Maboneng in the city centre, which have loft apartments on top and restaurants, food and art markets, retail stores, art galleries, gyms and tree lined walkways below are proving popular. The private sector has taken advantage of the current craze, which has given rise to investment opportunities in the inner city. Property developers taking advantage of this have had the foresight to purchase derelict buildings and refurbish them into stylish one and two bedroom loft apartments. Such developers have undoubtedly been instrumental in reshaping the inner city. One only has to look at the Maboneng Precinct where numerous buildings have been refurbished and transformed into trendy apartments such as Main Street Life, Revolution House, Artisan Lofts, Urban Fox and Rocket Factory. This has brought a significant proportion of younger and more educated people into the inner city.

The refurbishment of buildings into trendy apartments in the Johannesburg inner city, more often than not, means that the developer would need to open a sectional title register and have the sectional plans registered over existing space. From a legal perspective this would require that a conveyancer attending to the opening of the sectional title register to, simultaneously with the opening, ensure that the Registrar of Deeds issues the developer a certificate of registered sectional title in respect of each unit that have not been sold

The law in South Africa that governs Maboneng Precinct developments set standard rules governing sectional title developments. However, the law allows a developer to add or change some of the standard rules. The rules governing Maboneng Precinct developments have been drafted and settled from a great deal of legal input in order to cater for the mix use nature of the developments. The rules cater for restaurants, food and art markets, retail stores, art galleries, gyms and tree lined walkways activities, which meant that the standard rules had to be changed.

Agents of change in Johannesburg may be attributed to the private sector and public private partnerships as well as civil society. For residents, the attraction is the cosmopolitan ambience, good security and the lock up and go lifestyle. For investors, residential developments in the Johannesburg city centre offer opportunities such as tax incentives through the urban development zone. Through the urban development zone scheme, the South African government is incentivising investors to spend money on urban rejuvenation.

Should Africa's population exceed that of Europe, South and North America combined as projected then most African city centres will most probably be populated by young professionals who are inclined to spend their disposable income on lifestyle oriented activities. Being that the case, the current real estate trend in the Johannesburg city centre may well be a catalyst signalling what a typical African city may look like in 2050.

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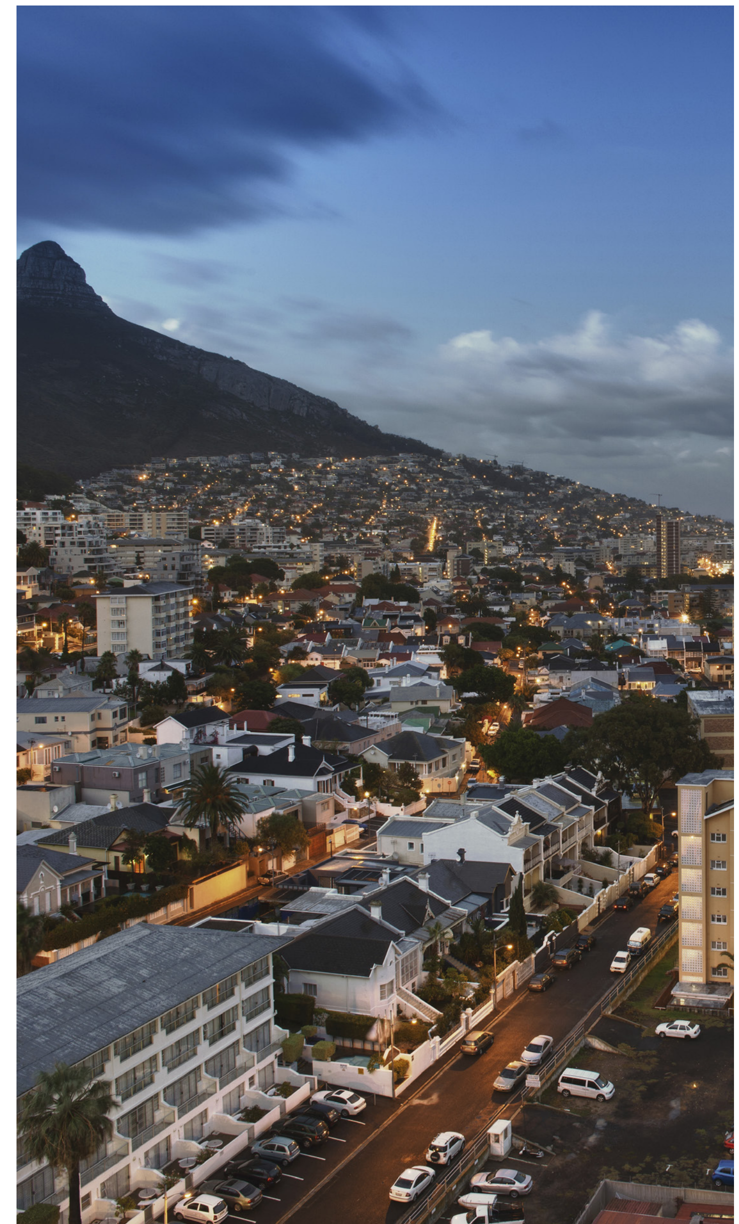

New Legislation and Roadmap Ensure Bright Future for Power Africa

On June 30, 2013, the Obama Administration introduced "Power Africa", an inter-agency initiative designed to increase access to electricity across Sub-Saharan Africa.

While the program was generally welcomed by industry participants and development professionals, there was some concern at that time whether it would survive beyond the end of President Obama's second term. Two very recent developments have eliminated any doubts that the initiatives embodied by Power Africa will continue well into the next decade.

Electrify Africa Act

First, on February 8, 2016, President Obama signed into law the Electrify Africa Act of 2015 (the "Act"). Initially passed by the Senate in December 2015 and then adopted by the House of Representatives in early February, the Act marks an important step towards institutionalizing the programs put in place under Power Africa. The purpose of the Act is "to establish a comprehensive United States Government policy to encourage the efforts of countries in Sub-Saharan Africa to develop an appropriate mix of power solutions, including renewable energy, for more broadly distributed electricity access in order to support poverty reduction, promote development outcomes, and drive economic growth, and for other purposes." More specifically, the Act establishes as the policy of the United States an intention to promote first-time access to power and power services for at least 50,000,000 people in Sub-Saharan Africa by 2020 in both urban and rural areas, and to encourage the installation of 20,000 MW of electric generation by 2020. Importantly, the Act calls for an "all-of-the-above" development strategy that utilizes fossil fuels, hydropower, geothermal and renewable energy sources – acknowledging that Africa's power needs will not be satisfied by solar panels and wind farms alone.

Under the Act, the President is tasked with establishing a multi-year strategy to "encourage the efforts of countries in Sub-Saharan Africa to implement national power strategies", to be set forth in a report delivered not later than 180 days following the Act's enactment. It also requires the President to identify what trade policies can be implemented in support of the Act's objectives, including a reduction or elimination of import tariffs in African countries applicable to power generation equipment. Finally, the Act encourages certain agencies of the United States Government, including the U.S. Agency for International Development and the Overseas Private Investment Corporation ("OPIC"), to prioritize power projects in Sub-Saharan Africa over other regions and sectors. By 2019, the President is required to submit a report on the progress arising out of the initiatives set forth in the Act.

A Roadmap to Electrification

On a January 28, 2016, the Power Africa partners introduced the "Roadmap", a well-conceived and detailed plan to achieve two ambitious targets in Sub-Saharan Africa by 2030: (1) to increase installed capacity by 30,000 MW and (2) to create 60 million new connections to electrical grids or other distribution systems. In terms of new generation, the Roadmap outlines an aggressive plan to increase installed capacity, and notably adopts the Act's all-of-the-above emphasis, encouraging non-renewable generation where there are no viable affordable alternatives. The second objective – creating connections to provide access to electricity – will be achieved through expansions of existing electric grids (both urban and rural) and developing off-grid and smaller scale solutions for more remote population centers.

The foundation of the Power Africa strategy set forth in the Roadmap is to partner with African governments, the private sector, development agencies, multilateral and bilateral financial institutions and non-governmental institutions to promote, stimulate and catalyze the development of power projects – emphasizing that the goal to achieve 30,000 MW by 2030 "starts and ends with energy deals".

To this end, Power Africa has recently partnered with a number of similar foreign or international initiatives, including the Department for International Development's "Energy Africa" campaign, which is working to increase electrification in Africa through wide deployment of off-grid solar, as well as the International Renewable Energy Agency and the Government of Norway.

Power Africa supports its partners by, among other things, deploying in-country Transaction Advisors to help governments and state-owned utilities structure and negotiate long-term agreements for power projects, including power purchase agreements. Currently, Power Africa has Transaction Advisors supporting 20 countries, but plans to expand. Power Africa also makes available other resources to governments, such as its excellent handbook Understanding Power Purchase Agreements (now available in both English and French), as well as templates for other project agreements.

A significant portion of the Roadmap is focused on how Power Africa will measure and report its progress towards meeting the two primary electrification objectives. New installed capacity and connections will only be counted towards satisfying the targets if the relevant project or initiative which produced such electricity or connections had substantial involvement from Power Africa and/or its key partners. Power Africa intends to publically demonstrate its progress towards its two targets through a detailed tracking tool available at www.usaid.gov/powerafrica or, for those who like to monitor access to electricity in Sub-Saharan Africa on the go, a mobile app.

Two reporting conventions adopted by Power Africa are worthy of some criticism. First, Power Africa intends to count megawatts generated by facilities that change hands due to privatization transactions, including several thousand MW of new gas-fired generation that was recently privatized in Nigeria, towards its target of achieving 30,000 MW. It seems disingenuous to treat such facilities as new generation unless the privatization results in the rehabilitation of a generating facility or some other incremental increase in power generation (and then only the incremental increase in output should be considered). Second, Power Africa intends to use the financial closing of its relevant projects to measure its progress against the 30,000 MW target. Although financial closing may be a convenient milestone for ranking banks and law firms in industry league tables, it seems a premature marker of success for a government initiative designed to ensure access to electricity for the people of Sub-Saharan Africa.

Challenges Ahead

Although Power Africa's future appears to be secure, some important challenges and shortcomings remain. First, while the Roadmap describes the substantial progress Power Africa has made since 2013, industry publications such as IJ Global who track the development of energy projects have noted that the number of privately developed projects in Sub-Saharan Africa that have reached financial closing has declined over the past two years, and that the investment in the power sector in Sub-Saharan Africa has not increased since 2012. One must question whether Power Africa itself is partly to blame.

According to the Roadmap, transactions supported by Power Africa "must meet a set of criteria related to improving the availability, access, or reliability of electric power; be technically and financially sound; align with local government priorities; and meet best practices for environmental and social safeguards, among others." In addition, the Roadmap indicates that Power Africa is also seeking to reduce gender inequality and promote female participation in the power sector as part of its mandate. While the foregoing criteria and goals are entirely sensible and should be applauded, they do create barriers to financial closing that are not present in other markets, potentially slowing investment decisions and lengthening the project development period. At a time when access to electricity in Sub-Saharan Africa is actually shrinking in percentage terms due to population growth, Power Africa's ability to accelerate projects towards financial closing is paramount.

Second, the Roadmap underemphasizes the financial impact that its aggressive plan to increase installed capacity will have on national treasuries across the continent. As described in Understanding Power Purchase Agreements, nearly every government-owned offtaker in Sub-Saharan Africa is typically required under its power purchase agreement to acquire the project (at a price to be negotiated) from the private owner when political events affecting the project lead to non-performance by the offtaker or some other default. The Roadmap refers to this obligation as a "financing tool", noting its utilization in the Azura-Edo gas project in Nigeria. In practice, though, as each new utility-scale generating facility reaches financial closing, the host government must assume, directly or indirectly, a contingent liability of potentially several hundred millions dollars. Governments in other regions have been reluctant or in some cases unable to take on such commitments, leading to the failure of otherwise financeable projects in their countries. As Power Africa marches towards its generation target, it will need to confront this important structural and economic issue.

Finally, Power Africa should devote greater focus to cross-border or regional projects. In other regions, countries have developed a competitive advantage in power generation by developing new projects and exporting electrical energy to their neighbors. Sub-Saharan Africa seems particularly well suited for such projects – e.g., large hydro resources, offshore gas-to-power in East Africa – and has a history of regional projects in the oil and gas sector. Those countries in Sub-Saharan Africa who are keen to take advantage of such opportunities would be incentivized to see projects realized, helping to stimulate foreign investment. Power Africa could play a unique and important role in bringing African governments together to consider and implement such projects and in encouraging multilateral and bilateral financial institutions to support them.

Hogan Lovells has advised on numerous power projects throughout sub-Saharan Africa.

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Investing in Africa

Our Dubai and Paris offices have their spotlights on the economic outlook and the benefits to be reaped through investing in Africa. They're uncovering the economic opportunities, taking steps to better understand the continent, and educating our clients in the process. Our Dubai office also partnered with Legal Week to produce a special report.

Dubai

On 13 April our team in Dubai hosted a conference on Middle East Investment into Africa, with an accompanying report co-produced by Legal Week. The report explores how the Middle East is becoming a hub for channelling investment into Africa, as its economies continue to develop. It discusses untapped opportunities, deal markets, capital raising, risks and challenges, and the medium-to-long-term outlook for the continent.

The conference featured a multi-jurisdictional team of speakers from across the firm including Andrew Skipper (Head of Africa Practice, London), Sohail Barkatali, Christopher Cross, Imran Mufti and Imtiaz Shah (Partners, Dubai), Samaa Haridi (Partner, New York), Lodewyk Meyer (Partner, Johannesburg), and Nathan Searle (Counsel, London).

The keynote speech was given by Koffi Klousseh, Principal Investment Officer for the Africa Infrastructure Department of IFC, looking at the economic outlook and opportunities for Africa. Other external speakers came from ACWA Power, Amani Partners, Control Risks, ENA Consulting, Iris Advisory, and Royal Capital Holdings.

The conference considered various methods of investing in African markets and the best way of mitigating risk to ensure successful outcomes. The overriding sentiment was that whilst there are significant and growing opportunities across the continent, careful due diligence and forward planning is required to ensure success.

Speakers shared their experiences and insights on doing business in various African countries, highlighting the importance of choosing the right partners, being pragmatic, and investing in a socially responsible way. Panellists discussed the growing availability of finance and alternative finance (such as Islamic finance) to support the development of key infrastructure and social development projects.

Andrew Skipper, head of our Africa Practice said:

> "We've witnessed a steady increase in clients from the Middle East entering into African markets, no longer solely in the North and East regions but across the wider continent. As African economies continue to expand and develop, businesses and investors are increasingly recognising the benefit of using Dubai as a base to access the massive growth potential available."

Paris

Our Paris office held a conference on 5 April looking at the protection of investments in Africa, where clients could hear from esteemed external speakers including Jean-Christophe Bélliard, Director of Africa at the French Ministry of Foreign Affairs.

The event was a Paris-Afrique group initiative, spearheaded by banking and finance partners Olivier Fille-Lambie and Bruno Cantier, international arbitration counsel Thomas Kendra, and banking associate Alex Bébé Epalé. Aimed primarily at clients operating in or looking to expand into the region and increase awareness of our capabilities in the Paris market, the event was over-subscribed demonstrating the huge interest in Africa.

The group was delighted to welcome external speakers Jean-Christophe Bélliard, Director of Africa at the French Ministry of Foreign Affairs, Abbé Yao, Bâtonnier of the Côte d'Ivoire Bar, and Diamana Diawara, Counsel in charge of the Africa team at the International Court of Arbitration of the International Chamber of Commerce ("ICC").

The conference opened with an introduction to the Paris-Afrique group by Olivier Fille-Lambie, followed by Jean-Christophe Bélliard, who addressed Africa's economic potential as well as the role of the French diplomacy in helping foreign investors in the continent. Alex Bébé Epalé and Abbé Yao then discussed the interaction between international law firms and local practices, after which, Thomas Kendra interviewed Diamana Diawara on the ICC's activities in Africa and the enforcement of arbitral awards in Africa. The conference rounded-up with a presentation by Bruno Cantier on a recent Hogan Lovells matter financing a rail project in Western Africa, "La Boucle de Ouest Africaine" for which we crowned an Africa Legal Awards winner in 2015. He also touched on the role of Development Finance Institutions (DFIs).

The event was very popular receiving well over 70 attendees and was followed by a musical drinks reception on our office's 9th floor terraces where guests enjoyed African snacks while listening to a live jazz band from Burkina Faso.

The Economist Nigeria Summit 2016

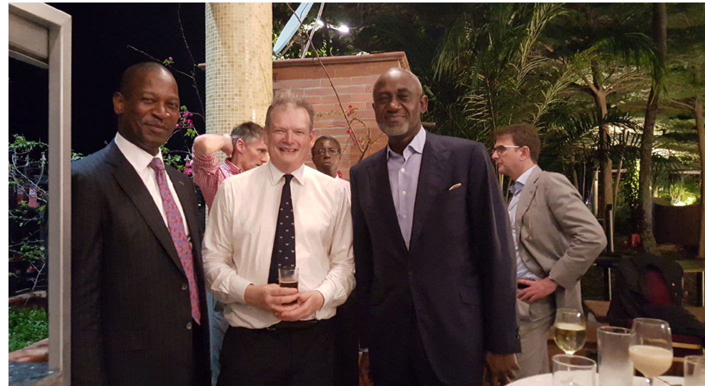
Hogan Lovells was a platinum sponsor of The Economist Nigeria Summit 2016: The Dawn of a New Day? which took place on 7 and 8 March at the Intercontinental Hotel in Lagos.

This Summit brought together over 350 business leaders, academics, investors, and representatives from government and civil society within Nigeria and from 15 other countries.

The Summit provided insight into what the most pressing challenges are and how prepared Nigeria is to deal with them. Hogan Lovells' Head of Africa Practice, Andrew Skipper, was part of a panel speaking on the subject of Infrastructure and Power: The Foundations of Growth. He said that investors considering entering into the Nigeria market should regard the major short term risks as being the "3 C's"– currency, corruption and complexity.

However, despite all the challenges raised during the summit, there was also considerable optimism. The opportunities are out there and Nigerians are well placed to position themselves to do business not only in their own country but also across the West Africa region. In addition, Philip Walker, Regional Manager of the Economist Intelligence Unit, saw the outlook for growth in the country as exponential, forecasting that by 2050, Nigeria could become the 12th largest economy in the world.

The day after the Summit a media roundtable was held with key legal, business and energy editors from news publications such as Business Day, This Day and The Guardian at Eko Hotel in Lagos with key spokespeople for Hogan Lovells including Andrew Skipper, Partner and Head of Africa; Anina Boshoff, Banking Partner in Johannesburg; Johannes Buntjer, Corporate Partner in Amsterdam and Rashida Abdulai, Senior Associate in International Arbitration. We were delighted to be featured in several key Nigerian newspapers over the following days and continue to be featured since that time.



As well as being sponsoring such a key event, the lawyers who made the trip from Hogan Lovells' offices in London, Washington, South Africa and Amsterdam, were able to use the remaining part of the week to visit colleagues at the various Nigerian law firms we regularly work with, as well as existing and new clients.

A highlight for everyone was the very successful networking event we hosted at the Lagoon Breeze, Eko Hotels & Suites in Lagos on the evening of Wednesday 9 March. It was an opportunity for us to mix with Hogan Lovells alumni, partners from our relationship firms, clients and other contacts.

A Secondees view

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. Shehu Mustafa, a Senior Associate from Nigerian firm Aluko & Oyebode, 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.

AD: Why did you apply for a secondment?

SM: I applied for the secondment because I was convinced that spending some time working in Hogan Lovells would help improve my skills and positively impact my career. I am glad that I had this experience as I accomplished my goals for the secondment. I was able to see things from an international perspective, and I also made new friends and work connections as a result.

AD: Was the work in London very different?

SM: Working in Hogan Lovells in London was different from working in Lagos in some ways and in other ways quite similar to what I am used to.

First the similarities: In Lagos I was working on general commercial arbitration, litigation and tax matters. In London, the work was similar although I was not particularly involved in litigation work. The attitudes and diligence of the lawyers and the collegial attitude amongst colleagues was quite familiar.

As for the differences, they were numerous and significant so I will mention just a few. The level of support services available to lawyers was much better in London as the support staff were quite capable and efficient and could come-up with first drafts of many non-technical documents as well as do good legal research. The amount of training on business development, networking, marketing and practical aspects of legal practice was impressive and something I believe we can duplicate not just in my firm, but across African legal practices.

AD: What did you get the most out of in your secondment?

SM: I very much enjoyed the trainings on business development, networking, and marketing, as much of this was new to me. As I mentioned earlier, I made many new friends both within Hogan Lovells as well as other law firms and barristers chambers. I also met many other fellows from other Commonwealth countries and forged some good, long-term friendships.

AD: Did you enjoy living in London?

SM: I did very much. The transportation was very user friendly, the sights, the museums and the variety of the food all made my time memorable. Living in London is lots of fun, but also very expensive!

AD: Has the secondment changed the way you work?

SM: Not much. However, it has changed the way I view legal practice. I am better able to see the business aspects of how to run a practice and the importance of managing client relationships. This has helped me frame a better understanding of how to win and keep legal work.

AD: What advice would you give future secondees?

SM: I would advise future secondees to set out with clear expected objectives, but also remain flexible to modify those objectives as the realities unfold. I also advise that secondees try to meet new people, travel around, see new places and have some fun along the way. London is a great place to learn and live so enjoy the experience.

I am grateful to Hogan Lovells for making my time there so memorable.

Shehu Mustafa
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Recent work in Africa

- Advising ICD, as arranger, on the inaugural CFA 150 billion sukuk offering by the Government of Cote d'Ivoire. The deal was awarded Sukuk of the Year and Africa Deal of the Year at the Islamic Finance News Awards 2015.
- Advising Proparco in relation to the financing of West Africa's largest solar power plant.
- Acting for African Export-Import Bank (Afreximbank) on its US$ 750 million Eurobond issue; the largest ever achieved by Afreximbank in the international debt capital markets.
- Assisting AfDB, IsDB and AFD in the financing of the construction and the operation of a new international airport in Dakar, Senegal.
- Advising Virunga Power LLC on all aspects of its power project development portfolio including several hydropower and other renewable energy projects in East Africa, such as the 2MW Mutunguru Project in eastern Kenya.
- Advising on all aspects of the construction of a 100MW parabolic trough concentrated solar power project in South Africa – Abengoa Kaxu CSP power project.
- Advising Reichmans on the acquisition of an interest in Invofin Proprietary Limited and the funding of the business of its wholly-owned subsidiary, Invoset SA, which operates an innovative IT system and payment platform for providing invoice discounting, payment and settlement services.
- Acting as International and UK counsel to Actis on the sale of Mouka Limited, Nigeria's leading manufacturer of foam mattresses, to the Abraaj Group.
- Advising PME African Infrastructure Opportunities Plc on its sale of a 50% equity investment in a rail leasing business operating in southern Africa, and seven heavy haul locomotives, with a put option over a further three.
- Advising on a multi-year materials supply and support agreement as part of the largest locomotive supply tender in South African history.
- Representing several mining companies in relating to fatal accidents (regulatory inquiries, civil and criminal).
- Representing the Business Rescue Practitioners in several mining and mining-related business rescue processes and representing investors in the acquisition and financing of mining assets.
- Advising on the Kumba Iron Ore Ltd Dingleton Relocation Project.
- Defending a claim by an ex-coal worker for occupational lung disease allegedly sustained during the course and scope of employment.
- Acting for Transnet SOC Limited in respect of defective infrastructure and IT systems installed at the Port of Saldanha, and defective workmanship in relation to the refurbishment of the Manganese terminal at the port of Port Elizabeth.
- Defending the Strategic Fuel Fund of South Africa in a dispute with Morgan Stanley over delivery of oil on termination of storage agreement and prosecuting counterclaim for outstanding cargo dues.
- Training lawyers in Africa working on editing mining laws and regulation, and assisting in the development of a complex database of existing mining laws which is now being used to develop a model mining law for Africa.

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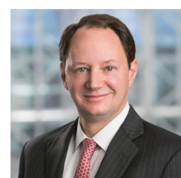

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