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Special Report on Investment in Africa 2017

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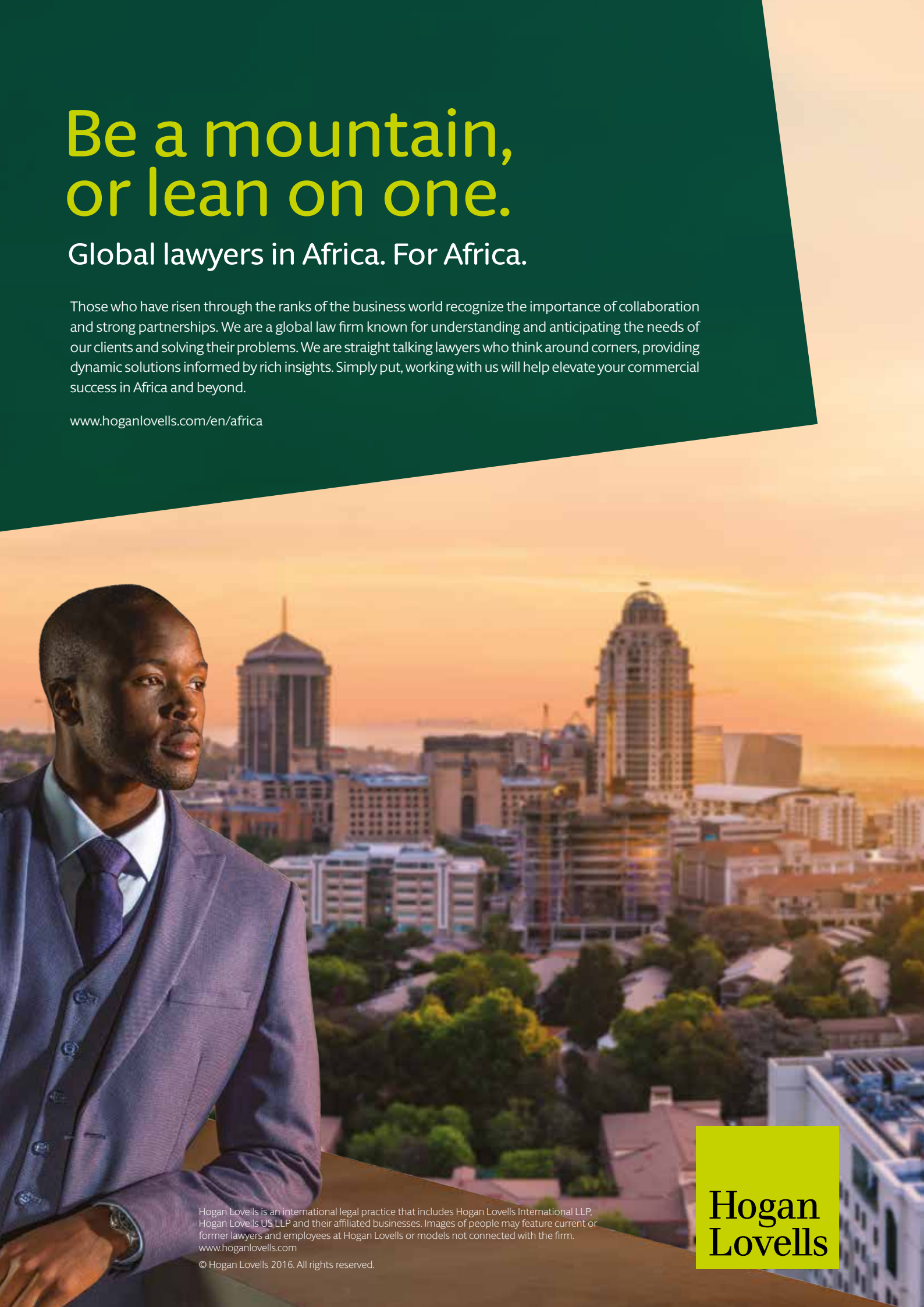

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Special Report on
Investment in Africa
2017

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glg global legal group

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
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African Law & Business

Special Report on
Investment in Africa
2017

Cover image, chapter images by
iStock.com

All other images courtesy
of the authors

Printed by
Stephens & George Print Group
June 2017

ISBN - 978-1-911367-60-4

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Introduction

Andrew Skipper
Hogan Lovells

We are delighted to have worked with *African Law & Business* on producing this report and, together with local law firms, gathering information from 22 countries to help inform our clients' investment decisions in Africa.

Over the last decade, the African continent has been transformed and currently is one of the fastest growing emerging and frontier markets for international, regional and local investors. However, it can be a minefield deciding what, where, when and how to invest. Although this report does not provide all the answers, it provides an opportunity for businesses, with existing or aspirational operations in Africa, to compare and contrast each country's legal and regulatory framework.

Over and above the **Country Chapters**, this report includes **Sector Overviews,** in which we examine some of the key areas affecting the continent's growth, and includes insights from leading industry experts and an analysis of the challenges and opportunities in each. The **Special Features** section looks at some major over-arching topics such as bribery and corruption, disputes in Africa, FinTech and OHADA law, and presents some of the legal considerations and opportunities in these areas.

Hogan Lovells has been working in Africa for several decades, bringing together professionals from across the world to advise clients on their inbound, outbound and pan-African investments. Our lawyers are considered trusted advisers and have the experience, knowledge and local understanding to navigate complex and challenging business issues. With a dedicated Africa team that stretches across our 45+ offices, including London, Johannesburg, Paris, Dubai, Beijing, New York, and Washington, DC and we work with a select group of leading local law firms to ensure that we deliver the best possible solutions and the highest quality service.

As a full-service international law firm, we offer a wide range of services for clients with existing operations or interests in Africa. We work and collaborate closely with some of the most renowned law firms on the continent. No matter what stage you are at with your investment plan, Hogan Lovells' experienced team can navigate you through the intricate legal landscapes in achieving your business objectives.

We regularly advise on large infrastructure and energy projects, multi-party PPP and project financing, complex Islamic financing, FinTech and private equity transactions, specifically for African investors. For each and every client and matter, we tailor our advice to respond to the unique situation offering practical legal solutions. Clients appreciate our innovative collaboration. ■

Andrew Skipper
Partner and Head of Africa Practice

From the editor

Ben Rigby
African Law & Business

I am delighted to introduce *African Law & Business'* Special Report on Investment in Africa. Our report reflects a range of business sectors in which investors pursuing African opportunities may be interested, and some of the key issues that they may face when they have decided to invest in them.

It also features a series of country chapters covering the major jurisdictions in Africa, which provide a snapshot of the key features of the legal and regulatory framework in those jurisdictions. These jurisdictions represent some of Africa's fastest growing economies, in which investors are already taking note of the many opportunities that present themselves, whether those opportunities are aligned to Africa's traditional strengths in energy, natural resources and raw minerals, or others such as financial technology, manufacturing, and property.

This report aims to showcase the latest developments in some of the key areas affecting businesses in the continent and features expert contributions from law firms familiar with the key issues and latest trends for investors in their home jurisdictions.

Collectively such law firms represent useful local partners in markets that can be as challenging, as they are rewarding. Seeking local knowledge, informed legal acumen and trusted advice from local partners such as these will enable readers to navigate the complex and challenging business issues that Africa presents, while informing the business case for investment that many consider compelling.

Managing sustainable long-term investments in Africa requires strategic insight, strong risk management, and a genuine commitment to building strong relationships, in utilising appropriate knowledge, understanding and commercial awareness in the key developments in often fast-moving fields of business and law, at a time when meeting any stakeholder concerns over the risks posed by such investments also remains highly important.

I hope that you enjoy reading from all our contributors. My deepest thanks go to Hogan Lovells for supporting this initiative, and to all those within Global Legal Group who have worked so hard on the report to make it a reality. ■

Ben Rigby
Editor-in-Chief

Country Chapters

African Law & Business

Special Report on
Investment in Africa
2017

Angola

Catarina Levy Osório
ALC Advogados

Claudia Santos Cruz
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Population:	26.3m (UN estimate – January 2017)
GDP per capita:	US$6,800 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 2.6% (CIA Factbook – 2014-2016)
Official languages:	Portuguese
Transparency International rating:	Ranked 164/176 (2016 Report)
Ease of doing business ranking:	Ranked 182/190 (2017 Report)

Type of legal system	Based on Portuguese civil law and African customary law
Signatory to NY Convention	Yes (12 August 2016)
Signatory to ICSID Convention	No
Member of COMESA, OHADA, SADAQ, EAC	SADC
Signed up to OECD Transfer Pricing Guidelines	Generally consistent with the OECD Guidelines
Bilateral investment treaties	Angola is a party to several BITs/TIPs including with the EU, Germany and Italy

Catarina Levy Osório and Claudia Santos Cruz discuss the regulatory environment in Angola which governs foreign investment, highlighting forthcoming legislative changes likely to affect foreign investors

Angola

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

In Angola, land originally belongs to the state, and may, if consistent with public interest, be transferred to individuals. The relevant statutes on this issue are the Land Law approved by Law no. 9/04 of 9 November 2004 and Decree no. 58/07 of July 13 2007, which enacted the General Regulation on the Concession of Land. According to the former, the state may transfer land to natural or legal persons. However, and although it is possible to transfer ownership of land, ownership is rarely transferred; usually the state transfers minor land rights, the most common of which being the lease. The land rights provided for by law are: (a) ownership; (b) customary *dominium utile*, or title; (c) civil *dominium utile*, or title; (d) lease; and (e) temporary occupation.

The state may transfer the right of ownership of urban property to Angolan citizens as individuals, while rural land may not be transferred to private entities, regardless of their nationality.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

For the purposes of Angolan labour law, a non-resident foreign employee is a foreign citizen with professional, technical or scientific qualifications (which are lacking in Angola), contracted in a foreign country to carry out their professional activity in Angola during a stipulated period of time.

Hiring foreign employees is subject to a work permit. In accordance with Presidential Decree no. 43/17 of 6 March 2017, foreign employees have to be, *inter alia,* scientifically or technically qualified, physically and mentally apt in accordance with a medical certificate issued in their country of origin, and have no criminal history in order to be hired in Angola. Furthermore, companies are subject to a quota of at least 70% of employees being Angolan or foreign residents.

The same statute provides for a maximum contractual term of 36 months between the employer and the foreign worker to be sequentially renewed. The foreign worker has to be paid in the national currency (Kwanzas) (AOA).

Non-compliance with the abovementioned requirements could make an employer liable for a fine amounting to 7-10 times the average monthly salary of the company if related to the quota, or 5-10 months' salary if related to the salary being paid in Kwanzas.

3. What are the restrictions on redundancies and any applicable compensation?

Angolan law allows employers to terminate employment contracts in the following circumstances: (a) termination during a trial period; (b) disciplinary dismissal; (c) objective dismissal of individual employees; and (d) collective dismissal. Compensation due by the employer to the employee dismissed via the abovementioned procedures depends on the size of the company:

- large companies: one base salary per year of service up to the limit of five years, plus 50% of the base salary per year of service exceeding five years;
- medium companies (100-200 employees and/or net annual revenue between 3,000,000 USD and 10,000,000 USD): one base salary per year of service up to the limit of three years, plus 40% of the base salary per year of service exceeding three years;
- small companies (10-100 employees and/or net annual revenue between 250,000 and 3,000,000 USD): two base salaries per year of service up to the limit of two years, plus 30% of one base salary per year of service exceeding two years; and
- micro companies (0 to 10 employees or a net annual revenue of up to 250,000 USD): two base salaries per year of service up to the limit of two years, plus 20% of one base salary per year of service exceeding two years.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Foreign or external investment is defined by the Private Investment Law (Law no. 14/15 of 11 August) as a project developed with the use of capital

held by non-residents. The definition of 'capital' encompasses technology, know-how, property and equipment as well as financial and monetary. This instrument sets out the requirements which investors need to comply with, authorises the repatriation of profits and dividends, but also creates an additional, progressive tax rate applicable to profits generated by investment projects.

The statute sets out several economic sectors where the joint investment with Angolan nationals is compulsory, namely: electricity and water; hotels and tourism; transport and logistics; construction; telecommunications and information technologies; and social media. In these sectors, investment is only authorised if conducted jointly with Angolan natural or legal persons who have to hold at least 35% of the participation which has to be reflected on management; the joint investment requirements also extend, by virtue of other laws, to oil and gas, mining, security, civil aviation and fishery.

In terms of the Commercial Companies Law, the shareholders appoint the directors, and there are no restrictions on appointing foreign citizens as such.

5. Are there any specific legislative requirements, and if so, what are they?

A project with foreign investment of up to AOA 1 billion to which that economic sector belongs; if the investment exceeds AOA 1 billion, the Ministry needs to approve the project, but further approval is required by the President.

The procedure starts with the submission of an investment proposal, which lays out the business plan of the respective project, to the Ministry which oversees the economic sector which pertains to the investment. The projects are then evaluated on a case-by-case basis; however, the authorities tend to favour projects which stimulate exports and which promote the integration of the national workforce, as well as their training and qualification.

In other sectors which are not subject to the joint investment requirement, foreign investors are allowed to have investments totally owned by them.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

The Ministries of Economics, Commerce and Industry are the authorities responsible for deciding, supervising and enforcing Angolan trade policies.

Joint Executive Decree 22/15 of 23 January 2015 established importation quotas for certain food products where domestic production amounts to 60% of domestic consumption. Products affected were *inter alia* flour, salt, sugar, rice, water, meat, fish, eggs, fruit and vegetables. As part of the quota's implementation, all importers sending food to Angola were required to obtain new licences. Although the present instrument only established the quotas for 2015, the Decree has not been expressly revoked, nor has there been a similar instrument legislated. Recent reports seem to indicate that the quota regime was suspended.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Foreign and domestic investors may obtain credit from Angolan banks; however, the former are considered, for the purposes of the Foreign Exchange Act, to be non-residents and, as such, the requirements of the Foreign Exchange Act are applicable and have to be observed. According to this statute, loans maturing at more than one year are considered capital operations. All capital operations are subject to the authorisation of the BNA (the Angolan Central Bank). (See question 16.)

Under the anti-money laundering regulations, commercial banks and other financial institutions have to observe, *inter alia,* the requirements regarding customer identification and due diligence, identifying and reporting suspicious transactions, refusal to carry out suspicious operations and record-keeping and cooperation obligations.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The debtor's assets are available as payment for debts arising out of credit agreements. There are personal guarantees, namely: bail, mandate of credit, endorsement, autonomous guarantees, comfort letters, letters of credit and promissory notes, and *in rem* guarantees mortgage and pledge.

A mortgage may be provided in respect of immovable property, or movable property subject to registration. It is possible to provide a generic mortgage, or a mortgage without a maximum amount, as well as one for guaranteeing of future debts, insofar as the amount of the debts are determinable at the moment of the issuance of the

mortgage and therefore mentioned in the registry. When related to immovable property, mortgages shall be established by means of a notarial deed or a will, subject to registration.

The pledge may cover assets or rights which are not subject to a mortgage, such as: financial investments; shares; receivables; and bank accounts.

The trustee figure is provided for in the instrument of the mandate of credit, whereby someone charges another to grant credit to a third party. The credit is provided on behalf of the trustee and not the principal. The mandate of credit is revocable until the provision of credit occurs.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

Law no. 2/11 of January 14 2011 approved the Public-Private Partnerships (PPP) Law which sets out the general legal framework applicable to this contractual regime. The public partner is responsible for monitoring and controlling the execution of the project, as well as guaranteeing the prosecution of the public interest while the private partner's main function is the funding of the project and its management.

Additionally, the Ministerial Commission for Evaluation of PPPs (*Comissão Ministerial de Avaliação das Parcerias Público-Privadas, "CMAPP"*), is the competent authority to: decide the procurement procedure applicable for the public partner's participation, which is subsequently approved by the relevant ministry; approve PPP projects which have obtained a favourable decision from the Ministry in charge of the economic sector to which the project belongs; control the procurement procedure after consulting the Court of Auditors and following the President's approval; and evaluate the execution reports of the project which are presented by the relevant Ministry.

If the outcome of the procurement procedure is such that the negotiations with tenderers do not seem to satisfy or be consistent with public interest, the procurement process may be suspended or cancelled, with no right to compensation for the tenderers.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Angola does not yet have a formal Competition Law. Nonetheless, Presidential Decree no. 199/15, of 26 October 2015 sets out the regulations governing the Price and Competition Institute ("PCI"). The PCI responsible for controlling the market structures through the issuance of economic opinions regarding the mergers of companies. Presidential Decree no. 199/15 further establishes that the department for the control of the market structures and competition (the executive services) is responsible for analysing the mergers, setting criteria to define a dominant position, and analysing the vertical integration of companies.

Although the PCI has in theory already been created, to the best of our knowledge, it is not yet operational and it will only be able to fully perform its functions as a market regulator once the Competition Law is in force.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

As mentioned, Angola has not yet passed a specific Competition Law, although draft competition and unfair market practices legislation is due to be approved. The Angolan legal system also foresees a Legal Pricing Framework:

1. Presidential Decree no.206/11, of 29 July, which enacts a general framework for the organization of the national price system ("Price System Framework") as amended by Presidential Decree no. 113/16 of 30 May 2016. (The Price System Framework coexists with an older general framework for the organization of the national prices system, enacted by Decree no.20/90, of 28 September, which was not expressly revoked and so both legal instruments must be taken into account.) This instrument sets out three different price regimes (free, supervised and fixed prices), regulating the market and competition between producers, and aims to reduce prices.
2. Decree no.14/96, of 1 July, which achieved the maximum prices which may be practised by producers, wholesalers and retailers, and sets out the margins for the trading of goods and services.

3. Executive Joint Decree no.34/96, of 1 July, which establishes the maximum profit margins in each transaction within the free price system.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

The principal statutes in this spere are:

- Law no.3/92, of February 28 – Industrial Property Law; and
- Law no. 15/14, of July 31 – Law of Copyright and related rights (the 'Copyright Law').

According to the Copyright Law, the Court may order the seizure of copies of works that are presumed to have been reproduced without the author's authorisation; the authors may claim compensation from the offender for the damages caused by the violation of the copyright. There is also the possibility of criminal liability.

In turn, the Industrial Property Law also provides for criminal liability for the breach of the industrial property rights enshrined therein; for instance, manufacturing products without the authorisation of the patent holder. Other breaches are also punishable by fines (the illegal use of a brand is punished with a fine of up to AOA 50,000 and/or imprisonment for up to three months.

The illegal use of trademarks, violation of patent rights and of the rights granted by the deposit of designs and models, as well as the violation of the rights granted in relation to symbols, awards and names of an establishment are subject to prosecution and may give rise to a fine or imprisonment.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Personal income tax: rates range from 7% to 17%. Individuals carrying on industrial and commercial activities are also subject to personal income tax at rates of between 6.5% and 30%, depending on turnover.

Consumption tax: has a standard rate of 10% and specific rates for listed goods and services ranging between 2% and 30%. Consumption tax rates on imports vary between 2% and 30%.

Capital gains tax: levied on dividends, interest from financial investments and royalties, with rates that range from 10% to 15%.

Stamp duty: levied over certain specific acts, documents, agreements and transactions in securities. Interest on treasury bills, treasury bonds and central bank securities and marketable securities sold over regulated markets are exempt from stamp duty.

Corporate income tax (industrial tax): has a rate of 15% for agriculture, aquaculture, poultry, fishing and forestry, and 30% for all other activities. A 6.5% industrial withholding tax is levied on services provided by non-residents without a permanent residence. A 2% industrial withholding tax is levied on the provisional assessment on income from the sale of goods.

In accordance with the Law on Private Investment, tax benefits and incentives are determined on a case-by-case basis.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

In this regard, the principal instrument is the Foreign Exchange Law approved by 5/97 of 27 June 1997, and the principal authority is the Angolan Central Bank – the BNA.

The Foreign Exchange Law applies, *inter alia*, to the liquidation of transactions related to goods, capital or current invisibles.

The notion of operations related to goods incorporates the payment of the importation, exportation and re-exportation of goods. These operations are subject to the prior licensing of the Ministry of Commerce, unless the goods in question amount to less than 5,000 USD.

Capital operations are contracts and other legal instruments which establish rights or obligations between residents and non-residents; these include, for instance, the purchase of real estate, the acquisition of shares and the incorporation of new companies. All capital operations are subject to the BNA's approval.

Current invisibles encompass any current account transactions that are not related to goods, particularly those related to travel and transfers between the country and abroad, and between residents and non-residents. These payments are divided between: (a) travel and transfers; and (b) service and income. These operations can only be concluded with the authorisation of the BNA.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Any decision on private rights taken by a foreign tribunal may not become effective in Angola and subsequently subject to enforcement without prior review and confirmation by Angolan courts.

Similarly, in order for a foreign court decision to be confirmed, the following matters are subject to review by the Angolan Supreme Court and must be satisfied:

1. authenticity of the document setting forth the decision and the reasoning of the decision;
2. the decision must be final;
3. competence – according to Angolan provisions on conflicts of law;
4. the same case cannot have been submitted to, or not already decided by, an Angolan court;
5. the defendant must have been served notice to defend itself, except where Angolan law would waive service;
6. the decision cannot include a provision that is contrary to the Angolan public order principles; and
7. that, in the case of a decision against an Angolan person or entity, such decision does not contravene Angolan private law, if applicable.

Accordingly, before recognition, i.e. registration and enforcement of a foreign award is permitted, the Angolan courts may review the case and judgment on its merits which will be a lengthy and unpredictable procedure in respect of the possible outcome.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Please note, however, that at the time of writing Angola has, on 6 March 2017, deposited its instrument of accession to the New York Convention, making it the 157th contracting state. The Convention will enter into force in Angola on 4 June 2017, which in theory means that a review of the merits will no longer occur.

In many business transactions, the choice of arbitration as the method for dispute resolution is encouraged by the Angolan authorities. Examples of this are distribution contracts, such as agencies and franchise agreements, where, by law, the parties may choose to have their disputes resolved by international arbitration.

Arbitral tribunals may, unless otherwise agreed by the parties, grant interim relief if requested by one of the parties. Such measures should be related to the object of the dispute, for instance, providing guarantees deemed to be appropriate.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

This will depend on the document. Certain documents are required under Angolan law to be executed before a notary. One example being when a director is representing a foreign company, proof of the director's powers will have to be shown before the notary before the document can be executed. Another example is loan agreements, which are not required to be signed before a notary; however, when a foreign party is involved, we recommend that these documents are signed before a notary.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

First, they should be aware of the aforementioned accession to the New York Convention, which comes into force on 4 June 2017, and secondly, they should note that Angolan commercial banks are currently experiencing an extreme shortage in foreign currencies, therefore, the expatriation of capital is, at the moment, an extremely difficult process, not only due to the administrative hurdles provided by law, but also due to the absence of supply of foreign currencies in the Angolan market. ■

Catarina Levy Osório
ALC Advogados

Catarina Levy Osório joined the firm in 2010 and became partner in 2016. She is a founding partner at ALC Advogados, the Angolan member of the network MLGTS Legal Circle. Catarina is a member of the Angolan and Portuguese Bar Associations and has relevant experience in Angolan law, having advised clients on private investment, tax and labour law in this jurisdiction.

Catarina provides assistance to clients from different sectors on VAT and other indirect tax matters, acquiring relevant experience on the development of tax diagnostics and on the implementation of corporate structures according to their tax effects.

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Claudia Santos Cruz
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Claudia Santos Cruz joined the firm as a Consultant in 2015 assisting clients on the international and cross-border aspects of their investments in Portugal, Angola and Mozambique. Claudia has close ties to both Africa and England, having trained and practised as an English solicitor in London until 2005. She was born in Mozambique, grew up in South Africa, and holds dual Portuguese and Mozambican nationality. She is a specialist in the areas of Energy and Natural Resources (Oil & Gas / Mining), international aspects of foreign investment into Angola and Mozambique, and Shipping.

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ALC ADVOGADOS

We are a firm with tremendous potential in Angola due to our dynamism, innovative capacity and the quality of service we provide. Our team emphasises dedication and hard work as the keys to building a legal practice capable of meeting our clients' needs in the Angolan market. Our office was created in the context of an association with Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS), a leading Portuguese law firm.
We are also members of the MLGTS Legal Circle, an international network created by MLGTS for a selected set of jurisdictions. We work very closely with the other member firms of the MLGTS Legal Circle, which allows our firm to maximise the resources available to our clients. ALC Advogados also benefits from the privileged relationship established by MLGTS with the leading Brazilian law firm Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados (São Paulo).

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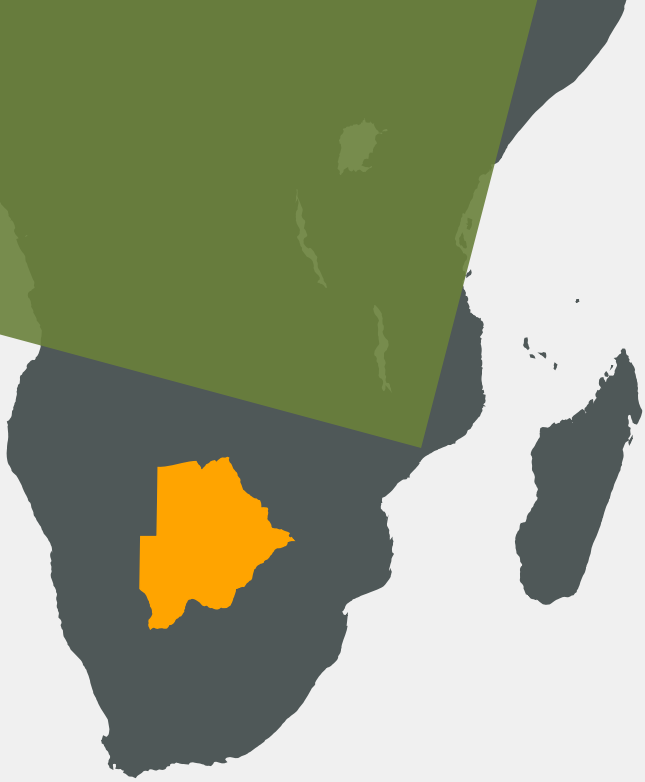

Yvonne Kose Chilume
Chilume & Company

Kesegofetse Malete
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Population:	2,343,981 (UN estimate – 2017)
GDP per capita:	US$16,900 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 2% (CIA Factbook – 2014-2016)
Official languages:	English
Transparency International rating:	Ranked 35/176 (2016 Report)
Ease of doing business ranking:	Ranked 71/190 (2017 Report)

Type of legal system	Mixed legal system of civil law influenced by the Roman-Dutch model and also customary and English common law principles
Signatory to NY Convention	20 December 1971 (accession)
Signatory to ICSID Convention	Yes (15 January 1970)
Member of COMESA, OHADA, SADAQ, EAC	SADC
Signed up to OECD Transfer Pricing Guidelines	No, although see question 18 below as to the proposed introduction of transfer pricing guidelines
Bilateral investment treaties	None. However, the US and the Southern Africa Customs Union ("SACU"), which includes Botswana, signed a Trade, Investment and Development Cooperative Agreement ("TIDCA") in 2008. Botswana has also entered into various trade agreements with countries such as Germany, China, Switzerland and Zimbabwe

Yvonne Kose Chilume and Kesegofetse Malete review important regulatory requirements and legislation that should be noted by foreign investors when doing business in Botswana

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

The Companies Act provides that foreign entities such as an external company registered with the companies registry has the same power to own land in Botswana, just as if it were a company incorporated in Botswana. Botswana has three categories of land:

- Tribal Land (70% of land total) – This cannot be sold to foreigners but can be leased. For residential property, citizens are issued a fixed term of 99 years for leasehold property and for non-citizens, a fixed term of 50 years. For non-residential property, tenure is granted for a fixed term of 50 years leasehold with rentals.
- State Land (25% of land total) – This cannot be sold to foreigners but can be leased. Tenure is granted for a fixed period, with state grants granted for a fixed term of 99 years for residential property to citizens and 50 years for non-citizens; for non-residential property, a fixed term of 50 years at nominal rentals for both citizens and non-citizens.
- Freehold (5% of land total) – This can be held unencumbered in perpetuity by citizens and non-citizens alike; however, the Land Control Act restricts the transfer of freehold agricultural land to non-citizens. Preference is given to citizens over foreign entities with transactions involving change of ownership of the land.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The Immigration Act and its Regulations require foreign nationals to obtain work and residence permits. A Botswana employer is also prohibited from allowing foreign nationals to commence employment without a work permit or an exemption certificate. Non-compliance with the above carries a maximum fine of P5,000 and or imprisonment not exceeding five years.

3. What are the restrictions on redundancies and any applicable compensation?

The Employment Act provides for the grounds and procedural steps to be undertaken on redundancy. The employer should take into account the procedure for efficient operation as well as the ability, experience and qualifications of the employee concerned. Notice should be given to the Commissioner of Labour and the employees likely to be directly affected.

Should the employer seek employees in the affected occupations within six months of termination of contracts, priority, to the extent that is reasonably practicable, should be given to the employees whose contracts of employment were terminated.

Such employees will be entitled to a severance benefit, including unused leave and any other right of absence in terms of the Employment Act, before any creditors of the employer are paid.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

There is no general discrimination against foreign investment in Botswana. Foreign investors can set up companies on their own without the need for a local partner through the registration of a company. It is, however, advisable to have local participation as locals know the local market well. The Botswana Export Development and Investment Authority, now known as the Botswana Investment and Trade Centre, can assist in terms of identifying potential local partners.

However, to encourage local empowerment, the government barred foreign direct investment from selected business activities, mostly in sectors dominated by small and medium-sized enterprises.

At present the licensing requirements preclude foreign participation in the following activities:

(a) Foreigners wishing to invest in the financial services sector must obtain a specific licence for prudential purposes. Beyond this, no restrictions on foreign as opposed to domestic investors are on record.
(b) Foreign investment is prohibited in retail services for entities with less than 100 employees and liquor retail.
(c) Entry into small-scale mining is limited to citizens. There are no formal restrictions on larger scale mining projects, commonly thought to be the ones that attract foreign investors.

(d) Participation in the manufacturing of school furniture, uniforms, protective clothing, sorghum milling, cement and bricks, and baking of bread is prohibited.

An Environmental Impact Assessment may be required for certain projects.

The Botswana Investment and Trade Centre (BITC) is in charge of integrated investment and trade promotion policies, and is the designated authority with a 'one-stop office' to facilitate all requirements for investment in Botswana, including the licencing and other arrangements listed above.

The Authority aims to ensure that investors obtain the relevant approvals, licences, residence and work permits, and other regulatory necessities they need with minimal delays.

5. Are there any specific legislative requirements, and if so, what are they?

Botswana has a citizen economic policy empowerment which reserves certain economic activities for citizens of Botswana. This policy is not enacted in a single law, various pieces of legislation provide for it. The Industrial Development (Amended) Regulations Act reserves small scale manufacturing for citizens or companies wholly owned by citizens; the Trade Act reserves retail services for entities with less than 100 employees; the Liquor Act reserves retail for citizens; and the Public Procurement and Asset Disposal Act gives preferential treatment to citizens or companies wholly owned by citizens in state procurement processes.

Joint ventures with foreign entities are permitted in the reserved activities, where a maximum of up to 49% foreign participation is permitted, subject to the Minister of Trade and Industry's approval.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Botswana is a member of the South African Customs Union (SACU), and so it is bound by the common external tariff (CET) set by that body. Therefore, there is a tariff book of products which are zero-rated or those that attract duty.

The general rule is that a person who imports goods upon which customs and excise duties and Value Added Tax (VAT) are levied, or exempted from the payment of these taxes, is required to declare the goods and pay the applicable duties and VAT in terms of the Customs and Excise Duty Act and Value Added Tax Act.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Yes, there are restrictions on the purposes for which money may be lent. As regards money laundering and other breaches of public policy, Banks are regulated by the Banking Act, as administered by the Bank of Botswana, and other financial institutions by the Non-Bank Financial Institutions Regulatory Authority Act of 2006 overseen by the Non-Bank Financial Institutions Regulatory Authority (NBFIRA). However, more generally, there are no foreign exchange controls in Botswana and no restrictions on capital inflows and outflows through financial institutions, although, traditionally, the banking sector is seen as quite conservative in nature as regards lending.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security may be granted over movable or immovable assets through a deed of hypothecation, mortgages, lien, pledge or security trust.

The security trust is recognised through common law; however, the device of a Security Trustee is rarely used. In order for security to be lawful under Botswana Law, a principal obligation must exist between the grantor of the security and the security trustee. However, such obligation does not normally exist between the security trustee and the grantor of the security under the security trustee arrangement, as the security trustee takes the security as trustee or agent for the lenders and not as security for an obligation owed or due to itself.

A further complication under Botswana Law is with respect to the taking of security over immovable property by a security trustee. In terms of section 52 of the Deeds Registry Act, no mortgage bond may be passed in favour of an agent of a principal. A security trustee could conceivably be seen to be an agent of the lenders and consequently any bond taken over immovable property invalid by virtue of section 52.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management

of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In Botswana, the Public Procurement Asset Disposal Act governs the procurement of goods and services, with plans to pass regulations of PPP projects for central government. A PPP Unit has been established within the Ministry of Finance and Development Planning, which plays the role of custodian of PPP policy. Its responsibilities are to coordinate and monitor PPP policy and projects, provide technical assistance to sponsoring institutions (such as government), assist in the selection of suitable PPP projects, approve PPP feasibility studies and bid evaluation reports and advocate for PPPs and capacity building initiatives. To carry out its mandate, the PPP Unit may adopt any processes and procedures necessary. The policy contains PPP Guidelines that cover the four phases of the PPP project cycle.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, there is a merger control regime under the Competition Act requiring that all transactions meeting the stipulated thresholds are notified before they are implemented. A merger is notifiable if:

(a) the combined annual turnover or assets in Botswana of the merging enterprises exceeds BWP10,000,000; or
(b) the enterprises concerned would, following the merger, supply or acquire at least 20% of a particular description of goods or services in Botswana.

The Botswana Competition Authority may reject mergers when they are deemed not to be in the public interest, which can include situations where the concentration of shares is held by non-citizens.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The Competition Act provides that any conduct on the part of one or more enterprises is subject to prohibition by the Competition Authority if, following an investigation, such conduct is determined to amount to an abuse of a dominant position in any market.

The Competition Authority may not take action if it believes that there are public interest benefits that arise from such conduct, such as:

(a) maintenance or promotion of exports from Botswana or employment in Botswana;
(b) advancement of strategic or national interest of Botswana in relation to a particular economic activity;
(c) provision of social benefits which outweigh the effects on competition; and
(d) citizen empowerment initiatives of government, or otherwise enhancement of the competitiveness of small- and medium-sized enterprises; other enhancement of the effectiveness of the government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property rights comprise industrial property rights and copyright and similar rights, and are regulated by the Industrial Property Act and the Copyright and Neighbouring Rights Act, respectively. The former provides protection of patents, utility models, trademarks and industrial designs, while the latter provides for the protection of, original literary and artistic works, as well as rights of performers, broadcasters, producers and publishers.

- A patent is protected for a period of 20 years from filing date, which may be nationally or regionally through the Harare Protocol, routed to the African Regional Intellectual Property Organisation (ARIPO), or internationally through the Patent Cooperation Treaty (PCT).
- A utility model certificate (petty patents) is issued for a period of seven years from filing date and national, regional and international routes are the same as those for patents.
- An industrial design is protected for 15 years from the filing date.
- A trademark is protected for 10 years from the filing date.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and

the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Corporate income tax (CIT) is charged at a single flat rate of 22%. Manufacturing companies and International Financial Services Centre (IFSC) companies may qualify for a 15% special rate.

Mining profits (excluding profits from diamond mining) are taxed according to the following formula: annual tax rate = 70 minus (1,500/x), where x is taxable income as a percentage of gross income. The tax rate shall not be less than the flat CIT rate of 22%.

Non-resident companies are taxed at a standard rate of 30%.

VAT is imposed at a standard rate of 12%. Certain specified supplies are either zero-rated or exempt from VAT.

VAT is payable by the importer of services not utilised in the making of taxable supplies.

Vocational training levy (VTL), calculated as a percentage of turnover ranging from 0.2% to 0.05%, is payable when submitting VAT returns.

Capital transfer tax (CTT) of 12.5% is levied on the transfer (by way of inheritance or gratuitous disposal of property) of tangible or intangible, movable or immovable property:

- Transfer Duty is payable in respect of immovable property: Urban property transfers (which are waived where VAT is payable) is taxed at 5%.
- Agricultural land transfers – citizens (waived where VAT is payable) are taxed at 5%, and agricultural land transfers – non-citizens (duty equivalent to VAT payable is waived) are taxed at 30%.

The first P200,000 of the purchase price is exempt from transfer duty in the case of transfer to a Botswanan citizen.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

There are no foreign exchange controls; however, the purpose of funds being transferred should be disclosed for the collection of macro-economic data, as well as enabling the enforcement of anti-money laundering measures.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

The Recognition and Enforcement of Foreign Arbitral Awards Act regulates the recognition and enforcement of arbitral awards in Botswana. In addition, a foreign award may be enforced under the Judgments (International Enforcement) Act which relates the enforcement in Botswana of judgments given in countries which accord reciprocal treatment to judgments given in Botswana. Under the Act, a foreign judgment must first be registered or confirmed in the High Court before enforcement. Registration or confirmation of the foreign judgment is conferment of recognition on such a judgment.

Furthermore, Botswana is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1971 ("REFAA 1971") and the New York Convention as stated above. Only arbitral awards made in countries that are both signatories to these conventions and have reciprocal arrangements in their national courts for the enforcement of Botswana law can be enforced in Botswana.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

The courts in Botswana are pro-arbitration. Arbitrations are regulated by the Arbitration Act and the courts enforce its provisions strictly. Furthermore, parties or litigants are required to provide for arbitration in a written agreement.

The Arbitration Act vests powers on the courts to, for instance, intervene in cases where arbitration proceedings are misconducted or awards procured in a manner that is not in accordance with the Act.

The arbitrator's power to grant interim relief depends on the rules agreed by the parties that determine conduct of the arbitration proceedings.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are no restrictions except the appointment of signatories through company resolutions and appointment of directors under the Companies Act.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The Immigration Act was amended to empower the Minister to grant status of permanent residence to non-citizens who are investors and have resided in Botswana lawfully for a period less than five years so as to promote job creation and encourage foreign investment. ■

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Yvonne is a Partner in the firm that provides a full range of diverse commercial, corporate and transactional legal advisory services. She specialises in intellectual property, environmental & energy law and banking & finance. Further, she has represented private clients in arbitration and other alternative dispute resolution matters. She had started her legal career as a public sector lawyer and legislative drafter for the Attorney General's Chambers of Botswana and part of the services included the drafting of the Environmental Impact Assessment Act of Botswana.

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Kesegofetse Malete is an Associate Attorney in the commercial law and litigation departments. She carries a broad range of experience with public sector and private practice. Her practice areas include civil litigation work in corporate law, negotiation and drafting of commercial agreements, registration and enforcement of intellectual property rights, arbitrations, and creation of various types of securities. Further, she provides legal and advisory work to an extensive client base, including financial institutions, insurance companies, private governmental agencies and statutory land boards.

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AB & David AFRICA

Chilume & Company is a law firm that was established in March 2002 in Gaborone under the auspices of the Law Society of Botswana by Yvonne Chilume. The firm is registered and recognised as a practicing member firm with AB & David Africa. The firm specialises in diverse areas of expertise, including corporate and commercial, banking and finance, insolvency and corporate rescue, energy, infrastructure and PPP, intellectual property, telecoms and technology, government business and policy reform, property development, labour, mining and natural resources. Its clients include financial institutions, national utility companies, national and international insurance and reinsurance companies, leading multi-nationals, the Botswana Government and other corporates.

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Cameroon

Alex Bebe Epale
Hogan Lovells

Population:	24.3m (UN estimate – January 2017)
GDP per capita:	US$3,300 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 5.5% (CIA Factbook – 2014-2016)
Official languages:	French and English
Transparency International rating:	Ranked 145/176 (2016 Report)
Ease of doing business ranking:	Ranked 166/190 (2017 Report)

Type of legal system	Hybrid system – based on English common law in North West and South West and the French civil law system in Adamaoua, Centre, East, Far North, Littoral, North, West and South
Signatory to NY Convention	Yes (19 February 1988)
Signatory to ICSID Convention	Yes (23 September 1965)
Member of COMESA, OHADA, SADAQ, EAC	OHADA
Signed up to OECD Transfer Pricing Guidelines	Follows the OECD Guidelines
Bilateral investment treaties	Cameroon is a party to several BITs/TIPs including with China, the UK and the EU

Alex Bebe Epale covers the incentives and benefits for foreign investors doing business in Cameroon

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Any foreign national wishing to invest in Cameroon can hold interest in land by entering into a lease or a sale agreement, except for the lands in border areas which cannot be leased to, or acquired by, foreign entities. Any lease agreement or sale contract entered into with a foreign entity must be approved/stamped by the minister of state property (when the foreign national is a natural person or a company) or by the minister of foreign affairs and the minister of state property (when the foreign entity is a diplomatic mission or an international organisation). Failure to comply with this formality will result in the nullity of the agreement. (Art. 10 – Ordonnance No. 74-1 dated 6 July 1974 as amended by Law no. 80-21 dated 14 July 1980.)

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

In principle, there is no restriction on the hiring of a foreign national. However, according to the Labour Code, the employment contract with a foreign national must be approved by the Minister of Labour before its performance. The application for this approval has to be submitted by the employer. In the event that the approval of the Ministry is denied, the employment contract would be automatically null and void. Failure of the Minister to respond within a two-month period following the application constitutes an approval. In addition, the Labour Code provides that, in order to ensure full employment of local manpower, the government may impose some restrictions on the hiring of foreign nationals for some professions or levels of professional qualifications. There are further governmental orders which complete the legal provisions contained in the Labour Code. In all cases, the employment of a foreign national must comply with the immigration rules.

3. What are the restrictions on redundancies and any applicable compensation?

An employment contract of unspecified duration may be terminated at any time at the will of either party. Such termination shall be subject to the condition that previous notice is given by the party choosing to end the contract. Notification of termination shall be made in writing to the other party and shall set out the reason for the termination. The notice period runs from the date of such notification. It shall not be subject to any conditions precedent or subsequent. Under no circumstances may it be set off against the leave period of the worker. Whenever an employment contract of unspecified duration is terminated without notice or without the full period of notice being observed, the responsible party shall pay to the other party compensation corresponding to the remuneration, including any bonuses and allowances, which the worker would have received for the period of notice not observed. However, a contract may be terminated without notice in cases of serious misconduct, subject to the findings of a competent court of law as regards the gravity of the misconduct.

Save in the case of serious misconduct, where an employment contract of unspecified duration is terminated by the employer, the worker with no less than two successive years of seniority in the enterprise shall be entitled to severance pay as distinct from pay *in lieu* of notice which shall be determined having regard to the worker's seniority.

An employment contract of specified duration may not be terminated prior to its expiry save in the case of gross misconduct, force majeure or by the written consent of both parties.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Foreign investments in Cameroon are subject to the investment code resulting from law No. 2013/004 dated 18 April 2013. This new law is very attractive. First, there is no discrimination between local and foreign investors. Secondly, no minimum investment is required. The four criteria used for the application of the code are the number of local staff employed, the percentage of exports, the use of natural resources and lastly the contribution to value added.

Thirdly, there are numerous incentives. During the establishment phase (which cannot exceed

five years), the new code provides for exemptions from VAT and duties on key services/assets (including an exemption from stamp duty on the lease of immovable property). During the operation phase (which cannot exceed 10 years), further exemptions from or reductions of other taxes (including corporate tax), duties (such as stamp duty on loans) and other fees are granted.

However, unlike many other African investment codes, the new law provides for many additional, non-tax-related benefits. Examples of these advantages include: the right to open local and foreign currency accounts locally or abroad; the right to freely cash in and keep abroad funds or income; and the right to directly pay non-resident suppliers of goods and services abroad. Also facilities will be put in place to facilitate the issuance of visas and work permits, environmental compliance certificates and land titles and long-term leases.

In principle, there is no investment requirement for foreign companies to invest in conjunction with local entities or people.

5. Are there any specific legislative requirements, and if so, what are they?

Under the OHADA Uniform Act on Companies dated 30 January 2014, a foreign company can establish a branch office in Cameroon. The branch shall be registered at the companies' registry. However, after two years, the branch office shall be transferred to an existing Cameroonian company or a Cameroonian company to be established (or to another company established in the OHADA area), unless the foreign company obtains a special exemption from the minister in charge of commercial activities. Such an exemption is granted for a non-renewable two-year period.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are a number of restrictions (e.g. prior authorisation) on the importation of goods into Cameroon, primarily aimed at drugs, plants, hazardous substances, weapons, and other products which are restricted in terms of both national and international legislation. Pursuant to the import policy of the Ministry of Finance, the importation of goods is subject to the presentation to the Customs Office of a compliance certificate. Various goods are involved, such as wheat flour; gas cylinders; yoghurt; concentrated milk; and pasta, etc. The non-compliance of these goods with the relevant standard may result in their re-exportation or destruction at the expense of the importer.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Money may not be part of the proceeds of crime and may not be used for criminal purposes or for any purpose related to, for example terrorism, money laundering and in contravention of exchange control requirements.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security interests are governed by the OHADA Uniform Act on Security Interests, which has undergone in 2010 a comprehensive reform introducing many improvements to this harmonised regime applicable across 17 African countries. Although the range of security interests has been extended, the OHADA system has not created a global security interest capable of covering all or most of the debtor's assets, like the debenture or the English law floating charge. The structure of the OHADA security law remains based on a Napoleonic legal system, which provides for a number of security interests covering each type of asset (business, bank account, receivables, land, etc.). Even if OHADA does not recognise the concept of security "trustee", it has introduced a similar concept of "security agent", which is a hybrid institution between the civil law mechanism of agency (*mandat*) and the security trustee.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In Cameroon, procurement of goods or services by the state (which includes state-owned entities) is mainly regulated by two different regimes. The concession regime, governed by the public procurement code resulting from decree No. 2004/275 dated 24 September 2004 and the partnership contracts, resulting from the Law No. 2006/012 dated 29 December 2006 and related

orders and decrees. There is a public procurement regulation agency (ARMP) which is the supervisor of the public procurement system. Concerning the partnership contract, there is a council for the implementation of partnership contracts (CARPA), which is the expert body in charge of the assessment of the partnership contract to be entered into by the state.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, there is a merger control regime. In principle, any merger which significantly impairs competition is prohibited, unless there are competitive justifications that outweigh the anti-competitive effects. The proposed transaction must be notified to the National Competition Commission at least three months before its completion if the combined annual turnover of the merging parties during the previous year is at least equal to 4 billion FCFA and if their market shares are at least equal to 30%. Failure of the Minister to respond within a six-month period following the notification shall constitute an approval.

As a member state of the Economic and Monetary Community of Central Africa, Cameroon is bound by a regional competition regulation dated 25 June 1999 which is applicable when a merger has an anti-competitive effect on the common market.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes. There is a competition/anti-trust law dated 14 July 1998 and which prohibits abuse of dominance (including refusing a new competitor access to the market or ousting an existing competitor from the market, price discrimination, etc.), anti-competitive arrangements, unless they are notified to the National Competition Commission and the latter decides that such arrangements make a contribution to economic efficiency that outweighs the anti-competitive effect (e.g. reduction of prices, improvement of product or service quality, etc.).

The competition law was not truly implemented until in 2005, i.e. the establishment of the National Competition Commission which is the main competition authority. A new decree organising the National Competition Commission was issued in 2013.

The privatisation of State monopolies from 1990 has also led to the creation of multiple regulatory agencies for the sector concerned (e.g. electricity, telecommunication or banking/finance sectors) under the aegis of certain ministries whose powers overlap those of the National Competition Commission.

As a member state of the Economic and Monetary Community of Central Africa, Cameroon is bound by regional competition regulation as above which is applicable when anti-competitive practices have an anti-competitive effect on the common market.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property (IP) rights are recognised in Cameroon on the basis of the African Intellectual Property Organization Treaty ("AIPO Treaty").
The AIPO Treaty and its annexes recognise the following intellectual property rights:

- patents – a patent is defined as the title granted for the protection of an innovation ; the patent shall expire at the end of the 20th year following the filing date of the application (annex I of the treaty);
- utility models, which are protected for a 10-year period from the date of their filing (annex II of the treaty);
- trademarks or services marks, which are protected for a 10-year period from the date of their filing (annex III of the treaty);
- industrial designs, which are protected for a five year period from the date of their filing (annex IV);
- trade names, which are protected for a 10-year period; and
- copyrights and related rights, which are protected during the lifetime of the author and for 70 years after his death (as regard economic rights); moral rights are not limited in time.

IP rights shall be registered at the OAPI headquarters in Yaoundé (Cameroon) or in any member states. IP rights can be enforced by civil or criminal actions against any person making unlawful use of such IP.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

It is important to stress that the tax regime is under constant change and it is necessary to review the applicable requirements at the relevant time. Companies doing business in Cameroon may be subject to taxes which include the following:

- Corporate tax at 30% (plus an additional 10% local council surcharge, leading to an effective rate of 33%); a reduced tax rate applies to listed companies and oil pipeline companies are also subject to different corporate income tax rates.
- Payments of dividends are subject to a withholding tax rate of 15%. However, outbound payment of dividends by resident companies listed at the local stock exchange is subject to a withholding tax rate of 10%.
- Regarding interest, the standard withholding tax rate is 15% (there are some exemptions of withholding tax for interest on foreign loans, the maturity of which is equal to, or exceeds seven years). However, outbound payments of interest on corporate bonds issued by resident companies and listed at the local stock exchange are subject to a reduced withholding tax rate of 10% (if the bond has a maturity period shorter than five years), or 5% (if the maturity period exceeds five years).
- Value Added Tax (VAT): the standard rate is 17.5% (plus an additional 10% local council surcharge, leading to an effective rate of 19.25%). Exports are not taxable.
- Various transfer taxes, for example:
  - transfer of immovable property is subject to registration duty, which varies (15%, 10% or 5%) depending on the location of the property (urban or rural area) and on whether the land is developed or not; and
  - transfer of shares, bonds or other securities is subject to a 2% registration duty.
- Stamp duty, which is levied on all papers used for official documents, judicial orders and documents (including agreements) to be used as evidence in court proceedings. Stamp duty is payable depending on the size of the document; they vary between FCFA 500 and FCFA 1500 per page. Graduated stamps are also payable on deeds relating to lands (between FCFA 10,000 and 300,000, depending on the underlying value).
- Special tax on petroleum products, payable by refineries and oil companies at FCFA 120 per litre (for super gasoil) and FCFA 65 per litre (for petroleum diesel).
- Forestry tax: companies engaged in forest exploitation are subject to a felling tax (*taxe d'abattage*) and an annual forest royalty.
- Employment fund tax at 1%, payable by employers on the total amount of salaries, wages and other remunerations.
- Annual real estate tax, payable by all companies which own real estate in Cameroon. The applicable tax rate is 0.1%, plus an additional local council surcharge at the rate of 10%.

In terms of transfer pricing rules, there are some provisions to prevent improper transfers abroad to the benefit of parent companies or any non-resident company. As a consequence, for the calculation of the corporate income tax due by a resident company controlled by a foreign company, any benefit indirectly transferred to the foreign company either by increase or decrease of purchase or selling prices, or by any other means are deemed as taxable profits. For that purpose, the tax authorities have additional means of investigation through the auditing of accounts of companies.

For withholding taxes, please see above (the second and third bullets).

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Yes. Cameroon is a member state of the Economic and Monetary Community of Central Africa and, as such, is bound by its foreign exchange regulations, including Regulation No. 2 dated 29 April 2000 (EMCCA Regulation). The EMCCA Regulation is supra national, i.e. in case of conflict with national laws (such as the investment code) the EMCCA Regulation would prevail. It provides for various restrictions on the transfer of funds out of the area. For example, in principle (there are various exceptions), any foreign loan exceeding FCFA 100 million to a company established in the EMCCA area shall be authorised by the Ministry of Finance, export revenues collected abroad must be repatriated in the EMCCA area within the 30-day period following their collection. However, in principle, the transfer of dividends outside the EMCCA area is free, subject to some notification formalities.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgments are not directly enforceable but can be recognised and enforced subject to the fulfilment of the exequatur procedure. These requirements include, for example, that the foreign judgment is not contrary to the public policy of Cameroon and is final and binding.

Foreign arbitral awards are enforceable by Cameroonian courts, provided that none of the

exceptions to the New York Convention apply and that the dispute is able to be arbitrated under Cameroonian law (i.e. not related for example to criminal or matrimonial law), subject to the fulfilment of the exequatur procedure.

For both foreign judgments and arbitration awards, once an exequatur is obtained from the Cameroonian courts, they would be enforceable as if they were the decisions of a Cameroonian court.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes. Cameroonian courts are generally supportive of arbitration proceedings. Interim relief can be granted by the court in relation to arbitration proceedings, although it is not common in relation to foreign-seated arbitrations.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are generally no restrictions other than the usual requirements on authority/mandating, in accordance with the company's constitutional documents and applicable laws.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Policy and legislation in Cameroon are under constant change and it is necessary to review the applicable requirements at the relevant time. ■

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Hogan Lovells has been active in Cameroon for several years. We have acted for major banks and development finance institutions on a wide range of matters such as trade finance, asset finance and business restructuring. Hogan Lovells has also been involved in the provision of legal services in Cameroon in the areas of dispute resolution and international arbitration and on corporate and commercial matters. We have a good understanding of the local legal and cultural environment due to our constant involvement and our network of correspondent lawyers.

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Chad

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Population:	14,965,482 (UN estimate – January 2017)
GDP per capita:	US$2,600 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 2.5% (CIA Factbook – 2014-2016)
Official languages:	Arabic and French
Transparency International rating:	Ranked 159/176 (2016 Report)
Ease of doing business ranking:	Ranked 180/190 (2017 Report)

Type of legal system	Based on Islamic (Sharia law)
Signatory to NY Convention	No
Signatory to ICSID Convention	Yes (12 May 1966)
Member of COMESA, OHADA, SADAQ, EAC	OHADA
Signed up to OECD Transfer Pricing Guidelines	Does not follow OECD Guidelines
Bilateral investment treaties	Chad is a party to several BITs/TIPs

John Ffooks and Richard Glass highlight the relevant laws and regulations that foreign investors should consider when doing business in Chad

Chad

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Chadian land legislation does not expressly set out provisions on the acquisition of land by foreign entities. In practice, the acquisition of an interest in land by foreign entities is made through a long lease agreement. The long lease agreement then allows the foreign entities to obtain a mortgage over the land as security for any loans.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Under local employment law (Law No. 038/PR/96 dated 11 December 1996), there is no express provision for local minimum quotas.

Despite the fact that foreign investors are entitled to employ foreign workers, in certain strategic sectors, such as mining, the law requires priority hiring of local workers. Furthermore, the mining permit holder is annually required to provide local staff with training and promotion opportunities in order to allow the latter to reach higher positions of employment.

Employment of foreign workers must be in written form and submitted for the prior approval of the National Office for the Promotion of Employment (ONAPE) and the certification stamp of the ONAPE. Any failure to obtain such a stamp and approval requirements could lead to either the payment of fines or the imprisonment of foreign workers in the event of a repeat offence.

3. What are the restrictions on redundancies and any applicable compensation?

The concept of redundancies can fall under the heading of the termination of employment for economic reasons in Chad. Termination for economic reasons may lead either to the removal of the position of an employee due to technological change, internal organisation, economic difficulties or closure of the entity.

Termination of employment for economic reasons is subject to a specific procedure involving the labour inspectorate. As a consequence of termination, the employer should be prepared for the payment of compensation *in lieu* of notice to the employees affected, and severance pay calculated in accordance with employee seniority.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Local investment laws do not prohibit or limit foreign investment in Chad.

There is no requirement for a director/manager (*gérant*) of a local company to be a national, foreigner, or resident in Chad. However, it is beneficial to have some of the directors resident in Chad for ease of management. There are no minimum qualifications (either academic or career experience) required to act as a director of a Chadian company.

5. Are there any specific legislative requirements, and if so, what are they?

There is no specific legislation relating to change of control restrictions or acquisition of shares in Chad. Strategic and regulated sectors such as mining or oil & gas may, however, request, as a result of any change of control, the notification or authorisation of the competent authority, subject to the provisions of any agreement entered into with the Chadian government (such as a mining convention or production sharing contract).

Local companies are free to enter into agreements with foreign entities (e.g. services or loan agreement). However, loans entered into with non-resident entities are subject to a declaration by that foreign entity to the Ministry of Finance and the central bank within thirty (30) days prior to their realisation.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are neither restrictions on the importation of goods or raw materials into Chad nor restrictions on the use of local products instead of imported products. For instance, the Chadian mining code provides that permit holders are

free to import materials and equipment for their operations.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Any local entities are free to enter into loan agreements with non-resident entities. Loan agreements should, *inter alia*, specify the identity of the parties, the loan amount and the repayment schedule.

From an anti-money laundering law perspective, the respective Chadian bank and borrowers must at any time be able to provide the Ministry of Finance and the central bank with information relating to:

- the amount and frequency of the transactions;
- the nature of the transactions;
- any legal documents evidencing the transactions and the identity of the parties;
- an explanation on the coherence of the transactions;
- currencies used;
- the identity of the parties and ultimate parties;
- the origin and destination of the transactions (whether geographically, or transactionally, including all stakeholders, which includes direct or indirect parties involved in each transaction, information on all bank accounts involved in the loan); and
- information on the ultimate and real beneficiaries of the transaction.

Moreover, the National Agency of Financial Investigations within the CEMAC region is entitled to initiate investigations with the assistance of the CAR Bank, the BCAS and the competent courts with respect to any financial transactions involving money laundering.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The main types of security commonly used in Chad are the non-possessory pledge and the mortgage. A non-possessory pledge can be taken over shares, professional equipment, inventory, business assets, receivables, bank account and intellectual property while a mortgage can be taken over properties and real estate. The concept of a Security Trustee is recognised by the OHADA Uniform Act on Security, to which Chad is subject as a member of OHADA. In this regard, the Security Trustee must be a local or foreign bank.

Security over movables assets are registered with the *Registre de Commerce et de Crédit Mobilier* (RCCM) where the company has its head office. Registration of security over immovable property is done at the land registry where the land is located.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

Chad does not have a specific law governing public and private partnerships. However, the state encourages the public-private partnerships to be established under the investment law. In this regard, the state agrees to:

- establish a partnership between the public and private sectors in order to agree strategies and to find solutions on social and economic issues;
- implement and host the systematic coordination of an institutionalised framework with the private sector and civil society on economic development questions; and
- simplify the administrative formalities of investors by establishing suitable reception arrangements, information, and an investors board.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, any company involved in a merger must notify the operation of that merger to the National Council of Competition or NCC for the control and examination of the file and for the advice of the Minister in charge of trade and industry. The threshold for notification is for companies which have realized together more than 30% of sales, purchases, or operations in the national markets of goods, products, or services or be deemed to be a significant part of the market.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes, under African Economic and Monetary Community (CEMAC) regulations. Regulation No. 1/99/UEAC-CM-639, dated 25 June 1999, and Law No. 043/PR/2014, dated 13 November 2014, relating to competition prohibits the abuse of a dominant position, cartel behaviour and exclusivity arrangements under regional law.

Abuse of dominant position, cartel behaviour and exclusivity arrangements are, if proven, subject to the payment of fines and other sanctions.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Law No. 005/PR/2003, dated 2 May 2003, on the protection of copyright and related rights protects, *inter alia*, copyright relating to literary, artistic or scientific pieces of work. Protection of copyright can be done via one of the following means:

- bringing a copyright infringement matter before the relevant courts; and/or
- the *Bureau Tchadien du Droit d'Auteur* or the BUTDRA can also bring a copyright infringement matter before the relevant courts on behalf of victims of such copyright infringement (Article 119 to 125).

Measures that can be taken by the courts include, *inter alia*, the confiscation of proceeds illicitly obtained from a copyright infringement, confiscation of counterfeited goods and payment of damages (i.e. compensation for the benefit of victims of copyright infringement).

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Please see below the taxes that businesses are subject to in Chad:

- Corporate tax, at a rate of 35% which is based on the company's income. Chad charges Capital Gains Tax, at a rate of 35%, on the disposal of fixed assets and shares, for which reliefs are available.
- VAT of 18% for any taxable transactions and 0% for exports and international transports. VAT is chargeable on production activities, the distribution of goods and the rendering of services in Chad, as well as imported goods and services.
- Stamp duties, which are based on the volume of the paper between FCFA 900, 1,000 and 2,000.
- Income tax on the employee's salary. This tax is withheld and paid by the employer to the tax authority.
- Contributions to the social security fund.
- Registration fee of 3% of the transfer price for shares transfer.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The CEMAC regulation No. 02/00 of 29 April 2000 on foreign exchange (CEMAC/UMAC/CM) contains the following provisions:

- all transfers of funds from Chad to a member state of the CEMAC area are subject to a transfer commission, which cannot exceed 0.25%, for the benefit of the Chadian bank that handles the transfer of funds;
- all transfers of funds abroad (i.e. outside of the CEMAC area) are subject to a transfer commission, which cannot exceed 0.50%, for the benefit of the Chadian bank that handles the transfer of funds;
- payments made via approved Chadian banks are subject to a declaration to the Bank of Central African States;
- loans and reimbursements of loans that were made by legal entities/individuals located outside of the CEMAC area have to be declared to the Ministry in charge of finance and the central bank within 30 days of the said reimbursements; and
- the liquidation of direct investments made by foreign legal entities/foreigners in Chad and exceeding FCFA 100 million (approx. USD 162,000) have to be declared to the Ministry in charge of finance 30 days prior to the said liquidation.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgments or arbitral awards are subject to obtaining an exequatur from the Chadian courts in order to be enforceable in Chad.

Exequatur is granted in accordance with the following conditions:

- the judgment was issued by a competent court

according to conflicts of competence rules, as accepted in Chad;
- the judgment has the force of *res judicata* and enforceable in the jurisdiction where it was rendered;
- the parties were duly summoned, represented or declared to be in default; and
- the judgment does not contravene public policy as understood under Chadian law and is not contrary to any Chadian court decision that has the force of *res judicata*.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes. The OHADA's Uniform Act on Arbitration encourages investors to refer their disputes to arbitration. A party to an arbitration agreement can also request interim relief from the relevant Chadian court. Such interim relief can only be granted if: (i) there is appropriate urgency; and (ii) there is no review pending on the merits of the case carried out by the relevant Chadian court.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

Parties are free to agree on the signing procedure for their agreement. They may agree to the agreements being signed in counterpart or at the office of a notary. However, in practice, agreements that are subject to registration formalities cannot be signed in counterparty. In other words, parties are required to sign on the same page of the agreement.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

No, there are not. ■

John Ffooks
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John has lived and worked as a lawyer in Madagascar for 15 years. He is familiar with the specific legal and business cultures across Francophone Africa and has extensive experience of French-based legal systems. John has handled finance transactions in excess of USD 6 billion in relation to natural resource and project finance projects, with all the requisite due diligence such complex transactions require. John has also been involved in acquisitions and disposals of assets in the natural resources and telecommunications fields.

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Richard is an English-law qualified corporate solicitor and the managing partner of the Madagascar and Mauritius offices of John W Ffooks & Co. Richard has a broad corporate practice encompassing telecommunications and general M&A which has developed over the past few years across West and Central Africa. Richard holds dual English/French nationality, is fluent in written and spoken French and has significant deal-experience in sub-Saharan Francophone Africa. Before joining the firm, Richard worked at a leading City law firm for a number of years.

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John W Ffooks & Co is one of Francophone Africa's leading independent international law firms. We specialise in advising inward investors to the region. We are able to give advice at any stage of an investment, from green field operations to the sale and purchase of mature operations, or on specific points of law separate from a specific transaction.
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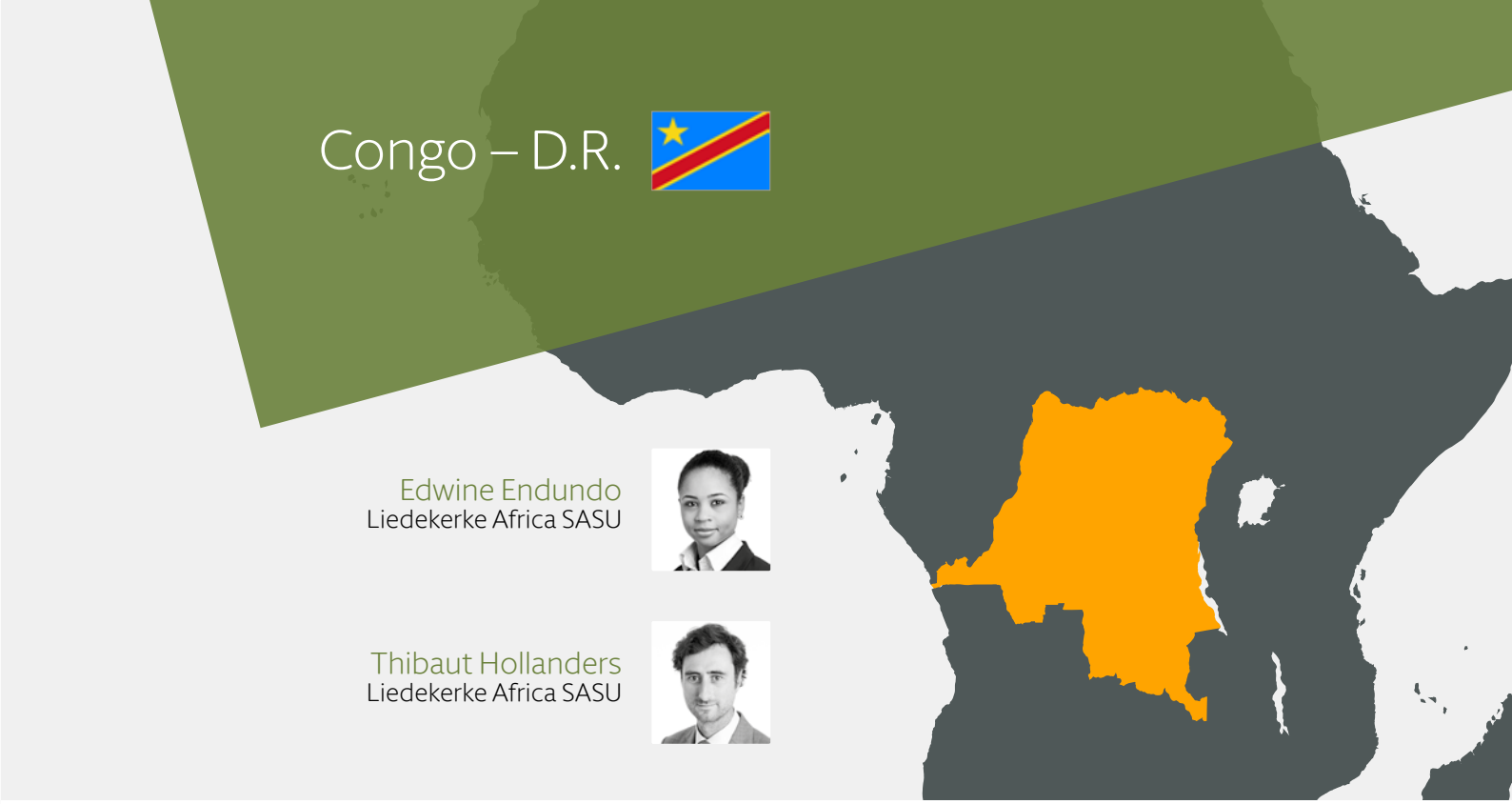

Edwine Endundo
Liedekerke Africa SASU

Thibaut Hollanders
Liedekerke Africa SASU

Population:	81,937,545
GDP per capita:	$800
Average GDP growth over previous 3 years:	Average 6.8% (CIA Factbook – 2014-2016)
Official languages:	French
Transparency International rating:	156/176 (2016 Report)
Ease of doing business ranking:	184/190 (2017 Report)

Type of legal system	Civil law system primarily based on Belgian law but also customary and tribal law
Signatory to NY Convention	5 Nov 2014 (accession)
Signatory to ICSID Convention	29 October 1968
Member of COMESA, OHADA, SADAQ, EAC	COMESA, OHADA and SADC
Signed up to OECD Transfer Pricing Guidelines	No
Bilateral investment treaties	BITs signed with France, Germany, Switzerland and the USA (plus others signed but not in force)

Edwine Endundo and Thibaut Hollanders assess the current regulations and restrictions applicable to foreign investment in Congo – D.R., and highlight potential set-backs for the implementation of legislation regarding subcontracting activities in the private sector

Congo – D.R.

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Foreign entities may only obtain rights of use for a duration limited to 25 years (subject to renewal). This is because all land is subject to the imprescriptible and inalienable ownership of the state.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Before hiring a foreign worker, the employer must publish the job advertisement with the National Employment Service. It is only in the absence of any qualifying applications by Democratic Republic of Congo (DRC) citizens within 30 days of the job advertisement that the employer may seek the approval of the National Commission for Foreign Employment to hire a foreigner. Moreover, before any formal hiring, the employer is required to obtain a work permit.

In addition, Congolese law imposes a maximum percentage on the number of foreign workers employed within the same company. This percentage depends on the company's business sector, but varies between 0 and 2.5%. Finally, some jobs are strictly reserved for Congolese citizens, e.g. human resources manager, legal counsel.

3. What are the restrictions on redundancies and any applicable compensation?

Permanent contracts may only be terminated by the employer for three main reasons. First, for causes related to the employee's professional abilities or attitude, in which instance, the employer is required to hold a hearing for the employee, prior to proceeding with any dismissal.

Second, termination may occur for operational reasons, subject to the prior approval of the Minister of Employment. Third, for economic reasons; in this case, prior ministerial approval is also required, and rules as to the order of priority regarding the selection of employees to be dismissed must be followed. Operational reasons relate to reorganisations made for structural reasons, internal to the company. A termination for operational reasons is therefore a consequence of the company's internal reorganisation, for instance after a merger, or a demerger. Economic reasons relate to general economic difficulties affecting the company's performance.

Early termination of fixed-term contracts automatically entails the right to compensation equal to the remuneration which would have normally been paid to the worker until the end of the contract.

Unlawful termination of an employment contract may lead to the payment of penalties amounting to a maximum of 36 months of compensation. In this respect, it is worth noting that Congolese courts can apply a heavy hand in granting individual damages. Congolese case law often applies the maximum sanction of 36 months where foreign companies are involved as defendant in a labour law dispute.

Finally, collective lay-offs are subject to various restrictive regulations, including, again, by the prior approval by the Minister of Employment.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

The Investment Code (*code des investissements*) and its implementing measures cover foreign investment in general. While there is no general requirement to enter into a joint-venture with public entities or local companies or citizens under DRC law, such requirement may directly or indirectly apply to specific industries, such as the mining sector. Similarly, the 2011 Agriculture Act states that agricultural concessions are only granted to either a Congolese citizen or a Congolese registered company controlled by the Congolese state or by Congolese citizens.

A recently enacted piece of legislation reserves subcontracting activities in the private sector for Congolese entities exclusively. Under section 2 of this Act, subcontracting involves:

- related activity, that is, the activity which indirectly contributes to the carrying out of the main activity by supplying the goods and services;
- ancillary activity, which is any service or any production that the company needs and which are linked to the main activity; or
- a part of the main activity.

5. Are there any specific legislative requirements, and if so, what are they?

The above-mentioned Act on subcontracting activities may be of relevance where foreign companies rely on subcontractors in the DRC.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are restrictions on the importation of goods into the DRC. These restrictions mainly concern the import of food products, weapons, and hazardous products. Advice should be sought in each circumstance.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

The main restrictions relate to the prohibition of criminal activity. In particular, money may not be lent for purposes pertaining to money laundering and terrorism.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security may be granted over movable and real property.

Congolese law, being based on civil law, does not recognise the concept of a trust. However, OHADA law, through Section 5 of the Uniform Act on Security Interests, recognises the concept of a security trustee. Subsequent articles of the Uniform Act on Security Interests have clarified and organised the role of the security trustee in DRC law.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In the DRC, procurement of goods and services are essentially governed by legislation, namely by the 2010 Act on public procurement and its implementation measures. The authorites responsible for public procurement are:

(i) The Public Procurement Regulation Authority (*Autorité de Régulation des marchés publics*).
(ii) The General Directorate of Public Procurement (*Direction Générale de contrôle des marchés publics*).
(iii) Public Procurements Management Units (*Cellule de gestion des projets de gestion des marchés publics*), which were created alongside each contracting authority as listed above.

Congolese law on the disengagement of the state (Law of 7 July 2008) is relevant since it designs the legal framework for private public partnerships, particularly for state owned enterprises. The PPPs signed under the umbrella of the above-mentioned law are overseen by both the government and a special unit, the *Copirep*, which notably elaborates the specifications for each project and proposes a partnership approach.

It must be borne in mind that a Bill on Public Private Partnership (hereafter the PPP Bill) is currently under discussion in the Congolese Parliament. Section 15 of the PPP Bill provides for the creation of a specific public entity responsible for the PPPs.

The main media the government uses to advertise PPP opportunities are: mediacongo.net; radiookapi.net, *Le Potentiel*, or the Official State Gazette.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

The merger control regime is that of the Common Market for Eastern and Southern Africa (COMESA) and its Competition Commission. Under this regime, where both the acquiring firm and the target firm (together or separately) operate in two or more member states, any merger must be notified if both of the following thresholds are met: (i) the combined annual turnover or combined value of assets (whichever is higher) in the common market of all parties to the merger equals or exceeds USD 50 million; and (ii) the annual turnover or value of assets (whichever is higher) in the common market of each of at least two of the parties to the merger equals or exceeds USD 10 million. However, if each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets within one and the same member state, COMESA does not need to be notified (the relevant national regime may need to be notified but there is no such regime in the DRC).

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

There is a prohibition on all agreements, decisions by associations and concerted practices which are intended to be implemented within the COMESA common market and which may affect trade between member states if their object or effect is the prevention, restriction or distortion of competition within the common market (unless there are pro-competitive justifications outweighing the anti-competitive effect).

The regime also prohibits any abuse of a dominant position within the common market or in a substantial part of it. There is also a prohibition of cartel actions such as: price fixing; collusive tendering and bid-rigging; market or customer allocation; allocation by quota as to sales and production; collective action to enforce arrangements; concerted refusal to supply goods or services to a potential purchaser, or to purchase goods or services from a potential supplier; and collective denials of access to an arrangement or association which is crucial to competition.

Although the COMESA legal framework is quite stringent, it is very rarely applied. However, as the COMESA Competition Commission continues to develop, it will look for opportunities to assert itself and business operations in the region will need to take its rules and regulations into account when establishing their business strategies.

For the sake of completeness, it should be noted that Congolese law includes a piece of legislation on unfair competition. However, it is obsolete (1950) and not applied or enforced, in practice.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property is recognised and protected under DRC law. For instance, the owner of an industrial design or model has the exclusive right for a period of five years to operate and sell (or cause to) such design or model. This exclusive right may be renewed once for a further period of five years. Congolese law grants the same rights to a trademark owner. Patents are also protected under Congolese law: patents of inventions are protected for 20 years, while patents for medication are protected for 15 years.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

The Regular Income Tax Regime is set out by Law No 69/009 of 10 February 1969 (the Regular Tax Regime). Some industries, notably mining businesses, benefit from a preferential regime provided for in specific Acts.

Please also note that the Investment Code as well as specific regulations provide for specific tax regimes, like in the mining or forestry sectors.

In the Regular Income Tax Regime, corporate income is subject to corporate income tax at a rate of 35%.

As to dividends, withholding tax is payable at a rate of 20% on the gross amount. Dividends paid to an "active" shareholder of a company other than a stock company are not subject to tax.

Since September 2014, a new withholding tax at a rate of 14% has become due in respect of payments for services of any kind provided by foreign legal entities without a permanent establishment in the DRC. In addition, a company established in the DRC may be subject to the tax on expatriate worker's compensation at a rate of 14%. The import of goods is subject to value added tax (VAT) at a rate of 16%.

As to transfer pricing, the Congolese Regular Tax Regime applies transfer pricing adjustments according to the at arm's length principle.

Consequently, where a company established in the DRC is directly or indirectly affiliated to a foreign company, any "abnormal or gratuitous advantage" granted to the foreign company, regardless of the means used for such purpose, would be requalified as an abnormal act of management and so disregarded for corporate income tax purposes. The DRC resident company would be reassessed accordingly. To avoid any tax adjustment, the DRC resident company must provide evidence that the transaction has been carried out in its own interest and not for the sake of the group's interest.

Congolese law does not provide for taxes on share issues. However, limited companies (*sociétés anonymes*) are subject to a tax on share capital increases at a fixed rate of 1%.

When immovable property is transferred, a transfer duty is payable. In addition, businesses involved in oil and mining industries are subject to a specific tax regime, details of which can be given by the authors.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Yes. The DRC has exchange control regulations, mainly set out in the DRC Exchange Regulation Act and its implementation measures. Basically, the DRC guarantees repatriation of funds under certain conditions. Transfers above USD 10,000 are subject to the prior purchase of a licence from the Congolese Central Bank.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Under DRC law, judgments rendered by a foreign court can only be enforceable in the DRC if ratified (by exequatur) by a competent DRC Court. Under DRC law, exequatur proceedings do not entail a thorough review of the merits of the case by the DRC courts but rather a review of the jurisdiction of the court that rendered the foreign judgment and of the procedural regularity, as per the DRC public policy principles, of the foreign proceedings. Pursuant to the relevant Congolese law, the courts of the DRC are in principle legally bound to recognise and enforce a foreign judgment if:

(i) it is not contrary to the public order of the DRC;
(ii) it is final and not subject to any further appeal in the country where it was rendered;
(iii) according to the law of the country in which it was rendered, the copy of the original judgment meets all legal conditions for authenticity;
(iv) the defendant's right to "due process" in the foreign jurisdiction where the decision was rendered was respected; or
(v) the jurisdiction of the court rendering the judgment was not solely based on the nationality of the plaintiff.

Once a foreign judgment has been ratified by a court in the DRC, it may be enforced in the same manner as decisions handed down by local courts. Further, it is noteworthy that, according to a widespread practice in the DRC, a corporation or an individual seeking to obtain the enforcement of a judgment in Kinshasa will have to deposit 3% of the amount sought to be enforced.

By virtue of the New York Convention recently ratified by the DRC (2015), arbitral awards are enforceable in the DRC, provided that:

(i) the arbitral award was rendered after February the 3rd, 2015; and
(ii) none of the exceptions to the New York Convention apply.

To date, no arbitral award has been enforced in the DRC on the basis of the New York Convention.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Before the recent (2015) entry into force of the Uniform Act on Arbitration in the DRC, legislation regarding arbitration was quite obsolete. However, very few arbitration proceedings were and are conducted in the DRC. Congolese courts are therefore not familiar with arbitration proceedings. This has prevented the advent of the potential support of the Congolese courts towards arbitration proceedings. In theory, however, the President of the *Tribunal de Grande Instance* (first instance tribunal) is competent to challenge an arbitrator and to rule on matters relating to the filing of evidence.

Where the seat of arbitration is located in the DRC, the allocation of competence between Congolese courts regarding support of arbitral proceedings is as follows:

- the Court of Appeal has jurisdiction to rule on an application for annulment; and
- the *Tribunal de Grande Instance* has jurisdiction to rule on interim measures petitioned by a party to the arbitral proceedings in case of emergency or if the measure is to be enforced outside OHADA territory. In any event, the *Tribunal de Grande Instance* is prevented from ruling on the merits of the case.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

Other than the usual requirements regarding authority/proxy, there are no specific formalities to be complied with for a foreign company to sign a document. There is, however, an exception to this principle: pursuant to the Congolese Mining Code, companies active in the mining sector must use a certified proxy ("*mandataires en mines*") for the accomplishment of specific formalities in connection with their business.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The Congolese legislator has recently enacted an Act regulating subcontracting activities in the private sector. This Act reserves, to a certain extent, subcontracting activities to Congolese citizens and DRC registered companies whose management is substantially in the hands of Congolese citizens. The Act's transitory provisions grant a 12-month delay to companies, either Congolese or not, to adopt the required measures in order to be compliant with the said Act. This piece of legislation rests on certain unclear concepts and lacks definition, which will undoubtedly undermine its application. An implementation decree is therefore seen as necessary and has been requested by businesses in order to ensure both the certainty and the consistency of the Act's application. ■

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Liedekerke Wolters Waelbroeck Kirkpatrick ("Liedekerke") is one of Belgium's foremost business law firms. The firm has an international reputation upon the unique experience and unchallenged expertise, which it has acquired in all areas of business law. Liedekerke's clients are active in a broad range of industries, to which it offers first-rate, creative and personalised full-service advice.

With over 135 lawyers, including 35 partners, Liedekerke is commonly recognised for its ability to quickly mobilise competent, flexible and multidisciplinary teams anywhere.

In 2014, "Liedekerke Africa" opened as a subsidiary in Kinshasa (DRC) to enhance their capability to provide local legal support and operational assistance to companies and other stakeholders active across Francophone Africa and the DRC in particular.

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Egypt

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Population:	94.4m (UN estimate – January 2017)
GDP per capita:	US$12,100 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.4% (CIA Factbook – 2014-2016)
Official languages:	Arabic
Transparency International rating:	Ranked 108/176 (2016 Report)
Ease of doing business ranking:	Ranked 122/190 (2017 Report)

Type of legal system	Based on Islamic (Sharia law) and Napoleonic Code civil law
Signatory to NY Convention	Yes (9 March 1959)
Signatory to ICSID Convention	Yes (11 February 1972)
Member of COMESA, OHADA, SADAQ, EAC	COMESA
Signed up to OECD Transfer Pricing Guidelines	Does not follow OECD Guidelines, but generally consistent with them
Bilateral investment treaties	Egypt is a party to several BITs/TIPs including with China, the UK, the EU and the US

Samaa Haridi and Reem Abbass provide an overview of the laws and regulations governing foreign investment in Egypt, and highlight forthcoming important legislative changes

Egypt

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

The ownership of land by foreigners is governed by three laws: Law No. 15 of 1963; Law No. 143 of 1981; and Law No. 230 of 1996. Law No. 15 of 1963 prohibits the foreign ownership of agricultural land; whether they are natural persons or legal entities, foreigners may not own or hold rights of usufruct over agricultural land. Law No. 143 of 1981 governs the acquisition and ownership of desert land. Partnerships and joint stock companies may own desert land within stipulated limits, even if foreign partners or shareholders are involved, provided that at least 51% of the capital is owned by Egyptians.

However, upon the liquidation of the company, the land reverts to Egyptian ownership. Law No. 230 of 1996 allows non-Egyptians to own real estate (vacant or built) with certain restrictions. These restrictions include the mandatory erection of a building on vacant land within five years of the foreigner registering his ownership with the notary public. As for the *residential* surface area and number of properties restrictions, a foreigner is limited to a maximum of 4,000 square metres and two properties that serve as accommodation for the owner and his family.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

According to the Egyptian Companies Law, and its related decrees, foreign labour may not exceed 10% of the total labour force of an Egyptian company and total compensation of foreign employees must not exceed 35% of the total payroll of the establishment.

Article 28 of Egyptian Labour Law No. 12 of 2003 stipulates that all foreign employees must obtain validly issued work permits, which require the submission of specific documents by both the employer and the expatriate employee and the fulfilment of certain requirements. A fine of not less than EGP 500 and not exceeding EGP 5,000 is imposed in the case of failure to comply.

Article 2 of Ministerial Decree No. 292 of 2010 provides exemptions from obtaining a work permit. A new regulation was passed in 2015 to further facilitate the permit issuance process.

3. What are the restrictions on redundancies and any applicable compensation?

Law No.12 of 2003 provides that if contemplating collective redundancies, the employer must submit a request for closing the enterprise or reducing its size or activity to a committee established for this purpose. The employer is not allowed to ask for partial or total closure of the enterprise during mediation or arbitration. In the request to the committee, the employer must provide information including the reasons for the contemplated terminations, and the number and categories of workers likely to be affected.

As an alternative to dismissing workers for economic reasons, the employer is entitled to propose modifications to the employment contract. If the worker refuses it, he/she has the right to leave the enterprise without giving any notice. In this case, the dismissal is deemed lawful and the worker keeps his/her rights to compensation prescribed for dismissals for economic reasons.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

The 1997 Investment Incentives Law was designed to encourage domestic and foreign investment in targeted economic sectors. The law allows 100% foreign ownership of investment projects and guarantees the right to remit income earned in Egypt and to repatriate capital. Other key provisions include: guarantees against confiscation, sequestration, nationalisation, the right to own land, the right to maintain foreign currency bank accounts, freedom from administrative attachment, the right to profits and equal treatment regardless of nationality.

5. Are there any specific legislative requirements, and if so, what are they?

The Companies Law 159 of 1981 regulates domestic and foreign investment in sectors not covered by the 1997 Investment Incentives Law, such as

shareholder investments, joint stock or limited liability companies. The law permits automatic company registration upon presentation of an application to the General Authority for Investment and Free Zones (GAFI), with certain exceptions. It also removed a previous legal requirement that at least 49% of shareholders be Egyptians and allows 100% foreign representation on the Board of Directors of any company.

In an effort to further promote investment, Egypt issued Presidential Decree 17 of 2015, reforming many of Egypt's investment-related laws, including company law, general tax laws, investment guarantees, incentives laws, and income tax laws. The decree refined Egypt's one-stop shop system, stating that the Ministry of Investment's GAFI will serve as a liaison between investors and government agencies when applying for business licences.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

In an attempt to reinforce the national economy, promote local products and enhance their competitiveness against foreign products, the Egyptian authorities have published new import procedures and measures, the most recent of which is Decree No. 43 of 2016. The decree increased the technical requirements (ex. registration of producers, legalisation of invoices), increased customs tariffs (if not regulated by free trade agreements) and provided for very limited access to foreign exchange currencies (if not considered a priority product).

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Egyptian law prohibits the granting of security over future assets other than the rights which have effectively been established but are not yet due. By way of example, a pledge over cash deposits in a bank account may be invalidated on the grounds that such a pledge covers future money which may or may not be available at the time of the execution of the pledge.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Law No.115 of 2015 governs security over movable assets (Movable Security Law), it regulates the pledging of movable assets and specifies the types of assets that can be taken as collateral and the Central Bank of Egypt (CBE) issues the regulations and guidelines for banks to follow. The categories of assets that are typically provided as security to lenders include shares, bank accounts, land, contractual rights, insurance proceeds, authorisations and licences, intellectual property, personal property, tangible assets, aircrafts and ships.

Egyptian law does not recognise the concept of a security trustee. However, the appointment of a security agent is common, especially in the context of syndicated loan agreements. The roles, duties and rights of a security agent are regulated by contract, since Egyptian law does not stipulate further requirements as to the enforceability of a security agent's right in security.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

There is a regulatory framework allowing national-level PPP projects across sectors, with laws and regulations passed in 2010 and 2011, which are generally considered to be in line with international best practice.

The institutional design of PPPs in Egypt centres upon the Supreme Committee for Public Private Partnership Affairs. The Supreme Committee is chaired by the Prime Minister and members include the Ministers of Finance, Investment, Economic Development, Legal Affairs, Housing and Utilities and Transportation, as well as the head of the Public Private Partnership Central Unit (PPPCU). However, depending on the project sector, provision is made for other relevant ministers to be invited to join.

The PPPCU was set up in 2006 as a unit within the Ministry of Finance and is mandated to provide technical, financial and legal expertise to the relevant ministries. The Unit is also responsible for the study, application and implementation of PPPs, for coordination with ministries and the private sector, and for implementing the country's PPP plan.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

The Egyptian competition law does not regulate merger rules; however, it includes post-notification clauses for mergers. Article 19 of Law No. 190 of 2008 imposes on entities whose annual turnover exceeds EGP 100,000,000 the duty to notify the anti-trust authorities of any transaction they undertake whether an acquisition of material assets, ownership rights, shares or usufruct rights or a merger, union or takeover of control of another person (whether *de facto* or *de jure*).

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The Egyptian Competition Authority is the body that ensures free competition in the market, prohibits anticompetitive practices, and serves consumer and producer interests. The Authority operates under the Egyptian Competition Law (Law No. 3 of 2005), which was enacted in 2005 and covers three categories of violations; cartels; abuse of dominance; and vertical restraints. In 2008, Law No. 190 of 2008, introduced amendments to the Competition Law aimed at protecting competition, prohibiting monopolistic practices and assuring free competition and free entry and exit from the market based on economic efficiency.

In 2016, a committee was appointed to propose new amendments to the Egyptian Competition Law to establish and further improve the legislation and the regulative role of the Egyptian Competition Authority.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Article 69 of Egypt's new constitution reaffirms the state's commitment to the protection of IP rights. It also calls for the establishment of an administrative organ to ensure legal protections, but this administrative entity has not been established yet. In the absence of that administrative entity, Egypt's IP rights sector remains regulated by Law 82 of 2002.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

In Egypt, companies are liable for corporate tax at a flat rate of 22.5%, with exceptions relating to the Suez Canal Authority, the Central Bank of Egypt and oil and gas exploratory and production companies. Corporate Tax is imposed on companies that are resident in Egypt on all profits realised from Egypt and abroad. It is also imposed on companies that are non-resident in Egypt with regard to profits realised through a permanent establishment in Egypt.

Dividends paid by corporations or partnerships in Egypt are subject to a tax on dividends. However, an applicable double tax treaty between Egypt and the foreign country may result in the reduction of such tax rate. Tax on dividends is imposed at a standard rate of 10% without any deductions or exemptions. However, this rate can be reduced to 5% if the recipient holds more than 25% of the distributing company's capital or voting rights and the recipient holds the shares or commits to hold the shares for a period of not less than two years. In 2016, Egypt's parliament gave a final approval to the implementation of the long-delayed valued added tax (VAT) at a rate of 13%.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Banking Law No. 88 of 2003 regulates the repatriation of profits and capital. The government has repeatedly emphasised its commitment to maintaining the profit repatriation system to encourage foreign investment in Egypt. The current system for profit repatriation by foreign firms requires sub-custodian banks to open foreign and local currency accounts for foreign investors (global custodians), which are exclusively maintained for stock exchange transactions. The two accounts serve as a channel through which foreign investors process their sales, purchases, dividend collections and profit repatriation transactions using the bank's posted daily exchange rates. The system is designed to allow for settlement of transactions in fewer than two days, though in practice some firms have reported significant delays in repatriating profits due to on-going currency controls.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Under Egyptian Law, parties are free to agree on the dispute resolution process they wish to use. Both domestic and international arbitrations are governed by Egypt's Arbitration Law No. 27 of 1994, which is based on the UNCITRAL Model Law. Also, as a signatory of the New York Convention, the New York Convention Rules apply when a party seeks the recognition and/or enforcement of a foreign arbitral award in Egypt.

In the enforcement of foreign judgments or arbitral awards, Egyptian courts do not address the merit of the case but rather make sure that the procedure complies with the requirements of Law No. 27 of 1994.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

The courts will generally decline jurisdiction to hear any matter which is subject to an arbitration agreement. The courts may also intervene during the process if requested by the arbitral tribunal to summon witnesses or impose fines for failure to attend. When deciding on the recognition or enforcement of an arbitration award, the Egyptian Courts do not review the arbitral award on its merits. The rules governing the recognition and enforcement of a domestic arbitral award are to be found in Law No. 27 of 1994 (the Arbitration Law).

As a signatory to the New York Convention, the New York Convention Rules, the Arbitration Law applies when a party seeks the recognition and/or enforcement of a foreign arbitral award. The conditions set out in the Arbitration Law include that the arbitral award does not contradict a judgment previously made by the Egyptian courts on the subject of the dispute that it does not contravene Egyptian public policy and it was properly notified to the party against whom it was made.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are generally no restrictions other than the usual requirements on notarisation and certification, in accordance with a company's constitutional documents and applicable laws.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The Egyptian Government has made progress on the roadmap adopted in July 2013; it ratified a new constitution in January 2014 and held presidential elections in May 2014. Since then, the government has demonstrated a willingness to make difficult economic decisions, including cutting fuel subsides, devaluating and floating the Egyptian pound and restricting imports. Upcoming planned investment reforms are set to simplify bankruptcy proceedings, and there are also forthcoming amendments to the capital markets law, a new insurance law and a land management framework. ■

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Hogan Lovells has a deep understanding of the legal, procedural and cultural frameworks in Egypt and the Middle East region. By combining international best practice with civil trained lawyers, as well as English and Arabic-speaking capabilities, Hogan Lovells provides its client with interests in Egypt and the Middle East a comprehensive and seamless service. Hogan Lovells provides legal services in Egypt in the areas of Alternative dispute resolution, international arbitration, international fraud and insolvency, construction and engineering, energy, real estate, financial services regulation, commercial and retail banking, insurance and reinsurance, investment banking and funds, IT and telecoms, product liability and class actions.

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Ethiopia

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Population:	103.3m (UN estimate – January 2017)
GDP per capita:	US$1,900 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 9.0% (CIA Factbook – 2014-2016)
Official languages:	Oromo, Amharic, Somali, Tigrigna, Afar
Transparency International rating:	Ranked 108/176 (2016 Report)
Ease of doing business ranking:	Ranked 159/190 (2017 Report)

Type of legal system	Civil law system
Signatory to NY Convention	No
Signatory to ICSID Convention	Yes (21 September 1965) but has not been ratified nor come into force
Member of COMESA, OHADA, SADAQ, EAC	COMESA
Signed up to OECD Transfer Pricing Guidelines	Generally consistent with OECD Guidelines
Bilateral investment treaties	Ethiopia is a party to several BITs/TIPs including with China, the EU and the US

Tamrat Assefa and Marina Bwile offer an insight into the current landscape of foreign investment in Ethiopia, and provide details of forthcoming legislative changes that foreign investors should be aware of

Ethiopia

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Yes. The Ethiopian Constitution and other federal framework laws determine who owns land and what type of land right individuals can have. Further, regional states can administer land by enacting additional laws, in accordance with the overall federal framework law.

In accordance with Article 40(3) of the Ethiopian Constitution, both urban and rural land is owned by the government and people of Ethiopia, and it is not subject to sale or other means of exchange. Thus, ownership of land is exclusively given to the government, and the right of individuals in both rural and urban land is limited to a use right. Based on this understanding, the constitution, under sub-article 6 of the same article, states that private investors may use land on the basis of a payment arrangement established by law.

However, individuals and investors have full right of ownership over their immovable property situated on the land and the permanent improvement they make to the land. These rights include the right to alienate, bequeath, and, where the right of use expires, remove their property, transfer their title or claim compensation.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

No. The Ethiopian Investment Law allows foreign investors to hire duly qualified foreign employees for the operation of their business. However, for very junior positions, e.g. secretaries and messengers, if they need them, an investor would be required to employ only local staff.

3. What are the restrictions on redundancies and any applicable compensation?

The employer is required to conduct the retrenchment exercise in accordance with the law in giving the requisite notice to the employee and paying all of the terminal benefits. Failing the aforesaid, the employer may be required to reinstate the employee back to employment or pay compensation of up to six months' salary in addition to severance pay and other payments. Where it has become necessary for the employer to reduce its work force, an employee retrenched will be entitled to an amount equal to two months' salary in addition to the applicable severance pay, as well as any unpaid salary, payment *in lieu* of notice and leave pay.

Retrenchment (re-organisation) is one of the grounds for terminating a contract of employment with notice. The employer must give prior notice to an employee in case of termination, of his/her employment contract, due to reorganisation.

The notice periods vary depending on the period an employee has been engaged by an employer. Where the employer terminates the employment contract without an advanced notice in accordance with law, he would be required to pay the employee wages in lieu of the notice.

Wages, and other payments connected with wages, due to the employee shall be paid within a prescribed period unless circumstances cause a delay. Where the employer is late in the payment of the final pay-cheque of the employee (i.e., more than the allowable time limit required by law), the employer may be required by the court to pay the employee's wage for the period of delay up to three months' wages.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

No, unless the investor is involved in the manufacture of weapons and ammunition or telecommunication services, in which case a joint investment with the government would be required.

All other areas open to foreign investment can be fully owned (100%) by foreign shareholders and there is no requirement for local partnership other than in the two investment business activities mentioned above.

5. Are there any specific legislative requirements, and if so, what are they?

Yes. The principal legislation dealing with foreign investments in Ethiopia are the Investment

Proclamation No. 769/2012 (the Proclamation) and Investment Regulation No. 270/2012 (the Regulation). The Investment Proclamation provides a general framework regarding foreign investment, and outlines areas of investment for government and joint investment for government, types of investment vehicles, minimum capital requirements and procedures for securing an investment licence. The Proclamation also provides investment incentives and guarantees, and the right of foreign investors to remit profits from the investment, proceeds from sale of shares or dissolution of the company, as well as money transfers for repayment of foreign loans and interest and other payments.

The Investment Regulation, on the other hand, provides a detailed schedule regarding investment areas permitted for foreign investors and tax incentives applicable to them. The Regulation also specifies duty free privileges accorded to foreign investors.

A foreign investor that wishes to invest in Ethiopia is required to bring a minimum of USD 200,000 for a single investment project. The capital requirement is reduced to USD 150,000 for foreigners who make a joint investment with Ethiopians, and USD 100,000 for those that wish to engage in architectural and engineering works or technical services.

Investors re-investing their profits or dividends generated from existing enterprises may not be required to allocate minimum capital.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are no legal restrictions on importation of goods and raw materials, although use of local produce is encouraged.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Foreign lending is restricted, unless authorised by the regulatory bank. Once approved, there are no restrictions on the use of the money lent.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Property is classified into corporeal or incorporeal; the former embraces all physical things whether movable or immovable, while the latter includes not just non-physical things, like patents, copyrights and shares, but rights less than ownership in physical things.

The general legal regime for security in Ethiopia enables a debtor to give security or right over his/her/its movable and immovable property to a creditor without the transfer of possession or title.

Ethiopian law affords lenders various types of security, among them, (a) mortgages over immoveable property, (b) pledge over moveable properties, (c) mortgage of business, and (d) guarantees by borrower or sponsor or any third party.

There are also further mechanisms provided for by law that enable the lender to benefit from contracts entered into by the borrower; namely, assignment and delegation agreements.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

Infrastructure projects are spear-headed mainly by the government. Currently, there are no specific laws governing PPPs, nor institutions that manage PPP projects in Ethiopia. The few PPPs in Ethiopia have been implemented by the relevant government ministries.

Under this structure, the applicable laws would include mainly the Property Administration Proclamation No. 649 of 2009, the Council of Ministers Regulations on Financial Administration of the Federal Government No. 17/1997, the Federal Government Procurement Directive issued by the Ministry of Finance and Economic Development in June 2010, and the Public Enterprises Proclamation No.25/1992, investment and business registration laws.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes. The Trade Competition and Consumer Protection Proclamation No. 813/2014 (TCCPP) repealed the Trade Practice and Consumer

Protection Proclamation No. 685/2010. This law regulates mergers, acquisitions and takeovers on essentially the same principles.

There are no specific thresholds (e.g. 50% of the market share) set in law that would be considered anti-competitive. The test applied is whether the share acquired will help the acquirer to influence the business decisions in the company and whether said acquisition will have anticompetitive effect if allowed to operate in the market.

The mechanics of determining whether the merger would cause a significant restriction on competition or eliminate competition altogether is the preservation of the Trade Competition and Consumers Protection Agency (TCCPA) established to implement the provisions of TCCPP.

The TCCPA implements TCCPP in line with the enabling directives and regulations.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The TCCPP prohibits anti-competitive agreements, abuse of dominance, unfair competition and merger/acquisition.

Although anti-competitive practices, e.g. price fixing, are not prevalent in Ethiopia, if at all, action is taken against the perpetrators. The government, however, has taken steps to stop/prevent hoarding and the relevant governed organs take action.

The general legal framework *vis-à-vis* mergers and acquisitions, and anti-competitive agreements is still in its formative stages and much remains to be done over and above promulgation of laws and the establishment of the implementing institutions.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

In 1998, Ethiopia acceded to the Convention establishing the World Intellectual Property Organization (WIPO). The Ethiopian Constitution (1995) provides the foundation for intellectual property rights. The government also recognises the protection of intellectual property rights as a key factor in economic growth and there are a number of legislative measures regulating such protection, namely: (i) the Inventions, Minor Inventions and Industrial Designs, Proclamation No. 123/1995 enacted to protect intellectual property rights; and (ii) Trade Mark Registration and Protection Proclamation No. 501/2006 which regulates acquisition, registration and protection of trademarks in Ethiopia.

These Proclamations are in accord with the spirit of the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO Treaty.

The various aspects of intellectual property are administered by the Ethiopian Intellectual Property Office (EIPO) established to oversee the protection of patents, trademarks and copyrights under one umbrella.

EIPO registers patents, industrial designs, utility models and trademarks after duly processing applications and the relevant supporting documents. Lengthy evaluation and verification procedures are involved especially in processing patents.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Corporate taxes

- Corporate Income Tax Rate: The standard corporate income tax rate is 30%.
- Capital Gains Tax Rate: 15/30%. The 15% rate applies to gains derived from transfers of immoveable assets. The 30% rate applies to gains derived from transfers of shares and bonds.
- Branch Tax Rate: The standard branch tax rate is 30%.

Withholding Taxes

- Withholding tax on payment for goods and services: 2%.
- Dividends: 10%. This is a final tax for both residents and non-residents.
- Interest: 5%. This is a final tax for both residents and non-residents.
- Royalties: 5%. This is a final tax for both residents and non-residents.
- Technical Services: 10%. This is a final tax for both residents and non-residents. This withholding tax applies to technical services rendered outside Ethiopia.

The stamp duties which are applicable in Ethiopia are as follows:

Indirect taxes

- The VAT rate in Ethiopia is 15%.
  If a non-resident person who is not registered for VAT in Ethiopia renders services in Ethiopia for a customer registered in Ethiopia,

the rendering of services is taxed unless the service is exempted from tax. The customer shall withhold the 15% (Reverse VAT) tax from the amount payable to the non-resident person.

The value of services taxable is the amount of consideration that the recipient is obliged to pay for the services, except that if the supplier and the recipient are related persons, the value of the import is its market value.

- Provision of service in Ethiopia without having a Tax Identification Number (TIN) will result in the service provider suffering a deduction of 30% withholding tax by the withholding agent.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Yes. There is a strict foreign currency control regime in force administered by the Exchange Controller at the National Bank of Ethiopia and by the commercial banks which conduct their work under the supervision of the National Bank of Ethiopia. Any transfer of foreign currency in and out of Ethiopia is regulated.

Repatriation of funds out of Ethiopia is in respect of permitted transfers only.

Under the Investment Law, foreign investors are legally entitled to remit the following out of Ethiopia in convertible foreign currency:

(i) profits and dividends accruing from the investment;
(ii) principal and interest payments on external loans
(iii) payments related to technology transfer agreements registered by the government;
(iv) payments in relation to an export-oriented non-equity collaboration agreement;
(v) proceeds from the transfer of shares or of partial ownership of enterprises to a domestic investor;
(vi) proceeds from the sale or liquidation of the enterprise; and
(vii) compensation paid to an investor in the event of expropriation.

The Investment Law does not apply to mining activities. However, foreign investors in the mining sector are granted similar rights under the Mining Proclamation No. 678/2010. In this regard, the Mining Proclamation provides that foreign investors holding a large-scale or small-scale mining licence may make the following remittances out of Ethiopia in the currency of investment or in an approved currency at the prevailing rate of exchange on the date of remittance:

(i) profits and dividends accruing from mining investment;
(ii) principal and interest on a foreign loan;
(iii) fees, royalties or other payments accruing pursuant to technology or the management agreement relating to the mining investment; and
(iv) proceeds from the liquidation of a mining business enterprise.

Repatriation of the above permitted transfers is subject to fulfilling all tax obligations and registration requirements in Ethiopia.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Under the laws of Ethiopia, foreign arbitral awards/foreign judgements will be recognised and enforced in Ethiopia where an application for the execution of such has been presented to the relevant division of the High Court accompanied by a certified copy of the foreign arbitral award/foreign judgment to be executed; and a certificate signed by the President or Registrar of the arbitral tribunal that rendered the award to the effect that such an award is final and enforceable.

The High Court will not review the merits of the case. It will, during an exequatur proceeding, merely establish whether the arbitral tribunal which rendered the arbitral award/foreign judgment had jurisdiction to do so, the defendant/respondent was given a chance to defend itself and, where it finds that this is the case, it will enforce the award against the defendant in Ethiopia.

The enforcement of the award/judgement will be subject to a number of conditions; among them, reciprocity between the country where the award/judgement was rendered and Ethiopia, whether the award/judgment is not against public order or morality, etc.

The courts with jurisdiction to hear such cases are the Federal High Courts and the Federal Supreme Court of Ethiopia in the event of an appeal.

Generally, the time taken would be about seven months from the time the first application is made and the court decides on any appeal made by the losing party, but in practice it may take a minimum of one year as it would depend on the number of cases already pending in court, which in most cases are many.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Parties to an arbitration agreement may approach courts, *inter alia*, seeking interim relief enjoining a

pending arbitral proceeding. In addition, courts in Ethiopia will up hold provisions of a contract with an arbitration clause on the basis of the principle enshrined under the Civil Code where contracts lawfully formed shall be binding on the parties as though they were law.

Normally, the courts will not entertain a dispute where parties have agreed to have their disputes settled by way of arbitration. If a suit is instituted in court where there is a valid arbitration clause under the contract, the other party is entitled to raise a preliminary objection in accordance with the provisions of the Civil Procedure Code.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

Signing procedures will depend on the type of document being executed and the transaction the parties are engaged in. In principle:

(a) any person signing a document on behalf of a foreign company must be duly authorised either under memorandum and articles of association or a power of attorney signed by the general manager or the shareholders;
(b) signing of agreements that are legally required to be in writing, e.g. contracts for the sale or mortgage of immovables, insurance contracts, administrative contracts and contracts of guarantee, must be attested by two witnesses; and
(c) mortgage agreements, memorandum and articles of association and amendments thereof, power of attorney, lease for an office business space and other documents where the law so requires must be signed before a notary, which in Ethiopia is a government-run office.

There are no requirements that such contracts need to be executed in the local language, and the practice also shows that contracts – even those entered into with foreign companies – can be executed in English or in the local language (or in both).

When adduced as evidence in court, contracts written in English are, in practice, translated into the local language (Amharic) and authenticated by the Acts and Documents Registration Office.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

A number of laws have been repealed and new ones promulgated. They include: the Commercial Registrations and Business Licensing Proclamation No. 980/2016, which repealed the Commercial Registrations; and Business Licensing Proclamation No. 686/2010. The need for renewing the commercial registration certificate on an annual basis has been done away with, and the Ministry of Trade has introduced the concept of holding companies, border trade and registration of domestic and foreign chamber of commerce, and has abolished the need for providing a business licence at the time of renewing a business licence, among other things.

The Federal Income Tax Proclamation No. 979/2016 repeals the Income Tax Proclamation No. 286/2012, Petroleum Operations Income Tax No. 296/1986 and the Mining Income Tax Proclamation No. 53/1993. It increases the minimum income bracket except for employee income tax, introduces tax on windfall profits, essentially merges three tax regimes (mining, petroleum and general income tax laws), makes it possible to obtain a tax ruling in advance with respect to imports, etc.

A new Federal Tax Administration Proclamation No. 983/2016 has been enacted which introduces a system of advance tax rulings to address the problem of prolonged pendency of taxpayers cases resulting from divergent interpretation of tax laws within the tax administration and generally establishes a more robust system for reviewing taxpayers' complaints on tax decisions by improving accessibility and quick disposition of taxes cases. The stamp duty rates are normally charged on value, for instance, the stamp duty on execution of security deeds and bonds is 1% of the value of the amount secured/bond and for documents relating to transfer of title is 2%. There are also flat fee charges on execution of memorandum and articles of association and collective bargaining agreements being ETB 350 on the first execution and ETB 100 on subsequent executions. ■

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Tamrat Assefa Liban Law Office is generally regarded as the premier most reliable corporate, commercial law firm in Ethiopia. The firm is committed to delivering an integrated, quick and effective service and at the same time maintaining high standards of technical quality drawn from a solid knowledge of the local business environment and an in-depth understanding of Ethiopia's intricate socio-political climate.

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Gabon

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Population:	1,801,232 (UN estimate – January 2017)
GDP per capita:	US$19,300 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.8% (CIA Factbook – 2014-2016)
Official languages:	French
Transparency International rating:	Ranked 101/176 (2016 Report)
Ease of doing business ranking:	Ranked 164/190 (2017 Report)

Type of legal system	Mixed legal system of French civil law and customary law
Signatory to NY Convention	Yes (15 December 2006 accession)
Signatory to ICSID Convention	Yes (21 September 1965)
Member of COMESA, OHADA, SADAQ, EAC	OHADA
Signed up to OECD Transfer Pricing Guidelines	Does not follow OECD Guidelines
Bilateral investment treaties	Gabon is a party to BITs/TIPs with BLEU, China, Germany, Italy, Republic of Korea, Morocco, Romania and Spain

John Ffooks and Richard Glass review key authorities and legislation governing foreign investment in Gabon, and discuss legislative changes to attract new investors for improving the production and distribution of electricity and water in Gabon

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

There are no formal restrictions on foreign entities holding an interest in land, and there are no formal distinctions under Gabonese law relating to land ownership as between nationals and foreign citizens, whether under Law No. 15/63 dated 8 May 1963 relating to land ownership in Gabon or Ordinance No. 50-70 dated 30 September 1970 relating to long leases of state private land. Both statutes govern the use of land in Gabon. In practice, the state owns almost 90% of land in Gabon and in order to acquire Gabonese land, foreign entities must establish subsidiaries and acquire interests in land either by direct acquisition of land from the government, or by entering into long lease agreements with the state. The common way for foreign entities to hold an interest in land is the long lease agreement.

When it comes to loans, it is possible for the landowner or the lessee (in case of a long lease) to grant a mortgage as a security in favour of the lenders over land.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The recruitment of a foreign employee is subject to the prior authorisation of the Labour Ministry (via a Work Permit). The employment contract must be stamped by the Labour Ministry. The application for a Work Permit is initiated by the employer, who must also file a commitment of employment letter stating that he commits to repatriate the foreign worker and his/her family to their home country at the end of the employment contract. The Work Permit is valid for two (2) years, and is renewable.

In order to be accepted, the application for the Work Permit must show evidence that no Gabonese worker is available to undertake the work sought on the basis of the nature of the work and location of the workplace as well as the professional skills required for the work.

A fine of CFA 100,000 to 600,000 and/or an imprisonment of two to six months apply to any individual or entity employing a foreigner without first obtaining of the Work Permit. A repeat offence under the law is sanctioned by a fine of CFA 200,000 to 1,200,000 and/or an imprisonment of four to 12 months.

3. What are the restrictions on redundancies and any applicable compensation?

Any employer wishing to proceed with redundancy proposals must inform the staff representatives, union representatives and any members of the permanent economic and social committee at the employer on the redundancy plan covering the reason of the redundancy, professional details on the employees, mitigation measures to limit the number of employees affected by redundancy and any social plans in favour of the employees affected by the redundancy process.

The staff representatives, union representatives and members of the permanent economic and social committee have eight days to review the redundancy plan. A meeting is held with the employer at the expiry of this period. The redundancy plan, the minutes of this meeting and an application for redundancies on economic grounds are submitted to the Ministry of Labour, via the labour inspector in order to obtain his approval on the redundancy process. The labour inspector has 30 days to issue his decision.

The employee affected by the redundancy process benefits from legal compensation of 20% of his monthly average salary calculated on the basis of the last 12 months as multiplied by the number of years spent in the company. The employer can apply for more favourable compensation to be offered should they wish.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

There is no law prohibiting or limiting foreign investment in Gabon. In addition to the preference given to the employment of Gabonese workers as stated under question 2 above, the management of a Gabonese company, irrespective of the types of companies, must also have at least one resident representative. The resident representative can be a non-Gabonese citizen.

5. Are there any specific legislative requirements, and if so, what are they?

From a general corporate law perspective, there are no specific legislative requirements. However, in the oil and gas industry, the state is entitled to hold a mandatory participating interest in a petroleum contract of up to 20% holding by the chosen contracting company. Any acquisition of that participating interest by the state exceeding the 20% holding interest must be done at market price. In addition to this, the Gabon Oil Company (i.e. the national oil and gas company) is also entitled to acquire at the market price a participating interest in the petroleum contract of up to 15%. The contracting company can assign its rights and obligations under any hydrocarbons contracts to a third party, subject to the prior approval of the Ministry of Oil and Hydrocarbons and the Ministry of Economy. The state is entitled to a pre-emptive right to apply on any assignment to a third party, excluding assignments between the contracting company and its affiliates.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

In general, the relevant Central African Economic and Monetary Community (CEMAC) Foreign Exchange Regulation applicable in Gabon does not provide any threshold or ceiling in terms of the quantity of imported or exported goods, save for specific goods falling within the scope of regulated activities such as, inter alia, oil and gas and mines. For example, the contracting company in an oil and gas production sharing contract must sell a part of the oil product to the local market in order to satisfy local needs.

Income from the importation and exportation of goods must be domiciled in a local bank.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Any loan granted by a non-resident in favour of a resident must be notified to the Central Bank and the Ministry of Finance 30 days prior to its execution. The reimbursements of loans must be notified to the same authorities 30 days after their realisation.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The main types of security commonly used in Gabon are the non-possessory pledge and the mortgage. The non-possessory pledge can be taken over shares, professional equipment, inventory, business assets, receivables, bank account and intellectual properties while mortgage can be taken over properties and real estates. The concept of Security Trustee is recognised by the OHADA Uniform Act on Security. In this regard, the Security Trustee must be a local or foreign bank.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In August 2015, the Government adopted Ordinance No. 22 /PR/of 2015 on public-private partnerships. This ordinance sets out the framework for the elaboration, signing and execution of contracts and agreements concluded for the implementation of public-private partnerships (CPPP). The relevant authorities in charge of the management, control and assessment of CPPP are in the process of being set up.

Gabon has also a mechanism governing public service delegations and public-private partnerships in its 2012 Public Procurement Code (under Decree No. 0254/PR/MEEDD of 19 June 2012 on the Public Procurement Code). The Directorate General for Public Procurement (DGMP) and the Public Procurement Regulatory Authority (ARMP) controls and regulates contracts for public service delegations. Gabon has experience in concessional PPP projects, particularly in the water and electricity sectors.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

The CEMAC regulation on competition only applies to mergers that have a regional dimension (i.e. involving legal entities registered and based in the CEMAC region).

The Gabonese Law No. 014/1998 on competition (the Competition Law) applies to mergers that have a national dimension or which involves Gabonese entities and non-CEMAC entities. A notification is required in the following circumstances:

- the Competition Commission's opinion is only required when the parties to a merger have made together 25% of sales, purchases or other transactions on a national market of goods or services; and
- all mergers must be notified to the Minister of Economy. Such notification has to be made either when it is still a project, or within two months following the date on which such project became effective. The Minister of Economy has three months to issue its decision. In the absence of a decision, silence will mean an approval of the merger.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The CEMAC Regulation on Competition Law only applies to abuses of a dominant position and cartel behaviours that have a regional dimension (i.e. involving legal entities registered and based in the CEMAC region).

There are no provisions in the Gabonese Competition Law that prohibit exclusivity arrangements.

Individuals and entities involved in an abuse of dominant position or cartel behaviours shall be liable to an imprisonment of three months to two years (only individuals) and to the payment of a fine of FCFA 100,000 (approx. USD 165) to FCFA 500,000,000 (approx. USD 812,000). The fines can be lessened (i.e. FCFA 50,000 (approx. USD 82) to FCFA 300,000,000 (approx. USD 488,000)) if the offenders and the local authorities agree to enter into amicable settlements. The following additional sanctions can also be applied:

- confiscation for the benefit of the state of all or part of the seized goods;
- permanent closure of the business; and
- publication of the decisions that have been rendered in an official journal.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Law No. 1/87 on protection of copyright and related rights dated 29 July 1987 (the Copyright Law) protects *inter alia* copyright relating to literary, artistic or scientific pieces of work. Protection of copyright can be done via one of the following means:

- bringing a copyright infringement matter before the relevant courts; or
- the *Agence nationale de promotion artistique et culturelle* (ANPAC) can also bring a copyright infringement matter before the relevant courts on behalf of victims of such copyright infringement.

Measures that can be taken by the courts include, *inter alia,* the confiscation of proceeds illicitly obtained from a copyright infringement, confiscation of counterfeited goods and payment of damages (i.e. compensation for the benefit of victims of copyright infringement).

The only Gabonese law on industrial property is law No. 14/2002 (as amended in 2008), which has set up the *centre de propriété industrielle du Gabon* (the CEPIG). The CEPIG's missions include *inter alia* (i) fighting against infringements of industrial property rights, notably counterfeiting and unfair competition, and (ii) ensuring and promoting the protection and use of industrial property in Gabon.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Businesses are subject to the following taxes:

- Corporate income tax (30%). There is a higher rate of 35% for companies in the petroleum and mining sectors and a lower rate for 25% for (i) companies that hold intellectual property rights, (ii) the *Banque Gabonaise de Développement* or Gabonese Development Bank, (iii) approved real estate development companies for the development of building lots in the urban area and for the construction of socio economic housing, (iv) public

institutions, (v) non-profit associations, and (vi) companies in the tourism sector that have been approved by the Finance Minister.
- VAT of 18%, with a lower rate of 10% for the production and sale of certain products (e.g. edible oil produced in Gabon, imported poultry, sugar...), and 5% for selling and providing services relating to cement, or 0% (e.g. exports).
- Stamp duty of CFA 500 (approximately USD 0.80) to CFA 600 (approx. USD 1) depending on the size of the paper.
- Registration taxes, which vary depending on the nature of the document to be registered.

There are transfer pricing rules in Gabon. Investors can benefit from these rules under strict conditions. For example, payments made by a Gabonese company to a foreign company (belonging to the same group as the Gabonese company), for services provided by the latter to the former, must (i) relate to real services, and (ii) not be exaggerated.

A withholding tax of 10% is applied to dividends, interest on bonds (with a maturity of less than five years) and other revenues coming from securities on the BVMAC (i.e. the regional stock exchange in central Africa). Such withholding tax is set at 5% for revenues pertaining to bonds of companies with a maturity of five years or more.

A withholding tax of 20% applies to the following transactions:
- payments of activities carried out in Gabon by an individual belonging to an independent profession;
- payments made in relation to copyrights and industrial property;
- payments of services provided or used in Gabon; and
- interests, annuities and investment products.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The CEMAC regulation No. 02/00 of 29 April 2000 on foreign exchange (the Regulation on Foreign Exchange) contains the following provisions:
- all transfers of funds from Gabon to a member state of the CEMAC area are subject to a transfer commission, which cannot exceed 0.25%, for the benefit of the Gabonese bank that handles the transfer of funds;
- all transfers of funds abroad (i.e. outside of the CEMAC area) are subject to a transfer commission, which cannot exceed 0.50%, for the benefit of the Gabonese bank that handles the transfer of funds;
- payments made via approved Gabonese banks are subject to a declaration to the Bank of Central African States;
- loans and reimbursements of loans that were made by legal entities/individuals located outside of the CEMAC area have to be declared to the Ministry in charge of finance and the central bank within 30 days of the said reimbursements; and
- the liquidation of direct investments made by foreign legal entities/foreigners in Gabon and exceeding FCFA 100 million (approx. USD 162,000) have to be declared to the Ministry of Finance 30 days prior to the said liquidation.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgments can be enforced in Gabon subject to obtaining of an exequatur order. A party that wishes to obtain the said exequatur order must submit to the relevant court, first an authentic copy of the foreign judgment, secondly, the original of the writ notifying the foreign judgment and thirdly, a certificate from the clerk of the court of the foreign court that has handed down the decision and which specifies that there is neither opposition to nor an appeal lodged against the said decision.

Foreign arbitral awards can also be enforced in Gabon subject to obtaining an exequatur order. To this extent, the foreign arbitral award and the arbitration agreement (or copies of these) have to be submitted to the relevant Gabonese court. If need be, French translations of these documents will also have to be submitted. Moreover, an exequatur order cannot be issued if the foreign arbitral award is contrary to the Gabonese international public policy.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes. A party to an arbitration agreement can request interim relief from the relevant Gabonese court. Such interim relief can only be granted if (i) there is urgency, and (ii) there is no review on the merits of the case carried out by the relevant Gabonese court. Moreover, if the assistance of the Gabonese judicial authorities is required for the production of evidence, the arbitral tribunal can request such assistance.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are no particular signing procedures that must be followed in Gabon. There is no compulsory number of signatories required. It is up to the parties to the document under Gabonese law to set the number of signatories.

If need be, powers of attorney may be produced. It is advisable to produce notarised powers of attorney (i.e. notarised by a notary of the country where the foreign company is located) in order to ensure the validity of the said powers of attorney in Gabon.

There is no legislation on counterparts. In practice, it is advisable that the parties sign on the same page and not in counterparts, particularly when the document is subject to registration formalities.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The adoption of a new law on water and energy has been envisaged by the Gabonese Minister in charge of energy since mid-2016. The aim of such new law would be to attract new investors for improving the production and distribution of electricity and water in Gabon. ■

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John has lived and worked as a lawyer in Madagascar for 15 years. He is familiar with the specific legal and business cultures across Francophone Africa and has extensive experience of French-based legal systems. John has handled finance transactions in excess of USD 6 billion in relation to natural resource and project finance projects, with all the requisite due diligence such complex transactions require. John has also been involved in acquisitions and disposals of assets in the natural resources and telecommunications fields.

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We are also one of the only firms in Francophone Africa with our particular combination of civil and common law corporate expertise, making us better able to deal with international transactions. Our City of London experience enables us to anticipate clients' needs, making us a proactive partner in dealing with local counsel.

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Ghana

Vera Owusu Osei
AB & David

Population:	28.4m (UN estimate – January 2017)
GDP per capita:	US$4,400 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.7% (CIA Factbook – 2014-2016)
Official languages:	English and prominent local languages, including Akuapem Twi, Asante Twi, Ewe, Dagaare, Dagbani, Dangme, Ga, Gonja, Kasem, Mfantse, Nzema
Transparency International rating:	Ranked 70/176 (2016 Report)
Ease of doing business ranking:	Ranked 108/190 (2017 Report)

Type of legal system	Based on English common law system and customary law, which by custom are applicable to particular communities in Ghana
Signatory to NY Convention	Yes (9 April 1968)
Signatory to ICSID Convention	Yes (26 November 1965)
Member of COMESA, OHADA, SADAQ, EAC	No, but is a member of ECOWAS
Signed up to OECD Transfer Pricing Guidelines	Follows OECD Transfer Pricing Guidelines
Bilateral investment treaties	Ghana is a party to several BITs/TIPs including with China, the UK and the EU.

Vera Owusu Osei reviews the current Ghanaian legislation in place for foreign investors, and discusses legislative changes that are set to promote private sector participation in economic development in Ghana

Ghana

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Under the Constitution of Ghana, foreigners cannot be granted an interest in land which exceeds 50 years.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The key qualification criterion for the employment of a foreigner is the unavailability of that foreigner's expertise in Ghana. An application may be made to the Ghana Investment Promotion Centre (GIPC) for an immigrant quota or an application for a work permit from the Ghana Immigration Service (GIS). A foreigner who obtains an immigrant quota or work permit is also required to obtain a residence permit from the GIS. The number of automatic immigrants allowed by GIPC regulations is dependent on the scale of the capital investment made by the company.

The capital investment and quota prescribed by the GIPC are as follows:

CAPITAL (USD)	AUTOMATIC QUOTA
50,000 to 250,000	1 person
250,000 to 500,000	2 persons
500,000 to 700,000	3 persons
Above 700,000	4 persons

3. What are the restrictions on redundancies and any applicable compensation?

Under Ghanaian law, there are no restrictions on redundancies *per se*, however, where the employer contemplates the introduction of major changes in the organisation that are likely to result in the termination of the employees' employment, the employee is required to notify the Chief Labour Officer and the trade unions (where the staff are unionised) not later than three months before the intended changes. The notice must include relevant information, including reasons for termination, the number and categories of workers to be affected and the period within which the termination will be carried out.

Under Ghanaian labour laws, where a redundancy causes the severance of the legal relationship of employee and employer or where the severance causes the employee to become unemployed or to suffer any disadvantages in the terms and conditions of his/her employment, the employee shall be entitled to compensation, commonly referred to as redundancy pay.

The amount of redundancy pay and the terms and conditions of payment are subject to negotiations between the employer and employee/trade union.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

The minimum capitalisation (either cash or capital goods) of a local entity is determined by the nationality of the shareholders and nature of business. The minimum foreign capital required is as follows:

(a) a joint venture company with Ghanaian and foreign shareholders requires a minimum foreign capital of USD 200,000 with the Ghanaian partner having not less than 10% equity participation;

(b) for a wholly foreign owned company, the minimum foreign capital required is USD 500,000; and

(c) for trading, a minimum foreign capital of USD 1,000,000 (whether wholly foreign owned or joint venture) is required. Additionally, the company is required to employ at least twenty skilled Ghanaians.

There are also sector-specific local content requirements:

Under the Petroleum (Local Content and Local Participation) Regulations, 2013, where the total value of the bid of a qualified indigenous Ghanaian company does not exceed the lowest bid by more than 10%, the law requires the contract be awarded to the indigenous Ghanaian company.

There is a local content requirement for a non-transferable minimum of 5% shareholding by Ghanaian companies operating in the upstream oil and gas sector. Additionally, foreign entities may only acquire a maximum 50% stake in oil marketing companies operating in the downstream sector.

5. Are there any specific legislative requirements, and if so, what are they?

See question 4 above.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Generally, there are no restrictions on the importation of goods or raw materials into the country. However, there are some restrictions in certain sectors such as the petroleum industry.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Generally, there are no restrictions on the purpose for which money is lent. However, lenders are prohibited from lending to finance criminal activities such as money laundering, tax evasion or terrorism.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Under Ghanaian law, movable and immovable property can be used as security for a loan transaction.

Movables including receivables, shares, and securities may be used as security for transactions by the creation of fixed or floating charges in respect of the identified security.

To assess whether a proposed security is free of liens and can be used as security for a transaction, searches must be conducted on the property at the Companies Registry, the Collateral Registry of the Bank of Ghana and at the Lands Registry in respect of landed property.

Security trustees are recognised under Ghanaian law, and a security trustee or agent may be appointed to hold security on trust on behalf of multiple lenders, or classes of lenders, or other secured parties.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The main law that regulates procurement and management of infrastructure projects (including PPPs) is the Public Procurement Act 2003, as amended by the Public Procurement (Amendment) Act 2016. This law was passed as an integral part of Ghana's public finance management, good governance reforms and to make further provision for public procurement and to provide for decentralised procurement.

There is a National Policy on PPPs which seeks to promote private participation in infrastructure and services for better public services delivery. The policy sets out certain principles that should guide PPPs in Ghana including value for money and transparency and accountability. Further, depending on the sector, the sector regulator may make some provisions on how concessions are to be regulated.

PPPs in Ghana are regulated by the National Policy for PPPs in Ghana (PPP Policy).

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

There is no specific merger control regime in Ghana. However there are specific rules in respect of publicly traded companies.

Generally, the Ghana Securities and Exchange Commission, as established by law, is mandated to review, approve and regulate the takeovers, mergers and acquisitions of listed companies.

Generally, there are no thresholds when it comes to notification of mergers. The sector regulator must be notified for a merger to grant its prior approval where the industry is a regulated industry.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

There is no general anti-trust or competition law in Ghana. A draft bill, the Competition and Fair Trade Practices Bill (the Competition Bill), has been in existence since 2004 and has not yet been passed into law.

Currently, the only legislation which makes express reference to "competition" in Ghana is the Protection Against Unfair Competition Act, 2000 (the Unfair Competition Act). However, the Act does

not apply in the same way as anti-trust or competition legislation in other jurisdictions in the context of mergers and/or acquisitions. It is a general mechanism for the protection of business goodwill and reputation, and proprietary information, whether or not such information or goodwill are registered and the prevention of acts that cause or are likely to cause confusion with respect to another person's enterprise.

The Unfair Competition Act does not create any regulatory body or administrative process for the purpose of enforcement. Rather, it provides that an aggrieved person may seek common law remedies in a competent court. The court may award injunctive or other equitable remedies, compensatory damages, or any other remedy that it deems fit.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Ghana has in place intellectual property legislation governing geographical indications, trademarks, unfair competition, copyright, industrial designs, patents, and layout-designs (topographies) of integrated circuits. There are civil and criminal sanctions for the infringement of IP legislation in Ghana.

Ghana's Protection against Unfair Competition Act, 2000 codifies the common law tort of passing off. The Act sets out the various practices deemed as unfair competition, defines these practices and outlines the extent of protection provided under Ghanaian law and other related matters. Major practices considered as unfair under the law include examples such as causing confusion with respect to another's enterprise or its activities, damaging another person's goodwill or reputation, misleading the public, discrediting another person's enterprise or its activities, unfair competition in respect of secret information, and unfair competition in respect of national and international obligations.

The Plant Breeders' Bill which is currently before Parliament is yet to be passed as there is an on-going debate on the impact it will have on the agriculture sector.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

- The income of a resident company is subject to a corporate tax of 25% on its annual profit. Under Ghanaian law, a company is considered resident for tax purposes where the company is incorporated or registered in Ghana; or where the management and control of the company is exercised in Ghana at any time within a year.
- Branch offices are required to pay tax on their repatriated profits for a basis period and in addition required to pay final tax on the gross amount of the earned repatriated profits to the Commissioner-General in accordance with the prescribed rate within thirty days after the end of the basis period.
- Withholding taxes are applicable to interest, dividends, rent, fees, supply of goods and services. Companies in Ghana are required to withhold tax from payments and pay same to the Ghana Revenue Authority (GRA).
- VAT is applied on the value added to goods and services. The current rate on VAT is 15% and NHIL is 2.5%.
- Stamp duty. There is a requirement under the Stamp Duty Act to stamp all agreements. Security documents must be stamped prior to registration within 28 days of execution. Subject to certain exceptions, the stamp duty payable on the principal security document is 0.5% of the secured amount and 0.25% of the secured amount for each additional security.
- The Income Tax Act, 2015 (as amended) makes provision for Transfer Pricing (TP). The TP rules apply to transactions between parties in a controlled relationship both locally and internationally. Specifically these are transactions between:
  - Permanent Establishment ("PE") – a separate legal entity and its head office;
  - a PE and other related branches of that PE;
  - a tax payer and another taxpayer; and
  - a taxpayer and another taxpayer in an employment relationship.

A person who engages in transactions with another person with whom they have controlled relationships are required to calculate their income and tax payable from that transaction according to the arm's length standard.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Ghana's foreign exchange regime is governed by the Foreign Exchange Act, 2006. The Central Bank, Bank of Ghana (BoG) regulates foreign exchange business and transfers between residents and non-residents. Payments to or from Ghana between residents and or non-residents must be made through a bank.

However, transfers to or from Ghana must be made through a bank, a dealer or person licensed to carry out the business of money transfers.

The Ghana Investment Promotion Centre Act, 2013 guarantees the free transfer from Ghana of net profits accruing to an investment through any authorised dealer bank in any currency. Net profit means that the profit must be less all expenses including tax liabilities. A person who seeks to transfer its profits must show that it has discharged all its tax obligations before the bank can comply with any instruction to effect the repatriation of the profits.

The BoG periodically issues directives on foreign exchange transactions

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign Judgments/Arbitral Awards With Countries That Ghana Has Reciprocity

Foreign judgments or arbitral awards given by a competent authority in the foreign country are enforceable in Ghana if there is a reciprocal arrangement existing between Ghana and the country in which the award was made. Ghana is party to the New York Convention and foreign arbitral awards are enforceable in accordance with the terms of the Convention. The enforcement of foreign judgments has been incorporated in the Courts Act and the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument. The Alternative Dispute Resolution Act also recognises the enforcement regime of the New York Convention.

Foreign Judgments/Arbitral Awards From Countries With No Reciprocity

Where the judgment is from a court of a country which Ghana has no reciprocal enforcement arrangement, a fresh action is required to be commenced in Ghana on the basis of the judgment which becomes evidence in the action. Once the action succeeds and judgment is given in Ghana, the judgment in essence becomes a judgment of a Ghanaian court and is executable using execution processes available under Ghanaian law.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes, where the parties have indicated in the agreement to submit disputes to arbitration, the courts will order the parties to settle the matter by arbitration.

The courts can grant interim reliefs in support of such arbitrations. For example, the court can grant an injunction for preservation of property where the subject of the dispute is in danger.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are currently no specific signing requirements.

However, the Conveyancing Act requires that all documents over land to which a company is a party which will be registered with the Lands Commission must bear the seal or stamp of the company.

Also per the Companies Act, all documents such as share certificates, security documents and Power of Attorney must bear the seal of the company. However, documents requiring authentication by a company may be signed on its behalf by an officer of the company and need not be under the company's seal.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The Borrowers and Lenders Bill 2017 was recently presented to parliament and it seeks to provide for a Collateral Registry, a legal framework for the registration of security interests, to establish an order of priority of security interests, the effectiveness of security interest against third parties and generally to regulate transactions between borrowers and lenders and for related matters.

The new Borrowers and Lenders Act 2017 was recently passed to provide for a Collateral Registry, a legal framework for the registration of security interests, to establish an order of priority of security interests, the effectiveness of security interest against third parties and generally to regulate transactions between borrowers and lenders and for related matters.

The new Securities Industry Act expands the powers of the Security Commission to include maintaining surveillance over activities in securities and protecting the integrity of the securities market against any abuses arising from dealing in securities.

The Ghana Export-Import Bank Act seeks to assist exporters to compete internationally by providing insurance and finance facilities to support their overseas activities and promote the acceleration of Ghana's drive towards achieving a more diversified economy. It is anticipated that the new Bank will help boost exports. ■

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AB & David

Vera's experience has been in corporate finance, commercial transactions, mergers and acquisitions, and tax. Vera provides advisory services on Ghana's investment regime. She works with international clients to establish their operations in Ghana and comply with statutory governance and instrument requirement. Vera has trained at the London offices of Hogan Lovells International LLP under the Commonwealth Professional Fellowship program and is currently an Associate Partner of AB & David.

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Ivory Coast

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Population:	23.6m (UN estimate – January 2017)
GDP per capita:	US$3,600 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 8.1% (CIA Factbook – 2014-2016)
Official languages:	French. Other languages include Baolué, Anyin, Dan, and Senari
Transparency International rating:	Ranked 108/176 (2016 Report)
Ease of doing business ranking:	Ranked 142/190 (2017 Report)

Type of legal system	Based on the French civil law system and African customary law
Signatory to NY Convention	Yes (1 February 1991)
Signatory to ICSID Convention	Yes (30 June 1965)
Member of COMESA, OHADA, SADAQ, EAC	Member of OHADA and ECOWAS
Signed up to OECD Transfer Pricing Guidelines	No, but follows anti-avoidance rules
Bilateral investment treaties	Cote d'Ivoire is a party to several BITs/TIPs including with Canada, the UK and the US

Michel Brizoua-Bi and Noël-Faustin Kouame provide comment on the evolving investment sector in Ivory Coast

Ivory Coast

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

There is no restriction on foreign entities owning property in the country. However, a foreign national or foreign entity may not hold an interest in rural land. According to article 1 of Law No: 98-750 on rural land, any person or entity can have access to land; however, only individuals and public or private entities of Ivorian nationality can own land in rural areas.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

There is no local minimum quota that must be met first in order to hire a foreign worker in Côte d'Ivoire. However, to recruit a foreign employee, the following procedure must be followed: the job announcement must be declared to the Youth Employment Agency in Abidjan, (in French, *Agence Emploi Jeunes* (AEJ)), or Ivory Coast Labour Office, which is the national agency in charge of promoting employment in Côte d'Ivoire. Following the declaration to the AEJ, the position is advertised in a local newspaper (ideally a gazette) for a period of one month. Should no national be hired at the end of the said period, the employer is free to choose anyone of his/her choice to fill the position, as per *Arreté N° 6421 du 15 juin 2004 portant travail des personnels non nationaux.*

3. What are the restrictions on redundancies and any applicable compensation?

Articles 16.11 and 18.10 of the Labour Code (Law No 2015-532) are the main rules in respect to redundancies. The employer is allowed to terminate an employee's contract provided that the termination is due to financial reasons (low or no budget) or an event of *force majeure* that compels him to suspend or terminate the employee's contract. A termination under such circumstances is said to be "*legitime*" (lawful) unless the employee proves otherwise.

In practice, a contract can also be terminated by mutual agreement. Compensation to be paid on termination is as follows:

- salary up to the date of termination;
- compensation in lieu of notice;
- compensatory allowance for paid leave (on an accrual basis);
- bonuses, if any(on an accrual basis); and
- severance pay.

Prior to any dismissal for misconduct, the employer is required to address a request for explanation to the employee. Once the decision to dismiss the employee is taken, notification of the termination must be given by letter to the employee, along with her/his certificate of employment and a statement of salaries from the social security institution. In a case of gross misconduct, there is no notice period to be complied with. However, in other situations, the duration of the notice period depends on the seniority of the employee. In case of dismissal for gross misconduct, the employee is entitled to:

- salary up to the date of termination;
- compensatory allowance for paid leave (on an accrual basis); and
- bonuses, if any (on an accrual basis).

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

There is no general regulation on foreign investment.

5. Are there any specific legislative requirements, and if so, what are they?

There are no specific legislative requirements with regard to foreign investment.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There can be restrictions on the importation of goods from outside of the ECOWAS region in the form of custom tariffs and quotas, if such product is deemed to, or likely to, affect the competitiveness of equivalent local products. This measure is provided by the ECOWAS trade defence mechanism to balance and mitigate the risk of openness to a third party country that trade may create. Although the

ECOWAS Common External Tariffs rules ("TEC") (Regulation CR/REG.3/06/13) tax goods more heavily than certain finished products, they also apply a less stringent regime to raw materials from a third party used to make social goods (as categorised under goods in category 0 under the TEC).

In addition, depending on the TEC tariff category, a tariff duty of 5% and 10%, respectively, may apply to basic raw materials and specific inputs, such as intermediary inputs. These carry the lowest percentage of duty. Some goods can be taxed at rates of 20% to 35%, namely, finished products and specific goods for economic development that are said to threaten local initiatives in the sector.

There are a number of restrictions on the importation of hazardous waste (under the Bamako Convention); and on the importation of chemical products (under the Ivorian Environment Code (Law No: 1996-766).

Finance

7. Are there any restrictions on the purposes for which money may be lent?

There is no restriction provided that the purpose for which money is lent is lawful and in accordance with the national law and international treaties ratified by the parliament, i.e. no money laundering, fiscal evasion, or from the proceeds of criminal activities, such as terrorism, or prostitution.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

As a member of OHADA, Côte d'Ivoire has passed the OHADA Uniform Act on Secured Transactions of May 2011, which is the law applicable to security interests. It provides for the granting of security over any asset, moveable and immovable, via mechanisms such as pledges, non-possessory pledges on tangible assets, mortgages, and bonds. It also recognises the concept of a trust and of the role of a Security Agent (whose role shares important similarities with that of a Security Trustee).

Article 5 of the Uniform Act states that a Security Agent may be appointed for the creation, perfection and management and enforcement of any security interests.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In Cote d'Ivoire, the procurement and management of infrastructure projects including PPP are regulated by a decree adopted in August 2009 in line with the WAEMU (West African Economic Monetary Union) Directives 4/2005 and 5/2005 on procurement contracts. Pursuant to this Decree, the government has created a national authority regulating procurement contracts, which has the power to settle disputes in relation to the granting or the execution of a procurement contract. The Decree also has power to impose sanctions on applicants or contractors of a procurement contract for fraud.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

There is no specific merger control regime in Côte d'Ivoire. Merger itself is not subject to any control unless it tends to create a dominant position. Article 4 of Regulation No. 02/2002 on anti-competitive practice prohibits mergers that tend to create a dominant position on the WAEMU territory. The obligation of notification only applies when there is an assumption of a dominant position being created. The threshold that triggers the control is, however, unclear. Nevertheless, Regulation No. 3 of 2002, of the WAEMU on anti-trust law and abuse of dominant position states that a company or group of companies that constitute alone or together a dominant share of the common market or a dominant share of its biggest portion as a result of a merger or an acquisition may, via notification or request to the competition commission of the WAEMU, ask for an exemption. The commission is required to conduct a study before an authorisation is issued to the company.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes, there is. The applicable laws and regulations are the WAEMU Treaty, and the WAEMU regulation No. 2 of 2002, on anti-competitive practice and No.

3 of 2002 on anti-trust and abuse of dominant position. The Ivorian national Law is the Competition Ordinance of 2013-662 on competition law. Article 88 of the WAEMU Treaty prohibits practices such as abuse of a dominant position, antitrust violations, exclusivity arrangements, and mergers and acquisitions that create a dominant position.

Following notification to the national or WAEMU competition commission, an interested party may be issued with a 'negative certificate' stating that the competition commisson does not consider it necessary to act against that party for behaviour which may be prohibited pursuant to article 88. Specific requirements are needed for the certificate to be issued. The WAEMU competition commission is very active but there are difficulties in enforcement in member states of sanctions taken at the regional level.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

The Bangui Agreement (*Accord de Bangui*) on intellectual property is the applicable law. The agreement provides for the protection upon registration of the following intellectual property rights: Copyrights; Patents; Trademarks; Industrial designs; and geographical indication. The national Law *2013-865* against copyright piracy applies sanctions to contraveners. These sanctions apply to all IP infringements and not just to copyright.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Companies doing business in Côte d'Ivoire are subject to the following taxes:

- **Corporate Income Tax**: set at 25%.
- **Capital gains tax**: rate is 25%.
- **Business licence tax**:
  - Tax on turnover at the rate of 0.5%, which the amount may not be less than XOF 300,000 or greater than 3 million (450-4,500 euro).
  - Tax on rental value at the rate of 18.5%.
- **Withholding tax**:
  - On the income tax on non-commercial profits of foreign providers is 20%.
  - Some local providers are subject to 7.5% on the gross sum.
- **Property taxes**:
  - Tax on rental value received by owner (The rental value is defined as the price the owner receives when renting it to a third party or could receive, if he/she is living in it): 4% for both companies and individuals.
  - Tax on developed land: the tax rate is 11% for companies and 9% for individuals. This rate shall be increased to 15% when the built property is used by the company itself. The rate is reduced to 4% for unoccupied buildings.
  - Tax on undeveloped land: The rate is 1.5% of the market value as of 1 January of the fiscal year for all non-built property in urban areas.
- **Income tax on securities**: Due on all profits or income which are not set aside or capitalised, and all amounts or securities made available to shareholders, shareholders and unitholders and not deducted from profits at a rate of 15%.
- **Tax on dividends**: Income arising from bond products are taxed at 15%; other than that, 18% tax on revenue from receivables is based on the gross amount of interest fees on current account or deposit account products of sums due or paid, with the exception of all operations of commercial credit not having the legal status of a loan.
- **Value Added Tax**: is generally payable at 18%, but a lower rate of 9% is payable on:
  - milk;
  - pasta based on 100% durum wheat semolina;
  - solar energy production equipment; and
  - petroleum products.
- **Special equipment tax** is a tax paid by all taxpayers for the purpose of equipping the government (financing of investment and maintenance works for buildings, computer equipment, furniture and vehicles). The tax is calculated at the rate of 0.1% of turnover and is paid monthly. This tax is scheduled to end on 31 December 2019.
- **Tax on banking**: At the rate of 10% on banking services rendered, which includes all transactions related to banking, financial and general trade in securities and money, except for leasing and money transfer transactions.
  A cumulative tax of 10% is levied on bank services rendered. Tax on banking operations charged by banks to companies is fully deductible from output VAT.
- **Taxation on wages**:
  - Salary Tax: 1.5% of salary (paid by the employee).

- National contribution: Calculated according to a monthly sliding scale that ranges from 1.5% to 10% depending on the remuneration (paid by the employee).
- General Income tax: Calculated according to a monthly sliding scale ranging from 10% to 60% depending on the remuneration (paid by the employee).
- Employer contribution: 2.8% for local staff and 12% for expatriate staff (paid by the employer).

The transfer pricing rules have been applied and there are withholding taxes in force in Côte d'Ivoire.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Regulation No. 9 of 2010 is the applicable instrument for the foreign exchange relations of the WAEMU. For all money transactions, transfer of funds between a member country and a third party or within the region between a resident and a non-resident, have to be done through the Central Bank of West African States (BCEAO) or any authorised intermediary.

The authorised intermediaries can execute payment transactions in a third party upon presentation of required documents. Transfers of capital to a third party, on the other hand, are subject to an authorisation request from the Ivorian Minister of Finance. Each authorisation request must be accompanied by supporting documents proving the nature and reality of the transaction.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Contentious and non-contentious court decisions by a foreign court may only be enforced or published in the territory of Côte d'Ivoire once they have been declared enforceable following enforcement proceedings, subject to the special provisions provided for in international conventions.

In Côte d'Ivoire, enforcement of a foreign decision may only occur if the following conditions are met:

- the judgment was pronounced by a competent court in the country concerned;
- the judgment is final, binding and enforceable under the laws of that country;
- the defendant has duly appealed before a court which pronounced a judgment and has been given the chance to defend himself;
- the dispute adjudicated by the foreign court does not, according to Côte d'Ivoire law, fall within the exclusive competence of the Côte d'Ivoire courts;
- there is no conflict between a foreign judgment and a judgment pronounced by a Côte d'Ivoire court in the same proceedings, on the same subject matter and between the same parties which is deemed final and binding; and
- the decision is not contrary to public policy rules in Côte d'Ivoire.

In addition, there is no particular difficulty in judgments being deemed final and binding once the said conditions are fulfilled.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Local courts may order interim or protective measures when urgently necessary (recognised and reasoned circumstances). These measures are enforceable in Cote d'Ivoire. When they are to be enforced outside the territory they may be subject to exequatur proceedings if required by the law there.

The *Cour Commune de Justice et d'Arbitrage* of OHADA (CCJA) is a supranational level court created and organised by the OHADA treaty, and established in Côte d'Ivoire. Besides its judicial function, the CCJA is also an arbitration centre with its own rules of arbitration, called the CCJA Rules of Arbitration. The decisions of the CCJA are enforceable in Côte d'Ivoire.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There is no particular procedure other than the general requirements on authority and mandating, in accordance with the OHADA Uniform Act on commercial companies.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The investment sector is very dynamic and regulations, as well as laws, can be subject to constant change. One of the major policy developments in the country is the incorporation of a company in 48 hours through the *guichet unique des formalités d'entreprises* that has the advantage of gathering in one place all the signatures needed for the incorporation. ■

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Formed on 1 April 2000 by Maître Michel Kizito Brizoua-Bi and Mr. Le Bâtonnier Joachim Bilé-Aka, Bilé-Aka Brizoua-Bi & Associés is a law firm with an international vocation located in Abidjan, with an essential mission outside the judicial activity to optimise the legal and fiscal security of projects or transactions of its clients.
In order to meet the growing needs of its customers in international operations, and aware of the new business environment created by regional integration and harmonisation of business law with the Treaty on the Harmonization of Business Law in Africa (OHADA), the firm has established close collaborative relationships with the most reputable firms of the continent and of other major financial centres worldwide.
Bilé-Aka, Brizoua-Bi & Associés provides a broad range of legal services in both French and English.

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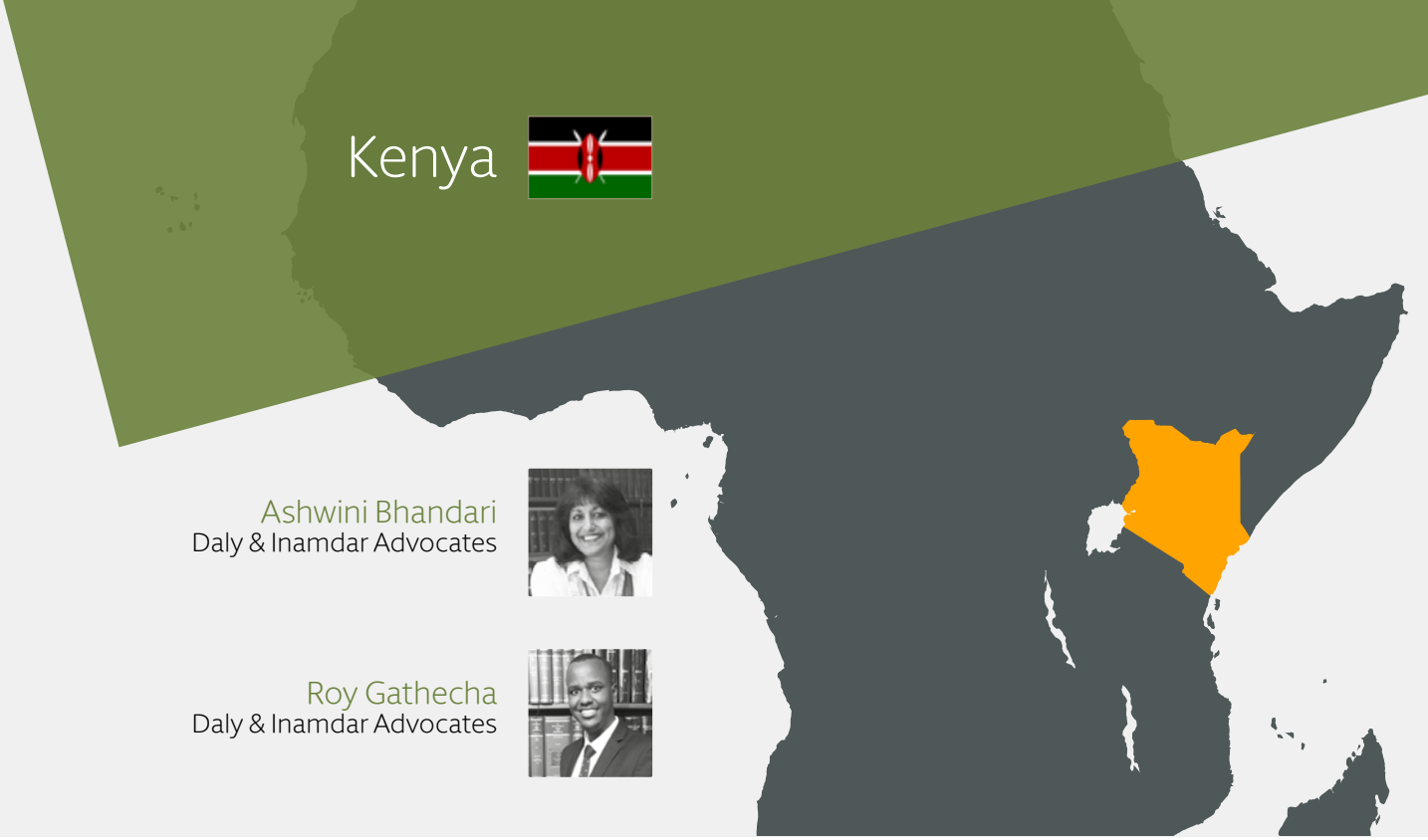
Kenya



Ashwini Bhandari
Daly & Inamdar Advocates

Roy Gathecha
Daly & Inamdar Advocates

Population:	47.9m (UN estimate – January 2017)
GDP per capita:	US$3,400 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 5.6% (CIA Factbook – 2014-2016)
Official languages:	English and Swahili
Transparency International rating:	Ranked 145/176 (2016 Report)
Ease of doing business ranking:	Ranked 92/190 (2017 Report)

Type of legal system	Based on English common law system and African customary law
Signatory to NY Convention	Yes (10 February 1989)
Signatory to ICSID Convention	Yes (24 May 1966)
Member of COMESA, OHADA, SADAQ, EAC	Member of COMESA and EAC
Signed up to OECD Transfer Pricing Guidelines	Follows the OECD Guidelines
Bilateral investment treaties	Kenya is a party to several BITs with other states including France, Germany, Italy, Kuwait, Netherlands, Switzerland, and the United Kingdom

Ashwini Bhandari and Roy Gathecha outline the myriad of tax obligations applicable to foreign investors looking to conduct business in Kenya

Kenya

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Article 65 of the Constitution and section 107(3) of the Land Registration Act provides that non-citizens can only hold land on the basis of a leasehold tenure, which shall not exceed 99 years.

These laws prohibit a foreign entity from owning freehold land.

A body corporate, for purposes of owning land, is regarded as a citizen only if it is wholly and exclusively owned by one or more Kenyan citizens. This means that a company will have to have a 100% local shareholding to be considered a citizen.

There are restrictions on non-Kenyan citizens owning agricultural land. The Land Control Act specifies (in section 9) that any dealings with agricultural land require application for consent from the relevant Land Control Board in the area the agricultural land is situated.

Dealings in agricultural land include dealings with a company holding agricultural land. In deciding whether or not to grant consent, the Land Control Board is obligated to refuse to grant consent in any case where the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not a citizen of Kenya or a private company all of whose members are not Kenyans.

Agricultural land, for the purposes of the Act, means land that is not within a municipality or a township or a market, or land in the Nairobi area or in any municipality, township or urban centre that is declared by the Minister, by notice in the *Gazette*, to be agricultural land for the purposes of this Act.

Non-compliance with the provisions of the law renders the title to the land and any subsequent dealings on the land void.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Yes. The principle condition is that every foreign worker intending to enter and work in Kenya must obtain a valid work permit. The relevant legislation places upon the employer the duty to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him/her employment.

3. What are the restrictions on redundancies and any applicable compensation?

The restrictions on redundancies are seen in the procedures laid out under the Employment Act of Kenya as follows:

i. where the employee is a member of a trade union, the employer must notify such union and the labour officer in charge of the area where the employee is employed, not less than a month prior to the date of the intended date of termination;
ii. where the employee is not a member of a trade union, the employer must notify, not less than a month prior to the date of the intended date of termination, the employee personally and the labour officer in writing;
iii. the employer must show that they, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy and that they had not placed the employee at a disadvantage for being or not being a member of a trade union; and
iv. lastly, the employer must pay to the employee all terminal dues owed. This includes any accrued leave days not taken and severance pay at the rate of not less than fifteen (15) days' pay for each completed year of service.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Foreign companies are allowed to make direct investments in Kenya without involving local entities or people. However, there are restrictions on foreign ownership in some companies/businesses, e.g. insurance business, under the Insurance Act, banking business, under the Banking Act, and restrictions on ownership in listed companies.

5. Are there any specific legislative requirements, and if so, what are they?

In relation to foreign companies establishing businesses in Kenya, the company must be registered as a foreign company, branch or subsidiary in order to carry on business.

The company is also required to have at least one local representative.

In case of any change in directorship or control, the company must, within one month of such a change, lodge with the Registrar for registration a notice of particulars of the change, together with any documents relating to the change.

There are no restrictions on local companies entering into agreements with foreign companies other than agreements entered into by way of fraud or agreements that intend to propagate a fraudulent activity.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Part A and B of the Eighth Schedule to the Customs and Excise Act and Part A and B of the Second Schedule to the East African Community Customs Management Act set out the various goods that are either prohibited or restricted from importation into Kenya.

They include false money and counterfeit currency notes and goods of all kinds, pornographic materials, distilled beverages containing essential oils or chemical products, certain agricultural and industrial chemicals, unwrought precious metals and precious stones, firearms and ammunition of all types, any goods certified by the Kenya Bureau of Standards as not meeting the standards set by that Bureau, genetically modified products, among others.

Subject to these restrictions, importers are free to import goods into Kenya provided they obtain the requisite licences such as the importation licence, Certificate of Conformity (if applicable) for inspection of the commodities that require inspection and payment of import excise duties unless exempted by the Treasury.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

There are some restrictions on the purposes for which money may be lent. These are contained in various legislation. Under the Banking Act, no institution, other than a mortgage finance company, may make loans or advances for the purchase, improvement or alteration of land, if the aggregate amount of those loans or advances exceeds 25% of the amount of its total deposit liabilities.

If one elects to borrow money from a mortgage finance company, such loan can only be for the purpose of the acquisition, construction, improvement, development, alteration or adaptation for a particular purpose of land in Kenya.

On money laundering, the Proceeds of Crime and Anti-Money Laundering Act (2009) makes it an offence in Kenya for a person to use money which he or she knows or ought to know that it forms part of the proceeds of a crime committed by him or by another person. The Prevention of Terrorism Act 2012 also prohibits the lending of money for the commission of or facilitating the commission of a terrorist act.

Money may also not be lent for purposes of aiding the commission of any criminal offences under the Penal Code, or any other unlawful acts proscribed under any other written law.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Yes the concept of holding securities on trust with a Security Trustee is recognised in Kenya.

Assets over which security may be granted as collateral in Kenya may be broadly categorised into real property, which includes land, the buildings affixed to it and the rights or interests that go with the land, and movable/personal property, which include Treasury Bills, Treasury bonds, shares, chattels, commercial papers, book debts, negotiable instruments, intellectual property, among others.

The most common forms of securities granted over assets in Kenya include charges whether fixed or floating, mortgages whether legal or equitable, debentures, guarantees, lien, pledge, letter of hypothecation, indemnity, undertaking and other means of securing payment or discharge of debt or liability, among others. The type of security to be granted depends on the assets held by the borrower.

There are no restrictions on granting of securities to foreign investors over relevant forms of property. However, please note that there are restrictions on foreigners owning agricultural land or shares in a company which owns agricultural land. Different banks may, however, for the purpose of perfection of the security, impose upon the foreign investor certain restrictions that are governed by the internal controls of the bank, and not necessarily by law.

The process of perfection of a security is as follows:

(i) Due diligence conducted by the lender on the type of security being offered by the borrower.
(ii) Drafting of security instrument depending on the form of security to be granted (for example, debenture, legal charge, etc.), which is to be executed and attested by the lender and borrower.
(iii) Assessment of Stamp Duty Tax. The amount here will depend on the type of security instrument. The Stamp Duty Tax is to be paid by the borrower within 30 days from the date of assessment.
(iv) The security instrument is then submitted for registration at the relevant Government Registry. Once the registration is complete, the security is deemed perfected.

The register is maintained by the relevant Government Registry in both electronic and manual form. Recent developments have seen the Land Registry attempt to fully automate their Registry and have all the records available in electronic form. This is still an on-going process.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The following legal framework is currently in place to manage the procurement and management of infrastructure projects:

a) the Constitution of Kenya 2010;
b) Policy Statement on Public Private Partnerships November, 2011;
c) Public Private Partnerships Act No. 15 of 2013;
d) Public Private Partnerships (Petition) Regulations, 2014;
e) Public Private Partnership Regulations 2014;
f) Petition Committee Guidelines, 2014;
g) County Government Procurement Regulations (Draft August 12th 2014);
h) Guidelines for the Assessment and Management of Fiscal Commitments and Contingent Liabilities (FCCL) in Public-Private Partnerships (PPP) in Kenya March 2015;
i) Public Private Partnerships (Project Facilitation Fund) Regulations 2015 (draft);
j) PPP (County Government) Regulations 2015 (draft);
k) PPP (Petition) Regulations 2015 (draft);
l) the Infrastructure Finance & Public Private Partnership (IFPPP) Project Procurement Plans;
m) The Public Procurement And Asset Disposal Act, No. 33 Of 2015; and
n) Public Procurement And Asset Disposal Regulations, 2016 (draft).

The following institutional framework is currently in place for the implementation of the procurement laws:

a) contracting authorities (CA), which are state departments or agencies, state corporations or county governments;
b) the PPP committee responsible for PPP policy guideline formulation, project approvals and monitoring and evaluation oversight;
c) the PPP Unit, domiciled at the state department responsible for Finance, which acts as a national centre for PPP expertise;
d) PPP Nodes, which support the development and ensure procurement and contract management of PPPs within the national policy guidelines and implementation of the PPP Act;
e) the Petition Committee, which hears petitions and complaints submitted by a private party during the process of tendering and to administrative decisions of the committee, unit, or contracting authority;
f) the Debt Management Office, which is responsible for assessing projects and determining any fiscal commitments or liabilities to the state at various stages of the project cycle;
g) the Project Facilitation Fund, established to enable public entities to prepare the projects for tender (including feasibility and viability studies) and provide financial resources to projects that are socially desirable but need support for bankability;
h) the Public Procurement Regulatory Authority, which monitors, assesses and reviews the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution and develops a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with state organs and public entities, among other functions;
i) the Public Procurement Administrative Review Board, which is responsible for reviewing, hearing and determining tendering and asset disposal disputes;
j) the National Treasury, which is responsible for public procurement and asset disposal policy formulation; and
k) the Public Procurement Oversight Authority, which is responsible for ensuring that the procurement procedures established under

the procurement laws are complied with and assists in the implementation and operation of the public procurement system.

In terms of international laws, the following have been adopted in Kenya:

a) Agreement on Government Procurement, 1981, which applies to central government entities, sub-central government entities, such as counties, and all other entities that procure in accordance with the provisions of the Agreement; and
b) UNCITRAL model Guidance on Public Procurement, 2011, which applies to all public procurement by any governmental department, agency, organ or other unit that engages in procurement.

The main advertising services used include: journals, for instance the Kenya Procurement Journal by PPOA and USAID Kenya; websites, such as the Public Private Partnership (PPP) Unit and national news websites; television; newspapers; magazines, such as the *Procurement Logistics & Management magazine*; radio; workshops, forums and conferences; online publications; brochures, leaflets or binders; and panels.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes there is a merger control regime under the Competition Act (2010). A merger under the Competition Act is defined as any acquisition of shares, business or other assets, whether inside or outside of Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.

Each of the undertakings involved in a merger must notify the Competition Authority of the proposal in writing or in a prescribed manner (merger notification form) and attach the requisite documents, which include the sale purchase agreement and audited financial statements for the preceding three (3) years.

The thresholds for notification under the guidelines for merger notification provided by the Competition Authority of Kenya can be summarised as follows:

(i) undertakings which have a minimum combined threshold of 1 billion shillings and the turnover of the target undertaking is above 100 million shillings;
(ii) in the healthcare sector, where the undertakings which have a minimum combined threshold of 500 million shillings and the turnover of the target undertaking is above 50 million shillings;
(iii) in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds 4 billion shillings; and
(iv) in the oils sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of, the target undertaking, even where the value of the reserves is below 4 billion shillings.

Mergers that fall below the above thresholds do not require notification, but the parties in the undertakings must apply to the Competition Authority to be exempted from notification.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes, the Competition Act prohibits abuse of dominant position in the Kenyan market. Any person who contravenes these provisions commits an offence and, if convicted, is liable to imprisonment for a term of up to five years, a fine of up to 10 million shillings or both. In addition, sections 21 and 22 of the Kenyan Competition Act prohibit restrictive trade practices (including exclusivity agreements whose object or effect is to prevent, distort or lessen competition) and cartel behaviour (such as price fixing).

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property in Kenya is governed by four main acts: the Industrial Property Act No. 2 of 2001; the Trademark Act; the Copyright Act 2001; and the Anti-Counterfeit Act 2008. In addition, Kenya is a party to the ARIPO protocol and the ability of parties to file with ARIPO and the effect of such filing is recognised under Kenyan law.

These Acts, other than the Anti-Counterfeit Act, provide for the registration of intellectual property rights including industrial designs, copyrights, patents, trademarks, etc. Such registration is *prima facie* evidence of exclusive use of such rights to the person it is registered against and any person is precluded from using such rights without the consent of the registered owner.

A person who claims infringement of his intellectual property rights is able to obtain an injunctive

order against the person infringing on the rights and seek compensation from the High Court of Kenya.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Businesses in Kenya are subjected to a myriad of tax obligations.

The main taxes imposed on entities include the following:

(i) **Corporation Tax** – this is a type of income tax levied on companies. Resident companies are taxable at the rate of 30% while non-resident companies are taxable at the rate of 37.5%.

(ii) **Withholding tax** – The rates on withholding tax are provided below:

Payments	Resident WHT rate (%)	Non-resident WHT rate (%)
Dividends lesser than 12.5% voting power	Exempt	10
Dividends more than 12.5% voting power	5	10
Interest		
• Bearer instruments	25	25
• Government bearer bonds (Maturity 2 years or more)	15	15
• Bearer bonds (Maturity 10 years and more)	10	N/A
• Other	15	15
Qualifying Interest:		
• Housing bonds	10	N/A
• Bearer Instruments	20	N/A
• Other	15	N/A
Royalty	5	20
Winnings from Gaming and Betting	10	20
Management or professional fees	5	20
Consultancy fees – Citizen of EAC member states	5	15
Training (Including incidental costs)	5	20
Rent/Leasing:		
• Immovable Property	N/A	30
• Others (Other than immovable)	N/A	15
Pension/Retirement annuity	Varied	5
Contractual fees	3	20
Sale of property or shares in oil, mining, or mineral prospecting companies	10	20

(iii) **VAT**

The rates for VAT are as follows:

(a) 16% is the general rate of VAT applicable to most taxable goods and taxable services.

(b) 12% is applicable to supplies falling under part II of the 1st schedule of the VAT Act, e.g. electrical energy and certain types of residual fuels and oils.

(c) 0% is applicable to certain categories of goods and services, which include exports, agricultural inputs, pharmaceutical products, educational materials, supplies to privileged persons and legal services to foreign entities.

(iv) **Excise Duty** – imposed on the local manufacture or the importation of certain commodities and services.

(v) **Stamp Duty** – payable on transfer of properties, leases and securities. The rates of stamp duty are shown below:

Activity	Stamp Duty Rate
Transfer of immovable property:	
• Urban	4% of transfer value
• Rural	2% of transfer value

Activity	Stamp Duty Rate
Increase of share capital	1% of increased capital
Registration of company (nominal share capital)	0%
Transfer of unquoted shares or marketable securities	1%
Transfer of quoted shares of marketable securities	0%
Registration of debentures or mortgage:	
• Collateral Security	0.05%
• Supplemental Security	K.Shs. 20 per counter part
Lease:	
• Period of 3 years and under	1% annual rent
• Period over 3 years	2% annual rent

(vi) **Tax on capital gains** (ToCG) – payable on gains derived from the sale or transfer of property by an individual or company at the rate of 5%.

(vii) **Compensating tax** – payable by a company upon issuance of dividends out of profits that have not otherwise been taxed at the rate of 42.8%.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

There are no rules or restrictions on repatriation of funds out of Kenya.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

The enforcement of foreign judgments in Kenya is governed by the Foreign Judgments (Reciprocal Enforcement) Act. The Act provides for the enforcement in Kenya of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya.

The Act applies to the following scenarios:

i. a judgment or order of a foreign court for the payment of a sum of money, not being a penalty or tax;
ii. a judgment or order of a foreign court in civil proceedings under which movable property is ordered to be delivered to any person;
iii. a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;
iv. a judgment given in any court on appeal against a judgment or order of a foreign court referred to in paragraphs (i) to (iii);
v. a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (vi); and
vi. an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.

The process of enforcement of foreign judgments or awards is done by way of application for registration at the High Court of Kenya using the prescribed forms.

The effect of registration of the judgment or award is that the registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment of the High Court entered at the date of registration.

The designated countries as per the Act are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.

The enforcement of foreign arbitral awards is governed by section 36 of the Kenyan Arbitration Act, which implements into local law the New York Convention on the recognition and enforcement of foreign arbitral awards.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes, the High Court of Kenya, which has the exclusive jurisdiction in arbitration matters, is supportive of arbitration. Where parties have agreed to submit themselves to arbitration, the High Court will enforce such agreement by ordering the parties to appoint an arbitrator as per their agreement. The High Court is, however, able to grant interim relief pending the determination of the arbitral proceedings. This relief is granted under section 7 of the Kenyan Arbitration Act and is confirmed by the Kenyan Arbitration Rules (1997) and Order 46 of the Kenyan Civil Procedure Rules, which provide the power to the court to grant relief in aid of arbitrations.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are currently no regulations prescribing procedures for execution of documents by a foreign company in Kenya. The practice has been that the execution of documents by foreign companies is regulated by the laws of the country in which the company is registered.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The new Company Act, promulgated in 2015, has introduced quite a number of changes from the previous legislation. The Act takes into account changes in modern business dynamics and imposes upon the officers of a company registered in Kenya greater responsibility in the running of the company. It is worth noting that severe punitive provisions have also been prescribed for non-compliance with the Act.

The law further modernises registration procedures and operations for companies. In 2015, the Business Registration Services (BRS) Act set up the Business Registration Service. This new law supervises company registration and assigns to counties the registration of the name and concepts of a company, which cuts costs of registering a company.

The Kenyan Government also introduced the Insolvency Act in 2015 in order to improve the legal framework in case of bankruptcy of a company. ■

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Libya

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Population:	6.4m (UN estimate – January 2017)
GDP per capita:	US$14,200 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 11.2% (CIA Factbook – 2014-2016)
Official languages:	Arabic
Transparency International rating:	Ranked 170/176 (2016 Report)
Ease of doing business ranking:	Ranked 188/190 (2017 Report)

Type of legal system	Based on civil law
Signatory to NY Convention	No
Signatory to ICSID Convention	No
Member of COMESA, OHADA, SADAQ, EAC	COMESA
Signed up to OECD Transfer Pricing Guidelines	No formal transfer pricing rules in place
Bilateral investment treaties	Libya is a party to several BITs/TIPs including with the US, Germany and Switzerland

Tarek Eltumi and Ibrahim Sharif share details of criteria that foreign investors must fulfil when considering investment in Libya

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

The ownership of real estate in Libya is restricted to Libyan nationals and wholly owned Libyan companies. There are two exceptions to this rule. First, real estate may be owned by nationals of countries that Libya has a treaty in place with that permits this. At present, this is limited to nationals of or Libyan companies in which nationals of Malta, Egypt and Tunisia hold shares. Secondly, the Libyan Encouragement of Foreign Direct Investment Law (Law No.9/2010) permits the ownership of real estate in Libya by locally established project vehicles of foreign investors. However, such ownership is limited to leasehold ownership only.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Libyan Labour Law (Law No.12 of 2010) provides that equality must be upheld between all Libyan citizens, and between Libyan citizens and foreigners who reside in the country legally. However, article 51 of the Labour Law provides that Libyan nationals must constitute at least 75% of the employees of all domestic and foreign entities. This percentage may be reduced if the required qualified persons are not available in Libya. Law No.9 of 2010 requires a quota of at least 30% of Libyan workers for foreign investment projects.

3. What are the restrictions on redundancies and any applicable compensation?

Article 73 of the Labour Law provides the cases in which the employer may terminate the contract of the employee. It includes such instances as breach of contract, causing severe loss/damages to the employer, absence without justification for over 20 days, etc. An employer cannot terminate an employee outside of the scope of article 73.

Article 76 preserves the right for the person (the employer or the employee) who suffers damages from the termination of a contract to be able to request compensation to be determined by the court.

Article 107 of the Labour Law provides that an employee has the right to suspend his termination with a written request to the Employment Office. The Employment Office would then try to resolve the matter and, if it fails, the case is then referred to the relevantcompetent summary court. If the court rules in favour of the employee, the court may rule that the employee receive compensation; additionally, the court could rule that the employee be reinstated. The level of compensation would depend on the type of employment contract in place, whether it be a limited term employment contract or an unlimited term employment contract.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Libya's Law No.9 of 2010 (the Investment Law) deals extensively with the issue of foreign investment. The Investment Law was enacted in order to encourage foreign capital investment in Libya. Investment projects that fall within the scope of this law enjoy a number of benefits, such as relief from income taxes for a set number of years. Foreign investors that qualify under this law may establish a wholly owned investment vehicle in Libya or they may choose to partner with Libyan partners.

5. Are there any specific legislative requirements, and if so, what are they?

The Investment Law, mentioned above, applies to projects that meet all or some of the following conditions (article 7):

1. the transfer and/or localisation of modern technology, technical expertise, or intellectual property rights;
2. the development, integration and cooperation of established economic projects, reducing production costs, or participation in providing materials and requirements for operations;
3. utilising or assisting in utilising local raw materials;
4. assistance in the development of remote regions;
5. production of commodities for exportation,

or assistance in increasing exports, or (an activity resulting in) totally or partially dispensing with the importation of commodities;
6. providing a service required by the national economy, or assisting in improving it or developing it, or rehabilitating it; and
7. providing employment for Libyan workers with no less than 30%, in addition to providing training and gain of technical expertise and know-how.

Article 8 of the Investment Law also provides that investment projects (to which this law applies) can be in all fields of production and services, with the exception of the oil and gas sectors (as per article 27). Lastly, for a project to qualify, the foreign investor must invest a minimum of 5 million Libyan Dinars (LYD).

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Yes, there are restrictions on imports (and exports). These are regulated by several administrative decisions by the Ministry of Economy, such as Decision 188 of 2012 which provides an initial list of goods that may be imported, Decision 199 of 2012 (as amended by Decision 8 of 2013) which provides a more detailed list of goods that can and cannot be imported/exported, and goods that can only be imported by certain Libyan entities.

There are no requirements that local products should be utilised, although investors seeking to qualify under Law No.9/2010 may increase the prospects of obtaining an investment licence by demonstrating reliance on local products.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

The debt capital market is largely nascent in Libya and focuses on locally arranged facilities for agricultural and industrial usage. That said, no formal restrictions exist with regard to the purpose for which money may be lent, save that such purposes must not conflict with Libyan laws and morals in general (such as the prohibition on gambling, alcohol, etc.).

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security for debt obligations may be obtained over property, fixed assets, funds, stocks and bonds, future earnings and rights. In order to create such security interests, the class of asset must be in existence and capable of description at the time of creation. That means that assets that will be created in the future, such as contract receivables, may not be secured because they are uncertain at the time of creation. Floating charges of the type seen in English law are unavailable under Libyan law. Additionally, security interests can be in the form of a direct personal guarantee and a third party guarantee, in which case the assets/funds of the debtor would all serve as a general guarantee for the debts.

The Libyan jurisdiction recognises the concept of a trust and the role of the trustee, and regulates them in the Libyan Civil Code. Within the context of creating security, practice has evolved to use a security agency in reliance on basic principles of agency law espoused in the Libyan Civil Code.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The Libyan Civil Code contains a number of provisions which regulate the management of public facilities by private concessionaires, which is quite similar to Public Private Partnerships (PPP); however, no laws or regulations currently exist that expressly regulate PPPs for infrastructure projects. A draft PPP law has been debated for a number of years but has yet to pass into law.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

The Commercial Code regulates company mergers (Articles 299-306). The Commercial Code does not provide for thresholds for notification. The merger procedures include a requirement to value the assets and shares by a committee of experts appointed by a competent court of first instance (in article 301), the notification of all debtors of the merging companies (in article 302), and the registration of all relevant documents at the Commercial Register (in article 306).

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Chapter 11 of the Libyan Commercial Code (specifically articles 1282–1304) deals with the issues of competition, and prohibits market abuses. The Commercial Code provides for the establishment of a Competition Committee to be responsible for reviewing complaints and investigating them and, in cases where the law has been violated, referring the cases to public prosecution. However, we are not aware of an active Competition Committee at the moment, and since these issues are regulated by law and considered violations, then interested/damaged parties can pursue legal action directly.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property rights are protected under the provisions of Law No.9 of 1986 and Law No.7 of 1984, in addition to the Commercial Code which provides the means of protection in a commercial context, and the general rules of the Civil Code in relation to the protection of rights.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

There are a number of taxes, including corporate tax, income tax, stamp duty tax, income tax on employees' salaries and Jihad tax. These taxes are governed by different laws and regulations which are usually specific (Income Tax Law, Stamp Duty Law, etc.) which determine the applicable rates. The current rate for income tax is set at 20% of annual income. The rates of stamp duty tax are set in the schedule accompanying the relevant law, which sets out various types of documents and transactions that attract stamp duty and the corresponding rate.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The Investment Law provides for the repatriation of funds out of Libya pertaining to those investors that qualify under Law 9/2010. Other than that, the Central Bank of Libya stringently regulates foreign exchange and repatriation of funds. Companies lawfully operating in Libya may repatriate net profits upon a demonstration of payment of all taxes and governmental fees due. There is a cap on annual repatriation of profits set by the Central Bank of Libya from time to time.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

The Libyan Civil Procedures Code also provides for the enforcement of foreign decisions or arbitral awards if they meet the following requirements:

(a) the decision must be issued from a competent authority, according to the laws of the country of origin of the decision;
(b) the parties must have been duly summoned to appear before the court (that handed down the decision) and must have been duly represented, in this case the laws of the foreign country also apply in terms of summons to and presence before the court;
(c) the decision must not contradict decisions already issued by Libyan courts; and
(d) the decision must not include anything that conflicts with the principles of Public Order in Libya.

As at March 2017, Libya is not a party to the 1958 New York Convention on Enforcement of Foreign Arbitral Awards.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

As an example of regional cooperation, Libya is a party to the Riyadh Arab Agreement for Judicial Co-operation, which facilitates enforcement of court judgments and arbitral awards through the mutual recognition of judgments and awards between the 21 contracting states of the Arab League.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

Depending on the document being signed, the company may need to have a lawfully incorporated presence in Libya which would allow it to enter into obligations locally. Furthermore, depending on the nature of the document being signed, it may need to be notarised if the document is to be considered an "official document". However, generally speaking, the vast majority of documents will need to be in Arabic (or Arabic and English or another foreign language), will attract the payment of stamp duty tax if an obligation is created and will need to carry the stamp or seal of the company (as a matter of local practice).

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The political and security situation in Libya is complex and constantly evolving. Investors should seek appropriate advice when considering investing in Libya. ■

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Tarek is a partner in the Hogan Lovell's Infrastructure, Energy, Resources and Projects team based in London. He is a dual Libyan/New York qualified lawyer with a broad practice that covers general corporate and commercial matters (foreign direct investment, joint ventures, restructurings), project development, finance and dispute resolution. He works principally in the sovereign wealth, energy, infrastructure and telecommunications sectors, with a geographic focus mainly on Libya and North Africa, but also on Europe and sub-Saharan Africa more generally.

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Hogan Lovells

Hogan Lovells has been active in Libya for several years. We have acted for oil majors, sovereign wealth funds and major international contractors on projects in Libya for a number of years and have developed a reputation for being a top tier law firm that delivers tangible results. We continue to be involved in a large number of high profile transactions in Libya, acting for various Libyan sovereign entities on a wide range of matters such as defending actions to seize Libyan assets before the ICC and restructuring international investments made by the former regime.

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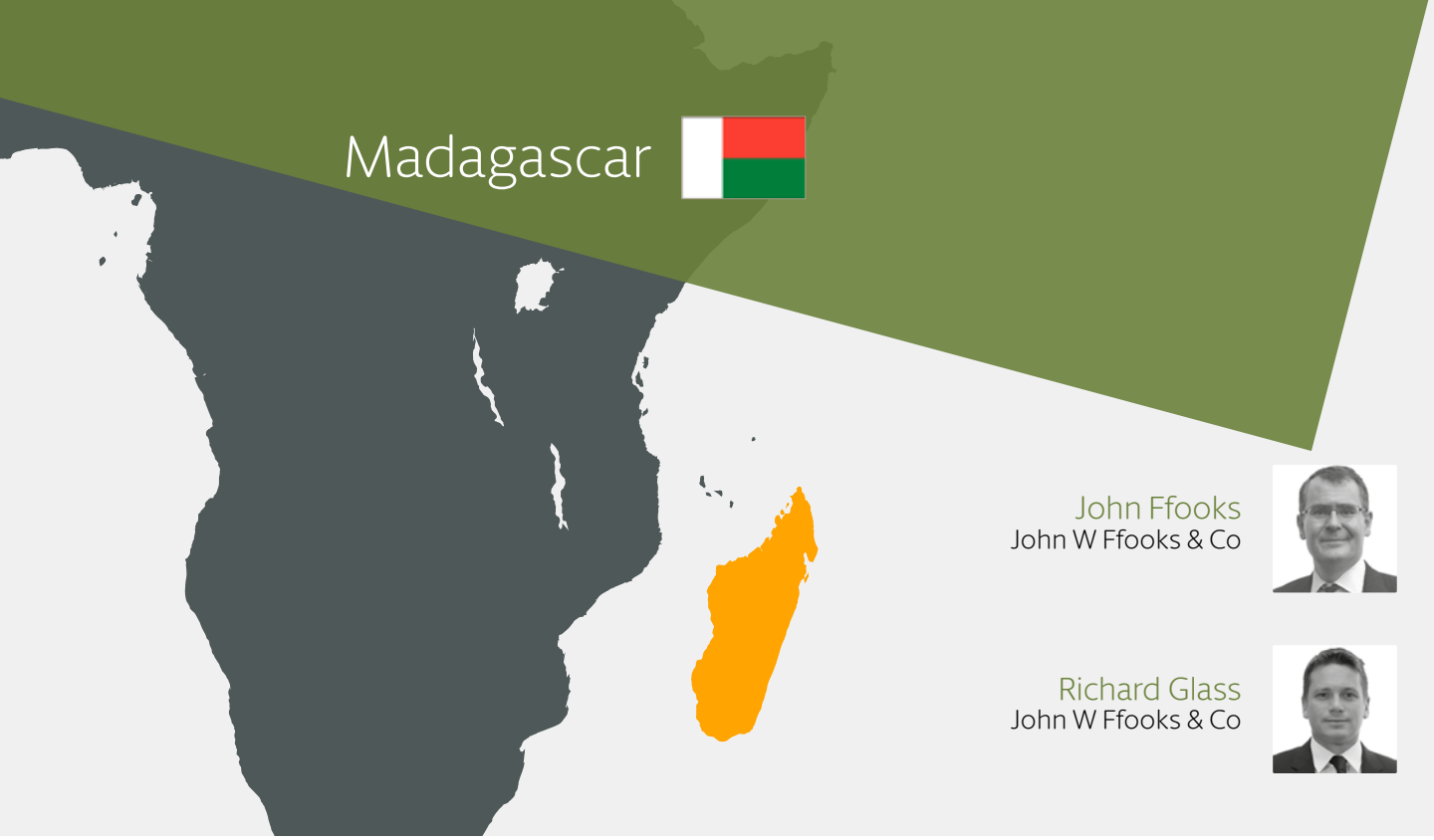
Madagascar



John Ffooks
John W Ffooks & Co

Richard Glass
John W Ffooks & Co

Population:	25,612,972 (UN estimate – January 2017)
GDP per capita:	US$1,500 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.5% (CIA Factbook – 2014-2016)
Official languages:	Malagasy and French
Transparency International rating:	Ranked 145/176 (2016 Report)
Ease of doing business ranking:	Ranked 167/190 (2017 Report)

Type of legal system	Civil law system based on the French tradition
Signatory to NY Convention	Yes (16 July 1962 accession)
Signatory to ICSID Convention	Yes (1 June 1966)
Member of COMESA, OHADA, SADAQ, EAC	COMESA, SADC
Signed up to OECD Transfer Pricing Guidelines	Does not follow OECD Guidelines
Bilateral investment treaties	BITs are in force with the EU, China, France, Germany, Mauritius, Norway, Sweden, Switzerland (a BIT is signed but not yet in force with South Africa)

John Ffooks and Richard Glass reflect on developments in Madagascar's foreign investment markets, and highlight the measures that have been taken to introduce IP protection into current legislation

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Foreign companies are not permitted to acquire land in Madagascar. However, Law no. 2007-036 dated 14 January 2008 governing investments in Madagascar (hereinafter referred to as the "Investment Law") provides that a company, which is incorporated in Madagascar, and managed by foreigners, can purchase land.

The purchase is subject to ensuring that the land is used exclusively for commercial purposes, and a business plan is submitted to the Economic Development Board of Madagascar (the "EDBM") setting out the planned investment and the company's intended business in Madagascar, with authorisation for land acquisition from the EDBM having been obtained.

The process for transferring title directly to a foreign owner is slow, cumbersome, complex and subject to significant limitations on total surface area and ultimate usage; however, foreign legal entities can enter into a long lease agreement (i.e. a 99-year lease) without the need to obtain any prior approval from the EDBM, which lease can also be renewed.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Companies may hire foreign workers without restrictions subject to satisfying the basic conditions for obtaining a local work permit. Where a company is contemplating a large-scale mining investment, in Madagascar, they are required to give preference to Malagasy nationals who have equal skills and qualifications to the foreign workers.

3. What are the restrictions on redundancies and any applicable compensation?

Under Malagasy labour law, a fixed-term contract cannot be terminated before its term except in the case of *force majeure* or serious misconduct, or for a prescribed reason provided for in the employment contract. Compensation is calculated based on (i) the seniority of the employee, and (ii) the employee's socio-professional category.

Contracts for an undetermined term may be terminated at any time by the employer in accordance with the labour code and the terms of the contract providing provisions relating to notice period, length of employment and seniority of the employee. The employer must notify the employee in writing of their decision and must provide the reasons for dismissal.

The employee will then be entitled to the payment of compensation, namely their remaining salary, severance pay, compensation in lieu of notice period, and any compensation for untaken leave.

An employee who is made redundant for gross misconduct is not entitled to either notice pay or severance pay.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

There is no law prohibiting or limiting foreign investment – subject to question 2 above. Article 2 of the Investment Law states that Malagasy or foreign entities are free to invest in Madagascar. However, some activities are subject to specific licences or regulatory approval such as banking, insurance, mining, oil, medical and pharmaceutical.

Under Malagasy company law, companies are free to contract as they wish. No permissions or permits are required after a company's incorporation to allow it to carry on business.

A system exists in Madagascar for a company to charge or pledge its assets by way of security for a loan. While this is not identical with systems in common law jurisdictions, it still has effect as long as procedure is respected. Rights under permits or contracts can be pledged or assigned as well as rights to physical goods.

5. Are there any specific legislative requirements, and if so, what are they?

There is no obligation to have local shareholders and a Malagasy incorporated company can be owned 100% by foreign people or foreign companies. Someone involved in the management or administration of a Malagasy company must be either a national or a resident foreigner. In

the case of an SARL this means that the *gérant* must be resident in Madagascar or a Malagasy national. For an SA, one of the administrators or the *Directeur Général* or his deputy must be resident in Madagascar or a Malagasy national.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Madagascar has no such policies discriminating against foreign investment, imports, or exports, and there is no restriction on the importation of goods or raw materials in the territory of Madagascar aside from the standard customs declaration. A declaration of the goods must be made by their owners, shippers or recipients or by the customs agent.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

There are no restrictions on the purposes for which money may be lent aside from the need to first notify the department in charge of the external relationships of the Ministry of Finance or the *Service de Suivi des Opérations de Change* (the SOCC) in case of a loan made by a foreigner/foreign legal entity for the benefit of a Malagasy national/Malagasy legal entity. Please note that such operation has to be handled by an authorised local bank.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Both non-possessory pledges (*nantissement*) and mortgages are the usual forms of security granted in Madagascar. A non-possessory pledge can be granted over assets like shares, business, materials and equipment, vehicles, bank accounts and receivables. The pledge must be registered with the tax authorities and with the companies registry in order to be enforceable in Madagascar. A mortgage can be granted over real estate (i.e. land and properties erected on the land). The deed of mortgage must be registered with the tax authorities and with the land registry in order to be enforceable in Madagascar.

The concept of a trust does not exist in Madagascar, and accordingly, nor does the concept of a Security Trustee. However, the Malagasy legislation pertaining to contracts gives free rein to parties to establish the terms and conditions of their contract(s). This includes the right to appoint an entity/individual to represent and act on behalf of several parties driven by the same interest.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

Madagascar has specific legislation regulating this sector: the 2015 law on Public Private Partnership (the 'PPP Law'). The PPP Law sets out the framework for the elaboration, signing and execution of contracts and agreements concluded for the implementation of public-private partnerships, including partnerships under the Build, Operate, Transfer (BOT) model and variants thereof.

The above regime is overseen by the following entities:

- the *Comité National PPP* (the PPP national committee), which sets the national policy relating to the development of PPPs and assists government with strategic decisions and policy relating to PPPs generally;
- a *Unité PPP* (i.e. PPP unit) which assists public entities with the PPP contracting processes;
- the *Autorité de Régulation des Marchés Publics* (the authority in charge of regulating public procurement, known as the "ARMP"), which controls the PPPs contracting processes; and
- the ministry in charge of finance, which evaluates the financial viability of proposed projects.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Prior approval of the Competition Council is required when two companies are parties to a transaction and together have either more than 30% of the sales, purchases or other transactions in whole or part of the national market or an annual turnover (excluding tax) of more than 10 billion MGA (approximately USD 5 million). The Competition Council was set up in September 2015.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The abuse of a dominant position in the domestic market or a substantial part of it, by a company or group of companies, which has the effect of preventing, distorting or restricting competition, is prohibited under Malagasy law, under the terms of Law No. 2005-020 of July 27, 2005 (the "Competition Law"). The Competition Law also specifically prohibits agreements and concerted practices between competitors that (directly or indirectly) (i) results in price fixing, or (ii) limit production / distribution of goods and services, such as cartels. Please note that Malagasy courts actively enforce the provisions of the Competition Law.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

The *Office Malgache de la Propriété Industrielle* (OMAPI) or Malagasy Office for Industrial Property and the *Office Malagasy du Droit d'Auteur* (OMDA) or Malagasy Copyright Office share responsibility for the protection of intellectual property rights. These are financially autonomous bodies that collaborate closely with the ministries of industry, trade, culture and handicrafts. Their missions include *inter alia* (i) fighting against infringements of industrial property rights, notably counterfeiting and unfair competition, and (ii) ensuring and promoting the protection and use of industrial property in Madagascar.

Measures that can be taken by the courts include, *inter alia*, the confiscation of proceeds illicitly obtained from a copyright infringement, confiscation of counterfeited goods and payment of damages (i.e. compensation for the benefit of victims of copyright infringement).

In reality, the enforcement capacity of the protection of intellectual property rights is sometimes quite limited due to resource constraints, weakness of the judicial system, and a lack of awareness of intellectual property rights among consumers.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Businesses are subject to the following taxes, including companies:

- Corporate income tax of 20%.
- Value added tax (VAT) of 20%. VAT liability is not mandatory except if the company's turnover is superior or equal to MGA 200,000,000 (approx. US$ 65,000) per annum.
- Individuals are subject to salary income tax of 20% for incomes over MGA 250,000.00, withheld from wages paid by the employer.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The Investment Law provides that foreign or local investors can freely transfer abroad without prior authorisation all profits after full payment of taxes, dividends, and miscellaneous payments. Any current transactions or transfer of funds between Madagascar and another country must be made through an authorised local bank.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgments can be enforced in Madagascar subject to the obtainment of an exequatur order. The exequatur is granted by decision of the president of the appellate court of Antananarivo (i.e. the capital city of Madagascar). When a decision of a foreign court is not contrary to Malagasy public policy or contrary to good morals, the Malagasy courts may order its enforcement.

A party that wishes to obtain the said exequatur order must submit to the relevant court (i) an authentic copy of the foreign judgment, and (ii) the original of the writ notifying the foreign judgment.

Madagascar is a party to both the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Madagascar ratified the ICSID in 1966 and the New York Convention in 1962.

The successful enforcement of arbitration awards requires the obtainment of an exequatur order from the appellate court of Antananarivo. A party that requests such an exequatur order will have to provide (i) the original copy/certified copy of the arbitral award, (ii) the original copy/certified copy of the arbitration agreement, and (iii) a

certified translation of the arbitral award and/or the arbitration agreement if these documents are not drafted in Malagasy or French.

The appellate court of Antananarivo may refuse to issue an exequatur order for various reasons, the most important one being that the recognition or enforcement of the arbitral award would be contrary to international public policy.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Arbitration proceedings are commonly used in preference to local courts when it comes to international transactions where the seat of arbitration is typically chosen by parties as being outside of Madagascar. Although nominally supportive of arbitration proceedings and remedies, in practice, local courts are not preferred by investors as dispute settlement in the local courts can take years, with the duration of investment disputes subject to numerous appeals before reaching a final verdict, thus ensuring obtaining remedies, like interim relief is potentially difficult.

Whilst Madagascar has its own arbitration centre, the *Centre d'Arbitrage et de Mediation de Madagascar* ('the CAMM"), little formal training is afforded to its personnel and it remains under-resourced. The CAMM mediated eight cases in 2014 and four cases in 2015.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There is no specific signing procedure that must be followed by a foreign company in Madagascar. There is no compulsory number of signatories required. It is up to the parties to the document under Malagasy law to set the number of signatories. If need be, powers of attorney may be produced. It is advisable to produce notarised powers of attorney (i.e. notarised by a notary of the country where the foreign company is located) in order to ensure the validity of the said powers of attorney in Madagascar.

Please note that parties to a document governed by local law must sign on the same signature page of the document as there is no legislation on counterparts.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

There is a project to reform Order no 89-019 of 31 July 1989 which establishes a regime for the protection of intellectual property in Madagascar. There are also plans for the accession of Madagascar to various international treaties on intellectual property i.e. industrial designs. The reforms would incorporate The Hague System (on the international registration of industrial designs) and the Lisbon Convention (on the protection of origin appellation and international registration) agreements, as well as other international treaty classifications in the matter of patents, design and industrial models, brands and figurative elements into the legislative framework. ■

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John has lived and worked as a lawyer in Madagascar for 15 years. He is familiar with the specific legal and business cultures across Francophone Africa and has extensive experience of French-based legal systems. John has handled finance transactions in excess of USD 6 billion in relation to natural resource and project finance projects, with all the requisite due diligence such complex transactions require. John has also been involved in acquisitions and disposals of assets in the natural resources and telecommunications fields.

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Richard is an English-law qualified corporate solicitor and the managing partner of the Madagascar and Mauritius office of John W Ffooks & Co. Richard has a broad corporate practice encompassing telecommunications and general M&A which has developed over the past few years across West and Central Africa. Richard holds dual English/French nationality, is fluent in written and spoken French and has significant deal-experience in sub-Saharan Francophone Africa. Before joining the firm, Richard worked at a leading City law firm for a number of years.

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John W Ffooks & Co is also one of the only firms in Francophone Africa with a combination of civil and common law corporate expertise, making us better able to deal with international transactions. Our City of London experience enables us to anticipate clients' needs, making us a proactive partner in dealing with local counsel.

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Mali

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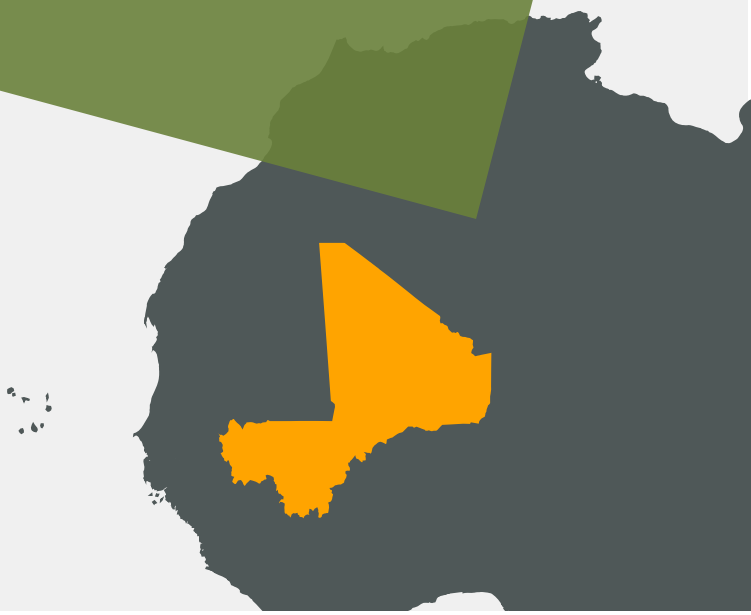

Population:	18,689,966 (UN estimate – 2017)
GDP per capita:	US$2,300 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 6.1% (CIA Factbook – 2014-2016)
Official languages:	French
Transparency International rating:	Ranked 116/176 (2016 Report)
Ease of doing business ranking:	Ranked 141/190 (2017 Report)

Type of legal system	Based on French civil law and customary law
Signatory to NY Convention	Yes (8 September 1994)
Signatory to ICSID Convention	Yes (9 April 1976)
Member of COMESA, OHADA, SADAQ, EAC	OHADA, and is a member of ECOWAS
Signed up to OECD Transfer Pricing Guidelines	No
Bilateral investment treaties	BITs are in force with Algeria, Canada, China, Egypt, Germany, Morocco, Netherlands and Switzerland (and signed with other countries but not yet in force)

John Ffooks and Richard Glass discuss the evolving business climate of Mali, highlighting government-led changes which aim to improve, support and identify future investments

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Foreign entities are entitled to hold interests in land. Holding interests in land is one of the advantages guaranteed to foreign investors by the Malian Investment Code, under article 10 of Law No. 2012-016 dated 27 February 2012. Foreigners, who intend to acquire land, shall comply with the laws governing the acquisition and protection of land and property rights in Mali. There are five steps that must be respected in order to register property in Mali.

These steps are as follows: first, checking of the real identity of the owner of land and property and the situation of the land title at the land registry (i.e. Bureau de la Conservation Foncière). Second, the assessment of the true value of the property/land by a price expert (i.e. by a courtier immobilier), followed by the preparation of a sale agreement at a public notary; fourth, the registration of the sale agreement at the Service des domaines et du Cadastre; and lastly, transfer of the land title with the land registry.

The process to register land takes over 29 days and comes with associated costs, which are charged at the rate of 11.9% of the value of the property.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Investors in Mali are free to hire either local employees or foreigners. However, a primary objective of any investment project is to generate new jobs for the local employees. In addition, the Malian Investment Code requires that investors should give priority to local employees over the employment of foreign employees, unless the former cannot meet the requirements for the position.

Under Malian law, namely, article 28 of the Malian Investment Code and articles 26 to 29 of Law No. 92-020 dated 23 September 1992 governing the Malian labour law (the Labour Law), in practice, the hiring procedure is the same for both local and foreign employees. However, the employments contracts of foreigners must:

- be in writing;
- be subject to the prior approval and visa issuance by the National Directorate of Labour;
- be concluded in four original copies; and
- provide information on the foreign employees and their local employers.

Failure to comply with the above can lead to the payment of fines of FCFA 10,000 (approx. USD 16) to FCFA 50,000 (approx. USD 80), which can be doubled in the case of repetition of the offence.

3. What are the restrictions on redundancies and any applicable compensation?

Under the Labour Law, a fixed-term contract cannot be terminated before its term except in the case of *force majeure* or serious misconduct, which is subject to the appreciation of the Malian Labour Court. In practice, a fixed-term contract can also be terminated by mutual agreement. Please note that compensation equal to the remaining balance of the salary of the employee is commonly paid to the employee if a fixed-term employment contract is terminated before its term of expiry.

A permanent contract may be terminated at any time by the employer for valid reason (on actual and serious grounds) and subject to the observance of a notice period by the employee, the length of which depends on the position and seniority of the employee in question.

The termination shall be notified to the employee, in writing, and provide the reasons of the decision. The employee will then be entitled to the payment of compensation, which includes sums such as remaining salary; severance pay; compensation in lieu of notice period; and any compensation for untaken leave.

An employee who is made redundant for gross misconduct is not entitled to either notice or severance pay.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

A foreign company/investor wishing to do business in Mali must establish a permanent corporate entity. The most common corporate structures are the *Société à Responsabilité Limitée* (the SARL) (the nearest equivalent under English law is a private limited company) and the

Société Anonyme or (the SA) (the nearest equivalent under English law is the larger limited liability company with board of directors). Both are governed by the OHADA Uniform Act on Company Law. Subject to certain statutory limitations, parties can create different types of shares with diverse voting and dividend rights, and can determine how management of the company is to be performed.

In an SARL, management is exercised by one or several managers (*gérants*), subject to certain decisions which, as a matter of law, can be made only by shareholders. *Gérants* or shareholders do not need to be Mali nationals or resident in Mali. However, it is beneficial to have a directors resident in Mali for ease of management.

In an SA, there is no requirement for any director to be a Malian national or resident in Mali. However, it is beneficial to have the directors resident in Mali for ease of management.

Mali has established a series of "one-stop shops" (*Guichet Unique*) called the Investment Promotion Agency of Mali (*Agence pour la Promotion des Investissements* or the API) to assist with the formalities of doing business in the country (including providing details on regulated activities, such as the pharmaceutical sector). Created in 2005, the API is a public agency and falls under the auspices of the Ministry of Industry, Investments and Trade.

5. Are there any specific legislative requirements, and if so, what are they?

The Malian Investment Code and its enforcing decree No. 2012-475 dated 20 August 2012 govern investments in Mali.

These texts ensure: equality of treatment between foreign and local investors; protection against nationalisation and expropriation or any requisition of company; stability; and free access to raw materials and to land. These texts also ensure the rights to transfer funds or to undertake capital and financial transactions, such as share transfer or transfer of business.

Please note that the Hydrocarbons Code (Law No. 2015-035 dated 16 July 2015) provides change of control restrictions for that industry.

For an SARL, any agreement (including intra-group services agreements, royalty agreements or loan agreements) between the SARL and one of its *gérant* or shareholders must be approved by the general assembly of shareholders.

For an SA, any agreement (including intra-group services agreements, royalty agreements or loan agreements) between an SA and one of its directors, managing director or deputy managing director should be subject to the prior authorisation of the board of directors. The same is true for agreements in which a director or a managing director or a deputy chief executive officer is indirectly involved.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

As Mali is a member state of the West African Economic and Monetary Union (WAEMU), the WAEMU Customs Code is applicable in the country. The WAEMU Customs Code provides uniform importation taxes between WAEMU member states. Products imported from countries, which are not members of WAEMU, are subject to the *Tarif extérieur commun* (Common External Tariff).

The WAEMU Customs Code provides some restrictions: for example, the importation of products which appear to suggest that they were manufactured in the WAEMU region but are actually manufactured from countries outside that region is prohibited. In all cases, it is prohibited to import any products which may affect public order, public safety, health, morals and the environment.

As a result of on-going economic reforms, the Malian government has recently reduced many export taxes and import duties; however, in certain areas, such as gold and cotton, such materials still require export taxes. They have also applied price controls to petroleum and cotton, and on occasion to additional items such as rice. Further incentives for investors include tax exemptions on the use of local raw materials.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

The 2010 WAEMU Regulation governs any current operations and capital transactions made between non-residents and residents. Based on the WAEMU Regulation, foreign investors are free to borrow money from overseas. However, such transactions may be subject to the prior authorisation of the Malian Ministry of Finance and/or the Central Bank of the West African States (CBWAS).

In fact, a loan granted by a Malian authorised bank to a non-resident is subject to the prior authorisation of the department in charge of external relations of the Ministry of Finance upon the favourable opinion of the CBWAS.

Any loan granted by a non-resident to a Malian resident must be notified to the department in charge of external relations of the Ministry of Finance and the CBWAS.

From an anti-corruption and anti-money laundering law perspective, the Ministry of Finance, the CBWAS and any other competent authorities may at any time require information relating to:

- the amount, frequency, nature, currencies used, origin and destination of the operations;
- legal documents evidencing the operations;
- an explanation on the coherence of the operations; and
- information on the ultimate and real beneficiaries of the transaction.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The creation, management and perfection of securities are governed by the Revised Uniform Act of OHADA on securities dated 15 December 2010 (the Security Act). Security can be taken over movables, assets and immovable properties.

In accordance with the provisions of the Security Act, security can be created over present and future assets but the asset must be identified or identifiable as indicated by reference to the following elements: the identity of the debtor; place of payment; secured amount or estimate of the payment; and due date.

Security over movable assets are registered at the *Registre de Commerce et de Crédit Mobilier* (RCCM) where the company has its head office. Registration of security over immovable property is made at the land registry where the land is located.

The concept of security agent is foreseen in the Security Act in respect of mortgage and pledge. By virtue of the Security Act, a creditor may appoint a security agent. The appointed security agent would have the power to create, manage and enforce the security on behalf of the creditor.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The procurement and management of infrastructure projects (including PPPs) is mainly governed by the following laws and regulations:

- Law No. 08-022 dated 23 July 2008 creating the *Direction Générale des Marchés publics et des Délégations de Service public* or the Direction in charge of public procurement and public service delegation contract amended by Law No. 2011-029 dated 24 June 2011;
- Law No. 2016-061 dated 30 December 2016, governing Public-Private Partnerships;
- Decree No. 2015-0604 dated 25 September 2015, regulating public procurement and public service delegation contracts; and
- Decree No. 2016-0155 dated 15 March 2016, regulating the organisation and modalities of functioning of the *Cellule de passation de marché public* or the Unit in charge of public procurement awarding.

The Malian government is creating a PPP policy and framework to provide support, assistance and a clear guide when implementing PPP as a method of procurement for business. In addition, the government is creating a PPP Unit, which will mainly have the following missions:

- selecting and managing projects directed by each ministry or local authorities;
- undertaking and monitoring risk analysis, financial approval and processing;
- coordinating the roles of government bodies; and
- promoting and developing PPP programmes.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Under the WAEMU Regulations, namely, Regulation No. 02/2002 dated 23 May 2002, Regulation No. 03/2002 dated 23 May 2002 and the WAEMU Treaty regulating the law of anticompetitive practice within member states, including Mali (together referred to as the WAEMU Competition Regulations), there is no procedure for the merger control of transactions and no notification thresholds.

However, parties in a merger transaction can seek clearance of their transaction through the procedure of negative clearance to check whether the transaction will raise serious competition concerns or not (i.e. will it impede free competition within the market or not).

They can ask the WAEMU Competition Commission's opinion on the compliance of a transaction with the WAEMU Competition Regulations as to whether it meets those standards.

Under the Competition Regulations, relevant

transactions qualifying for negative clearance include the following situations:

- first, the merger of two or more previously independent entities;
- secondly, a transaction whereby one or more persons already controlling at least one entity or one or more entities acquire, directly or indirectly, either through shareholding or contract or by purchasing items of an asset, control all or parts of one or more other entities; and
- lastly, the creation of a joint venture that performs in a sustainable manner all the functions of an autonomous economic entity.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes. Under WAEMU Competition Regulations, as referred to above, there are prohibitions against the abuse of a dominant position, cartel behaviour and exclusivity arrangements.

The sanction is the payment of fine of FCFA 500,000 (approx. USD 800) to FCFA 100,000,000 (approx. USD 160,000). Fines can be levied which are up to 10% of the amount of the turnover of the entities that take part in the offence.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

The *Bureau Malien des Droits d'Auteurs* (BUMDA) or the Malian copyrights office and the *Centre Malien de promotion de la Propriété Intellectuelle* (CEMAPI) or the Malian Centre for the Promotion of Intellectual Property are the two key organisations involved with protecting intellectual property rights in Mali.

The BUMDA is primarily involved with more artistic and cultural works, whilst industrial property rights violation claims are covered by the CEMAPI. The latter is a member of the African Property Rights Organisation (IAPO) and works with international agencies recognised by the United National Industrial Development Organisation (UNIDO).

The relevant law is stated in Law No. 08-024 dated 23 July 2008 regulating the literary and artistic property regime and Law No. 87-18/AN-RM dated 9 March 1987 and its enforcing decree No. 130/PG-RM dated 18 May 1987 on the regulation and the protection of industrial property rights.

Malian law states that all rights must be registered and enforced. Any alternative registrations will not protect exclusively in Mali. The doctrine of international copyright does not exist and will not automatically protect an author's writings throughout the entire world.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

According to the Malian general Tax Code, an entity, which intends to carry out business in Mali, is subject to the payment of the main following taxes:

- corporate income tax: levied at a rate of 30%;
- social security contributions: levied at a rate of 21.9%;
- Stamp Duty: FCFA 1,500 (approx. 3USD per page of the pages of the document to be registered); and
- value added tax at a rate of 18%.

Dividends paid to a non-resident company are subject to a withholding tax at a rate of 10% and 7% when it is from a listed company.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The WAEMU Regulation No. 09/2010, regulating financial relationships between member states of WAEMU and foreign states, governs the repatriation of funds out of Mali. It provides that capital transactions such as investment abroad and the liquidation of an investment abroad are subject to the prior approval of the Ministry of Finances.

Any current transactions such as payment of salary, distribution of dividends and payment of services are freely transferable but must be made through a local authorised Malian bank.

In all cases, all transfers of funds between Mali and another country must be made through an authorised Malian bank.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Recognition and enforcement of foreign arbitral awards in Mali is governed by the Uniform Act of OHADA on Arbitration dated 11 March 1999.

The Common Court of Justice and Arbitration (CCJA), which is both an arbitration institution and a judicial court is the relevant body, whose competences cover all the OHADA States, including Mali.

Articles 514 to 525 of the Malian Code of Civil Procedure in Mali provide that a foreign judgment is enforceable only by virtue of an exequatur. The exequatur is granted by decision of the president of the First Court of Instance where the foreign decision should be executed provided that:

- the foreign judgment is issued from a competent foreign court;
- the foreign judgment is given as final decision;
- parties were duly represented or summoned or pronounced as defaulting;
- the Malian court has no exclusivity to settle the case;
- the final judgment was not issued by the Malian courts; and
- the foreign judgment is not contrary to the public order and morals of Mali.

Mali is also a member state of the International Centre for the Settlement of Investment Disputes (ICSID – Washington Convention) and the World Bank Multilateral Investment Guarantee Agency (MIGA).

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Arbitration proceedings are commonly used when it comes to international transactions. Local courts are, in practice, often unsupportive of ongoing arbitration proceedings, although equally they are not willing to deal with this kind of dispute resolution in enforcement matters. This is because local courts are sometimes reluctant to handle arbitration cases, because they consider that arbitral procedures are not matters that they should handle. They prefer to deal with disputes in which ongoing arbitration proceedings are no longer required.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There is no particular signing procedure that must be followed by a foreign company to sign a document under local law. Please note that parties to a document governed by local law must sign on the same signature page of the document, as there is no legislation on counterparts.

The signing of a document between private and public entities shall be made in respect of the provisions of Law No. 2016-061 dated 30 December 2016 governing Public-Private Partnership and Decree No. 2015-0604 dated 25 September 2015 regulating public procurement and public service delegation contracts.

The number of the signatories and powers of attorney required and notarisation requirement depend on the document to be signed. Please note that any power of attorney from a non-resident entity should be notarised, as required by Malian law.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Financial partners invested in Mali have announced an impressive 4 billion dollar multi-year assistance package following the removal of economic assistance sanctions that were originally imposed following the *coup d'etat* of March 2012. Furthermore, since 1 January 2014, the African Growth and Opportunity Act (AGAO) deemed Mali eligible for trade treatment. In addition, the Overseas Private Investment Corporation (OPIC) has agreed Mali is eligible for financing and insurance products. U.S investors have expressed interest in various sectors, including energy and mining.

With the support of the World Bank, Mali has established a Presidential Investment Council. The council contains foreign and national businesspeople, and its primary aim is to improve the business climate in Mali, support current investments and identify the best investment projects for the future. ■

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John has lived and worked as a lawyer in Madagascar for 15 years. He is familiar with the specific legal and business cultures across Francophone Africa and has extensive experience of French-based legal systems. John has handled finance transactions in excess of USD 6 billion in relation to natural resource and project finance projects, with all the requisite due diligence such complex transactions require. John has also been involved in acquisitions and disposals of assets in the natural resources and telecommunications fields.

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Richard is an English-law qualified corporate solicitor and the managing partner of the Madagascar and Mauritius office of John W Ffooks & Co. Richard has a broad corporate practice encompassing telecommunications and general M&A which has developed over the past few years across West and Central Africa. Richard holds dual English/French nationality, is fluent in written and spoken French and has significant deal-experience in sub-Saharan Francophone Africa. Before joining the firm, Richard worked at a leading City law firm for a number of years.

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John W Ffooks & Co is one of Francophone Africa's leading independent international law firms. We specialise in advising inward investors to the region. We are able to give advice at any stage of an investment, from green field operations to the sale and purchase of mature operations, or on specific points of law separate from a specific transaction.
We are also one of the only firms in Francophone Africa with our particular combination of civil and common law corporate expertise, making us better able to deal with international transactions. Our City of London experience enables us to anticipate clients' needs, making us a proactive partner in dealing with local counsel.

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Mauritania

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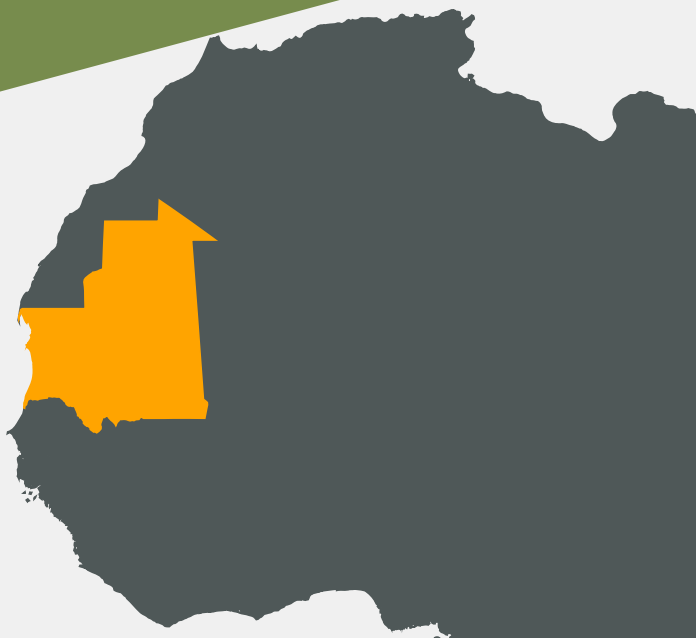

Population:	4,266,448 (UN estimate – January 2017)
GDP per capita:	US$4,400 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	3.3% (CIA Factbook – 2014-2016)
Official languages:	Arabic
Transparency International rating:	Ranked 142/176 (2016 Report)
Ease of doing business ranking:	Ranked 160/190 (2017 Report)

Type of legal system	Based on Islamic (Sharia law) and French legal and judicial system
Signatory to NY Convention	Yes (30 January 1997 accession)
Signatory to ICSID Convention	Yes (30 July 1965)
Member of COMESA, OHADA, SADAQ, EAC	None
Signed up to OECD Transfer Pricing Guidelines	Does not follow OECD Guidelines
Bilateral investment treaties	Mauritania is a party to several BITs/TIPs

John Ffooks and Richard Glass give an overview of local laws and regulations for foreign investors looking to do business in Mauritania

Mauritania

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Law No. 2012-52 dated 31 July 2012 relating to the investment code (the Investment Code) guarantees investors equality before the law, irrespective of nationality or origin. This includes property rights, which are protected under the Mauritanian Civil Code, which is modelled on the French code. Likewise, mortgages exist and are extended by commercial banks.

There is a well-developed property registration system for land and real estate in most areas of the country, but land tenure issues in southern Mauritania, particularly the area along the Senegal River, are the subject of much controversy.

Investors should be fully aware of the history of the lands that they are purchasing or renting, and should verify that the local partner has the proper authority to sell or rent large tracts of land – particularly in this region – before agreeing to any deals.

In 2015, the Ministry of Economy and Finance established a computerised system to provide more transparent land allocation. All information regarding the property titles is available at the Land Registry Agency housed at the Ministry of Housing, including information related to mortgages and other tax-related matters.

The Land Registry Agency performs due diligence prior to making the final title transfer. To register a property, owners only need to have their notarised sale agreement along with the title certificate.

In practice, however, investors should note it can be difficult to gain redress for grievances for property rights through the courts.

Foreign investors undertaking business in Mauritania can benefit from different advantages under the Investment Law (including land acquisition) under the following regime:

- Certificate of Investment granted by the Office for Promotion of Private Investment and International Cooperation "the Guichet unique";
- operation under a Free Zone regime;
- benefits for medium-sized enterprises (PME); and
- there is a special regime for investment outside the capital city of Nouakchott.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Local law requires that employers give priority to citizens over foreign workers, unless the skills required for the position cannot be filled by the national labour force, especially in security-related fields. In this case, the employer should create a plan of "Mauritanisation" to transfer skillsets to local workers within a period of two years.

3. What are the restrictions on redundancies and any applicable compensation?

Contracts of employment of unspecified duration may be terminated at any time at the will of either party. Such terminations shall be subject to the condition that prior notice is given by the party taking the initiative of terminating the contract. Notification of termination shall be made in writing to the other party and shall set out the reason for the termination. The duration of the notice period varies depending on the seniority of the employee. In practice, it means that a senior employee is entitled to a long notice period.

The employee will then be entitled to the payment of the following compensation:

- remaining salary;
- severance pay;
- compensation in lieu of their notice period; and
- compensation for untaken leave.

It should be noted that an employee who is dismissed for gross misconduct is not entitled to either notice payment or severance payment.

Fixed-term contracts cannot be terminated prior to their expiry except in the case of gross misconduct, *force majeure*, or by the written consent of both parties. In case of gross misconduct, a notice period is not required. In case of unfair dismissal, an employee is entitled to receive compensation.

There are no restrictions on employers resorting to reduce their workforce in periods of unfavourable market conditions (i.e. a termination for economic reasons). However, the law requires that compensation is granted to laid off employees as regards any periods of notice, severance pay and unpaid leave, depending on the length of tenure, in common with other Francophone countries.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

There is no law prohibiting or limiting foreign investment, which can target any sector of the economy. There are no laws or regulations specifically authorising private firms to adopt articles of incorporation or association which limit or prohibit foreign investment, participation, or control. There are no other practices by private firms to restrict foreign investment. Historically, Mauritania has been relatively open to foreign direct investment (FDI), especially in the fishing, mining, and hydrocarbon sectors. The current government, first elected in July 2009 and then re-elected in June 2014, has prioritised recruiting foreign investment in these sectors. It is working closely with the International Monetary Fund (IMF), the World Bank, and the international donor community to improve basic infrastructure and to update laws and regulations.

5. Are there any specific legislative requirements, and if so, what are they?

The Investment Code, last updated in June 2012, was designed to encourage direct investment, by enhancing the security of investments and facilitating administrative procedures. The code provides for the free repatriation of foreign capital and wages for foreign employees. The code also created free points of importation and export incentives. Small and medium enterprises (SME), which register through the Office for the Promotion of Private Sector (OPPS), do not pay corporate taxes or customs duties. The Code also created Special Economic Zones to encourage regional development. Separately, the Nouadhibou Free Zone was created with its own regulatory scheme which is more favourable to foreign investment. The country's Civil and Commercial Codes protect contracts, although court enforcement and dispute settlement can be difficult.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Mauritania has no discriminatory policies against foreign investment, imports, or exports. The mining, fishing, agricultural, banking, petroleum, and technology sectors actively seek foreign direct investment. There are no laws or regulations which limit or prohibit foreign investment, participation, or control. There are no other practices by private firms to restrict foreign investment.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

There are no restrictions on the purposes for which money may be lent.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

There is no integrated or unified legal framework for secured transactions that extends to the creation, publicity and enforcement of functional equivalents to security interests in movable assets that exist in the economy. Mauritanian law does not allow businesses to grant a non-possessory security right in a single category of movable assets, without requiring a specific description of collateral.

However, Mauritanian law does allow businesses to grant a non-possessory security right in substantially all of its assets, without requiring a specific description of collateral. Secured creditors are not paid first (i.e. before tax claims and employee claims) when a debtor defaults outside an insolvency procedure, nor are they paid first (i.e. before tax claims and employee claims) when a business is liquidated.

Finally, the law does not recognise the concept of a Security Trustee, nor does it allow parties to agree on out of court enforcement at the time a security interest is created. The law also does not allow the secured creditor to sell the collateral through public auction and private tender, as well as for the secured creditor to keep the asset in satisfaction of the debt.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In October 2016, the government adopted a law relating to public-private partnerships (PPP) which manages the procurement and management of infrastructure projects (the 'PPP Law').

The PPP Law sets the scope of the project, the rules applicable to the award of the contract, the procedures for the execution of the contract, and the means for the settlement of any disputes.

In addition, the PPP Law sets up an inter-ministerial committee with the office of the Prime Minister and a technical support committee to the Minister of Economy and Finance, both in charge of the development of PPP. It also provides for the eventual establishment of an operational PPP unit whose assistance and expertise will be useful to the contracting authorities, the operation of which is not yet known.

The PPP unit will serve as a centre of expertise and help projects reach financial close. The unit will also disseminate PPP information and resources, contribute to capacity building and support contractual authorities in managing viable PPP projects included in the pipeline.

Mott MacDonald was appointed by the World Bank Group to provide PPP advice to the government in 2015, with a brief to develop a comprehensive political, legal and institutional framework to conduct successful PPP transactions and attract national and foreign private sector investments.

Mott MacDonald has supported PPP development in Mauritania for the last two years, having conducted training sessions for Mauritanian officials, help to develop a dedicated PPP website, advise existing departments and support implementing institutions. Their commission is due to finish at the end of 2017.

Suppliers for large government contracts are selected through a tender process. Invitations for tenders are publicly announced in local newspapers and on government websites. After issuing an invitation for tenders, the Central Market Commission, a Commission created in each Ministry under the 2012 Investment Code, selects the offer that best fulfils government requirements.

If two offers — one from a foreign company and one from a Mauritanian company — are otherwise considered equal, statutes require that the government award the tender to the Mauritanian company.

In practice, this has resulted in tenders being awarded to companies that are felt by some to have strong ties to government officials and tribal leaders, arguably regardless of the merits of an individual offer, although this is disputed. It is believed that preferential treatment remains common in government procurement, despite the government's recent efforts to promote transparency in the public sector.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

There is no merger control regime in Mauritania.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Law no. 2015-032 repealing, amending and supplementing certain provisions of Law no. 2000-05 of 18 January 2000 of the French Commercial Code, as adopted in Mauritania, prohibits the abuse of a dominant position, cartel behaviours and any agreements and concerted practices between competitors that (directly or indirectly) result in price fixing, or limit production and/or distribution of goods and services.

This new code of commerce has addressed various deficiencies but it is desirable to have a specific competition law, rather than the actual code of commerce, which just has provisions on competition.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

The legal protection of intellectual property rights (IPR) is still a relatively new concept in Mauritania, and those seeking legal redress for IPR infringements will find very little historical record of cases or legal structures in place to support such claims. Mauritania is a member of the Multilateral Investment Guarantee Agency (MIGA) and the African Organization of

Intellectual Property (OAPI).

In joining the latter, member states agree to honour intellectual property rights principles and to establish uniform procedures of implementation for the following international agreements: the Paris Convention for the Protection of Industrial Property; the Berne Convention for the Protection of Literary and Artistic Works; the Hague Convention for the Registration of Designs and Industrial Models; the Lisbon Convention for the Protection and International Registration of Original Trade Names; the World Intellectual Property Organization, the Washington Treaty on Patents; and the Vienna Treaty on the Registration of Trade Names. Though the government is in the process of launching reforms related to property, product certification and accreditation bodies to protect IPR remains fragile.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Businesses in Mauritania are either taxed based on an Actual Profit System (APS) or flat rate tax system (FRS). Taxpayers who have a turnover of MRO30 million or higher are taxed under the APS. This tax rate is 25% of taxable profit. Those who have turnover less than MRO30 million are taxed under the FRS. This tax rate is 3% of turnover.

Stamp duty is levied on most legal instruments and levied on all signing parties, lenders, borrowers and ministerial officers who have prepared an unstamped act. Instruments exempted from stamp duty are specifically stated in the act. The rates of stamp duty on paper documents are set according to the size of the paper. Registration fees are either fixed or proportional, depending on the nature of transaction and deeds concerned.

VAT is levied at a rate of 16% on all economic activities which constitute importation, delivery of goods and provision of services carried out in Mauritania.

There are no special transfer pricing rules in Mauritania. However, the tax authority is allowed to levy tax on any enterprise in Mauritania that has carried out artificial transactions or appeared to have transferred profit to a related entity located abroad.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

There are no legal or policy restrictions on converting or transferring funds associated with investments. Investors are guaranteed the free transfer of convertible currencies at the legal market rate, subject to the availability of such currencies. Similarly, foreigners working in Mauritania are guaranteed the prompt transfer of their professional salaries. To transfer funds, investors are required to open a foreign exchange bank account in Mauritania. Transfers from abroad are limited to EUR 100,000 per transaction, but investors may conclude an unlimited number of transfers each day.

There are no legal transaction limits for investors transferring money out of Mauritania, although regulations to undertake such transactions may be complicated. Hard currencies can be found in commercial banks, although there can be issues as to the extent of any reserves. The Central Bank has liberalised the foreign exchange system and now holds regular foreign exchange auctions, allowing market forces to fix the value of the ouguiya.

However, in practice, foreign currency is in high demand and banks may not have sufficient currency, as the transfer of money out of Mauritania is subject to the availability of those currencies. In that case, the commercial bank must obtain it from the Central Bank in order to conduct the transfer. The Central Bank is required to prioritise government transfers. Delays, although relatively uncommon, have been reported from one to three weeks.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

The enforcement of foreign judgments in Mauritania is subject to an exequatur order issued by local court.

Mauritania is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Mauritania ratified the New York Convention in 1997.

As such, foreign arbitral awards can be enforced in Mauritania but are also subject to the obtainment of an exequatur.

The party that requests such an exequatur shall therefore submit an application within the Mauritanian court.

It should be noted that a Mauritanian court might refuse to issue an exequatur order if the foreign judgment or arbitral award is contrary to Mauritanian public policy or contrary to good morals.

The government accepts international arbitration of investment disputes between foreign investors and government authorities. There are also domestic mechanisms for arbitration, both through traditional religious institutions and through the courts. The revised Investment Code anticipates a local International Chamber of Mediation and Arbitration of Mauritania (ICMAM) to be housed at the Chamber of Commerce, although as of April 2015, the ICMAM is awaiting approval from the Mauritanian Chamber of Commerce and the Ministry of Justice.

Previously, issues were referred to the International Center for Settlement of Investment Disputes (ICSID), of which Mauritania became a contracting state in 1965. In 1997, Mauritania became a signatory to the convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention). The enforcement of such disputes can be lengthy and take considerable time.

In practice, we have not seen a case in which local courts have enforced any arbitration awards under the New York Convention.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

No. Mauritanian courts will generally uphold jurisdiction to a dispute, either for reasons involving public policy or if the subject matter of the dispute involves property, in which case, dispute settlement resolution in local courts can take years and obtaining interim relief in such cases may be difficult. The duration of investment disputes are subject to numerous appeals before reaching a final verdict. In other cases, especially where such issues are not involved, they may be more supportive.

In practice, we have not seen local courts granting interim relief for arbitration. It shall be noted that Mauritanian judges are not properly trained and assisted to handle cases with an (international) arbitration coloration.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

No. There are no specific requirements for a foreign company to sign a document under local law.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Not known at the time of going to press. ■

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John has lived and worked as a lawyer in Madagascar for 15 years. He is familiar with the specific legal and business cultures across Francophone Africa and has extensive experience of French-based legal systems. John has handled finance transactions in excess of USD 6 billion in relation to natural resource and project finance projects, with all the requisite due diligence such complex transactions require. John has also been involved in acquisitions and disposals of assets in the natural resources and telecommunications fields.

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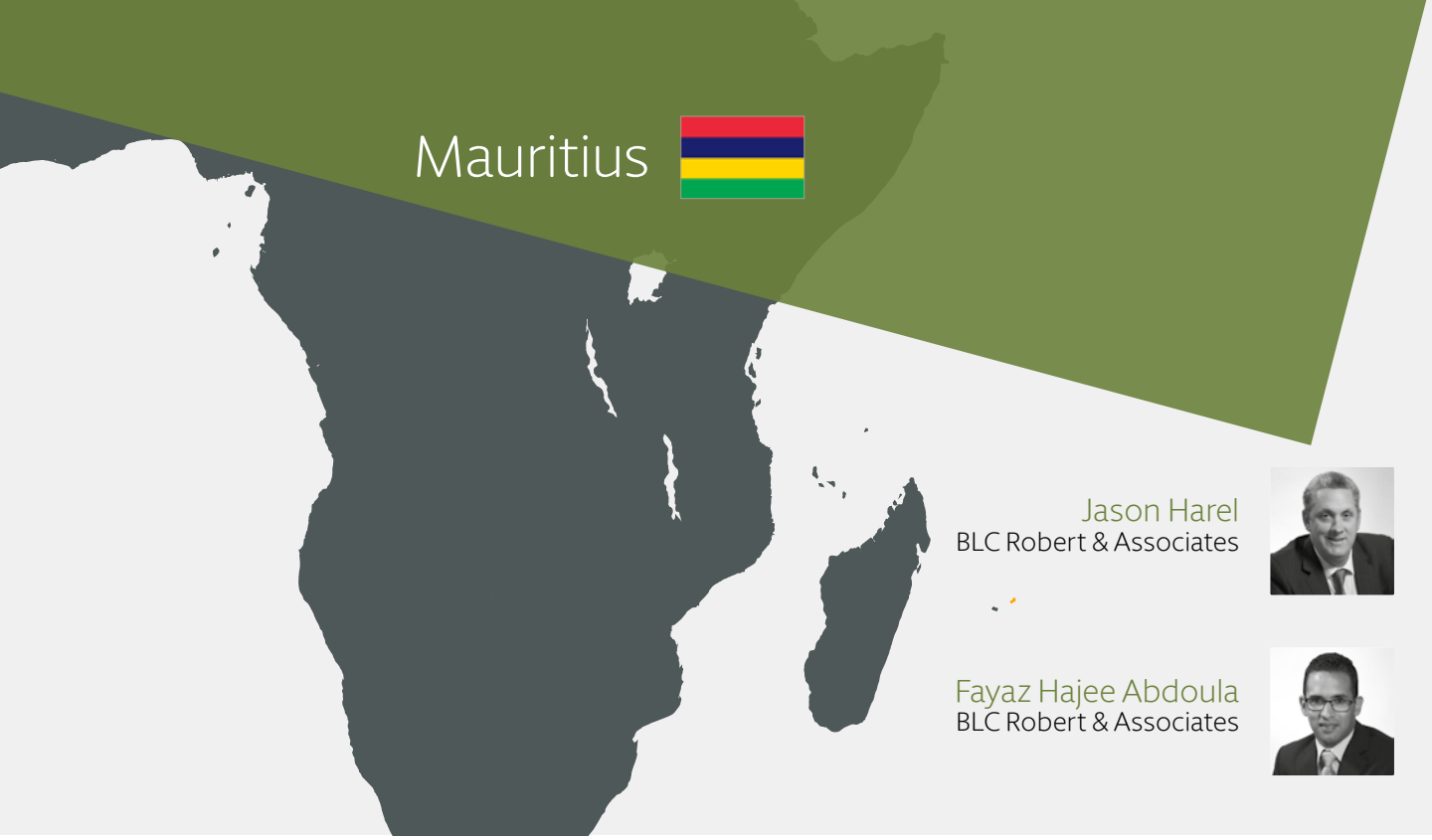
Mauritius



Jason Harel
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Population:	1.3m (UN estimate – January 2017)
GDP per capita:	US$20,500 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	3.5% (CIA Factbook – 2014-2016)
Official languages:	No official language, Creole, French and English widely spoken
Transparency International rating:	Ranked 50/176 (2016 Report)
Ease of doing business ranking:	Ranked 49/190 (2017 Report)

Type of legal system	Hybrid – based on the civil Napoleonic Code and the English common law system
Signatory to NY Convention	Yes (19 June 1996)
Signatory to ICSID Convention	Yes (2 June 1969)
Member of COMESA, OHADA, SADAQ, EAC	COMESA and SADC
Signed up to OECD Transfer Pricing Guidelines	No
Bilateral investment treaties	Mauritius is a party to several BITs/TIPs including with China, the US, the UK and the EU

Jason Harel and Fayaz Hajee Abdoula offer an insight into foreign investment in Mauritius, highlighting restrictions within the sugar industry, applicable tax rules and the relevant authorities that investors should consider

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Yes, the holding of interests in land (whether freehold or leasehold) by foreign entities requires the authorisation of the Prime Minister's Office (PMO).

A written application must be made to the PMO, detailing the precise location of the property, a site plan showing its extent, the nature of the interest intended to be purchased or otherwise acquired or held, and the reasons for which the application is made. The PMO may, at its entire discretion, request such other information it may require.

Certain statutory exceptions to the requirement of obtaining the authorisation of the PMO include:

- Holding immovable property for commercial purposes under a lease agreement not exceeding 20 years.
- Purchasing luxury villas, apartments, penthouses or other similar properties under the Invest Hotel Scheme, Property Development Scheme and Smart City Scheme.

A certificate of authorisation, setting out any particular conditions that must be respected by the applicant, is issued where the PMO authorises the application.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

A foreign worker cannot engage in employment in Mauritius without a work permit and a residence permit.

There are two different applicable regimes, depending on the category of employment and level of remuneration.

An employer must apply for a work permit from the Ministry of Labour for a foreign worker to be allowed to work in Mauritius.

Any non-citizen not holding a valid work permit whilst in employment, or any person employing a non-citizen not holding a valid work permit, commits an offence, and upon conviction is liable to a fine of not less than MUR 25,000 but not exceeding MUR 50,000 and to imprisonment for a term not exceeding two years.

Foreign workers should possess the skills, qualifications and experience required for their proposed employment.

Generally, work permits are granted where a ratio of three local workers to one foreign worker is satisfied, and is subject to particular conditions which must be respected. An application for a residence permit must also be made.

For foreign professionals who, *inter alia*, will be employed to deliver professional services and earn a monthly basic salary of MUR 60,000, an occupation permit (which is a combined work and residence permit) may be obtained.

3. What are the restrictions on redundancies and any applicable compensation?

Mauritian employment legislation provides for employees to be consulted through trade union representatives.

An employer cannot reduce the number of workers in employment (temporarily or permanently) or close down the enterprise without first having, in consultation with the trade union, explored other possibilities, such as:

- restrictions on recruitment;
- retirement of workers who are beyond the retirement age;
- reduction in overtime;
- shortening working hours to cover temporary fluctuations in the need for a workforce; or
- providing training for other work within the same enterprise.

The employer and the worker may agree on the payment of compensation by way of a settlement. The employer may be required to pay severance allowance in the case of unjustified termination.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

In general, there are no restrictions on foreign investment in Mauritius, except for foreign ownership in Mauritian sugar companies listed on the stock exchange. Not more than 15% of the voting capital of a sugar company can be held by a foreign investor without written consent from the Financial Services Commission (FSC).

It is to be noted that investors would usually

be subject to existing anti-money laundering legislation.

There is no requirement for foreign companies to invest in conjunction with local entities or people.

5. Are there any specific legislative requirements, and if so, what are they?

There are no restrictions on doing business with certain countries or jurisdictions, except for countries banned by UN sanctions. Please also refer to the previous question.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Yes. The Minister of Finance may prohibit the importation of any goods.

In particular, the importation of the following is prohibited:

1. base or counterfeited coins;
2. goods which, for the time being, are prohibited by any other enactment; and
3. manufactured articles bearing the name, address or trademark of any manufacturer or dealer or the name of any place calculated to impart to those articles a special character of manufacture which they do not actually possess.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Yes. Money may not be lent for any purpose which is unlawful and/or against public policy.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Common forms of security interests include charges, pledges, mortgages and assignments.

Security interests may be granted over the present assets owned by a company. Security over future assets generally cannot be taken. Future assets may be captured by a floating charge once these form part of the company's pool of assets.

The provision of, *inter alia*, fixed and floating charges over property, pledges over shares, and assignment of bank accounts would be recognised. Shares may be secured by (i) a general pledge under articles 2073 to 2094-1 of the Civil Code, (ii) a pledge of shares under articles 2129-1 to 2129-6 of the Civil Code, provided the beneficiary of the pledge is a bank licensed under Banking Act 2004, or (iii) a pledge of shares under articles 92-6 to 92-11 of the Commercial Code, provided the issuer holds a global business licence granted by the FSC.

Mauritius recognises the concept of trust. A security trustee would hold security interests as trust property on trust for the benefit of secured creditors. The trust structure remains unaffected by changes to the underlying debt and the beneficiaries so that a change in lender will not necessitate amendments to the security documents or changes to registration of security.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The Public Procurement Act 2006 provides the framework for procurement and management of infrastructure projects in Mauritius. The Procurement Policy Office monitors the performance and progress of the procurement system.

The Central Procurement Board is responsible for approving the award of major contracts by public bodies. A party aggrieved by the breach of a duty imposed on public bodies or the Central Procurement Board may challenge procurement proceedings by writing to the chief executive officer of the relevant public body. Where the aggrieved party is unsatisfied with the decision of the relevant chief executive officer or the latter has not issued a decision within a specified time limit, the aggrieved party may apply for a review by an independent review panel.

The Build Operate Transfer (BOT) Projects Act 2016 allows the private sector to build and operate a project for a specified time before transferring the same back to a government entity at the end of an agreed period. Where a governmental authority identifies a potential project, it will appraise that project and submit a feasibility report to the BOT Projects Unit within the Procurement Policy Office. The BOT Projects Unit assesses the report and submits its findings to the governmental authority.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

There is no mandatory approval or notification requirement in respect of merger situations in Mauritius. Under Mauritius law, a merger situation (i.e., the bringing together under common ownership and control of two or more enterprises of which at least one carries on its activities in Mauritius, or through a company incorporated in Mauritius) may be subject to review by the Competition Commission (Commission).

This occurs where all parties to the merger supply or acquire goods or services of any description, and will, following the merger, together supply or acquire 30% or more of all those goods or services on the market or one of the parties to the merger alone supplies or acquires, prior to the merger, 30% or more of the goods or services of any description on the market.

If the above criteria are fulfilled, and the Commission has reasonable grounds to believe that the creation of the merger situation has resulted or is likely to result in a substantial lessening of competition within any market for goods or services, a review may follow. There is a procedure to seek voluntary guidance from the Commission.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The Competition Act 2007 regulates business practices which have the effect or object of preventing, restricting or distorting competition in Mauritius. It encompasses the abuse of monopoly, merger, collusive agreements, bid rigging and vertical agreements involving resale price maintenance, and other restrictive agreements such as non-collusive horizontal agreements and other vertical agreements. The Competition Act 2007 is enforced by the Commission and through its chief executive officer (Executive Director).

Where the Executive Director has reasonable grounds to believe that a restrictive business practice is occurring or about to occur, he/she conducts an investigation and submits a report to the Commission. The Commission may then conduct a hearing with parties suspected of anti-competitive practices and decide whether to issue orders or directions or impose financial penalties or remedies. If an enterprise breaches a direction or an undertaking without reasonable excuse, the Commission must apply to a judge in chambers for a mandatory order to make good the default.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property is protected under two branches – industrial property and copyright.

The Industrial Property Office's (IPO) responsibilities include handling and administration of applications for the protection of patents, industrial designs and trademarks. Applications are made using prescribed forms and paying statutory fees. Duration of protection for: (a) patents is 20 years; (b) industrial designs is five years; and (c) trademarks is 10 years. An Industrial Property Tribunal (IPT) exists to, *inter alia*, hear appeals of persons aggrieved by certain IPO decisions and confirm, amend or cancel such decisions. The IPT is also empowered to invalidate decisions as to whether patents should have been granted, or industrial designs or trademarks been registered.

Any person committing an offence is, upon conviction, liable to a fine not exceeding MUR 250,000 and imprisonment for a term not exceeding five years.

The Copyright Act 2014 (CA 2014) provides for effective protection of copyright and related rights. An author who registers his artistic, literary or scientific work with the Rights Management Society (RMS) secures economic rights (reproduction, adaptation, distribution) and moral rights (claiming authorship, objecting to distortion or alteration) that subsist in the copyright material, and reinforces the claim of authorship by depositing such material with the RMS.

The RMS may represent and defend the interests of its members in Mauritius. An offence under the CA 2014 attracts on a first conviction a fine not exceeding MUR 300,000 and imprisonment for a term not exceeding two years and on a second or subsequent offence, a fine not exceeding MUR 500,000 and imprisonment for a term not exceeding eight years. Offenders may also be subject to orders of forfeiture.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example,

corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Tax resident vehicles are charged 15% on chargeable income. Foreign tax credits are generally allowed to reduce Mauritius tax payable where foreign tax is suffered on taxable income and written evidence of same is produced to the revenue authority.

A company holding a category 1 global business licence (GBC1) is entitled to a system of deemed foreign tax credits of 80% of the Mauritius tax which reduces the income tax to an effective tax rate of 3% on the qualifying income of the GBC1. Corporate tax payable by a GBC1 can be less than 3% and even nil where the actual foreign taxes are more than 12%.

A company holding a category 2 global business licence (GBC2) is not resident in Mauritius for tax purposes and is not liable to tax in Mauritius.

Value Added Tax (VAT) applies to goods and services. It is chargeable on taxable supplies of goods and services made in Mauritius by taxable persons in the course of any business. VAT is also payable on importation of goods into Mauritius, irrespective of whether the importer is taxable or not. The rate of VAT is 15% on a taxable supply or 0% on a zero-rated supply. Goods and services which are exported and certain goods and services which are supplied on the local market are zero-rated supplies.

There are no stamp duties, capital duty or any other taxes on share issues, and no withholding tax on dividend distribution.

There are no transfer pricing rules. However, transactions between related parties must be made at arm's length.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

There are currently no foreign exchange rules in Mauritius applicable to the repatriation of funds out of Mauritius.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Registration and enforcement of a foreign judgment without a re-examination of the merits of a case is effected through exequatur provided that, *inter alia*, such judgment remains valid and capable of execution where it was delivered. The judgment must also not be contrary to any principle affecting public order, and the defendant regularly summoned to attend proceedings and the court delivering the judgment had jurisdiction to deal with the matter. The Supreme Court (court) may also register and enforce, under the Reciprocal Enforcement of Judgments Act 1923, an *in personam* judgment of a superior court in the United Kingdom.

Mauritius has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Previously, the courts adopted the reciprocity principle and enforced arbitral awards only from contracting states. However, with the government's commitment to promoting Mauritius as an arbitration platform, the reciprocity reservation was repealed. A party wishing to enforce an award must apply to the court and submit the duly authenticated original award and the original arbitration agreement or duly certified copies of the same. The court may refuse enforcement upon request of a party against whom it is invoked if the party furnishes proof of one of the reasons provided under Article V (1) of the New York Convention or the subject-matter of the dispute is not capable of settlement by arbitration under Mauritius law or recognition or enforcement of the award would be contrary to public policy of Mauritius.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Courts adopt a non-interventionist approach to arbitration unless otherwise required by Mauritius law. Six judges designated by the Chief Justice for a five-year mandate may determine issues relating to arbitration under Mauritius law. Matters arising out of an arbitration submitted to the court are heard by a panel of three judges.

An interim measure application by a party before the court will be heard in chambers by a designated judge and on returnable date by a panel of three designated judges.

The application must be made on notice to the other parties except where the case is urgent and to the arbitral tribunal if it has already been constituted. The court may grant an interim measure where the arbitral tribunal has no power to do so, for example where it has not yet been constituted or is unable to act effectively at that time. Upon application of a party, the court may also enforce an interim measure irrespective of the country in which it was issued.

The court may assist an arbitral tribunal in taking evidence by issuing a summons compelling a person to give evidence before the tribunal or produce documents, or ordering a witness to submit to examination.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

No, there are no specific signing procedures for a foreign company to sign a document under local law.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

The Financial Services Act 2007 has been amended as follows:

- a GBC2 may invest in shares or other securities listed on the Stock Exchange of Mauritius or other exchanges operating in Mauritius;
- no prior approval of the FSC is required for change of legal or beneficial ownership of not less than 5% in global business companies conducting financial activities such as investment advisory, custodian and fund management; and
- entities conducting investment banking activities such as brokerage, underwriting, investment advisory, asset management and distribution of financial services may apply for an investment banking licence to the FSC.

The amendment of the Investment Promotion Act 2000 by the Finance Act 2016 introducing the "regulatory sandbox licence" allows companies to invest in innovative projects within an agreed set of terms and conditions.

The amendment of the Securities Act 2005 by the Finance Act 2016 introduces a corporate finance advisory licence for entities wishing to engage in the provision of advisory services.

The enactment of the CA 2014 revamps the legal framework for copyright protection and makes copyright law compliant with the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonogram Treaty 1996. ■

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Jason Harel is a co-founding partner of BLC Robert and boasts substantial experience in corporate M&A, workout transactions as well as taxation. He generally practises in the areas of corporate and commercial law, M&A, corporate insolvency, real estate and tax, but also advises on litigation matters.
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Fayaz has advised on some major transactions and has counselled various sophisticated and expert investors in the acquisition of companies incorporated in Mauritius. He has also advised Courts Asia, a company listed on the Singapore Stock Exchange, in respect of the proposed acquisition of the one of biggest furniture business in Mauritius. Currently, Fayaz is also the advisor to General Electric, a multinational conglomerate corporate, RIU Hotel and Resort Group, one of the renowned names in the hotel industry. He is one of the lead employment lawyers in the firm.

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BLC Robert is the leading independent business law firm in Mauritius. The firm has 5 partners and over 30 locally and internationally-trained fee earners. The firm serves a diverse client base including regional and international financial institutions, corporations, funds and public sector bodies among others.
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Morocco

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Population:	35.2m (UN estimate – March 2017)
GDP per capita:	US$8,400 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.0% (CIA Factbook – 2014-2016)
Official languages:	Arabic (Some legal documents are also published in French. French is also used before some administrations and between private companies)
Transparency International rating:	Ranked 90/176 (2016 Report)
Ease of doing business ranking:	Ranked 68/190 (2017 Report)

Type of legal system	Based on the French civil law system and Islamic law
Signatory to NY Convention	Yes (12 February 1959)
Signatory to ICSID Convention	Yes (11 October 1965)
Member of COMESA, OHADA, SADAQ, EAC	No
Signed up to OECD Transfer Pricing Guidelines	Generally consistent with the OECD Guidelines
Bilateral investment treaties	Morocco is a party to several BITs/TIPs including with China, the UK, the US and the EU

Fatima-Zahra Fassi-Fihri, Bouchra Belouchi and Saad Drieb identify key regulations which affect foreign investment in Morocco, and discuss ambiguities caused by updates to the country's competition law

Morocco

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

The foreign individuals and the foreign entities whose share capital is held in whole or in part by foreign persons are not allowed to acquire agricultural land unless they obtain a certificate for non-agricultural purposes. The procedure to obtain such certificate is quite long and complex as it requires the view of several different authorities: the urban agency, the Wilaya (regional government office), the Investment Regional Center and other organisations.

Foreign entities can execute a lease agreement for a maximum term of 99 years to use agricultural land.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

There are no local minimum quotas to be met. However, in order for a foreign worker (i.e. expatriates) to be hired by a Moroccan company, a specific procedure should be followed.

Indeed, the employer shall prove the absence on the national market of profiles complying with the criteria of the job. Also, a foreign worker needs to obtain the prior approval of the Employment Ministry.

Once the foreign worker obtains the approval of the Employment Ministry, he should ask for his residence permit.

3. What are the restrictions on redundancies and any applicable compensation?

The employee can be dismissed only through the procedure set out for wrongful misconduct or a disciplinary dismissal which is duly described in the Labour Code.

The employer should carefully follow Moroccan labour regulations in order to avoid the termination of the employment contract being treated as an unfair dismissal.

In case of unfair dismissal:

- For an indefinite term contract: the employer will have to indemnify the employee by paying (i) severance pay, (ii) damages by reason of severance, (iii) any payment in lieu of notice, and (iv) any unpaid or unconsumed leave. The calculation of these indemnities is also regulated by the Labour Code.
- For a fixed term contract: the employer will have to pay to the employee the salary due between the time of unfair dismissal and the term of the employment contract.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

As a general principle, there is no legal requirement for a foreign company to invest in conjunction with a Moroccan entity or people, and there are no limits on the percentage of shares which foreigners are authorised to own in a Moroccan company.

For significant investments, Morocco has put in place an investment charter which aims to develop and promote investment in Morocco by creating tax and customs incentives (except for agricultural investment which is limited for foreigners). These incentives are confirmed through an investment convention entered into between the Moroccan government and foreign investors after the approval of the Moroccan Investment Commission.

5. Are there any specific legislative requirements, and if so, what are they?

No.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are some restrictions on the importation of goods into Morocco, primarily aimed at weapons, explosives, military uniforms, white lead and other products which are restricted, mostly, in both national and international legislation.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Money may not be part of the proceeds of crime and may not be used for criminal purposes or for any purpose related to, for example, money laundering, tax evasion, and in contravention of exchange control requirements.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The only way to enforce security interests over assets in Morocco is public auction (i.e. the assets will be sold to the highest bidder for cash consideration through judicial public auction).

Moroccan law provides for security interests over a broad range of assets. This includes personal security given by a third party (cautionnement), ordinary assignment of receivables, assignment of professional receivables, pledge over receivables (among which credit balance of bank accounts), pledge over shares, pledge on movable and immovable property, pledge of the ongoing business, pledge of tools and equipment, mortgages on real estate.

The concept of a trust does not exist in Morocco.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In Morocco, the procurement and management of infrastructure projects are regulated by the following laws:

- Dahir (Law) No. 1-14-192 dated 24 December 2014 promulgating law No. 86-12 related to PPP contracts. This law is applicable to the contract whose subject is the design, development, financing, construction or rehabilitation, maintenance and/or operation of a structure or infrastructure necessary for the public service;
- Law No. 1-06-15 dated 14 February 2006 promulgating law No. 54-05 related to the public tender for management of public services. This law sets the legal framework of delegated management of public services; and
- Decree No. 2-06-388 dated 5 February 2007 setting out the terms and conditions of public procurement. This decree provides for the terms and conditions of the execution of works, deliveries of supplies or the provision of public services.

The regime of procurement and management of infrastructure is not overseen by a special unit, division or department within the Government.

However, there is a Public Commission for Procurement which is a market research and consultancy body placed before the the General Secretariat of the Government.

The Public Commission for Procurement may be overseen by:

- The Prime Minister.
- The Secretary General of the Government.
- The Authorising Officers concerned.
- The Comptroller General of the Commitments of Expenditure.

The Public Commission for Procurement is not empowered to examine applications directly from individuals/entities, but the latter may apply to one of the abovementioned authorities who may submit the matter to the Public Commission for Procurement for its opinion. In this case, the advice given shall be transmitted to the consulting authority, which shall decide on the action to be taken.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Companies which are planning to merge or concentrate their activities with a competitor present in the Moroccan market have to comply with the strict procedures provided by Competition Law.

Please note that there are currently two laws in Morocco dealing with the competition regulation: Law No. 1-00-225 dated 5 June 2000 promulgating Law No. 06-99 on the freedom of price and competition (the Existing Competition Law) and Law No. 1-14-116 promulgating Law No. 104-12 related to the freedom of prices and competition (the New Competition Law). In this respect, Decree No. 2-14-652 which applies the New Competition Law was published on 4 December 2014 (the New Competition Decree). The New Competition Decree refers to further decrees enacted by the Prime Minister or the authority delegated by him (*arrêtés*) which have not been published yet.

Therefore, since all the necessary legal texts

(*textes réglementaires*) have not yet been published, the majority of the practitioners consider that the New Competition Law has not yet become effective.

Under the Existing Competition Law, any concentration or contemplated concentration likely to affect competition, in particular by creating or strengthening a dominant position, shall be submitted by the Prime Minister to the opinion of the Competition Council.

These provisions only apply when the companies which are parties to the act, or which are the subject of the act, or which are economically related have performed together, during the previous calendar year, more than 40% of the sales, purchases or other transactions on a national market for goods, products or services of a similar nature or which are substitutable, or on a substantial part of such market.

Under the New Competition Law, any operation of concentration shall be notified to the Competition Council by the companies. This obligation of notification applies when one of the three conditions listed is below is met:

- the total worldwide turnover, excluding taxes, of all the companies or groups of individuals or entities parties to the concentration is above MAD 750 million; or
- the total turnover, excluding taxes, realised in Morocco by at least two of the companies or groups of individuals or entities involved is above MAD 250 million; or
- companies which are parties to the act, or which are the subject of the act, or which are economically related have performed together, during the previous calendar year, more than 40% of the sales, purchases or other transactions on a national market for goods, products or services of a similar nature or which are substitutable, or a substantial part of such market.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Both the Existing Competition Law and the New Competition Law prohibit the abuse of a dominant position, cartel behaviour and exclusivity arrangements.

When competition in Morocco was only governed by the Existing Competition Law, heavy sanctions were applied in cases of non-compliance with the procedures. Indeed, several sentences have been pronounced against companies.

However, since the publication of the New Competition Law, the coexistence of the two regimes have led to a certain doubt as to the applicable regime and the competent authorities to enforce competition regulations.

Indeed, under Law No. 1-14-117 promulgating Law No. 20-13 related to the Competition Council (the New Competition Council Law), the members of the New Competition Council formed under the New Competition Law have not yet been nominated, whereas the Competition Council which was carrying its functions under the Existing Competition Law completed its term in September 2013 and has not been operational since this date.

Therefore, to date, the operators continue to submit the notification of the concentration operations to the Prime Minister (the competent authority under the Existing Competition Law). In this respect, the Prime Minister has reverted to them in the timeline provided in the Existing Competition Law, despite the publication of the New Competition Law.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual and industrial property are recognised and protected under Moroccan law. In particular, the protection of industrial property covers patents for invention, industrial designs and models, trademarks and service marks, trade names, geographical indications and appellations of origin. Furthermore, Law No. 97-17 on the protection of industrial property (as it has been completed by Law No. 31-05 and the Law No. 23-13) prohibits and punishes unfair competition and the fraudulent use of registered trademarks. This protection for the Moroccan territory is mainly subject to the registration of the right to be protected with the Moroccan Office of Industrial Property.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Companies doing business in Morocco may be subject to taxes which include the following:

- Corporate income tax: calculated by applying the proportional rates below:

- amount of net income, less than or equal to MAD 300,000 – 10%;
- amount of net income from MAD 300,001 to MAD 1,000,000 – 20%;
- amount of net income from MAD 1,000,001 to MAD 5,000,000 – 30%; and
- amount of net income from MAD 5,000,000 – 31%.

- Flat rate income tax: 8% of the value, excluding value-added tax on contracts regarding non-resident companies contractors of market of works, construction or assembly, having opted for the flat-rate tax. The payment of corporate tax at this rate is in full discharge of the withholding tax.
  When the contract involves "turnkey" delivery of a building or industrial or technical installation in a market order, the taxable basis includes the cost of the incorporated materials and the settled equipment, whether these materials and equipment are supplied by the contractor company or for its account, invoiced separately or customs cleared by the contracting authority.
- Withholding taxes:
  - 10% of the amount of gross products, excluding value added tax, collected by non-resident physical or legal person;
  - 20% of the amount, excluding value added tax, of fixed income investment products; and
  - 15% of the amount of the proceeds' shares, the partnership shares and the assimilated incomes.
- Minimum contribution: is the minimum amount of taxation, even in absence of profit.
  - The rate of the minimum contribution is 0.5% of the turnover. However, the amount of the minimum contribution, even in the absence of turnover, cannot be less than MAD 3,000. Besides, companies are exempted from making the minimum contribution during the first 36 months following the date of the start of their activities (this date is indicated in their extract of commercial register).
- Professional taxes are established on the annual gross, normal and current annual rental value of shops, stores, factories, workshops, hangars, rebates, work sites, places of deposit and all locals, locations and accommodation used for taxable professional activities.
  For industrial establishments and any other professional activity, the business tax shall be calculated on the rental value of these establishments taken as a whole and provided with all their material means of production including goods rented or acquired by leasing without (this rental value) exceeding 3% of the cost price of the fields, buildings, fixtures, equipment and tools.
  Companies are exempted for the first five years of their business activity, as this date is indicated in their extract of commercial register.
- Value Added Tax which is a tax on turnover, applies to the industrial, commercial, and craft nature or in the exercise of a liberal profession, performed in Morocco, as well as import operations.
  - Normal rate fixed at 20%.
  - However, in order to encourage investment, the Moroccan legislator exempt from VAT the acquisition or import of all investment goods included in the assets accounts of the companies and giving rise to a right of deduction for a period of 36 months from the start of their activity, as this date is indicated in their extract of commercial register.
    Also, are exempted from VAT with the right to deduct the delivered products and services provided for export by taxpayers.
- Incorporation of the company and capital increase:
  - 1% constitutions or capital increases of companies or Economic Interest Groupings (EIG) carried out by new contributions, purely and simply;
  - MAD 1,000: The constitutions and capital increases of companies or Economic Interest Groupings (EIG), realised by contribution pure and simple, when the subscribed capital does not exceed MAD 500,000; and
  - 0% if the company is incorporated in the free zones.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Morocco has a set of foreign exchange rules to control the repatriation of funds from Morocco to another country. Foreign investors are allowed to proceed with the following main forms of repatriation of funds after the fulfilment of some legal declarations: dividends, interests and principal on foreign shareholders' loans, proceeds resulting from the sale of shares and assets or liquidation proceeds.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

A foreign judgment or arbitral award will be recognised and enforced by Moroccan courts following the exequatur procedure, which is followed before the competent court in the location of the defendant's domicile or the location of performance of the judgment/arbitral award.

Such court shall ensure, before granting exequatur, that the foreign judgment/arbitral award has been validly rendered, that the foreign court has jurisdiction to rule on the matter and that the foreign judgment does not violate the Moroccan public order.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes, local courts are generally supportive of arbitration proceedings. They grant interim relief if they consider that this requirement is legitimate.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

Yes. Moroccan administration asks for "legalised" documents even though there is no legal background for such a request. Under Moroccan law, legalisation is required in order to officially ascertain the execution date of a document. In practice, legalisation is a process aimed at confirming that the signature on a document is genuine or attesting that a copy of a document is genuine.

When the legalisation occurs in Morocco, it will consist of going to the Mayor's office (*la Commune*) and obtaining a stamp on the relevant document. The process of legalisation does not have anything to do with the content of a document (the agent at the Mayor's office asks for the payment of a fee, MAD 20 per page in order to proceed with the legalisation of the document).

This process requires either the physical presence of the signatories in Morocco to sign the register of the Mayor's office or the implementation of a power of attorney allowing a representative present in Morocco to proceed with the legalisation process (on behalf of the person whose signature has been either duly previously registered to the Mayor's office in Morocco or duly apostilled in the country of residence of the signatory).

When the legalisation occurs abroad, the process of legalisation is different depending on the country of the presence of the party who wants to legalise the relevant document. Indeed, it could consist in going to the Moroccan Embassy in order to follow the same process as in Morocco; or in other cases, the legalisation can occur before a notary and once the document is in Morocco, the document can be provided to the Foreign Affairs Ministry and stamped.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Policy and legislation in Morocco are under constant change and it is necessary to review applicable requirements at the relevant time. Generally, Morocco is aiming to develop foreign investment in Morocco and to make Morocco a hub of Africa. ■

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Mozambique

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Population:	29.2m (UN estimate – January 2017)
GDP per capita:	US$1,200 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 6.2% (CIA Factbook – 2014-2016)
Official languages:	Portuguese
Transparency International rating:	Ranked 142/176 (2016 Report)
Ease of doing business ranking:	Ranked 137/190 (2017 Report)

Type of legal system	Based on Portuguese civil law system, Islamic law and African customary law
Signatory to NY Convention	Yes (11 June 1998)
Signatory to ICSID Convention	Yes (4 April 1995)
Member of COMESA, OHADA, SADAQ, EAC	SADC
Signed up to OECD Transfer Pricing Guidelines	There is no comprehensive transfer pricing regime, but provisions in Mozambique's tax code require transactions between related parties to be entered into at arm's length
Bilateral investment treaties	Mozambique is a party to several BITs/TIPs including with China, the US and the EU

Paula Duarte Rocha and Tiago Arouca Mendes identify the key regulations that foreign investors should be aware of in order to ensure greater security over their investments in Mozambique

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

According to Mozambican legislation, land is owned by the State and cannot be sold or otherwise disposed of or encumbered. Nevertheless, the law provides for a lesser real right known as the use and enjoyment of a land right ("*direito de uso e aproveitamento da terra*"/DUAT), which allows for the use of the land.

The DUAT may be held by Mozambican natural and corporate persons, as well as by foreigners, provided they have an approved investment project (following the established by the legislation under the Investment Act – see question 4 below) and meet the following conditions:

(i) if natural persons, they have resided in Mozambique for at least five years; or
(ii) if corporate persons, they are incorporated or registered in Mozambique.

Furthermore, according to investment legislation, the foreign investor must comply with the terms of the approved investment project, under penalty of cancellation of such investment project and consequently of the respective DUAT.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The Mozambican labour law determines that the hiring of foreign workers may only take place through one of the following alternatives:

a) hiring for short-term periods;
b) hiring through the quota system ("*comunicação de trabalho*"); or
c) hiring through an authorisation procedure ("*autorização de trabalho*").

Hiring for a short-term period allows the foreign worker to be in the country for up to 90 days, consecutive or non-consecutive, being only necessary to notify the labour authorities; no authorisation is required.

Under the quota system, a certain number of foreign workers may be hired depending on the total number of Mozambican workers the company employs:

a) a small-sized company (up to 10 workers) may have up to 10% of its workforce as foreign workers, with a minimum of one foreign worker;
b) a medium-sized company (ranging from 11 to 100 workers) may have up to 8% of its workforce as foreign workers; and
c) a large-sized company (more than 100 workers), may have up to 5% of its workforce as foreign workers.

As for the authorisation procedure, it is commonly used by companies that have reached their quota and wish to hire foreign workers for periods longer than 90 days per year and, therefore, must justify to the labour authorities that such foreign worker holds technical qualifications that no other Mozambican worker may provide.

3. What are the restrictions on redundancies and any applicable compensation?

According to the Mozambican Labour Law, the dismissal of an employee can only take place under the following scenarios:

(i) breach of labour-related duties by the employee. The process begins with a disciplinary proceeding brought against the employee. Following the accusation note, the employee has the right to present his defence, and only if the facts are proven and the circumstances demand for such penalty, the employer can dismiss the employee; or
(ii) termination of the employment relationship due to structural, market and technological reasons that affect the employer's business. In this case, the dismissal is a result of the employer's inability to have such employee working, which must be duly justified to the labour authorities.

In both cases, the employee is entitled to compensation that varies according to the type of agreement, be it a fixed-term agreement or an indefinite term agreement. In the first case, the employee is entitled to all salaries that he would have received from the date of dismissal up until the termination date indicated in such agreement. In the second scenario, the compensation is determined taking into account the employee's remuneration and seniority.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

The Investment Act and its regulations establish the basic legal framework for domestic and foreign investments that govern guarantees and incentives.

According to the Investment Act, a minimum direct foreign investment, resulting from equity investment, of MZN 2.5 million (approximately USD 35,000) must be invested into the country in order for profits to be transferred out of country and for the invested capital to be re-exported.

Other forms of foreign direct investment are:

(i) freely convertible external currency;
(ii) equipment and related accessories, materials and other imported goods; and
(iii) the assignment, under certain circumstances, of rights to use patented technologies and trademarks.

Investment legislation does not apply to investments in the areas of oil and gas, mining of mineral resources or to public investments financed by funds from the general state budget, or to investments of an exclusively social nature.

As for local content, currently only a sectoral regulation exists. For example, in the oil and gas sector, the respective framework establishes that companies carrying out projects in such sector must have the national company responsible for such sector as a partner.

5. Are there any specific legislative requirements, and if so, what are they?

As mentioned above, in Mozambique, there is no specific law regulating local content in general or which determines the requirements that shall be complied with by foreign investors wishing to invest in Mozambique.

Also, in general, there are no requirements for share capital to be held exclusively by Mozambican nationals or companies having a registered office in Mozambique, except with regard to regulated sectors, such as private security or press.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

In general, there is no restriction regarding the importation of goods or raw materials into the country.

Investment legislation allows for investors to import goods necessary for them to carry out their activities, being as well subject to tax benefits.

Other than that, those wishing to import need to register as a foreign-trade operator and comply with the requirements set out in the import export regulations, which entail being subject to customs control and the respective customs clearance process.

Furthermore, the following do not need any previous authorisation from local entities:

(i) importers who import goods worth less than USD 500;
(ii) passengers bringing in personal property (as baggage or separately) of a value less than MZN 25,000 (approximately USD 670);
(iii) diplomatic missions and officials when importing goods intended for personal representation or for personal use;
(iv) foreign employees of international organisations, with regard to goods for personal use, under the relevant United Nations Convention;
(v) United Nations agencies, when importing goods for their own use; and
(vi) entities importing samples of no commercial value.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Mozambican law does not impose any restrictions on the purposes for which money can be lent, as long as it is not for any unlawful activity (Mozambique has recently approved a legal diploma that establishes the legal framework and the measures to prevent and punish the use of the financial system and non-financial entities for the purpose of money laundering and terrorism financing).

However, in the case of loans taking place between resident and non-resident entities and resulting or that may result in payments to or receipts from foreign countries, such loans are subject to foreign exchange legislation and, therefore, subject to the Central Bank supervision and authorisation.

When submitting such application to contract a loan with a non-resident entity, the Mozambican entity must identify the reasons of such debt and prove that it has the financial capacity to carry out its commitments towards the lender, through the presentation of financial statements and the repayment plan, amongst others documents.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

The Mozambican Civil Code rules provide for the types of collateral/security available to creditors,

the most common forms being mortgages (over immovable assets or movable assets subject to registration) and pledges (over movable assets or rights such as corporate shares).

Securities are considered to bind the parties from the moment of signature of the constituent instrument; such agreement may be by a private document or public deed (depending on the case) and is usually subject to registration.

In Mozambique, unlike many countries, no security interest can be provided over land. As mentioned above, land is owned by the State and private individuals can only obtain a DUAT.

In Mozambique, the concept of acting as a security trustee exists; it is common under Mozambican law to appoint and have a single fiduciary or agent holding all of the local law securities in the name of and on behalf of the lenders. As the lenders' representative, the security trustee must be registered as the holder of such security at the relevant registries; however, the lenders must also be individually specified in each security instrument.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

Mozambican legislation (Act 15/2011 of August 10, regulated by Decree 16/2012 of June 4) defines public-private partnerships (PPP) as undertakings in the area of the public domain (excluding petroleum and mineral resources) or in the area of public provision of services, in which, under contract and with the funding provided in whole or in part by a private partner, the latter undertakes to the public partner to make the necessary investment and to manage the activity for the efficient provision of the services or goods that the State is charged with providing to its users.

As a rule, the procedure for the contracting of PPP undertakings is by public tender. However, for reasons of public interest and provided the legal requirements for the purpose are met, a limited call for tender by prior qualification or a two-stage tender procedure may be permitted. Exceptionally, contracting a PPP can take the form of negotiation and direct award.

The sectoral supervision of the PPP undertaking is entrusted to the government entity responsible for the area or sector of activity of the PPP, while its financial supervision is entrusted to the Ministry of Economy and Finance.

Finally, one should also point out Decree 69/2013 of December 20, which regulates the contracting of PPP and business concessions whose investment does not exceed MZN 5 million (approximately USD 72,000) (small dimension ventures) and which is made through public tender and, exceptionally, by direct award.

Finance

10. Is there a merger control regime? If so, what are the thresholds for notification?

Competition rules in Mozambique determine that all agreements, decisions of associations and concerted practices between competing undertakings (horizontal practices), as well as agreements and practices between undertakings and their suppliers and customers (vertical practices), which have the object or effect of appreciably impeding, distorting or restricting competition in the market, are prohibited.

As mentioned below, concentrations between undertakings meeting the jurisdictional thresholds of the Competition Act are subject to prior mandatory notification to/authorisation by the Competition Regulatory Authority.

Such thresholds are:

(i) the combined turnover of the undertakings concerned in Mozambique in the preceding year is equal to or exceeds MZN 900 million (approximately USD 12 million);

(ii) the transaction results in the acquisition, creation or reinforcement of a share of or above 50% of the national market of a given good or service;

(iii) the transaction results in the acquisition, creation or reinforcement of a share of or above 30% of the national market of a given good or service, as long as at least two of the undertakings concerned each achieved in the preceding year a turnover of at least MZN 100 million (approximately USD 1.5 million) in Mozambique.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

The competition rules also prohibit the abuse of a dominant position by one or more undertakings. It is presumed that dominance exists when companies have (individually or jointly) a share above 50% of the relevant market. The abuse of economic

dependence is prohibited in cases where a company is economically dependent on a supplier or client, and there is no an equivalent alternative.

Also, concentrations that create or reinforce a dominant position which may significantly impede competition in the relevant markets (i.e. cartel behaviour) are in principle prohibited, although such transactions may be justified under certain public interest reasons set forth in competition legislation.

The violation of provisions regarding prohibited practices, as well as the early implementation of a concentration subject to mandatory filing before clearance, subjects such each company involved to fines of up to 5% of its previous year's annual turnover.

Competition legislation also provides for periodic penalty payments, as well as ancillary sanctions with potentially serious consequences, such as exclusion from participating in public tenders for five years and even the possible break-up of the offending undertaking.

Note that the Mozambican Competition Regulatory Authority is not yet operational given that its members have not yet been appointed.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

In Mozambique, there is both an Industrial Property Code and a Copyright Act in force, as a result of the ratification of several international treaties.

The purpose of the Copyright Act is the protection of literary, artistic and scientific works and of their authors, performers, record and video producers, and the presenters of radio broadcasts.

Copyright covers rights of an economic and non-economic nature. Economic rights consist mainly of the exclusive right of economic exploitation of the work, reflected in the author's right to authorise its reproduction, translation, adaptation, import or export, having copies for sale to the public, as well as their right to perform any other type of transfer of ownership.

In turn, non-economic rights are of a personal nature and consist of the author's right to claim authorship of the work, to remain anonymous, or to use a pseudonym, and to oppose any distortion, mutilation or modification of his work or any attack against it detrimental to its honour, reputation, integrity or authenticity.

As indicated above, the Investment Act also grants a protection over intellectual property given that the state guarantees the security and legal protection of property over assets and rights, including industrial property rights, within the scope of authorised investments in accordance with such legislation.

Mozambique is a member of the African Regional Intellectual Property Organization (ARIPO).

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

In Mozambique, companies are subject to several taxes, such as:

- Corporate Income Tax – at a rate of 32%;
- VAT – at a rate of 17%;
- stamp duty – percentage varies according to the operation (for example, purchase and sale, swap or assignment for consideration of real estate are taxed at a rate of 0.2% of the value; mortgages and other collateral are taxed at a rate of 0.02% per month or 0.2% and 0.3% *per annum* for guarantees less than one year, between one and five years or more than five years);
- economic activity fee (i.e. the municipality Tax) – the rate is determined by each municipality;
- social security – at a rate of 4% per employee; and
- SISA (Property Transfer Tax) – at a rate of 2%, among others.

Regarding the transfer pricing regime, it is embodied in the Mozambican Corporate Income Tax Code and roughly consists of one single provision stating the arm's length principle and foreseeing the possibility of adjustments whenever that principle is not abided by, that is, whenever related parties (which, according to the law, are those which may exert a significant influence on others' decision process) deviate from what would be agreed by independent parties in similar transactions.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

As referred to above, all transactions and operations taking place between residents and non-residents and resulting or may result in payments to or receipts from foreign countries are governed by the Foreign Exchange Act and respective regulations. Such legislation establishes that all foreign-exchange transactions are subject

to registration with the Central Bank, but not all require its prior authorisation, such as the transfer of funds resulting from foreign direct investment.

Furthermore, taking into account investment legislation, foreign investors who have investment projects approved have the right to transfer abroad the totality of the dividends that they are entitled to at the end of each financial year and re-export the invested capital.

To that end, a discharge document proving the conclusion of the investment, compliance with all tax obligations and that all the necessary measures have been taken to comply with the capital and interest payments related to loans that might have been contracted for the realisation of the investment must be presented to the Central Bank.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

In order for foreign judgments to be effective in Mozambique, rulings on private rights issued by a foreign court must be reviewed and confirmed before the Supreme Court.

For confirmation of a foreign judgment, it is essential that the content of the decision does not lead to a result which is manifestly incompatible with the principles of public order of the Mozambican state, though the confirmation process does not assess the merits of the decision.

A ruling recognised by the Supreme Court has the effect of *res judicata* and is enforceable within national territory; judgments of foreign courts not reviewed may, however, be invoked in cases pending in Mozambican courts as simple means of evidence subject to appraisal by those judging the cause.

As for the enforcement of foreign arbitral awards, the law also admits its recognition and confirmation in cases heard at the Supreme Court. The rules of the New York Convention, dated 1958, to which Mozambique acceded, subject to reciprocity, apply to the review and confirmation of arbitral awards proffered by foreign courts or arbitrators.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

According to the Arbitration, Conciliation and Mediation Law Act, the interested parties may explicitly submit the resolution of all or some of their disputes to arbitration, either in advance (through the provision of an arbitration clause in the contractual instruments), or subsequently (by entering into an arbitration agreement).

The arbitration award, provided that it is given in compliance with the law and provided that the arbitral tribunal is legally constituted, has the same value as a judgment rendered by a court of law.

Arbitral awards are final and enforceable and may be challenged in court only on the basis of formal order and procedural principles laid down in the law; in particular, in the case of patent disregard of procedures which has an impact on the exercise of the rights of defence.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

As a rule, when it comes to companies, under the articles of association and the commercial certificate, it is obligatory for the subscriber to have the power to bind the company.

The recognition of signatures can be by presence or by similarity, and for certain documents containing sensitive content, for example matters related to bank accounts, it is mandatory that the signature be done in the presence of a public notary.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

As a recommendation, it is important to reiterate the importance of obtaining an investment authorisation by those wishing to invest in Mozambique, given that an agreement with the Government always provides for a greater security when it comes to the investment itself.

Currently, a Local Content Act is being prepared by the Mozambican Parliament which may be approved this year and should be of great importance to all foreign investors. ■

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Nigeria

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Population:	189.7m (UN estimate – January 2017)
GDP per capita:	US$5,900 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 2.4% (CIA Factbook – 2014-2016)
Official languages:	English
Transparency International rating:	Ranked 136/176 (2016 Report)
Ease of doing business ranking:	Ranked 169/190 (2017 Report)

Type of legal system	Based on English common law system, African customary law and Islamic law
Signatory to NY Convention	Yes (17 March 1970)
Signatory to ICSID Convention	Yes (13 July 1965)
Member of COMESA, OHADA, SADAQ, EAC	No, but is a member of ECOWAS
Signed up to OECD Transfer Pricing Guidelines	Follows OECD Guidelines
Bilateral investment treaties	Nigeria is a party to several BITs with other states, including China, Finland, France, Germany, Italy, Republic of Korea, Netherlands, Romania, Serbia, South Africa, Spain, Sweden, Switzerland, Taiwan (Province of China) and the United Kingdom

Babatunde Ajibade SAN and Kolawole Mayomi discuss the developing foreign investment market in Nigeria, highlighting restrictions that investors may face

Nigeria

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Section 1 of the Land Use Act vests all lands in Nigeria in the respective State Governors.

In principle, foreign entities, whether corporate or individual, can acquire land in Nigeria, as prescribed by state legislations. In Lagos State, for instance, the Lagos Acquisition of Lands by Aliens Law provides that:

(a) The acquisition of land by aliens must be approved in writing by the Governor, save where the interest in land sought is for less than three years (including any option to renew).
(b) Foreign entities seeking to alienate interest in land must offer to sell the land to the State government first, and if the government declines, to Nigerians (section 3).
(c) Under the Law, unlawful occupation of land by foreigners is a criminal offence punishable with 12 months imprisonment or a N180,000 fine.
(d) The Acquisition of Lands by Aliens Regulation provides a 25-year tenure (including the option to renew) of land.

Notwithstanding the above provisions, in appropriate circumstances, an application can be made to the State Governor for an exemption from the Law's provisions.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The Nigerian Immigration Act and the Immigration Regulations, 2017 require any company that wishes to hire a foreign worker to obtain prior approval from the Minister of the Interior through an application for Expatriate Quota (EQ).

The EQ specifies positions to be filled and the number of slots granted for foreign workers. An EQ is granted for an initial period of three years and is renewable every two years, subject to a cap of 10 years.

A foreign worker must also apply to the Immigration Service for a temporary subject to regularisation visa, before issuance of a Combined Expatriate Residence Permit and Aliens Card. Any foreigner who fails to comply with these entry requirements, if convicted, is liable to a fine of N1, 000,000 or deportation, or both. Furthermore, any company convicted of such an offence will be liable to a fine of N5,000,000 or, in extreme cases, be wound-up.

The company must employ at least two Nigerians to understudy each position and render monthly returns to the Ministry and the Immigration Service, in the expectation that the competencies of foreign workers would be transferred by the end of the approved periods.

3. What are the restrictions on redundancies and any applicable compensation?

In a redundancy situation, section 20 (1) of the Labour Act, places certain restrictions on an employer, who must:

- inform the trade union or worker's representative of the reasons for and extent of the anticipated redundancy;
- observe the principle of "last in, first out", subject to giving consideration to factors such as relative merit, skill, ability, etc.; and
- use its best endeavours to negotiate redundancy payments to discharged workers who are not protected by regulations made further to the Labour Act.

Section 20 (2) of the Act provides that the Minister may make regulations for the compulsory payment of redundancy allowances on the termination of employment because of his redundancy. So far, no such regulation has been issued.

In practice, the redundancy/severance pay is usually computed using the employee's length of service and their last remuneration. Employees not covered by the Labour Act (non-workers) may in a redundancy only be entitled to the benefits set out in their contracts, or as are agreed with the employer, or between the employer and a trade union (where applicable) via a Collective Bargaining Agreement.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

A foreign company seeking to merely invest in Nigeria does not require local incorporation, and may invest by itself or in conjunction with others in already established entities. However, if it plans to operate a business in Nigeria, it is required to incorporate a company locally. The Nigerian Investment and Promotions Commissions Act (NIPC Act) allows foreign investors to own and control 100% of the shares in any company in Nigeria, subject to a minimum of two shareholders and two directors. Foreigners are, however, prohibited from engaging in items on a negative list, set out in a schedule to the Act.

Additionally, an entity with foreign participation is required to obtain a business permit before commencing business in Nigeria.

The Nigerian Oil and Gas Content Development Act (NOGCDA) requires that first consideration be given to Nigerian companies in awarding contracts in the petroleum sector, even where Nigerian companies do not present the lowest bids. To be considered Nigerian and given preference, at least 51% of the shares of the company must be owned by Nigerians. The NOGCDA stipulates that local content levels in various projects must be in accordance with certain statutorily stated minimum levels.

5. Are there any specific legislative requirements, and if so, what are they?

Generally, there are no restrictions on local companies entering agreements with foreign companies, although the petroleum sector requires a holder of an oil prospecting/mining licence or lease to obtain prior consent from of the Minister of Petroleum Resources to assign (in whole or in part) any rights, power or interest in it to a third party. The 2014 guidelines outline the procedures for obtaining the Minister's consent, which involves giving notification to the government prior to the transaction; not advertising, publishing, or issuing a press release in respect of the assignment; and not proceeding with any process incidental to the transaction, until authorised. The transfer of shares in the entity holding the asset also requires ministerial consent.

Moreover, the National Office for Technology Acquisition & Promotion (NOTAP) Act requires all technical services agreements signed by Nigerian parties and foreign technical partners to be registered with NOTAP. An application for the registration or renewal of an agreement must be made to NOTAP within 30 days from the effective date of the agreement.

A wide range of agreements are classified under the Act, including agreements for:

- management services, consultancy services, technical know how;
- trademarks licence;
- franchising, technical services;
- software licensing; and
- research and development.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Yes, there are.

There is a ban on the importation of such items like ball point pens, toothpastes, sanitary products, cocoa butter, some medicaments, used vehicles older than 15 years, as defined by Nigerian customs, etc.

There is also an import substitution policy aimed at stimulating local production on more than 40 products. Moreover, exporters must pay an export supervision scheme administrative charge, which ranges from 0.5% to 0.15% of the free-on-board value.

In a bid to conserve the country's foreign exchange reserves, the CBN also placed 41 items on a list of items not eligible for foreign exchange. This means that the importers would have to source it from private bureau de change at a marked difference. These items include rice, tomato paste, meat and processed meat products, and plastic rubber, steel, iron and metal products, and other products also listed on the CBN's websites.

Exemptions are granted and currently include foreign tuition fees, business and personal travel allowances, medical fees abroad, life assurance premium payment and monthly mortgage payments.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Generally, loans may not be given for an illegal purpose, as the Nigerian courts would not uphold such transactions.

Section 159 of the Companies and Allied Matters Act (CAMA) prohibits companies from 'giving financial assistance' for the purchase of their own shares or to reduce or discharge any liability incurred by any person while acquiring the company's shares, except loans granted in the ordinary course of business to employees to participate in an employee share scheme, or to purchase shares independently.

Also, section 270 of CAMA prohibits a company from giving loans to its directors or directors of its holding company. Only loans given to directors within the ordinary course of the company's business are permissible. Since the grant of loans and provision of guarantees is the ordinary business of a bank, it can provide credit (secured or unsecured) to its directors and entities in which they have over 5% interest, provided the prior approval of the Central Bank of Nigeria is sought and obtained.

The CBN's *Prudential Guidelines for Deposit Money Banks 2010* also prohibits the grant of loans for infrastructure projects which are still in the developmental phase, stating that funding for that phase should come from the project sponsors.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security may be granted over physical assets, shares, bank accounts, contracted rights, proceeds of authorisations and licences, and intangible assets like intellectual property.

The common forms of security over these assets are by way of mortgages, charges (fixed and floating), pledges, and liens. CAMA requires that charges created over assets of a Nigerian company shall be registered with the Corporate Affairs Commission (CAC) within 90 days. Failure to register will render the charge void against other creditors and liquidator of such company. However, the debt is not discharged as the debenture is only rendered unsecured.

For individuals, charges created over an asset must be registered with the Bills of Sale Registry under the Bills of Sale Law applicable in the various states.

The concept of a trust is recognised under Nigerian law, and is governed by the common law of trusts and the Trustee Investment Act. A validly appointed security trustee can hold security in trust for lender(s).

Generally, there are no restrictions on granting security to foreigners. However, statutory corporations may not grant security over their assets to foreigners. Similarly, banks require the prior written consent of the CBN before granting security over their assets.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The Infrastructure Concession Regulatory Commission Act, (ICRCA) established the Infrastructure Concession Regulatory Commission (ICRC) to oversee private sector participation in the development, financing, construction, operation or maintenance of federal infrastructures.

In its work, the ICRC applies the following legislations and regulations: (a) the Public Private Partnership Manual 2012 ("PPP Manual"); (b) the National Policy on Public Private Partnerships 2008; (c) the Public Enterprises Privatisation and Commercialisation Act, which provides the framework for the privatisation and commercialisation of various public assets in Nigeria; (d) the Public Procurement Act, which applies to the procurement of goods and services for the Federal Government and any public body engaged in procurement; and (e) the National Planning Commission Act.

Leaning on the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, ICRC has formulated Unsolicited Proposals Guidelines, which provide that unsolicited proposals may be submitted to the ICRC for joint evaluation by ICRC and the relevant public authority.

Section 12 of the ICRCA mandates the relevant procuring entity to supervise the project in respect of which a concession has been granted, whilst section 20 empowers the ICRC to monitor compliance with the terms and conditions of any concession agreement.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, there is a merger control regime in Nigeria governed by the Investment and Securities Act (ISA) and Rules of the Securities and Exchange Commission (SEC).

There are three merger thresholds (small, intermediate and large) calculated based on the combined turnover or assets of the merging companies. A small merger is one below N1 billion; an intermediate merger is one between N1 billion and N5 billion; and a large merger is above N5 billion.

In a small merger, the entities are not required to notify the commission till the conclusion of the merger. However, in the case of both an intermediate and large merger, a pre-merger notification must be filed with the SEC which will conduct a review and approve or disapprove of the merger.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

There is, currently, no consolidated regime to regulate competition/antitrust problems in Nigeria. However, there are divergent provisions in sector-specific legislation. These include:

Under section 121 of the ISA, the SEC is empowered to determine whether any business combination is likely to substantially prevent or lessen competition. Also, the SEC may, in the public interest, order the break-up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market. Since the Commission's competition review is limited to mergers, it is not effective in other instances of abuse.

An acquisition of a majority interest in a company is subject to the prior approval of the SEC; unless it is an acquisition in a private company or in an unlisted public company with assets or turnover below N500 million.

Furthermore, the Nigerian Communications Commission (NCC) has issued the Competition Practices Regulations 2007. Regulations 23–25 deal with abuse of dominant position and empower the NCC to issue directives and implement appropriate remedies, which are usually in the form of fines.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Copyright and neighbouring rights, patents, industrial designs, trademarks and service marks are statutorily protected in Nigeria. The Copyright Act protects copyrights or neighbouring rights from unauthorised use. The Patent Act protects the registered owner of an invention or industrial design from the unauthorised use of his monopoly rights, while the Trademarks Act protects registered trademarks and service marks from unauthorised use of identical brands or marks that are so similar and likely to deceive or cause confusion among consumers. An action for infringement may be instituted at the Federal High Court at the division where the infringement occurred. The owner of the copyright, patent or trademark may claim relief by way of damages, injunction, and an account of profits or delivery up for destruction of the infringing items or implements.

In addition, common law claims for passing off also protects unregistered trademark owners from misrepresentation based on prior established goodwill in the relevant marks. Although there is no specific local enactment that regulates trade secrets in Nigeria, the courts normally place reliance on the common law in resolving such matters. The Nigerian courts are effective in protecting intellectual property owners who can establish ownership of the intellectual property.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Generally, a company will be liable to tax in Nigeria if profits accruing to the company for the relevant year of assessment are (a) accrued in or is derived from Nigeria (accrual basis), or (b) if the profit is brought into or received in Nigeria (remittance basis).

Businesses in Nigeria may be subject to varying tax regimes. However, most businesses are subject to the following regime:

- Companies Income Tax: 30% (of taxable profits).
- Value Added Tax: 5%.
- Withholding Tax: 5% (individuals) 10% (company).
- Capital Gains Tax: 10% of the value of qualifying asset.
- Education Tax: 2% of chargeable profit.
- Personal Income Tax (PIT): a company is expected to deduct PIT from its employees' wages, and remit to the taxman. PIT is calculated on a marginal rate 19.2% increasing on a graduated rate.

With regard to withholding taxes, the rates are: dividends, 10%; interests, 10%; and royalties, 10%.

The Federal Inland Revenue Service (FIRS) released a new Income Tax (Transfer Pricing) Regulations No 1, 2012 in October 2012. The Transfer Pricing regulations give effect to the existing anti-avoidance provisions in the income tax laws and provide guidelines for the application of the arm's-length principle.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act regulates such transactions in Nigeria.

Section 15 requires foreign investors who wish to import capital into the country for their operations through official channels to obtain a Certificate of Capital Importation (CCI) from authorised dealers (licensed banks). A CCI is issued by a bank and certifies a foreign inflow for investment, either in cash or in kind (importation of machinery and equipment, etc.).

Aside being statutory evidence of capital inflow into the country, a CCI enables the unrestricted repatriation of funds, either as interest/loan repayments or dividends. However, where the foreigner wishes to repatriate funds being proceeds of management services or technical agreements, repatriation will only be possible if the underlying contract had been previously approved prior to that time by (NOTAP).

Due to the global drop in oil prices which resulted in a reduction of foreign currency reserves, the Central Bank of Nigeria has placed limits on goods for which importers can access the official window for payment. Also, it has prohibited Nigerian banks from lending in foreign currency or re-designating Naira loans as foreign currency loans.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

There are two pieces of legislation governing the registration of foreign judgments in Nigeria: Reciprocal Enforcement of Judgments Ordinance (1922); and Foreign Judgments (Reciprocal Enforcement) Act (1961).

Under the 1922 Ordinance, a judgment creditor may apply to register a judgment obtained in the United Kingdom and its dominions in a High Court in Nigeria within 12 months of the date of judgment. Similarly, under the 1961 Act, a judgment creditor may apply to register a judgement obtained in any country of the world in a High Court in Nigeria within 12 months of the date of judgment.

A foreign judgment will not be registered if it is wholly spent or if it would not be enforceable in the country of the originating court. Moreover, registration can be set aside on grounds, *inter alia*, that: (a) the original court lacked jurisdiction; or (b) that the judgment was obtained by fraud, or is contrary to the public policy of Nigeria.

A foreign arbitral award can be enforced in Nigeria under the New York Convention at the Federal High Court or the High Court of a State. The applicant shall file (a) a certified copy of the award, (b) the certified copy of the arbitration clause, and (c) a certified translation into English language where the award is rendered in another language.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Nigerian courts have repeatedly held that once an arbitration clause is valid, and the dispute is within the contemplation of the clause, the courts will enforce the arbitration clause by staying any litigation commenced in breach thereof.

The court have also demonstrated support for the arbitration process by granting interim measures, pursuant to article 26(3) of the Arbitration Rules, made pursuant to the Arbitration and Conciliation Act, to preserve assets which are the subject of claims at arbitration proceedings, pending the resolution of such claims. Either the Federal High Court or a State High Court can exercise this jurisdiction.

In further demonstration of Nigeria's pro-arbitration stance, the Court of Appeal recently set aside two anti-arbitration injunctions issued by the lower courts to restrain arbitration proceedings. The Court of Appeal made it clear that the import of section 34 of the ACA which states that "a court shall not interfere in arbitral proceedings except where allowed by the Act" means that the court's intervention in arbitration proceedings shall only lie in specific areas (i.e. appointment of an arbitrator, grant of interim reliefs, setting aside or enforcement of an award, etc.) delineated in the ACA itself, and not at large.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are no special signing procedures required of a foreign company under Nigerian law.

The company may by an ordinary resolution authorise its director or other individual to execute contracts or registration documents on its behalf. Such documents would be presumed to have been duly executed. However, where a foreign company purports to sign a document authorising the registration of a wholly owned Nigerian subsidiary, or approved an investment in conjunction with

others, the foreign company is required to affix its corporate seal on such resolutions/documents.

Where the foreign investor (or its representative) is not present in the country to sign certain documents, a power of attorney can be utilised. The power of attorney must be granted in writing and it is recommended that an independent person with good repute attest it.

The land instrument registration laws of some states in Nigeria define an instrument to include a power of attorney under which an instrument may be executed, so a power of attorney is a registrable instrument. If it is not registered, it shall not be pleaded or given in evidence.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Oil and gas: In 2016, a new Petroleum Industry Governance Bill (PIB) was introduced to the National Assembly and is currently under review by the relevant Senate committee. If passed in its current form, the PIB will harmonise petroleum regulatory functions and reposition the Nigerian National Petroleum Corporation as a commercial entity.

Taxation: The Federal Government recently (1 February 2017) approved the revised National Tax Policy (NTP) which aims to diversify government revenues whilst lowering tax rates and VAT for SMEs. It aims to solve the problem of multiple taxes and revenue agencies by putting in place one revenue agency per level of government, and sets out guidance on tax administration including registration, technology, and dispute resolution.

Foreign exchange regulation: To mitigate the negative impact of declining crude oil prices and consequential shortages of foreign currency, the CBN relaxed its foreign exchange control policies by introducing a single forex market in June 2016 (the *Revised FX Guidelines*). The effect of this was that CBN only participates in the interbank market through secondary market intervention mechanisms such as the sale of FX to authorised dealers on a wholesale basis or to end-users through authorised dealers on a retail basis. ■

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S. P. A. Ajibade & Co. is a leading Corporate and Commercial Law firm based in Nigeria. Established in 1967, it has been at the forefront of developments in commercial practice in Nigeria and has continuously rendered sound technical advice and tailored customer solutions to its local and international clients.

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Senegal

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Population:	15.9m (UN estimate – January 2017)
GDP per capita:	US$2,600 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 5.8% (CIA Factbook – 2014-2016)
Official languages:	French
Transparency International rating:	Ranked 64/176 (2016 Report)
Ease of doing business ranking:	Ranked 147/190 (2017 Report)

Type of legal system	Based on French civil law system
Signatory to NY Convention	Yes (17 October 1994)
Signatory to ICSID Convention	Yes (26 September 1966)
Member of COMESA, OHADA, SADAQ, EAC	OHADA , and is also a member of ECOWAS
Signed up to OECD Transfer Pricing Guidelines	Generally consistent with OECD Guidelines
Bilateral investment treaties	Senegal is a party to several BITs/TIPs including with Canada, the UK, the EU and the US

Khaled Houda provides an analysis of the legislation governing foreign investment in Senegal and highlights potential forthcoming policy changes

Senegal

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

In Senegal, there are no restrictions on foreign entities holding an interest in land. Like Senegalese nationals, they must comply with local rules pertaining to the ownership and exercise of real estate, but are in no way more restricted.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

According to the law, the employer must receive the authorisation of the Labour Director before hiring a foreign worker.

In article 9 of the Mining Code, any mining activity involving the exploitation of raw materials must prioritise the hiring of local workers when their skill is equivalent to that of foreign workers. Furthermore, article 224 of the Labour Code indicates that the state may, by decree or ruling, in periods of unemployment restrict the hiring of foreign nationals in certain professions and of certain skill levels.

Breaches of the Labour Code may allow the work contract to be terminated.

3. What are the restrictions on redundancies and any applicable compensation?

The law governing redundancies and compensation is very detailed, and includes the following list of restrictions on redundancies:

- A redundancy must be notified to the employee in accordance with article 51 of the Labour Code. If such written notification is not made, the redundancy may be considered as unfair dismissal. The court may, however, grant the worker compensation to sanction the non-observance of the rules pertaining to redundancies.
- According to article 56, redundancies made without legitimate reason are considered as unfair dismissals. Furthermore, dismissals on the grounds of the beliefs or opinions of a worker, trade union activity, and membership or non-membership of a specific union are considered as unfair dismissals.
- Article 60 of the Labour Code, pertaining to economic redundancies, states that before any dismissal is formally made, the employer must consult staff representatives with the aim of exploring alternative solutions such as reducing work hours. The minutes of the meeting must be sent to the Labour Office for inspection as proof of good practice.

In the case of redundancy (except for gross misconduct), the employer must pay, in addition to salaries and compensation for unused pay, both severance pay, and pay in lieu of notice as compensation. In addition, in the case of redundancy made on economic grounds, a special compensation payment amounting to one month's salary is given.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Yes; these are the Senegalese Investment Code as promulgated in Law No. 2004-06 of 6 February 2014, as well as the General Regulations of the CREPMF (*Conseil Régional de l'Epargne Publique et des Marchés Financiers*) and Regulation No. 09 of 2010 (CM/UEMOA), on the external financial relations of member states of the West African Economic And Monetary Union (WAEAMU).

Article 2 of the General Regulations of the CREPMF list the following investment activities which require authorisations from the Ministry of Finance:

- issuing and distributing securities;
- trading and intermediation on the securities market;
- trading and intermediation on the derivatives market;
- organisation and operation of stock exchanges;
- organisation and operation of commodities and futures exchanges;
- management of securities portfolios and custody of securities; and
- the provision of investment advice.

Article 6 of the Senegalese Investment Code states that there is a guarantee of the transfer of

capital, which permits the freedom of the enterprise to transfer income or products of any kind resulting from its operation, any disposal of assets or its liquidation, as guaranteed in accordance with the legislative texts in force.

The same guarantee extends to investors, entrepreneurs or partners, natural or legal persons, who are not nationals of Senegal, in respect of their shares of profits, proceeds from the sale of their partners' rights, their share of the bonus after liquidation.

Furthermore, article 7 of the same code guarantees the right of foreign nationals to transfer all or part of their salary.

In Senegal, there are no specific restrictions on foreign nationals to be appointed to the board of directors of a Senegalese company.

5. Are there any specific legislative requirements, and if so, what are they?

Yes, there are certain specific legislative requirements, including:

- The requirements and the specificities regarding change of control is defined in the by-laws of the corporation and in some cases by the OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) Uniform Act on Commercial Companies.
- The ownership of corporations in Senegal is open to all as there are no existing restrictions requiring the presence of local persons and entities as owners in these corporations except in a few sectors such as mining and fishing. In the mining sector, for companies engaged in mineral exploitation, the state is entitled to 10% of the share capital of an exploitation company.
- There are restrictions to the contracts that local companies can sign with foreign companies, e.g. mining companies must prioritise signing supply agreements with local companies when their goods and services are of the same quality as foreign entities.
- All foreign loans (loans contracted by residents from non-residents) are subject to mandatory declaration to the External Finance Directorate and the BCEAO (*Banque Centrale des Etats de l'Afrique de l'Ouest*), for statistical purposes. The repayment of any foreign loan, either by purchase and transfer of foreign currencies or by crediting foreign accounts in Francs or in Euros, must be declared for statistical purposes to the External Finance Directorate and the BCEAO, and said transactions must be carried out through a licensed intermediary (Article 11 of Regulation 09 of 2010).

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Save for respecting legal formalities required for importation, in Senegal there is, in principle, no restriction on the importation of goods or raw materials into the country.

However, for certain sectors, there exist restrictions (sugar, onions, etc.). In these cases, the State may by decree undertake to temporarily restrict the importation of such goods to allow the local distribution of products and merchandise.

Furthermore, in the context of the exploitation of mines, it is stipulated that holders of mining exploitation permits are under the obligation to first consider buying materials and tools of local origin when these are of the same quality as goods that could have been sourced outside of Senegal.

Certain raw materials are also subject to restrictions, such as gold, oil, and other raw materials. The importation and exportation of gold is subject to authorisation from the Ministry of Finance. The importation of oil including crude oil is subject to authorisation from the Ministry of Energy.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Yes, in Senegal providing loans is considered as a banking practice and as such is heavily regulated. For one to be authorised to give out a loan, a preliminary authorisation from the Ministry of Finance is required. The acts regulating this practice are as follows:

- Article 13 of Law No. 2008-26 of the 28 July 2008, which states that entities taking part in financial transactions must carry an accredited licence delivered by the Ministry of Finance of Senegal.
- Pursuant to Article 2 of Regulation No. 09 of 2010, foreign exchange transactions, capital movements (issuance of transfers and/or receipt of funds) and settlements of all kinds from a WAMU (UMOA) member state to a foreign country, or in the WAMU space between residents and non-residents, can only be made through the BCEAO, the Administration or the Post Office, a licensed intermediary or a licensed manual exchange agent.

Licensed intermediaries are allowed to undertake the following activities to a destination abroad,

under their responsibility and on the basis of supporting documents (Article 7 of the Regulation No. 09 of 2010):

(i) the transfer of money required for contractual debts amortisation, as well as short-term repayment of loans granted for the financing of commercial and industrial operations;

(ii) the transfer of liquidation proceeds of investments or the sale of foreign securities by non-residents; and

(iii) the required settlements, either for transactions on derivatives instruments or for transactions on commodity derivatives and basic products.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

In Senegal, the law pertaining to securities is either judicial or borne through agreements. Securities can be taken on the basis of an agreement signed by both parties or on the basis of a court decision where a judge allows a creditor to take such securities over the asset of its debtor. Securities can be on tangible or intangible assets and movable or immovable assets. The law does not take into account the nationality of the foreign investor.

In the case of judicial securities, for example, the creditor who does not receive payment from his debtor can demand from the judge the forced inscription of a mortgage on an immovable asset of the debtor.

The three most common forms of securities are those of mortgage (of an immovable asset); pledge (of a movable tangible asset); and collateral (given as an intangible asset).

Local law does not recognise the concept of a trust and the role of a Security Trustee.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The laws regulating PPPs are:

- The Code of the Administrative Obligations (Law No. 2006-13 of 13 June 2006).
- Article 10, of the Code des Marchés Public (decree No. 2014-1212 of 22 September 2014).
- The law relating to partnership agreements (Law No. 2014-09 of 20 February 2014 as modified by Law No. 2015-03 of 12 February 2015).

According to the Office of the President under the "*Plan Sénégal Emergeant*", a government programme of investments and modernisation, there were 33 infrastructure projects in 2015. These projects amounted to the construction of 965 kilometres of roads and 2,281 linear metres of bridges.

To our knowledge, there is no third-party guidance as to how PPPs are construed in Senegal.

Public procurements are regulated by the Central Directorate for Public Markets (DCMP) and the Authority for the Regulation of Public Markets (ARMP). The government ministries responsible for PPPs are the Ministry of Finance under its Public Markets Division and the Ministry for the Promotion of Investments, Partnerships and the Development of State Teleservices under the directorate for the financing of Public-Private Partnerships.

The government mainly uses its website, http://www.ppp.gouv.sn, to advertise PPPs, as well as advisory services for the communication of their existence.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Except for in certain sectors such as the banking and microfinance sector where the merger must be prior authorised by the Minister of Finance, there is no merger control regime in Senegal; however, the law regulating competition/anti-trust law is Law No. 94-63 of 22 August 1994. This law outlines the guidelines for mergers and other activities pertaining to competition law, and the penalties resulting from the failure to comply with its provisions.

Following a merger, such merger is registered at the Trade Registry. This is not a form of merger control, but it is a registration procedure. The delay for this procedure is typically short and on average takes 24 hours.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

In Senegal, the law regulating competition/anti-trust law is Law No. 94-63 of the 22 August 1994. This law pertains to competition law, and sets the

penalties resulting from the failure to comply with its provisions, which include the above items.

For infractions of articles 46 and 47 (illicit pricing), the penalties are as follows: a fine of FCFA 25,000 to FCFA 50,000,000. In the case of fraudulent maneuvers, three months to three years of imprisonment can be demanded by the judge.

The definition of fraudulent maneuvers is detailed in paragraph 2 of article 67 as the failure to keep accounts, the falsification of records, the hiding of accounting documents, keeping secret accounts, making false invoices, handing over or collecting hidden payments, or any other maneuvers which tend to hide either the impugned operation or its character or its real conditions.

For infractions of article 48 (refusal to communicate documents, fraud or concealment of any document, opposition and insults to public agents), the penalties are as follows: a fine of 50,000 FCFA to 5,000,000 FCFA. When there is a refusal to communicate documents, there is a penalty of 5,000 FCFA for each day that document was not communicated.

Article 73 states that if an entity commits an infraction within two years of a previous infraction, the fines and penalties mentioned above may be doubled.

The law formalised the creation of a Commission for Competition that regulates and investigates anti-trust activities in Senegal. This Commission is highly effective and operates in all of Senegal.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Senegal has ratified major international conventions applicable to intellectual property such as the Bern Convention, Convention creating the OMPI, the Paris Convention, the Hague Convention and the Bangui Convention.

In Senegal, the local law pertaining to intellectual property rights is Law No. 2008-09 of 25 January 2008.

This law guarantees the protection of intellectual works which are categorised into several categories as enumerated in article 6 of the said law. These categories are:

- Language works: literary, scientific or other works written or oral.
- Dramatic works: theatre, and other dramatic works.
- Choreographic works: theatre and circus.
- Musical works: including those with or without speech.
- Audiovisual works: films, animated pictures, and other images and sounds.
- Visual arts works: drawings, paintings, sculptures, etc.
- Geographic works: plans and drawings relevant to topography, architecture and the sciences.

(Please note that the lists presented are not limited to the works specified.)

The works that are protected by this law must be original works. The law excludes from its protection: ideas; procedures or methods pertaining to the workings of mathematic principles; news; and translations.

The sanctions enumerated by the law are found in articles 142 to 152. The penalties include fines ranging from 500,000 FCFA to 5,000,000 FCFA, and imprisonment from one month and up to two years. These measures are most often effective in dissuading entities from breaching intellectual property rights.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

In Senegal, businesses are subject to the following taxes:

- Income taxes resulting from a Global Unique Contribution regime, which is calculated on a turnover basis against income from goods and services, concerned with specific categories of small businesses, and consolidates a number of previous taxes.
- Corporate Tax: 30% of profit (however, there are certain corporations which are exempt, e.g. charities and others that have statutory deductions such as export companies).
- Flat-rate contribution paid by employers. Since 2006, there is no difference in the tax treatment between local and foreign workers. Companies that have created 50 new permanent positions benefit from a three-year exoneration of tax payments following an agreement with the Ministry of Finance.
- Property Tax, for any building and factories and the rate depends on the type.
- VAT: 18%.
- Registration Tax for share transfers, following verification by the tax authorities of the value of the transferred shares.

- Stamp duty. No fixed rate, dependent on the number of pages.
- Many withholding taxes are applicable depending on the conditions, such as tax on interest of foreign creditor (16% of the interest), the non-commercial profit (BNC) tax on services provided by foreign company to a local national (25%).

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The Senegal Investment Code guarantees foreign investors the right to transfer abroad any funds associated with an investment, including dividends, receipts from liquidation, assets, and salaries. Such transfers are authorised in the original currency of the investment. Once the interested party presents the request for transfer, accompanied by all relevant bank documents, Senegalese banks transfer the funds directly to the recipient banking institution.

Pursuant to article 2 of Regulation No. 09/2010 foreign exchange transactions, capital movements (issuance of transfers and/or receipt of funds) and settlements of all kinds from a WAMU (UMOA) member state to a foreign country or in the WAMU space between residents and non-residents can only be made through the BCEAO, the administration or the Post Office, a licensed intermediary or an licensed manual exchange agent.

Licensed intermediaries are allowed to perform the following activities to a destination abroad, under their responsibility and on the basis of supporting documents (article 7 of the Regulation above):

i) the transfer of money required for contractual debts amortization, as well as short-term repayment of loans granted for the financing of commercial and industrial operations;
ii) the transfer of liquidation proceeds of investments or the sale of foreign securities by non-residents; and
iii) the required settlements, either for transactions on derivatives instruments or for transactions on commodity derivatives and basic products.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign arbitration awards are enforceable in Senegal under the New York Convention.

However, in conformity with Senegalese law, foreign judgments may be executed in Senegal following the process of exequatur. The three conditions of exequatur are as follows:

- The decision must be taken in conformity with the laws and regulations of the foreign jurisdiction that has rendered the decision.
- The decision must be in conformity with public order in Senegal.
- The original hard copy of the decision or sentence must be deposited at the competent Senegalese court. Note that if the original copies are not provided in French, they must be translated by a translation duly accredited by the local jurisdiction.

If the three conditions are respected, the foreign judgment or arbitral award is enforced by the courts of Senegal.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

In Senegal, courts are favorable towards arbitration awards, as a signatory of the New York Convention

With the presence of an arbitration clause in a dispute, a court will declare unable to handle the case and transfer the case to the competent court. Also, the Uniform Act provides that the court may grant interim relief in support of that clause. Before the case is handed over to the arbitrator, and in exceptional circumstances, afterwards, in the event that the urgency of the provisional and precautionary measures applied for do not enable the arbitrator to take a decision in due time, the parties may request such measures should be taken by the competent judicial authority.

The arbitration award may, however, be subject to an annulment appeal in front of the competent local court (the Arbitration Court and/or the Court of Appeals). This is the only remedy available to local courts.

The annulment appeal is only receivable by the courts if the following conditions enumerated in article 26 are respected if:

- the arbitration court has ruled without an arbitration convention being in force, or a nullified or expired convention was in place;
- the arbitration court was irregularly composed or if the sole arbitrator was designated on irregular grounds;
- the arbitration court has ruled in non-conformity to the instructions it was given;
- the contradictory principle was not respected;
- the arbitration court violated a public order rule of the signatory states; and
- the arbitration award was unmotivated, i.e. has been delivered without reasons.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

In Senegal, the law does not distinguish the nationality of individuals signing documents. As such, the law applicable to Senegalese nationals or entities is equally applicable to foreign nationals or entities.

For the signatories of documents representing a company whether it be foreign or national, a Power of Attorney is required. If such Power of Attorney is not given by the legal representatives of the company to the entity signing on their behalf, the signed documents are void.

Furthermore, pursuant to the "*Codes des Obligations Civiles et Commerciales*", certain documents must be notarised such as sale documents for immovable assets. In addition, such agreements as share transfers must be registered in front of the Trade Registry (*Registre du Commerce et du Crédit Mobilier*).

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

There are several current legislative and policy developments in Senegal. The recently signed new Mining Code (signed 8 November 2016) requires a Presidential decree to finalise its application.

Furthermore, there is a project for the creation of a uniform Labour Law for OHADA member states. At present, no date has been communicated concerning the ratification of these projects. ■

Khaled Houda
Cabinet D'Avocats Houda

Mr. Khaled Abou El Houda is an attorney-at-law registered with the Bar Association of Senegal since 1999. He holds a Master's degree in Business Law from the University of Aix-Marseille and a Master's Degree in Business Law, Banking and Finance from Cheikh Anta Diop University in Dakar.
He is a member and secretary general of the Canadian Institute of Mining, Metallurgy and Petroleum in Senegal, and of the American Chamber of Commerce in Senegal.

He is also recognised as an arbitrator at the Court of Justice and Arbitration of Abidjan and at the Centre of Arbitration, Mediation and Conciliation of Dakar. He is an excellent business law practitioner who has developed proven and recognised expertise in banking, finance, restructuring, mergers and acquisitions, financing of major infrastructure, energy and mining projects.

Due to his linguistic (fluent in French, English and Arabic) and multi-cultural aptitudes, Mr. Houda has worked with clients from various countries in Africa, Europe, Asia and Australia.

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Houda Cabinet d'Avocats

Cabinet D'Avocats Houda is a full-service law firm based in Senegal, which specialises in all forms of corporate and general business law, as well as intellectual property law and international trade law, and banking and financial service practice, including investment fund laws. The Firm is well known for its work in corporate, M&A and project finance in several key sectors such as banking, NTIC, mining, energy, oil, gas and infrastructure. It has extensive experience on establishing foreign companies in Senegal and providing high level quality counsel, legal assistance and litigation representation at Court.

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South Africa

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Population:	55.1 million (United Nations estimate – November 2016)
GDP per capita:	USD 13,200 (CIA Factbook – 2015)
Average GDP growth over previous 3 years:	1.67% (World Bank – 2013-2015)
Official languages:	11 in total, including Zulu, Xhosa, English, and Afrikaans
Transparency International rating:	Ranked 65/168 (2015 Report)
Ease of doing business ranking:	Ranked 74/190 (2017 Report)

Type of legal system	Hybrid – Roman-Dutch civil law, English common law and African customary law
Signatory to NY Convention	Yes (May 3rd, 1976)
Signatory to ICSID Convention	USD 7,6785
Member of COMESA, OHADA, SADAQ, EAC	Member of SADC
Signed up to OECD Transfer Pricing Guidelines	Follows OECD Transfer Pricing Guidelines
Bilateral investment treaties	South Africa is a party to several BITs/TIPs including with China, the USA and the EU

Warren Beech and Hedda Schensema assess the latest legal developments for investors in South Africa, across all the major areas of interest for those looking to explore business opportunities in the country

South Africa

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Foreign entities may hold property in South Africa but need to register as external companies with the South African Companies Office.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The employment of a foreign national can only be done in compliance with the Immigration Act and its regulations. In order for a foreign national to legally work in the Republic of South Africa (RSA), the application for a work visa will have to be submitted by the employer on behalf the foreign national. The application will further have to include a certificate from the Department of Labour confirming that despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant. Further confirmation that the applicant is in possession of qualifications or proven skills in line with the job offer and that the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards of the Republic and is made conditional upon the general work visa being approved.

3. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The termination of employees for operational requirements is governed by section 189 of the Labour Relations Act (LRA). In principle it is fair and lawful for an employer to dismiss one or more employees on the strength of the operational requirements of the business. However, in order to balance the employer's interest in the on-going success of the business with the employees' interests in fairness at work and job security, there must be a genuine defensible business case for the terminations. Accordingly there are no restrictions on redundancies, however strict compliance with the procedure as set out in s189 of the LRA is required. Should no alternatives be available, the minimum statutory compensation is one week for every completed year of service as well as notice pay and any outstanding leave.

4. What are the restrictions on redundancies and any applicable compensation?

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Investment and Local Content

5. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

When the state issues a Request for Proposals as part of the PPP process (see below), the rules of engagement are set out very clearly. Failure to abide by these rules will render the bid non-compliant leading to rejection of the bid (and possible forfeiture of bid bonds). Bids are adjudicated by allocating a score for each aspect of the bid requirements. These will include the level of local content in the project and local ownership. Local content and ownership can vary from project to project but where the RFP is part of a larger programme (such as the Renewable Energy Independent Power Producer Programme), the requirements for local content and ownership has tended to become stricter.

6. Are there any specific legislative requirements, and if so, what are they?

There are no material legislative requirements regarding foreign investment in South Africa. In certain instances and depending on the scope and nature of such investment or business carried on, such as registering security or immoveable property in its own name or carrying on certain business activities, a foreign entity may be required to register as an external company (as a branch) or incorporate a subsidiary under the Companies Act (Act 71 of 2008) and is required to have a South African resident as their legal representative and to register for tax with the South African Revenue Service.

Certain business sectors require a minimum amount of historically disadvantaged persons (HDPs) participation as regards, ownership, board representation and benefits from such sector (for example the mining industry currently requires that 26% of the relevant mining right be held by and for the benefit of HDPs as a condition to obtaining and maintaining such mining right). In some cases compliance with HDPs targets per sector is mandatory but generally it is not, bearing in mind that failing to comply with such HDPs participation targets may dissuade other entities concerned with compliance from doing business with such non-compliant entities.

7. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

There are a number of restrictions on the importation of goods into South Africa, primarily aimed at foodstuffs, plants, hazardous substances, weapons, and other products which are restricted in terms of both national and international legislation. While there are certain general restrictions, the restrictions are often article-specific and the laws relating to the article must be confirmed.

Finance

Are there any restrictions on the purposes for which money may be lent?

Money may not be part of the proceeds of crime and may not be used for criminal purposes or for any purpose related to, for example money laundering, tax evasion, and in contravention of exchange control requirements.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Generally, security may be granted/obtained over moveable and immovable property, through mechanisms such as mortgages, liens, notarial cessions/bonds, pledges and attachments. South Africa recognizes the concept of a trust, which is addressed in trust-specific legislation, read together with the tax legislation (and in some instances, specific legislation, such as environmental legislation).

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

In South Africa, procurement of goods or services by the state (which includes state owned entities) is regulated by legislation, in particular the Public Finance Management Act (Act 1 of 1999 as amended) commonly referred to as the PFMA. This enactment requires that all procurement must be by way of open public tender (except where special circumstances indicate otherwise). This normally entails the publishing of a Request for Proposal, or RFP, which may be preceded by a request for Expression of Interest (EOI) or a Request for Qualification (RFQ). The whole process is overseen by the PPP Unit of the National Treasury.

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes. A transaction must be notified to the South African Competition Commission (SACC) as an 'intermediate merger' if the 'combined figure' (being the combined annual turnover of the merging parties in, into or from South Africa, or the combined value of their assets in South Africa, or the turnover of the one and the assets of the other, in whichever combination reaches the highest figure) is equal to or greater than R 560m and the annual turnover or asset value of the target is equal to or greater than R 80m.

A transaction must be notified to the SACC as a 'large merger' if the combined figure is equal to or greater than R 6.6bn and the annual turnover or asset value of the target is equal to or greater than R 190m.

A transaction which does not meet the thresholds for an "intermediate merger" will be classified as a "small merger". Such mergers are not generally notifiable but may be in circumstances where the acquirer or target is the subject of any on-going competition investigations/complaints.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes. The law prohibits anti-competitive horizontal (between competitors) and vertical (between suppliers and customers) arrangements unless there are pro-competitive justifications that outweigh the anti-competitive effect; the law also prohibits abuses of dominance including excessive pricing, refusing a competitor access to an essential facility, exclusionary conduct and price discrimination.

Cartel conduct and minimum resale price maintenance are prohibited outright, and this conduct as well as certain abuses of dominance including excessive pricing, refusing a competitor access to an essential facility, and certain types of exclusionary conduct, are all considered particularly egregious anti-competitive conduct and attract significant penalties, even for first time offences.

The law is very actively enforced, and there have been numerous substantial fines imposed, for example in relation to cartel conduct in the bread, construction and steel industries, and for abuses of dominance by dominant players in the aviation and oil industry. The Competition Commission also conducts "dawn raids" on a regular basis as part of its investigations into prohibited conduct.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Intellectual property is recognised and protected under South African law, both in terms of specific legislation (which, if breached, constitutes an offence), and by way of damages claims.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Companies doing business in South Africa may be subject to taxes which include the following:

(a) Corporate income tax at 28% (including capital gains tax the disposal of capital assets at an effective rate of 22.4%).
(b) Value-Added Tax (if certain thresholds are met) at 14%, although certain supplies may be exempt or subject to a rate of 0%.
(c) Securities Transfer Tax (STT) on the transfer (but not the issue) of shares in South African companies or foreign registered companies that are listed on a South African exchange at a rate of 0.25% of the consideration paid for the transfer of the share or the market value of the share transferred, whichever is higher.
(d) Employees' tax (Pay-as-you-earn/PAYE) to be deducted by employers (according to prescribed schedules) paying remuneration, as defined, to employees and to be paid over to the South African Revenue Service (SARS).
(e) Unemployment Insurance Contributions to the Unemployment Insurance Fund (UIF). Each employer must deduct 1% from an employee's remuneration and pay the amount deducted to SARS, together with a 1% contribution (equal to the amount withheld from the employee) by the employer itself. The total amount that may be withheld is subject to a maximum/cap, which is currently R 148.72.
(f) Where an employer expects that the total amount of salaries payable by it will be more than R 500 000 over the next 12 months, that employer becomes liable to pay the Skills Development Levy (SDL) of 1% of the total amount paid in salaries to employees on a monthly basis. SDL is a levy imposed to encourage learning and development in South Africa and is determined by an employer's salary bill. The funds are to be used to develop and improve skills of employees.
(g) When immovable property is transferred, transfer duty may be payable. The percentage of the duty is determined according to a sliding scale and may vary from 3% to 13%.
(h) Donations made by South African tax residents are subject to donations tax at a rate of 20%, subject to certain exemptions.
(i) Businesses involved in the mining industry are subject to special mining-related taxes and levies (e.g. the Mineral and Petroleum Resources Royalty Act (Act 28 of 2008)).
(j) Businesses involved in cross-border trade are subject to customs duties which vary, depending on the items imported and exported.
(k) South Africa also imposes withholding taxes on interest, dividends and royalties at a rate

of 15%, subject to certain exemptions. This rate may be reduced in terms of an applicable double taxation treaty.

South Africa's Income Tax Act contains specific transfer pricing rules. South Africa subscribes to the arm's length principle of the Organisation for Economic Cooperation and Development (OECD), i.e. all cross-border transactions between connected persons must be entered into on arm's length terms. Transactions that are not entered into on arm's length terms may be adjusted by SARS with various tax consequences, with concomitant interest and penalties to be levied by SARS.

In addition to withholding taxes on interest, dividends and royalties, South Africa also imposes withholding taxes on immovable property disposed of by non-residents (the rate varies from 5% to 10%, depending on the legal nature of the seller) and on non-resident sportspersons and entertainers, at a rate of 15% (which may be subject to relief in terms of an applicable double taxation agreement).

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Yes. South Africa has exchange control regulations which are administered by the Financial Surveillance Department (FinSurv) of the South African Reserve Bank. Different rules and approvals apply to different types of transactions and different types of payments.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgments are not directly enforceable but constitute a cause of action which will be enforced if the necessary requirements are met. These requirements include that the judgment is not contrary to the public policy of South Africa and that the judgment is final and binding.

Foreign arbitral awards are enforceable by South African courts, provided that none of the exceptions to the New York Convention apply and that the dispute is arbitrable under South African law (i.e. not related to criminal or matrimonial law).

Yes, foreign judicial decisions or arbitration awards are enforceable in South Africa. An application may be made to the High Court to have the award/decision made an order of the South African court, and once made an order of a South African court it would be enforceable as if it was a decision of a South African court.

There is provision for the recognition and enforcement of foreign arbitral awards in South Africa. South Africa acceded to the New York Convention without reservation in 1976, and enacted legislation to give effect to this ratification in 1977 in terms of the Recognition of Foreign Awards Act, 4 of 1977. South Africa is a signatory to the Convention. The application of the Convention will be limited where it is contrary to public policy.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes, South African courts are generally supportive of arbitration proceedings. Interim relief can be granted from the court in relation to arbitration proceedings, although it is not common in relation to foreign-seated arbitrations. South African courts will also generally provide injunctive relief to stay/dismiss court proceedings brought in violation of an arbitration agreement made between the parties.

In terms of the Arbitration Act, (Act 42 of 1965) where a party commences legal proceedings in any court in respect of a matter agreed to be referred to arbitration, any party may apply to court for a stay of such proceedings. Furthermore, the court has the power to order that a dispute between parties to an arbitration agreement be determined by way of interpleader proceedings for the relief of any party desiring so to interplead.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are generally no restrictions other than the usual requirements on authority/mandating, and the process is largely a matter of contractual requirements. However, there are prescribed formalities for official documents such as banking, tax, company and other statutory documents.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Policy and legislation in South Africa are under constant change and it is necessary to review the applicable requirements at the relevant time. The key policies that are of interest relate to Broad Based Black Economic Empowerment and local ownership requirements. ■

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Warren provides multi-disciplinary legal and related services, primarily to the mining, construction and engineering industries. This includes health and safety, environmental, commercial, litigation, criminal and employment law advice, as well as training, auditing and consulting services.

He consults locally and internationally, and has represented mining and non-mining companies in more than 1,800 fatal inquiries and inquests arising out of incidents and accidents. He has conducted inquiries in terms of the Mine Health and Safety Act and the Occupational Health and Safety Act for many clients.

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Hedda Schensema
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Hedda Schensema focuses on employment and labour law. She advises employers on employment related aspects of transactional, litigation and dispute resolution, regulatory and compliance related matters in both the public and private spheres, as well as giving strategic insights into all employment related matters, training, reviews of employment contracts and employee policies within various workplaces, as well as all forms of collective and individual bargaining, and on discrimination issues. Hedda has also acted as a judge of the Labour Court.

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Hogan Lovells

Hogan Lovells in Johannesburg is the gateway to Sub-Saharan Africa for global organisations and investors attracted to the region's expanding economies and growing consumer base. Our clients include major domestic and international corporations, banks, financial institutions, and state authorities.

We focus on corporate, commercial, finance, tax, litigation, mining, and employment work. Our professionals are approachable sector practitioners with broad Sub-Saharan Africa capabilities. Working collaboratively with more than 45 Hogan Lovells offices worldwide, we provide clients a consolidated approach across jurisdictional borders. We value client relationships above all. As a full-service firm, we constantly adapt and expand our areas of practice to meet clients' needs.

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Tanzania

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Population:	56.1m (UN estimate – January 2017)
GDP per capita:	US$3,100 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 7.1% (CIA Factbook – 2014-2016)
Official languages:	Swahili and English
Transparency International rating:	Ranked 116/176 (2016 Report)
Ease of doing business ranking:	Ranked 132/190 (2017 Report)

Type of legal system	Based on English common law system, Islamic law and African customary law
Signatory to NY Convention	Yes (13 October 1964)
Signatory to ICSID Convention	Yes (10 January 1992)
Member of COMESA, OHADA, SADAQ, EAC	SADC and EAC
Signed up to OECD Transfer Pricing Guidelines	Follows the OECD Guidelines
Bilateral investment treaties	Tanzania is a party to several BITs/TIPs including with China, the UK and the EU

Comfort Alenyo Kitula, Sophia Issa Jaffari and Jackline Silaa provide an analysis of policies which affect foreign investment across different industries in Tanzania

Tanzania

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

All land in Tanzania is public land vested in the President as trustee for citizens of Tanzania. 'Freehold' ownership does not exist and the law only recognises the following rights of use over land:

- right of occupancy;
- customary right of occupancy;
- Tanzania Investment Center (TIC) leasehold agreement (derivative title); and
- lease (long-term or short-term).

Section 19 of the Land Act prohibits a foreigner from owning land except for investment purposes by way of a derivative right (which means a right to occupy and use land created out of a right of occupancy) issued by the TIC.

There are no restrictions with respect to foreigners leasing land in Tanzania.

The government has developed the National Land Policy, 2016 which is not yet in force (the Policy). The Policy focuses on land tenure and administration, legal and institutional framework and the monitoring and evaluation framework of land, including land held for investment purposes. It notes that large parcels of investment land are allocated regardless of proven ability for development, leading to large areas remaining undeveloped. To facilitate optimal utilisation of land, the Policy recommends that the government should formulate a series of detailed reforms which would potentially affect investment in land.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

Foreigners who want to work in Tanzania are required to obtain work and residence permits. Labour and immigration authorities usually decline applications for permits where local skills are available to meet those requirements.

The Non-Citizens Employment Regulations Act 2015 requires an employer who intends to employ a foreigner to apply and obtain a work permit from the Commissioner of Labour before such employee can work in Tanzania.

There are four categories of work permits, of which three are relevant to investors:

- Class A work permits: issued to investors and those who are self-employed.
- Class B work permits: issued to foreigners who undertake a prescribed profession, including medical/health care professionals, experts in oil and gas, and teachers/university lecturers in science and mathematics.
- Class C work permits: issued to foreigners who undertake other professions other than the prescribed professions.

Upon receipt of a work permit, the employee through his employer must obtain a residence permit from Immigration Services.

The residence permit required depends on the type of work that the foreigner will undertake. There are three categories of resident permits, which are issued with reduced fees for East African Community citizens and the Tanzanian diaspora, of which two are relevant:

- Class A residence permits: issued to investors in trade, professions and industry.
- Class B residence permits: issued to employees of Tanzanian entities.

The classifications of work permits do not necessarily correspond to the same categories of residence permits.

3. What are the restrictions on redundancies and any applicable compensation?

Section 36 of the Employment and Labour Relations Act, 2004 (the ELRA) and rule 3 of the Employment and Labour Relations (Code of Good Practice) Rules 2007 (the ELR) governs termination of employment, including redundancies.

The ELR provides for the lawful termination of employment contracts under common law including by agreement, including fixed-term contracts; automatic termination, for example, on the employer's death or closure of the employer's business, and on retirement; resignation; and constructive termination.

The termination of a contract must:

- comply with the termination provisions of the contract;
- comply with provisions concerning notice, severance pay, transport to the place of recruitment and payment;
- follow a fair procedure; and
- be based on a fair reason on a balance of probabilities.

It is unlawful for an employer to terminate employment unfairly. Termination would be considered "unfair" if the employer fails to prove the following:

- a valid reason for termination and that such

reason is fair – including those based on operational requirements (defined below) of the employer; and
- that the employment was terminated in accordance with a fair procedure, which must be followed before termination takes place.

Depending on the kind of reason given for such termination, the burden of proof lies with the employer.

Reasons that may justify termination include redundancy-related factors, among other reasons, such as performance or ill health, including operational requirements, defined as a requirement based on the economic, technological, structural or similar needs of the employer.

Section 42 of the ELRA provides that an employer shall pay severance pay of at least seven days' basic wage for each completed year of continuous service up to a maximum of 10 years, subject to exceptions relating to misconduct, capacity, compatibility or the operational requirements of the employer, and other individual exceptions.

The ELRA provides for additional payments to be made on termination of employment, including annual leave, payments in lieu of notice, severance pay and the like.

There is no maximum cap for unfair dismissal. If an arbitrator or the Labour Court finds that termination is unfair, they may order the employer to:
- reinstate the employee without loss of remuneration during the period that the employee was absent due to the unfair termination;
- re-engage the employee on any terms that they may decide; or
- pay compensation of not less than 12 months' remuneration.

Compensation ordered under the ELRA is additional to, and not a substitute for, any other amounts to which the employee may be entitled.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

The Companies Act, 2002 (the CA) does not set out restrictions on the shareholding structure and appointment of foreign directors to the board of local companies. However, there are industry-specific restrictions, for example, in specific investment sectors, as detailed below.

5. Are there any specific legislative requirements, and if so, what are they?

There are industry-specific restrictions, for example, in specific investment sectors, such as:
Telecommunications licences: to hold a content services licence for free-to-air broadcasting, a company must have at least 51% of its shares held by Tanzanians and listing is not required. For network facilities, network services or application services licences, a minimum of 25% local shareholding must be obtained through listing on the Dar es Salaam Stock Exchange (the DSE) as an on-going obligation during the life of the licence.
Insurance: Not less than one third of the shareholding or voting right of the issued share capital of an insurer must be owned by Tanzanian citizens and one third of the directors must be Tanzanian. One third of the directors must be unaffiliated directors.

Engineers: Engineering companies are required to have majority of shares (51%) held by Tanzanians if they wish to be considered as local engineering companies, and 51% of those shares must be held by engineers registered with the Engineers Registration Board.

Contractors: Construction companies are required to have majority of shares (51%) held by Tanzanians if they wish to be considered as local contractors.

Mining: Certain categories of licences for mining are reserved for Tanzanians. Small-scale mining licences (primary mining licences) are only granted to Tanzanians. Only Tanzanians may mine for gemstones (although there are some exceptions in areas requiring specialised skills, technology or a high level of investment). In such an instance, foreigners can enter into a joint development agreement and shall be provided relevant licences if the participating shares are not more than 50%. Special mining licences for large-scale mining operations of not less than USD 100 million require a 30% local shareholding to be obtained through listing on the DSE.

Shipping agents: No person shall be registered and licensed as a shipping agent unless that person is Tanzanian or is a Tanzanian-registered company with 50% of the share capital held by a Tanzanian citizen. Certain miscellaneous port service licences require a 100% Tanzanian shareholding.

Ground handling services at airports: No undertaking shall provide airport ground handling services (excluding fuelling and defueling and

including storage), unless its principal place of business and its registered office are located in Tanzania, and Tanzanians own at least 35% of total shares.

The Tanzanian Ministry of Energy and Minerals produced a local content policy for the oil and gas industry in 2014 which reportedly received Tanzanian Cabinet approval in May 2015, although this is not yet in force.

The new Petroleum Act 2015 (PA) has introduced un-tested (and in many cases unclear) new local content requirements for the Tanzanian petroleum industry. The PA suggests that when considering a licence grant or renewal, the applicant should meet a minimum local shareholding of 25% of its participating shares held by Tanzanians.

There may also be requirements to obtain other specific ministerial/government consent for investments in certain sectors such as oil and gas, mining, insurance, telecommunications, banking, fertilisers, etc.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Yes, there are restrictions on the importation of raw materials and goods into Tanzania as provided under the Imports Control Act (Cap 276) (ICA).

The ICA prohibits importation of any goods into Tanzania without an import licence issued by the imports controller, except if authorised by an open general licence (OGL) issued by the imports controller or his duly appointed representatives. Pursuant to the OGL, all goods which have not been specified in the first schedule do not require a specific import licence in order to import them into Tanzania.

Under the first schedule, goods that require an import licence for health reasons and security reasons, as well as luxury items, are listed.

Upon receipt of an import licence application, the imports controller may refuse to issue the import licence or may decide to issue the same imposing terms and conditions.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Tanzanian companies may hold foreign currency amounts with local banks. Repayment of loans and payment of dividends to foreign entities is also permitted. However, any loan made by a non-resident to any person in Tanzania should be registered with the Bank of Tanzania (the BoT) and be issued with a debt record number (DRN). Investment by residents in foreign capital assets and the obtaining of foreign long-term debt must be approved by the BoT through a registered financial institution.

There are certain transactions subject to control, such as where any payment is made in Tanzanian shillings to or for the credit of a person resident outside Tanzania or foreign lending operations in favour of non-residents, which would require approval from the BoT.

Furthermore, the operation of offshore foreign currency accounts by residents and participation by non-residents in domestic money and capital markets are restricted and require approval of the BoT except for residents of the East African Community.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Tanzanian law allows for the taking of security over a wide variety of assets and property.

Security can be created over immovable property, stocks and shares, cash, insurance policies, benefits of contracts, book debts and rental income, ships and aircraft, negotiable instruments, future interests, including unvested ones, although those securities will be classified as equitable security as opposed to a legal security and, upon perfection, will become a legal security.

The concept of a Security Trustee is recognised in Tanzania and effective charges can be created in their favour for an identified pool of beneficiaries.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

The laws and regulations are:

- The Public Procurement Act, 2011;
- The Public Procurement (Amendment) Act, 2016;
- The Public Procurement Regulations, 2013;

- The Public Private Partnerships Act, 2010;
- The Public Private Partnerships Regulations 2011; and
- Public Procurement Selection and Employment of Consultants) Regulations, 2015.

The government authorities, divisions and departments that oversee the procurement projects and PPPs are:

- Public Procurement Regulatory Authority (PPRA) (www.ppra.go.tz).
- PPP Centre (established under Section 4 of the PPP Act). This is part of the Office of the Prime Minister (www.pmo.go.tz).
- Contracting Authorities, being any Ministry, government department or agency, local government authority public or statutory corporation.
- Public Private Partnership Technical Committee.
- Ministry of Finance (www.mof.go.tz).

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes. Mergers in mainland Tanzania are governed by the Fair Competition Act, 2003 (FCA), which provides that a merger must be notified to the Fair Competition Commission (the Commission) if it involves assets above TZS 800 million. A merger is prohibited if it creates or strengthens a position of dominance in the market.

A merger is defined in the FCA to mean an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of shares, a business, or an asset of a business in Tanzania.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes. Section 8 (1) of the FCA provides that a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition. Furthermore, a person with a dominant position in a market (35% market share) shall not use his position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition.

Irrespective of whether an agreement is seen to appreciably prevent, restrict or distort competition and relates to a non-dominant position in the relevant market, the FCA prohibits a person (natural or legal) from making or giving effect to an agreement if the object, effect or likely effect of the agreement is price fixing between competitors, a collective boycott by competitors, leads to output restrictions between competitors or collusive bidding or tendering. Such an agreement/arrangement would not be enforceable in Tanzania except to the extent that the offending provisions will be severed from the other provisions of the agreement.

In terms of how actively this is enforced, recently, there have been investigations into various sectors such as the cement industry and the tobacco industry for such agreements/arrangements, but as these are on-going we are not yet aware of the outcome.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Copyrights

Copyrights are regulated by the Copyright and Neighbouring Rights Act (Cap 218) (CNRA) under the Copyright Society of Tanzania (COSOTA). Copyright protection is available to original literary and artistic works of authors who are nationals of, or have their habitual residence in, Tanzania and also includes protection of performance, phonograms, and broadcasts.

Patents

A patent is a right granted to the owner of an invention that prevents others from making, using, importing or selling the invention without permission.

A patentable invention can be a product or a process that gives a specific solution to a problem in the field of technology as has been defined under section 7 of the Patents (Registration) Act (the PRA). Section 8 of the PRA provides that an invention is patentable if it is new, involves an inventive step and is industrially applicable.

Trademarks

Trademarks in Tanzania are governed by the Trade and Service Marks Act. Trademark registration is done on the basis of the trademark classes provided under international classification according to the Nice Agreement of 15 June, 1957 (the Nice Classification).

The Cybercrimes Act, 2015 provides that a person shall not use a computer system with intent to violate intellectual property rights protected under any written law and provides for penalties. It defines

intellectual property rights to mean the rights accrued or related to copyrights, patents, trademarks and any other related matters.

Tanzania is a member of the African Regional Intellectual Property Organization (ARIPO).

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Income tax is governed by section 6 of the Income Tax Act, 2004, which provides that the chargeable annual income of a person (natural or legal) from any employment, business or investment shall be:

- in the case of residents, worldwide income, irrespective of the source of income;
- in the case of a non-residents, income that has a source in Tanzania; or
- in the case of a resident corporation which has perpetual unrelieved losses, the annual turnover of such corporation.

A person must calculate income or loss from any employment, business or investment with a source in Tanzania separately from those with foreign sources. In the event the businesses are resident corporations, they will be taxed on worldwide income. If they are not resident in Tanzania, income that has a source in Tanzania will be subject to tax.

All companies irrespective of their turnover are required to prepare annual audited financial statements, and these are required to be filed with the Tanzania Revenue Authority (the TRA) within six months from the end of the accounting period and must be prepared by a Certified Public Accountant approved by the National Board of Accountants and Auditors.

Furthermore, a statement which shows the estimated tax payable in each year of income must also be filed with the TRA and paid quarterly.

Pursuant to the Value Added Tax Act, 2014, registration for VAT is mandatory for every person attaining the threshold of TZS 100 million over 12 months or TZS 50 million in a period of six months. Professional service providers are required to register for VAT whether they attain the threshold or not. All VAT returns must be filed on the 20th day of each month for the previous month.

Pursuant to section 12 (1) of the National Social Security Fund Act (Cap 50), the employer and employee are required to contribute 10% each of the employee's gross remuneration to the NSSF. Alternatively, an employer in the private sector may opt to register under the PPF pursuant to the Parastatal Organisations Pensions Scheme Act (Cap 372). Returns must be filed with the relevant fund within one month of the payment of the previous month's salaries.

Section 14 (1) of the Vocational Education and Training Act provides that every employer with four or more employees must pay a skills and development levy calculated at 4.5% of monthly gross emoluments. Returns must be filed within seven days of the subsequent month.

Pursuant to the Workers' Compensation Act, 2008, private sector employers are required to contribute 1% of each employee's gross emoluments on a monthly basis to the Workers Compensation Fund. Returns must be filed on the last day of each month for the previous month.

Personal income tax, known as pay as you earn, is withheld by the employer and is payable by persons resident in Tanzania on a sliding scale ranging between 9% and 30% depending on the quantum of the income. This must be paid and filed with the TRA within seven days of the subsequent month. The total income of a corporation is taxed at the rate of 30%, as accounted for on an accrual basis.

According to section 12 (2) of the ITA, thin capitalisation deduction is restricted to the interest portion in respect of debt that does not exceed a 7:3 debt to equity ratio.

The Income Tax (Transfer Pricing) Regulations, 2014 (the Regulations) apply to transactions between resident and non-resident entities, as well as between resident entities and a branch and the foreign company. They require taxpayers to prepare contemporaneous transfer pricing documentation and records before the annual tax return is filed. Transfer pricing documentation should be provided within 30 days of request by the TRA. Further, there is an emphasis on the need for taxpayers to demonstrate how intra-group services confer economic benefits to their operations.

Withholding tax is payable on dividends, interest, royalties, rental income service fees and management fees, and rates differ between residents and non-residents.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Transactions involving foreign exchange are permitted in Tanzania, but must be conducted through a licensed financial institution. A Tanzanian company may hold foreign currency amounts with banks in Tanzania. Repayment of loans and payment of dividends to foreign entities

is also permitted. Any money earned by foreigners whether by way of dividends or investment can be repatriated.

Investment by residents in foreign capital assets and the obtaining of long-term debt must be approved by the BoT. Certain transactions are still subject to control. For example, restrictions apply where any payment is made in Tanzanian shillings to or for the credit of a person resident outside Tanzania, any such transaction would require approval from the BoT.

Participation by non-residents in domestic money and capital markets are restricted and require the approval of the BoT, except for residents of the EAC.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

Foreign judgment enforcement in Tanzania is governed by the Reciprocal Enforcement of Foreign Judgement Act (REFJA). They are enforceable if they originate from countries whose courts are recognised as superior courts. Currently, courts of the Lesotho, Botswana, Lanca, Mauritius, New South Wales, Zambia, Seychelles, Somalia, Zimbabwe, Kingdom of Swaziland and the United Kingdom are recognised under REFJA and as such judgments of superior courts from those countries would be enforceable in Tanzania.

Under the REFJA, for a foreign judgment to be recognised by Tanzanian courts it has to originate from the superior courts listed above and be registered in the High Court of Tanzania (the High Court). The REFJA Rules set out the procedures for registration, which should be done within six years from the date of the judgment save where subject to appeal in which case the six-year period runs from the date of the determination of the appeal. Even after registration, a judgment can be set-aside on the following grounds:

- if the judgment is not a judgment to which the REFJA applies or was registered in contravention of the REFJA;
- if the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- if the judgment debtor, did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- fraud;
- if the judgment is contrary to public policy in the country of the registering court; or
- if the rights under the judgment are not vested in the person by whom the application for registration was made.

A foreign judgment from a country not recognised under the REFJA would not be recognised, and for enforcement, a fresh suit would have to be instituted.

Arbitration in Tanzania is governed by the Arbitration Act (AA). Section 16 provides that an arbitral award shall be recognised as binding and, upon being filed in the court, shall be enforceable as if it were a decree of the court. Section 29 provides that a foreign award shall be enforceable in the High Court and that any such award shall be treated as binding.

Furthermore, Tanzania is a signatory to the New York Convention, as well as a member of several international organisations including the International Centre for the Settlement of Investment Disputes (ICSID) and Multilateral Investment Guarantee Agency (MIGA).

As a result, arbitration awards granted in member countries can be enforced in Tanzania provided that the relevant procedure is followed and:

- the award was made pursuant to a valid arbitration agreement under relevant law and is enforceable in the relevant country;
- the award was made by a tribunal agreed upon by the parties or constituted as agreed upon by the parties;
- the award was made in conformity with the law governing the arbitration procedure;
- the arbitration is final in the relevant country;
- the subject matter is one that may lawfully be referred to under the law of Tanzania; and
- in any event, the enforcement is not be contrary to public policy or the law of Tanzania.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Yes. Under Tanzanian law, an express and clear provision in the contract that defers any dispute to arbitration before any litigation is commenced must be complied with and a court in Tanzania would be bound to uphold such a provision in a contract.

Any arbitration provisions stipulated in the contract would have to be complied with prior to a Tanzanian court hearing the matter, should it have jurisdiction to do so, and this is also supported by the Judicature and Application of Laws Act. This principle has been given further support and confirmed by the Court of Appeal in the *Thaker Singh* litigation in 2005.

The AA does not cover interim measures; an arbitration clause may include provisions relating to measures such as injunctive relief, security for costs, pre-arbitration disclosure of documents or preservation of evidence or pre-emptory orders.

However, unless otherwise agreed to by the parties, the court has, for the purposes of and in relation to arbitral proceedings, the same power in relation to the making of orders regarding matters under consideration as it has for the purposes of and in relation to legal proceedings.

Those matters include the granting of an interim injunction or the appointment of a receiver. However, the courts do not have exclusivity over the arbitral tribunal in terms of interim measures.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

The CA requires that execution by a company be by two directors or a director and the company secretary or by affixing of the common seal in the presence of two directors.

From a practical perspective, Tanzanian regulators will not accept documents that have not been witnessed by two directors or a director and the company secretary and the company seal affixed thereon.

In the case of execution by an individual or authorised signatory on behalf of the company, he/she should be authorised by a board resolution or power of attorney issued by the company. In addition, his/her signature should be witnessed by a notary public or Commissioner for Oaths.

Furthermore, in order for a document to be adduced into evidence it must be stamped with the requisite amount of stamp duty as set out in the Stamp Duty Act.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

There is a new Industrialisation Policy which we have not sighted which may include changes that may affect foreign investments.

As stated above, the Land Policy is likely to bring in changes to the way investors will be able to hold and obtain land. As this is the first draft, it is yet to be seen what amendments will be made and what the final Policy will look like. ■

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Zambia

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Population:	17,237,931 (UN estimate – 2017)
GDP per capita:	USD 3,900 (CIA Factbook – 2016)
Average GDP growth over previous 3 years:	Average 3.7% (CIA Factbook – 2014-2016)
Official languages:	English
Transparency International rating:	87/176 (2016 Report)
Ease of doing business ranking:	98/190 (2017 Report)

Type of legal system	English Common Law and customary law
Signatory to NY Convention	Yes (14 March 2002 (accession))
Signatory to ICSID Convention	Yes (17 June 1970)
Member of COMESA, OHADA, SADAQ, EAC	COMESA, SADC
Signed up to OECD Transfer Pricing Guidelines	No, but has observer status and follows OECD TP Guidelines
Bilateral investment treaties	Zambia has a number of BITs such as with China, Belgium, Luxembourg, Cuba, Finland, Egypt, Greece, France, Germany, Ghana, Italy, Mauritius, Netherlands, Switzerland and the United Kingdom

Sydney Mulengeshi, Brenda Chanda and Vanessa Chitupila assess the current regulatory environment governing foreign investment in Zambia, and reflect on recent and forthcoming legislative changes

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Yes there are restrictions on foreign entities holding interests in land in Zambia. Under Zambian law, particularly section 3 (3) (d) of the Lands Act, a foreign entity can own land only if the company is registered in Zambia under the Companies Act and if 75% of the shareholding is held by Zambian citizens.

The exception to the foregoing provision is under section 3 (3) (b) of the Lands Act, which provides that land will be alienated to a non-Zambian if they are an investor within the meaning of the Investment Act (now repealed and replaced by the Zambia Development Agency Act 2006). This position has been augmented by the provisions section 64 of the ZDA Act, which states that where a company holds an investment licence issued by the Zambia Development Agency, the company can own property relating to its operations irrespective of its shareholding if it has an investment licence.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

There are conditions in place for the hiring of foreign workers in Zambia. Employers seeking to employ foreign employees are required to apply for employment permits for such employees from the Immigration Department as provided for under section 28 of the Immigration and Deportation Act 2010. Such permits are usually issued for an initial period of one year with provision for subsequent extensions or renewals for up to a period of five years. The Immigration Act provides the conditions which must be satisfied and further that an employment permit will only be issued to a foreign worker who is not a prohibited immigrant, belongs to Class A specified in the First Schedule of the Act, is employed by the Zambian government or a statutory body, or is a volunteer or missionary.

Additionally, section 65 of the ZDA Act provides that a foreign entity that holds an investment licence and invests a minimum of USD 250,000 and employs a minimum of 200 employees shall be entitled to work permits for up to five expatriate employees and a self-employment permit.

3. What are the restrictions on redundancies and any applicable compensation?

There are no restrictions on redundancies and the applicable compensation. The provisions in section 26B of the Employment Act relating to redundancy do not apply to written contracts. Therefore, the question of redundancy is decidedly a contractual matter between the employer and employee to be contained in the employment contract. However, in the event of an oral contract, the provisions of section 26B of the Employment Act would be applicable. Therefore, if the contract does not specifically state the applicable compensation, the usual compensation is payment of two months' basic salary for every completed year of service.

Investment and Local Content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

Yes, there are general regulations governing foreign investment in Zambia, the operation of which depends on the manner in which the foreign entity wishes to invest. The Zambia Development Agency (ZDA) Act and its provisions will apply to foreign companies wishing to invest in Zambia, under an investment registration (formerly investment licence). It is important to state that the ZDA Act does not require that members of the foreign entity applying for an investment registration be Zambian or that all be Zambian residents in order to be granted the licence. However, there is a requirement under the Companies Act requiring all companies to have at least 50% of the directors to be resident in Zambia.

The Companies Act also applies in instances where the foreign company has been registered in accordance with the Companies Act at the Patents and Companies Registration Agency (PACRA). It must be stated that unlike the ZDA Act, where a foreign company is being registered in Zambia, the Companies Act section 248 (1) and (2) requires that the foreign owned or controlled companies must have at least one local director who is a Zambian resident out of a minimum number of two directors in a company.

Furthermore, as has been stated in question

1 above, a company seeking to invest by owning land in Zambia generally needs to be majority-owned by Zambian citizens as provided under Section 3 (3)(d) of the Lands Act. However, where the company is wholly owned by foreign entities or foreign individuals, it must obtain an investment registration for it to own land in its own right.

5. Are there any specific legislative requirements, and if so, what are they?

Yes there are specific legislative requirements, including:

i) Sections 68 and 69 of the ZDA Act, in relation to the criterion for the granting of an investment registration in Zambia.
ii) Sections 245 and 248 of the Companies Act, which outline the criterion to be satisfied in the registration of a foreign company in Zambia.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Currently, there are no restrictions on the importation of raw materials in Zambia. However, raw materials are subject to import/customs duty tax at the rate of 0-5% for capital equipment and raw materials. Please note that customs duty is charged on the customs value (CIF) of the goods being imported. However, there are some restrictions in certain aspects of the food industry such as restrictions placed on the importation of poultry or related products.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

There are currently no restrictions on the purposes for which money can be lent. However, where the government borrows from funds emanating multilateral or bilateral agreements, there may be restrictions under the agreements on how those funds may be utilised.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Various security interests, both over movable and immovable assets, are recognised by the law in Zambia and most of them can be registered. Security interests can be created over shares in a company by way of pledge of shares, over immovable property by way of mortgage, over stock by way of floating charge, and over specific moveable property like equipment and machinery by way of specific charge. Security interests can also be created by way of account charge. In a project finance transaction, security interests can be created for the benefit of the lender by way of assignment of the project company's interest in the project contracts.

Section 99 of the Companies Act outlines various charges that can be created over the property or undertaking of a company to include, inter alia: a charge for the purpose of securing any issue of a series of debentures; a charge on uncalled share capital of the company; a floating charge on the whole or part of the undertaking or property of the company; and a charge in land, wherever situated or any interest therein.

The law recognises the concept of trust and also the role of a Security Trustee. The appointment of a Security Trustee is a matter of contract. Sections 88-90 of the Companies Act, contains provisions relating to trustees for debenture holders.

A Security Trustee will usually be appointed from among the syndicate participants in a syndicated lending and will hold the security for the loan on behalf of the participating lenders.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit, division or department (such as a PPP unit) within Government?

PPPs in Zambia are provided for and governed by the provisions of the Public Private Partnerships Act 2009 (hereinafter referred to as the "PPP Act"). The Act was enacted to promote and facilitate the implementation of privately financed infrastructure projects and effective delivery of social services by enhancing transparency, fairness and long-term sustainability, and removing undesirable restrictions on private sector participation in the provision of social sector services and the development and operation of public infrastructure.

Section 4 of the PPP Act establishes the Public-Private Partnership Unit (hereinafter referred to as the "PPP Unit") which is responsible for the

ensuring the proper implementation, management, enforcement and monitoring of any agreement and the reporting by a concessionaire on an agreement, and for the implementation of the provisions of the PPP Act. The functions of the PPP Unit are set out under section 5 of the PPP Act, and it must be noted that PPP Unit is under the supervision and control of the Ministry of Finance but is currently based at the State House.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, in Zambia, there is a merger control regime in place. Mergers and acquisitions in Zambia are legally governed by the provisions of the Competition and Consumer Protection Act 2010 (the Competition Act), particularly Part IV of the Act. Under the Competition Act, with regards to the definition of a merger, it is defined as occurring 'where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses'. The Competition and Consumer Protection Commission (CCPC) is responsible for conducting merger regulation in Zambia.

The Regulations contained in Statutory Instrument No. 97 of 2011, particularly regulation 8, set out the thresholds for notification and provide that the notification threshold applies to the combined turnover or assets, whichever is higher, in Zambia of the merging parties. The combined assets or turnover, whichever is higher, must be "at least fifty million fee units (approximately ZMW15,000,000) (About USD1,600)" in their latest financial year, for which figures are available. Furthermore, an enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and review as far as the operation has an effect on competition in Zambia. In such a case, the turnover or assets that will be assessed will be those of an enterprise present or with a presence in Zambia.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

Yes there is. In Zambia, as stated above, the Competition Act is the legislation that deals with matters of abuse of dominance, and other anti-competitive conduct. The Act was enacted to safeguard and promote competition in Zambia, protect consumers against unfair trade practices.

The CCPC is the regulatory body tasked with ensuring compliance with the provisions of the Competition Act, and has in place a complaints mechanism through which consumers and business entities can report any acts that may be in contravention or violation of the provisions of the Competition Act. The Competition Act requires that the CCPC conduct investigations of the alleged conduct before formally charging the party in breach. Where a party is aggrieved with the decision of the CCPC, an appeal can be brought before the Competition and Consumer Protection Tribunal, which was established under the Competition Act.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

There are numerous laws that provide for intellectual property rights in Zambia, but noteworthy are:

i) The Industrial Designs Act 2016 was enacted to provide for, *inter alia*, the creation of designs and development of creative industries through enhanced protection and utilisation of designs, the registration and protection of designs, the rights of proprietors of registered designs and for the restriction, publication and communication of registered designs.

ii) The Copyright and Performance Rights Act 1994 was enacted for the protection against the infringement of copyrights and performance rights as set out in the Act.

iii) The Patents Act was enacted for the protection of patents in Zambia against infringement or violations and further created the Patents Office where all patents are applied for and registered.

iv) The Trade Marks Act was enacted for the protection of trademarks against infringement or violations, and further provides for the registration of trade marks in Zambia through the Trade Marks Office that was established under the Act.

In addition to the above legislation, numerous other legislations have been enacted to provide for other forms of intellectual property, such as Merchandise Marks Act and the Plant Breeders Rights Protection Act 2007.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Taxes payable by businesses in Zambia include corporate tax, VAT, income tax on employee emoluments, Property Transfer Tax on the transfer of property such as land or shares. Withholding taxes are payable on rent income and on income earned by consultants. Corporate tax is calculated at 35% of the net profit while VAT is at 16% of chargeable income. Property Transfer Tax is charged at the rate of 5% of the value of property subject of disposal. Income Tax on employee emoluments, termed Pay As You Earn (PAYE) is calculated based on thresholds set by statute, the Income Tax Act. These are as stated under question 18 (vi) below.

Withdrawing Tax is at 10% on rental income and 15% on dividends and consultancy services which includes legal services.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

Subject to payment of local applicable and taxes due, there are currently no foreign exchange control rules. A Statutory Instrument was introduced sometime in 2013 but was later revoked.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

The courts are supportive as to the enforcement of arbitral awards, as detailed in our answer to question 16, below, and regularly enforce arbitration awards, leading to clearly understood precedents. Zambia has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as domesticated into Zambian legislation by the Arbitration Act, while the Investments Disputes Convention Act provides the domestic legislative basis for recognising awards under the ICSID Convention. It has also signed a number of regional protocols, in respect of the SADC and the COMESA investment agreements.

The enforcement of foreign judgments is recognised in Zambia under the Foreign Judgments (Reciprocal Enforcement) Act Chapter 27 of the Laws of Zambia (the Foreign Judgments Act), which provides for the enforcement in Zambia of judgments given in foreign countries which accord reciprocal treatment to judgments given in the Zambian courts and further for facilitating of enforcement in foreign jurisdictions of judgments given in the Zambian courts. However, it is imperative to note that before a foreign judgment can be recognised and registered in Zambia it has to meet several conditions prescribed by the Foreign Judgment Act, such as:

a) **Reciprocity** – The High Court of Zambia, being the only court where a foreign judgment can be registered, cannot register a foreign judgment unless the provisions of the Foreign Judgment Act have been extended by Statutory Order to the country in which the judgment has been obtained.
b) **Final, conclusive, and enforceable judgment** – The judgment sought to be registered must be a final and valid judgment, i.e., that it is not subject to alteration or variation by the court which pronounced it.
c) **Judgment should not be time barred** – Under the Foreign Judgments Act, a period of six years from the delivery of the judgment should not have elapsed at the time of registration.
d) **The foreign court must have had jurisdiction** – Which question is determined in accordance with the Foreign Judgments Act.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

In relation to arbitral awards, arbitration is highly encouraged by the courts in Zambia, with courts now more inclined to allow the parties to pursue resolution of disputes through arbitration. The Arbitration Act 2000 is the law that governs arbitration in Zambia; under this Act, the role of the courts in arbitral proceedings has been set out as supervisory. Section 11 (1) of the Arbitration Act empowers a party to arbitral proceedings to apply for interim measures, while section 11 (2) sets out the nature of interim reliefs that the court can grant discretionarily and upon application by a party. It must be stated that under the Arbitration Act, the High Court for Zambia is the only court where a party can apply for interim relief in arbitral proceedings. Further, where a matter commenced pursuant to an agreement or contract that has an arbitral clause, the High Court has no jurisdiction to determine the same and such matter will always be referred to arbitration for resolution.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are generally no specific signing procedures. However, any document executed outside the jurisdiction is required to be authenticated for it to be enforceable in the Republic. The usual way of authentication is to take the document to any Zambian Mission overseas for that purpose. The process of authentication is done by authority of the Authentication of Documents Act. Further, for a document to be used under local law, it is imperative that the signing of the said document should have been witnessed by a Notary Public with a notary seal affixed to it and the person performing notarial function should sign and state his or her name and place of the signing.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Yes there are several legislative and policy developments relating to investment that are noteworthy:

i) The Financial Intelligence Centre (Prescribed Thresholds) Regulations S.I No. 52 of 2016 prescribes thresholds for specific transactions in the normal course of business specifically in relation to customer due diligence for specific transactions. It also provides for wire transfer thresholds as follows:

ii)
   a) Individuals – USD 5,000 or the kwacha equivalent.
   b) Corporate entities or legal arrangement – USD 100,000 or the Kwacha equivalent.

iii) The Mines and Minerals Development (Amendment) Act 2016 adjusted mining royalties on production of minerals payable by mines from 9% for open cast mining operations and 6% for underground mining operations of the norm value of base or precious metals and the gross value of gemstones or energy minerals produced or recoverable under the licence.

iv) Financial Intelligence Centre (Amendment) Act 2016, under Section 5, defines the duties of the Financial Intelligence Centre (FIC) in relation to suspicious transactions by individuals and corporate entities.

v) Kafue District in Lusaka Province was declared an iron and steel facility zone with the intention to encourage investment in the iron and steel industry.

vi) The government intends to invest in other sources of diversified sustainable energy sources, i.e. solar, nuclear, oil and gas. Zambia's main source of energy is hydro-electric energy which has recently proved not sustainable long term.

vii) There is therefore development of Renewable Energy Policies such as the Renewable Energy Feed In Tariffs which are meant to spur investor interest in the energy sector for private investment.

viii) Development of Economic Zones such as the Lusaka East Economic, Lusaka Multifacility Economic Zone and the Chambishi Economic Zone on the Copper Belt.

ix) Formation and clustering of agricultural blocks and concessions, such as the Mkushi Farming Block and the Mumbwa Big Concession.

x) Creation of a Fish Farming Fund under the Ministry of Food and Fisheries to spur farming in this sector to cover the country's perennial deficit in fish.

xi) The threshold for Pay as You Earn (PAYE) has been revised to the effect that the exempt threshold for PAYE has been increased from K3,000 to K3,300 per annum, and under the new PAYE regime, a person's income will be taxed as follows:
   a) K0 – K3,300 taxed at 0%.
   b) K3,300.01 – K4,100 taxed at 25%.
   c) K4,100.01 – K6,200.00 taxed at 30%.
   d) Above K6,200.00 taxed at 37.5%.

xii) The Income Tax (Amendment) Act No. 11 of 2016 fixed the corporate/income tax payable from mining operations. ■

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AB & David Zambia is a multi-specialist business law firm, committed to the provision of client-focused and innovative solutions. At AB & David, our focus is simple: to ensure businesses and projects succeed in Africa by helping them minimise the risks associated with doing business in Africa. Our extensive experience is an excellent resource that helps you do business in the complex environment of Africa. Our ability to reduce the bureaucracy and minimise your project and investment risk is priceless. AB & David's practice is organised around six practice areas; Natural Resources and Extractive Industries, Corporate and Finance, Energy, Infrastructure and PPPs, Dispute Resolution and Employment, Government Business and Regulation, and Intellectual Property, Telecoms and Technology.

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Sector Overviews

African Law & Business

Special Report on
Investment in Africa
2017

Finance

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Anina Boshoff and Shalini Bhuchar of Hogan Lovells give an indicative overview of the key trends affecting the African finance market

It is almost impossible to identify trends that are common to each of the 54 countries that make up the African continent. That said, the effects of low commodity prices, political instability and liquidity constraints continued to be felt across the continent in 2016. These challenges were compounded by recent uncertainty in Europe and China and by the US presidential election, all of which contributed to somewhat suppressed activity in the African loan and bond markets. Looking forward, however, 2017 presents ambitious initiatives at certain financial institutions and regulatory developments which are aimed at facilitating growth in the financial sectors of those economies in the coming years.

Liquidity

The domestic markets in the vast majority of African countries lack liquidity due to their size. In 2016, the unavailability of hard currency also reached a crisis point, especially in Nigeria where the Naira peg had been draining foreign

reserves since early 2015.

The loan markets responded to liquidity challenges with various new innovations. Many larger loan transactions included both USD and local currency tranches. An example of such a dual currency facility is the USD 500m syndicated facility for **Kenya Power and Lighting Company** (KPLC), arranged by **Standard Chartered Bank**, that closed in July 2016. The transaction allowed multiple currencies and multiple tenors and was backed by a World Bank guarantee.

Another innovation addressing the lack of liquidity came in the form of **Afreximbank's** USD 3.5bn counter-cyclical trade liquidity programme. Under this programme Afreximbank provides trade finance to African central banks and selected commercial banks with a view to bridging the trade finance gaps caused by economic shocks and reducing the likelihood of a continent-wide recession. The bank has also launched a further initiative through its IMPACT 2021: Transform Africa programme.

Debt funds (both African and non-African) have been increasingly active in assisting to plug the liquidity gap; diaspora funding also continues to play a part.

Political instability

There has been a general deterioration in the sovereign credit ratings of African countries over the past two years. 2016 saw the sovereign credit ratings of the Democratic Republic of Congo, Mozambique, Nigeria and Zambia downgraded. More recently, in early 2017, South Africa's long-term foreign credit rating was downgraded to below investment grade by both **Standard & Poor's** and **Fitch**.

Cooperation among development finance institutions (DFIs) has addressed uncertainty and other risks in Africa for many years by spreading the risk on large transactions among multiple DFIs. One of the more established initiatives is the Joint FMO-DEG office for Southern Africa which was established between the Dutch and German development finance institutions in 2011. The initiative focuses on joint investments in infrastructure, including renewable energy projects.

More recently, institutional investors have also been joining larger transactions as passive investors behind DFI's. One of the most encouraging recent developments in this regard was the launch, by the **International Finance Corporation** (IFC), of the MCPP Infrastructure initiative late in 2016. This USD 5 billion platform builds on the IFC's existing Managed Co-Lending Portfolio Program, but focuses specifically on syndicated loans in the power, water, transportation, and telecommunications sectors in developing economies.

Positive developments

Despite the headwinds, the continent has seen a significant increase in investment in private companies in 2016. Sectors that have enjoyed support include telecoms, infrastructure and power. Loan volumes in sub-Saharan Africa increased by around 20% (year on year) in 2016. Much of the increased volume can be attributed to South Africa, where large corporates have been borrowing to support strategies to externalise revenues.

The stand-out commercial loans in South Africa in 2016 included first, the syndicated USD 2.65 billion bridge loan raised by Sibanye Gold for its proposed 2017 acquisition of US palladium and platinum miner Stillwater Mining in which 16 banks took part.

Also of note was the funding for Ascendis' acquisition of international firms Remedica and Scitec, which included new debt facilities of EUR180m as well as an USD 30 million contribution from the IFC.

South African power utility, **Eskom** secured approximately ZAR 20 billion in loan facilities from the African Development Bank. These facilities included a senior unsecured unguaranteed ZAR facility; a USD guaranteed A loan (DFI tranche) and a guaranteed syndicated B loan from various commercial lenders. The facilities will be used to fund the company's general expansion programme.

IHS Netherlands Holdco, the holding company of **IHS Nigeria** issued a USD 800 million Eurobond in 2016. This was the largest high-yield corporate bond to be issued out of Africa and follows IHS' acquisition, earlier in 2016, of **Helios Towers**. IHS is the largest mobile telecommunications infrastructure provider in Africa, Europe and the Middle East. The bond issue enabled it to refinance its existing debt and finance a new towers building programme. This issue is a landmark transaction in Africa's bond market, which has long been dominated by sovereigns and supra-nationals.

Regulatory changes

In most African markets, pension funds continue to be the dominant investors in corporate bonds. In South Africa, important amendments to regulation 28, published under the South African Pension Funds Act, 1956, has introduced more flexibility in the types of investments that may be made by pension funds. More changes are envisaged, both under the Pension Funds Act

1956 and the Collective Investment Schemes Act, 2002.

In Nigeria, corporate bonds continue to be somewhat slow to the market with regulatory approvals for new bond and commercial paper issues taking up to five months. Yields also remain high, making corporate bonds expensive relative to sovereign issues. Despite this, the Nigerian corporate bond market has grown significantly over the past 12 years. Much of this can be attributed to positive changes in government policies and related laws and regulations.

The Pension Reform Act 2014 expanded the asset classes in which pension funds can be invested to include specialist investment funds and other financial instruments approved by the National Pension Commission. Although this has (and will continue to) stimulate volumes in the Nigerian corporate bond market, it is unlikely to improve liquidity given the mandates of pension funds to buy and hold.

Strong economic growth in Kenya in recent years has increased the local demand in various sectors, including real estate. To address the high cost of property development whilst stimulating access, Real Estate Investment Trust (REIT) regulations were published in 2013. The regulations provide for the development and construction REITs (only available to professional investors) and income REITs. Stanlib Fahari Income REIT became the first income REIT to be listed on the Nairobi National Securities Exchange towards the end of 2016.

A more controversial development in Kenya was the signing into law, in August 2016, of limits on bank lending and deposit rates. Lending rates are now capped at four percentage points above the central bank's benchmark rate and deposit rates may be no less than 70% of that rate. It is not possible to measure the effect of these limitations on Kenya's financial markets yet, but it is anticipated that liquidity may reduce and that smaller, high-risk borrowers may struggle to access funding.

South Africa is in the process of overhauling the legislation that governs its financial markets completely. The Financial Sector Regulation Bill, when promulgated, will introduce a "twin peaks" model of financial regulation, shifting South Africa from a relatively fragmented sectoral approach to a more functional approach. Although aimed generally at improving market conduct, the new regime should also allow consumers better and fairer access to financial products. In line with its G20 obligations, regulations have also been published to regulate trading in over-the-counter derivatives.

South Africa is a net exporter of financial services into the rest of Africa and we may well see some of the new regulatory principles being adopted by financial institutions in other countries in Africa as South African institutions seek regulatory consistency across the continent.

Looking ahead

At present, a relatively small portion of inward funding into Africa comes from the Middle East and Asia (excluding China and Japan). Given that investment in infrastructure fits comfortably within the ethos of Islamic finance, there should be an increase in funding from such regions. In April this year, Kenya's government outlined

steps to further develop and formalise Islamic funding products, particularly Islamic bonds.

The continent has already recently seen sovereign sukuk issues by Côte d'Ivoire, Senegal, South Africa and Togo. In terms of corporates, South Africa's electricity utility Eskom has expressed an intention to develop funding instruments that could be marketed to the Middle East and Asia and guidelines for sharia compliant instruments (including sukuks) have been published in Nigeria.

Low commodity prices, currency volatility, foreign exchange shortages and general pressure on liquidity will no doubt continue in 2017, but the debt capital and loan markets have already started adapting to these obstacles. It is very likely that we will see more dual currency funding transactions that allow for multiple tenors and yields and that more of these transactions will be supported by existing export credit agencies and other issuers of insurance cover and/or guarantees.

Institutional initiatives amongst DFIs, multilaterals and development aid agencies, as well as increasing activity from debt funds and diaspora products, will continue to boost liquidity. ■

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Natural resources

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Kevin Pietersen, Warren Beech and Nathan Searle, all partners at Hogan Lovells, assess the current state of the market for natural resources in Africa

The use of natural resources in Africa is a topic which receives international attention and is often the cause of many debates amongst role players in the global market. Although Africa is often regarded as a hub for mining activity, new projects are often stalled due to lack of capital.

Over the last year, the natural resources market in Africa has received publicity for many reasons, and it has become evident that volatility, cost-cutting and restructuring of major organisations have developed into common trends across all regions in Africa.

One trend is a lack of demand. Africa generally experienced a reduction in demand for its resources and a consequential decrease in commodity prices. On a number of occasions, the market has been reported to be volatile and performing below market expectations. Volatility

was seen, for example, among coal producers in South Africa with the price of coal reaching a 10-year low in January 2016, followed by a rapid increase and recovery in the market in the last quarter of 2016. Oil prices in 2016 dropped to their lowest level in over 20 years affecting the economies of Nigeria and Angola, both heavily reliant on oil exports.

Another trend was the urgent drive to reduce costs among some of the most established players in African natural resources. This drive is likely to continue throughout 2017 and is coupled with a need to utilise existing capital optimally to improve cash flow. This trend resulted in a need among miners to outsource various services to consultants and other skilled people. The trend also led to a reduction in expenditure on exploration activities in the oil and gas sector.

A third trend relates to capital. Capital investments in new and innovative technologies which improve productivity and efficiency will continue to be a focus amongst role players throughout the next year. This is an international and universal trend in the natural resources market, and is driven by the need to reduce environmental damage, increase efficiency and reduce costs.

There has also been a tendency to restructure existing organisations, not only aimed at reducing costs, but also at focusing on key core assets, and retaining and maintaining the existing market share that the organisation has.

Inward investors

The downward turn in the African natural resources market has created an opportunity for investors to acquire assets and to inject large amounts of capital into underutilised resources. A gateway into Africa has been opened to new foreign investors as a result of this opportunity. As a result, in 2016, the African market saw the entrance of some surprising new investors such as India, Turkey and Germany.

India is, reportedly, one of those countries most likely to have a tangible, short- to long-term influence on mining in Africa. India (which appears to have remained unaffected by the current reduction in commodity prices) has brought unexpected hope to African mining, and is said to be one of the front-runners for future consumption of commodities such as steel. This 'newcomer' in the market has indicated its willingness to invest in Africa, and in Ghana in particular.

There is, currently, a lot of interest in countries in West Africa. Ghana has always been known as one of the largest gold producers in Africa and is still among the largest producers of gold globally. With the price of gold rising 26% during 2016, it is no surprise that there is new interest in investment in Ghana and that old interests have been rejuvenated.

An example is the announcement by Gold Fields, at the end of October 2016, of its intention to invest USD 1.4 billion into its Damang mine in order to produce 1.56 million ounces of gold by 2024. There are also Canadian-based companies which continue to operate large gold mines in Ghana. The Wassa underground mine and the Prestea mine are relatively new projects which are expected to attract a lot of attention in the next few years.

A country which has received a lot of support in recent years from its government is Tanzania,

Focus on South Africa

With its mature mining industry, South Africa remains an investment destination, and has benefitted from significant foreign direct investment.

While, historically, there was a strong emphasis on minerals such as tin, copper, zinc, lead and asbestos, the primary current focus is on coal (thermal and export quality), platinum group metals, iron ore, chrome, manganese and diamonds, as well as minerals associated with these primary minerals. There is also a strong focus on clays (brick-making) and the various minerals that are source materials for the production of cement. South Africa has vast reserves and remains a leading producer of gold and platinum group metals.

South Africa's mining industry is highly regulated, which is primarily policed by the Department of Mineral Resources (which has also recently become the primary enforcer of environmental laws).

The South African mining industry faces the common challenges which are prevalent internationally, including commodity demand cycles, fluctuating commodity prices, increased costs of production (which includes high employment costs), and infrastructure (roads, ports, rail, water and electricity), health and safety, increased stakeholder activism, and strong community influence. South Africa compares favourably with other African countries and in many respects, has a more favourable investment climate as a result of the strength of the South African financial institutions, court system (rule of law) and the established infrastructure.

Current trends also relate to renewable energy, oil and gas, and infrastructure. These are largely due to the adoption by the government of South Africa of the National Infrastructure Plan, the Integrated Resource Plan, and the National Development Plan. Upcoming projects being developed under those plans include water (including hydropower) projects, coal and gas independent power producer programmes, wind and solar projects, and preparatory work relating to nuclear power.

which is also among the top gold producers in Africa. A policy has been implemented in Tanzania which envisions that its mining industry will contribute 10% to its GDP by 2025. In late 2016, a regulation was passed that requires holders of special mining licences to issue shares to the public and list on the Dar es Salaam stock exchange.

Technology minerals

Over the last year or so, there has been an increased demand in the African market for "technology minerals" such as graphite and lithium. The demand has largely arisen as a result of the need to produce lithium-ion batteries, which contain lithium and graphite and are used globally in cell phones, laptops and electric cars. Three major car manufacturers have earmarked huge production lines of electric cars over the next five to 10 years. As Zimbabwe is the fifth-largest producer of lithium in the world, it is suspected that it will increase production to cater for the increased demand.

There are also graphite projects in Madagascar, Mozambique, Namibia and Tanzania which are likely to increase productivity. The largest graphite project is held by an Australian-listed company in Mozambique and contains an estimated 117 million metric tons of graphite, which is more than the rest of the world's graphite reserves combined.

It is clear that there are several investment opportunities in African mining and commodities, and countries such as Turkey have shown a new and vested interest in Africa, with its investors targeting countries such as Ethiopia which, according to reports, is the largest recipient of Turkish investment in Africa. Turkey has poured huge amounts of money into construction and infrastructure for mines in Ethiopia and has, in recent years, created more than 30,000 jobs for the African country. It is believed that Turkey will continue to invest into the African region over the

next few years, which will greatly assist Ethiopia with its economic growth.

Energy markets

There are also opportunities in oil and gas in both East and West Africa. In East Africa, Tanzania is relishing the prospect of a natural gas boom as the Tanzanian government is hoping to reach an agreement with international oil companies in 2018, paving the way for the construction of a liquefied natural gas plant which will enable Tanzania to export some of the significant offshore gas reserves discovered recently. Uganda and Tanzania are also preparing to build a crude export pipeline which is expected to transport 200,000 barrels of crude oil per day. Further, Somalia has announced plans for an offshore exploration licence round in 2017.

In West Africa, while Nigeria will continue to be a major producer, new players such as Senegal are attracting investment, for example the SNE offshore oilfield project where the first oil is expected between 2021 and 2023. Development of the Tortue offshore gas fields, between Senegal and Mauritania is also progressing with first gas expected in 2021.

Generally, the regulatory requirements of the natural resources industry in Africa have been subject to amendment over the last two decades and the need to secure tenure in mining interests and oil and gas concessions is being uniformly recognised across the African continent. To increase confidence of foreign investors, it has also been necessary for governments in developing African countries to provide their support to the producers of commodities.

Given the recent volatility present in those economies heavily reliant on mineral royalties, African governments are seeking to encourage beneficiation. By having more of the supply chain located in the country where the natural resources are extracted, governments are seeking to diversify their economies and also increase local participation and job growth. This trend is likely to continue as a result of governments implementing investment incentives and/or increased regulation.

The African mining industry is perceived to be recovering and many African producers of commodities believe that the end of 2016 marked the end of the downward cycle in the market. The majority of executives remained positive throughout the turbulent 2016 year, and have reportedly indicated that they expect to achieve growth in 2017. In the oil and gas sector, those long-term projects that create value in the current pricing environment will continue to attract investment. Investment into Africa, although never completely stable, is developing and becoming a more secure option for foreign investors. ■

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Mining companies face a range of challenges: health, safety, and environmental issues; complex regulatory due diligence; cybersecurity risks; and weakened commodity prices. At Hogan Lovells, we work with mining clients in all aspects of the industry. Our global footprint allows us to advise in key jurisdictions for mining operations and outbound investment.

Our award-winning oil and gas team works in all sectors of the industry, including upstream exploration and production; oil and natural gas pipelines (both domestic and cross border); liquefied natural gas (LNG), gasification, gas storage, trading, and distribution; and crude oil refining and trading.

Power and infrastructure

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Alex Harrison, an energy lawyer at Hogan Lovells in London, assesses the latest developments in the power and infrastructure sector in Africa

The scale of need and opportunity for power and infrastructure project development in Africa remains colossal. In the 49 countries of sub-Saharan Africa, only approximately one-third of people have access to electricity, only two-thirds have access to running water, and transport access, density and quality rates are low even when compared to equivalent nations. One standout success story has been the proliferation of mobile phone access and usage in recent years, with more than three-quarters of people now having access to a mobile phone.

Investment priorities remain dominated by power and transport (road, rail and port infrastructure) with commodity extraction acting as the main catalyst for major infrastructure developments on the continent. Telecommunications and water and sanitation projects remain high on the agenda. The estimated investment need is USD 50 billion per annum with two-thirds of that needed for power and transportation infrastructure and the remainder for water and telecoms projects.

However, there are a number of positive trends, including the broader role being played by development finance institutions (DFIs) in financing projects and acting as a strong catalyst for legal and regulatory reform and domestic institutional capacity building.

In addition to this, there has been an increase in regional and cross-border projects and inter-country interconnection, although not yet at, or near, the levels that are needed to realise the full benefits of integration. This has occurred at the same time as the gradual diversification of the energy mix, which has been heavily dependent on coal or hydropower (hydro) to date, but where the market share of gas and the installed

capacity of hydro are growing and renewables (in particular solar energy) offers huge longer term potential.

At the same time, there has been a growth of decentralised off-grid and mini-grid solutions providing power where it is most needed, quickly and cheaply and without a dependence on existing network infrastructure, alongside an increased focus on enhancing and optimising the efficiency and reliability of the existing generation assets.

Africa has also seen pledges for foreign investment to support key energy and power sector projects. These include China's pledge to invest USD 60 billion in energy, mining, infrastructure and transportation projects; Japan's recently announced commitment of USD 30 billion in public and private support for infrastructure development, education and healthcare expansion on the continent; and the EU's recently announced plans to contribute over USD 300 million to support the Africa Renewable Energy Initiative and leverage investments worth USD 5 billion to finance 19 projects generating 1.8 gigawatts (GW) of renewable energy across Africa.

In parallel, the growth and success of independent power production (IPP) programmes have been notable. For example, the overall success of South Africa's Renewable Energy Independent Power Producer Procurement Programme (REIPP) has seen the procurement of 6.4GW of capacity from over 100 IPPs and the resulting reductions in renewable tariffs (notwithstanding the recent difficulties that some projects have encountered in concluding PPAs with Eskom); this has been achieved alongside the broader expansion of the IPP model and the number of IPP market players.

Other highlights include the first success of the World Bank's "Scaling Solar" programme, aimed at unlocking private investment in African solar power by bringing forward operational projects within two years at competitive tariffs, under which **Neoen**, a leading French renewable energy firm and **First Solar**, a leading US photovoltaic cell manufacturer and developer, successfully bid for a 47.5 MW utility-scale solar power project in Zambia at a ground-breaking tariff of USD 0.06 per kilowatt-hour (kWh), the lowest seen in sub-Saharan Africa to date.

Other examples of energy innovation include the exciting potential offered by floating (FSRU) LNG-to-power projects, such as the proposed USD 3.7 billion gas-to-power project at the ports of Richards Bay and Coega in South Africa and in countries such as Ghana, Ivory Coast, Guinea and Cameroon.

There has also been increased interest in privatisation and market reform, with the privatisation of Nigeria's generation, transmission and distribution assets, the proposed privatisation of the Electricity Company of Ghana and power sector reform in Angola and Tanzania, all of which offers greater scope for market engagement by foreign investors.

Challenges for investors

The challenges facing Africa remain numerous and complex, but not insurmountable. They include an existing structural power and infrastructure deficit, which leaves millions of people off-grid and without access to effective transport infrastructure adversely impacting economic productivity and growth, as well as the difficulties of transitioning from the existing low base of existing transport and energy infrastructure and connectivity across an enormous geographic area, which makes building fixed infrastructure such as roads and rail links comparatively expensive.

Africa is vulnerable to currency risk with a shortage of liquid, long-term currency hedging markets, as well as country and political risk, in all its forms, which, in turn, poses challenges for investors to the extent to which this can not be effectively managed by political risk insurance or other risk mitigation strategies.

Indeed, more generally, the "risk envelope" of existing funding programmes can, at times, be out of step with the realities of doing projects in Africa.

There are low levels of institutional capacity and experience to procure, negotiate and manage projects: the PPP model, for example, offers a lot of promise, but has yet to be widely adopted in Africa; while in the employment market, the continued labour market skills' gap in delivering and operating the required infrastructure poses an ongoing challenge.

There are also affordability constraints within host governments, in part driven by low levels of tax receipts and existing (dollar based) debt burdens and a shortage of hard currency; when aligned to a limited domestic financing capability, with comparatively small domestic banking and capital markets, this poses financing problems alongside those of affordability.

More generally, there is a lack of long-term political and policy stability and transparency, exacerbated by the election cycle in sub-Saharan Africa countries, which is often longer than in other nations and can stifle investment; flowing from that lack of stability, there is also "white elephant" risk where projects are brought

forward without a genuine need or purpose for the asset or investment.

Demand and risk profiling

Clear evidence that there is demand, which creates further pressures on the energy sector, to both find potential energy sources and to develop the necessary means to exploit them, can be seen by high population and economic growth forecasts and a growing middle class increasing the need for core infrastructure and power; alongside the demands of other, related natural resources sectors, such as water, which has seen in a lack of growth in infrastructure development in water supply and sanitation.

More practically, there is a need for robust project pipelines and project track records, with little data currently publicly available on the status of existing and proposed projects, so informing investors of the likely possible time-scales and pitfalls to inform future decisions, and limited DFI bandwidth to support existing development programmes.

More generally, Africa can be held back by underdeveloped and unpredictable legal systems, and the continued impact of corruption, which undermines investor confidence and the efficient deployment of available capital.

The African power markets also face additional challenges, including reduced commodity prices, which make project development more difficult, while also managing the impacts of weak revenue collection processes, vandalism and theft which result in large value leakage, whilst there are political difficulties in raising tariffs to reflect the true costs of generation.

Other financial risks include managing exposure to feedstock and wholesale electricity price risk (where it applies); as well as facing difficulties in obtaining robust, take-or-pay commitments under a Power Purchase Agreement as a result of the frequent absence of creditworthy off-takers and the unwillingness of governments to stand behind the obligations of their electricity utilities to support IPP financings.

Likewise, there is a need to manage insolvency risk when dealing with newly unbundled off-takers and transmission and distribution companies, alongside managing the demands of an ageing generation, transmission and distribution infrastructure that is often unreliable, and which results in regular blackouts and significant transmission and distribution losses limiting the capability to accommodate an increase in generation load.

That, in turn, leads to a temptation to focus on temporary, expensive and polluting interim solutions (such as diesel generation) to address the power shortage and keep the lights on in the short term.

Other energy issues

A number of broader issues are also impacting the growth of African infrastructure, including the current very high cost of mobile phone data usage, a weak logistics sector and the lack of an effective "open skies" framework limiting air travel between countries in Africa.

In addition to the above, it remains to be seen how President Trump's "America First" policies will impact US commitment to the USD 7 billion Power Africa programme created by President Obama and aimed at doubling access to electricity across sub-Saharan Africa by adding 60 million new electricity connections and 30 GW of new and cleaner power generation.

It is worth noting that the policies underpinning the Power Africa programme have, since early 2016, been codified as federal law in the US, through the Electrify Africa Act of 2015, and it is likely to be difficult for the Trump administration

to overturn that law, which received wide bipartisan support.

Positive future

Despite the challenges, there are many reasons to be optimistic. There is wide political support, from both inside and outside of Africa, for investment in power and infrastructure. There is a substantial and pressing need. Political stability is generally increasing, which allows stable policy and institutional frameworks to emerge, capacity to build and political and country risk to reduce.

Urbanisation is driving growth, improving affordability and contributing to reduced currency volatility. DFIs and others are evolving and refining the tools needed to drive and support the required investment. There is increased interest in capital flows into Africa, notably from private equity. And the IPP and PPP models offer proven paths to deliver the projects that are most needed.

The best structured projects, with the strongest levels of political support, will succeed. Leaders can lift their countries up the pecking order by showing clarity of purpose and political will, openness to regional cooperation and a clear pipeline of opportunities. Developers, investors and funders can improve their competitiveness by unbundling Africa into its constituent parts, identifying and focusing on their priorities, building their in-country relationships and being willing to take a long-term and diversified view. ■

This article has been written by Alex Harrison, an energy lawyer at Hogan Lovells in London, with input from across the global Hogan Lovells power and infrastructure team.

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Private equity

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Jeff Buckland, John Nielsen and Keith Woodhouse of Hogan Lovells examine the landscape for private equity investment in Africa

African-focused private equity funds continue to be active, with over 200 reported private equity deals and 41 exits in 2016; 99 of these deals and 14 of these exits were in Southern Africa. The main sector focus for investments in 2016 was telecommunications and technology, followed by consumer-facing businesses and financial services. The level of activity in 2016 indicates that, notwithstanding the challenges of investing in Africa, there remain significant opportunities for private equity investors to make good returns in Africa.

Some of the challenges facing private equity investment in Africa continue to include, where applicable, low commodity prices, volatile local currencies, emerging market risk, uncertainty about political stability, introducing best governance practices and difficulties in finding and

partnering with experienced and knowledgeable local partners with proven track records.

In addition, there has been a slower than expected growth in the spending power of the middle class, while the existence of unsophisticated private equity markets and uncertainty regarding exits and unpredictable private equity regulatory regimes, allied to the squeeze from increasing competition arising from surplus capital chasing the mid to large size deals, and sellers' high pricing expectations compounded by difficulties in valuing assets, have been coupled with increased competition between buyers through the increased use of auction processes.

Fundraising

Private equity fundraising in Africa in 2016 was USD 2.3 billion, compared to USD 4.4 billion in 2015. This slowdown in fundraising indicates that there is still a lot of capital available to fund managers with a mandate to invest in Africa, while fund managers continue to grapple on the ground with the realities and challenges of investing in Africa.

As a separate asset class, African private equity still remains underrepresented within institutional portfolios and among traditional African and international institutional investors such as pension funds and insurers. This underrepresentation is viewed by private equity fund managers as a potential untapped source of additional funds for private equity investments, provided the reasons for underrepresentation can be overcome.

This underrepresentation among African institutional investors may be due to a lack of understanding of private equity as a viable asset class together with restrictive regulatory regimes across a number of African jurisdictions. Recently, there have been promising developments in Southern Africa as restrictions in some jurisdictions have eased. For example, Kenyan institutions can now invest up to 10% of their portfolio's value into private equity following changes to investment guidelines in 2015. South African pension funds can invest up to 15% of their portfolio's value into private equity.

Underrepresentation among international institutional investors is typically due to the limited number of African fund managers with proven track records, deal values generally being too low, local currency volatility and the expectation of a "premium" return for investing in Africa which is perceived as a riskier investment than investing in the United States, Asia or Europe.

Notwithstanding the slowdown in fundraising, a number of new African-focused private equity funds were established in 2016, including **Actis Africa Real Estate Fund III**, a private real estate fund targeting sub-Saharan Africa, which raised commitments of over USD 500 million; a second fund from **Investec**,

the **Investec Africa Private Equity Fund II**, a private equity fund focusing on African consumers, which raised commitments of USD 295 million; and the creation of **Capital Alliance Private Equity Fund IV**, which is focused predominantly on investments in Nigeria and other West African countries, and which raised commitments of USD 570 million.

Deals

According to the African Venture Capital Association (AVCA) *2016 Annual African Private Equity Deal Tracker* (the AVCA Report) USD 3.8 billion was invested in over 200 reported deals in Africa in 2016 and deals with a value of USD 250 million or more accounted for more than 50% of the total deals done in 2016. A number of large investments in the utilities, energy and pharmaceuticals sectors helped contribute to the increase in deal value.

The value and number of deals executed continues to favour sub-Saharan Africa and South Africa in particular. But West and North Africa continue to increase their share of deal flow by offering compelling investment propositions to potential investors.

Depreciating local currencies and resulting difficulties for businesses to access more traditional capital markets across Africa in 2016 may have inadvertently aided African private equity funds. This is so because businesses requiring capital found themselves driven to sourcing alternative capital, such as private equity funding, creating the opportunity for private equity fund managers to find and make investments at good prices.

A difficult commodities market has also presented opportunities to private equity fund managers. With the amount of undrawn committed capital available for investment by African focused private equity funds in 2017, combined with owners' pricing expectations becoming more realistic, we also expect fund managers to be more active in 2017.

Some of the notable deals concluded or announced in 2016 have included the **Kibo Capital Partners**, and others, investment in **Ciel Healthcare**, which owns and operates a number of subsidiaries offering healthcare services in Uganda, Mauritius, sub-Saharan Africa and Sri Lanka, alongside that of the **Abraaj Group's** investment in **Indorama Eleme Fertilizer & Chemicals**, a West African fertiliser manufacturer which is amongst the largest manufacturers of petrochemicals and fertiliser in Africa.

Another deal of note was **Investec Asset Management's** investment in **Mobisol**, a German based company offering low-income customers in developing nations quality solar home systems with flexible payment plans.

Exits

Ensuring a viable exit environment which enables exits at optimum times is critical to the success of the private equity industry in Africa. Exits to trade buyers, particularly buyers with a regional focus, remain the most prevalent exit route for African private equity funds. We have also seen some secondary transactions (one fund selling to another fund) and initial public offerings (IPOs) on African stock exchanges are beginning to gain more favour, which indicates that the private equity market in Africa is maturing and developing.

Some notable exits by private equity funds in Africa in 2016 included that by **Catalyst Principal Partners** in selling its majority shareholding in **Goodlife Pharmacy**, a pharmaceutical retailer with 19 stores across East Africa, to **LeapFrog Investments**, after holding the shares for approximately two years.

Another exit included **Helios Investment Partners** and other shareholders (including the **International Finance Corporation**) announced the completion of the sale of **HTN Towers** to **IHS Holding**, the largest mobile telecommunications infrastructure provider in Africa, Europe and the Middle East.

One other, notable, deal was the **Abraaj Group** in selling its investment in the Tunisian pharmaceutical company **Unite de fabrication de medicaments** (Unimed) through an IPO (which was heavily oversubscribed) on the Tunis Stock Exchange. Unimed was the first IPO of 2016 on the Tunis Stock Exchange at an estimated market capitalisation of TND 300 million (approximately USD 150 million).

Trends

Decrease in entry multiples

According to the 2016 *Africa Private Equity Confidence Survey* prepared by **Deloitte**, private equity fund managers expect entry multiples in West Africa and Southern Africa to decrease in the next 12 months, and in East Africa to remain flat, as investors take a more conservative approach to investment and valuation.

Key Sectors

There was a particular increase in private equity investments in industrial, health care and technology businesses in 2016. This is to be expected when it is estimated that within 15 years, over

50% of Africans will live in urban areas and the middle class will have grown exponentially.

This data, along with estimated GDP growth rates of approximately 4% for Africa (varying country by country) according to the International Monetary Fund, all support forecasts of growth in the consumer goods and services sectors, which will open up additional scalable investment opportunities in Africa.

Innovative fund structures

In more mature private equity markets, we are also seeing more creative fund structures being designed to meet and match the investment and liquidity needs of different investors from different jurisdictions with the particular capital needs of different businesses in Africa. These innovations include the use of listed entities as a direct investor in the fund, which allows fund managers to access publicly raised capital while providing indirect investors with improved liquidity.

We have also seen the emergence of more traditional 'investment companies' by private equity fund managers created to invest and hold investments for longer periods or indefinitely until an appropriate time to exit the relevant investment(s). These vehicles are intended to address the need of some African businesses and projects with longer term capital requirements, such as infrastructure and real estate.

However, there is a strong desire among a number of investors (particularly Development Finance Institutions – DFIs) and fund managers to continue to use the traditional private equity model, which remains an effective mechanism to create sustainable value in the investment over the typical 10 year life cycle of these funds in Africa and incentivise fund managers to earn carry based on their actual performance measurable on actual realisation of fund assets.

What has become evident though is that there are a number of investment fund models that can be used, tailored appropriately to optimally meet the needs of different investors and businesses.

Closing thoughts

All in all, prospects in 2017 for private equity investments in Africa to increase and to create sustainable value and realise good returns remain positive, particularly for those funds with sound business and professional connections, local savvy and the patience to allow their African investments the time needed to realise their full potential. ■

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Our global private equity team advises private equity and venture capital houses through their growth cycle, including: fund formation; new money or private equity investments; financings; initial public offerings; as well as in mergers, acquisitions, strategic partnerships, or trade sale exits. We offer sound commercial advice for the full life cycle of your investment. Our team has a history of innovation, having advised on a number of cutting-edge fund projects that have become precedents for the market.

Special Features

African Law & Business

Special Report on Investment in Africa 2017

Steering the course

Ben Rigby of *African Law and Business* explores how investors can manage third-party risk, and what level of due diligence can and should be adopted when buying African assets, against a background in which the risks of bribery and corruption that can arise in Africa are ever more acute

A recent report from **Hogan Lovells** – the annual *Global Bribery and Corruption Review* – (the *Review*) suggested that Africa has an embedded bribery and corruption problem as well as other barriers to doing business – including the difficult issue of managing third-party risk.

As the *Review* states, in discussing Africa, the issue arises, partly because, "historically, the economy has been run in a way that makes it hard to detect bribery and corruption, and partly because it seems to have become pretty much normalised".

A recent business breakfast seminar in London discussing the report highlighted those risks, with London counsel, **Liam Naidoo**, one of the authors of the *Review*, commenting that things are changing.

He said: "Africa has undergone significant change in social attitudes and popular attitudes to tackling grand corruption and political corruption," adding that "there have been a number of high-profile changes of government where the incoming leader stood on an anti-corruption ticket in democratic elections".

Determining third-party risk

That makes the issue of detecting such risks, including among third parties, a vital one. The problem is not new to law firms – or to Hogan Lovells. A survey report, issued last year, called

Steering the Course: Navigating third party bribery and corruption risk found that nearly half of multinationals were failing to carry out basic bribery and corruption checks on third-party contractors prior to work beginning.

The findings of both the *Review* and the survey were discussed at the event, where members of the firm's investigations, white-collar and fraud team spoke.

The study, conducted with over 600 compliance officers and other senior legal personnel across key investor jurisdictions with interests in Africa, such as the United Kingdom, France and China, found that the use of third parties, or intermediaries, was the second-biggest bribery and corruption risk after that inducements by government officials.

The survey found their use of third parties was on the rise, with 82% of respondents noting an increase in the past three years and 78% anticipating an increase in 2017.

Crispin Rapinet, global head of investigations, white-collar and fraud at Hogan Lovells, said at the launch of the 2016 survey that, given overseas expansion, "there are good reasons to engage third parties – local know-how, connections to potential customers, and familiarity with the bureaucratic hurdles".

However, Rapinet, who also co-authored both the *Review* and the survey, adds: "It is a fine line to balance the commercial advantages against the risk that third parties pose to your organization, when they are acting in your name."

He reminded companies, including those working in Africa: "If you don't have the right checks in place your company can be held liable if your third party bribes for your benefit."

Indeed, the *Review* makes this clear: both local, and international laws, require it, in saying: "You will need to carry out due diligence on all your partners — third parties as well as counterparties — to investigate their liabilities and obligations and to check for bribery risk, because you can be held liable for corrupt practices of your partners when they act on your behalf."

Naidoo said that the use of third parties, especially in industries requiring local content, gave rise to material corruption risk, commenting that in many cases multinationals are "not able to do proper due diligence on the provenance of assets. [That process] requires factual due diligence, which effectively involves having to conduct an investigation into how the asset was acquired in the first place and the full chain of ownership since then".

The importance of due diligence

There are also risks in managing such individuals both ways, the *Steering the Course* survey found, noting that managers have had to balance anti-bribery and corruption procedures with the demands of running a successful business, particularly in order to meet monthly sales targets.

In it, 57% said sales pressures and incentives were one of the biggest challenges to reducing bribery and corruption risk, while more than half (53%) of respondents also reporting resistance due to compliance procedures conflicting with 'getting the job done', while 53% admitted that anti-bribery and corruption was seen as an unnecessary headache that 'gets in the way' of day-to-day operations.

Likewise, 47% of respondents were failing to carry out desktop due diligence, 44% did not ask third parties to complete a questionnaire, and the same proportion failed to conduct face-to-face interviews with third parties. Yet such due diligence – and having a robust compliance culture – is important.

The *Review* says: "Using third-party business partners is common in Africa; they may be sales agents, consultants or joint venture partners. Working on your behalf, their conduct is considered sanctioned by you."

A third-party bribing an official, it says, is considered to be 'your' bribing of the official. "In other words, you could be held liable for any illegal acts they take part in. So you should investigate as best you can their past business conduct, ownership structure, their internal controls to stop bribery, and so on."

One example, in the US, of such third-party risk, is the US Foreign Corrupt Practices Act enforcement decision in the *Och-Ziff* case, in which hedge fund **Och-Ziff Capital Management Group** resolved a long-running government inquiry based on alleged corruption in Libya and other African countries, by agreeing to USD 200 million in fines levied by the US **Securities & and Exchange Commission**, with a criminal penalty of USD 213 million being paid by Och-Ziff's African subsidiary, based on a deferred prosecution agreement agreed with the **Department of Justice.**

The *Och-Ziff* case involved the payment of bribes over a six-year span to unlock millions of dollars of investments paid into the hedge fund's accounts, the sources of bribery ending up in the hands of former Libyan government officials and members of the Gaddafi family. One aspect of the case that was useful, as US Hogan Lovells partner **James McGovern** noted at the breakfast briefing, was in understanding the use of intermediaries.

While the hedge fund itself may not have had actual knowledge of bribes being made, that fact that such investments were being made by intermediaries could have been discovered. McGovern said: "Due diligence would have uncovered the fact that some of these folks would

The Life Sciences sector

One US-based Hogan Lovells partner, **Gejaa Gobena**, assessed the litigation risks due, in particular, to life sciences companies, saying: "They face enormous risks, frankly," given the extent of the government-facing interactions they need to engage in, and their reliance on third parties.

"Some of those markets obviously involve state-owned entities, in which case you're dealing with people who are going to be characterised as government officials under the Foreign Corrupt Practices Act," he said.

Indeed, *Steering the Course* found that the life sciences sector had increased its use of third parties in the past three years compared with other sectors; 10% of respondents in this sector said they have taken on more than 30 new third parties.

Gobena outlined some safeguards: "You should have various controls in place, for example the purposes for which you're engaging a third party should be clearly laid out, whatever requests, or proposals for business you have down there to engage them."

He added: "The fair market value of the services they provide should be clearly and carefully assessed, so it doesn't appear that you're overpaying them for their services, in particular something that's going to require engaging the government."

have potentially had some past problems in close relationships with these governments."

The *Review*, again, spells out what is needed: "You should be prepared to go much further than you would have to in other jurisdictions," in carrying out investigations, in investing in local relationships to carry out due diligence effectively, using lawyers "who are well-versed in local laws and who understand first-hand how best to conduct due diligence processes in Africa".

The importance of culture

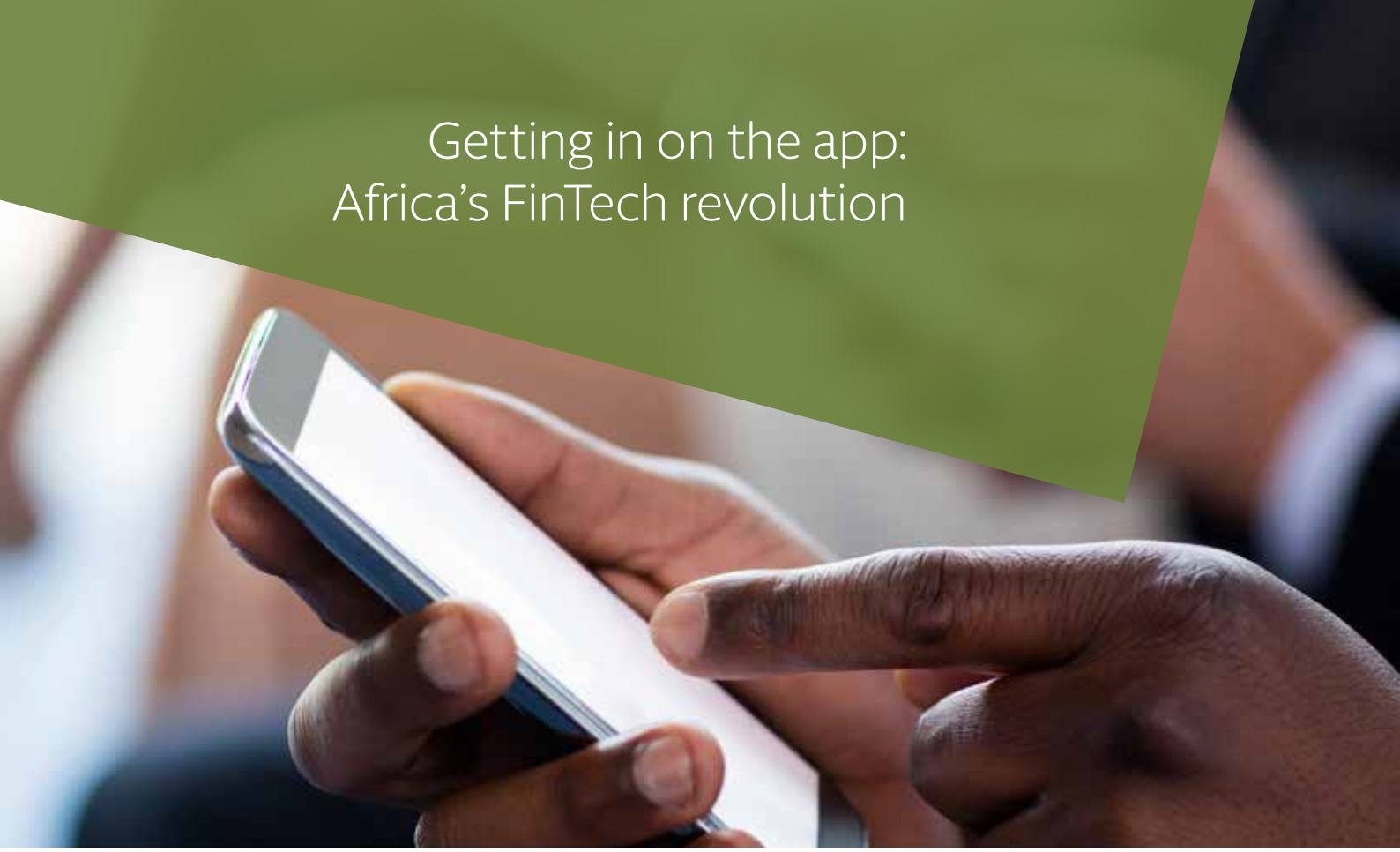
One facet of the *Steering the Course* survey that also rings true for those working in African legal markets is the finding that, despite two-thirds of respondents saying that cultural differences can cause a lack of support for anti-bribery and corruption, more than a quarter of companies did not tailor their approach to different markets, and 43% did not make anti-bribery and corruption guidelines available in local languages.

Given the wide variety of cultural heritage across Africa, the survey suggests people could be prevented from understanding the real essence of how employees should behave; leaving them to determine what is acceptable based on their personal moral compass or local customs – and thus opening them to risk.

The *Review* suggests: "Companies investing in Africa must remember that dealing in Africa differs from dealing in other developing countries. You need to be sensitive to the jurisdiction you want to invest in and you need to understand the local environment from the start so you can build your compliance procedures around them."

It is with that in mind that the firm has also produced its own benchmarking model, 'The ABC of AB&C' (anti-bribery and corruption), to help companies company with anti-bribery and corruption legislation around the world. To access it and read *Steering the Course: Navigating third party bribery and corruption risk*, visit www.hoganlovellsabc.com. ■

Getting in on the app: Africa's FinTech revolution



With financial technology providing a significant potential market for those looking to invest in Africa, Ben Rigby of *African Law & Business* finds that law firms are quick to embrace the opportunities presented

Financial technology (FinTech) is big business. A recent research report from digital commerce analysts **Jupiter Research** showed that the annual transaction value of online, mobile and contactless payments would reach USD 3.6 trillion this year, up from USD 3 trillion in 2015 – a 20% increase – and Africa is at the forefront of that market.

British companies have enjoyed a share in that fortune; in a blog on **Hogan Lovells'** Africa sector website, **Edward George**, head of research at **Ecobank**, the pan-African banking conglomerate, singled out **M-Pesa**, developed by **Vodafone UK** using GBP 1 million from the United Kingdom Department for International Development, calling it "the most successful mobile money transfer system in history".

It is not hard to see why. Speaking to Hogan Lovells in November 2016, **Ezechi Britton**, co-founder and chief technology officer at **Neyber**, an employee-based alternative lending platform, by which employers offer loans to employees, said that in Africa, such applications help to meet unmet need.

While in Europe, FinTech is seen as disruptive and challenging to existing business models in Africa, as such, companies are innovating. "A large proportion of the population are just not served," given that the banking system is less sophisticated and a huge number," he says, are "unbanked".

To him, FinTech companies in Africa "are building entirely new ecosystems and

Tim Nuy, the deputy chief executive officer of financial technology company, MyBucks, gives a client view of the FinTech revolution in Africa

Nuy's business, like many of those featured by ALB, deals with payments. It is not hard to see why. He expands on the example of M-Pesa.

Nuys says: "Due to the lack of infrastructure or brick and mortar banks in Africa, it is impractical for rural individuals to have to travel to a physical bank to perform their banking needs. Most individuals, however, possess mobile phones, so payment systems that utilise these networks are the most effective way to target Africa-specific concerns."

Instead, they seek to use apps like his own, "which are intuitive and easy for customers to use, using digital channels and internet service points". **MyBucks** seeks to be a market leader in lending, banking, and insurance, especially outside of South Africa, a mature market; operating in 14 countries, with the majority of these operations in sub-Saharan Africa.

He sees future activity developing in nano-SME lending, which is the funding of small or medium-sized enterprises, with collateral-based lending typically offered, and continued funding of FinTech reforms, with "increased commitments coming from international investors".

That is partially due to necessity, he notes, making "solutions to African-based challenges are more ground-breaking" than their US or EU equivalents, thanks to the drivers mentioned above.

"This necessity," he says, "spurs innovation and a drive to create cutting-edge financial services that can incorporate emerging markets while dealing with unique challenges such as rural settings, power outages, or energy restrictions".

He sees "a great amount of potential for further investment in fintech in Africa, primarily because it remains an emerging market", adding: "It is the hub of innovation because these markets have nothing in place at the moment, yet need access to loans, credit scoring, and money transfers."

While aware of regulatory constraints, he is pragmatic about compliance, saying: "Regulators can present challenges to FinTech innovation and new entrants to markets, however, as an operator one simply has to work within the given rules."

He adds: "Over time, markets will adopt more and more to technology, as innovation drives society forward."

Nuy calls for FinTech companies to have "a true edge over other financial services players" by being able to compete with them within normal regulations.

He concludes, positively: "Many regulations are still adapting [to the existence of FinTechs], however, due to [their] lower marginal operating costs in comparison to institutional banking services, once regulations are adapted, FinTech will be the way of the future."

infrastructure so the chances and opportunities that are out there are immense", saying they can "provide for natural organic growth within Africa, as opposed to being imported from the West".

M-Pesa is a part of that, says **Gaurav Bhandari** of law firm **DV Kapila & Co Advocates** in Nairobi, Kenya; noting: "The digital age has definitely disrupted normal protocol in Kenya; of course with the likes of M-Pesa taking centre stage, there has been in the last year or so, exponential growth of FinTech services."

Alongside banking apps like **BitPesa**, which uses blockchain technology to increase the efficiency of business payments, enabling the use

of bitcoins in Africa, **Branch**, a recent start-up which offers loans via mobile money accounts, and **Umati Capital**, which is similar, he says that "a majority of banks have chosen local software companies to develop the products, peer-to-peer lending programs, digital wallets, with a small segment looking at crypto currencies and the like".

The same is true of West Africa. In Nigeria, **Bukola Iji**, a partner at **SPA Ajibade & Co**, notes: "We also have start-ups like **Aella Credit**, **Paylater** and **KiaKia** who now provide loans with application and credit processes accessible via online and mobile technology applications".

For South African businesses seeking online lending, there are options like **RainFin**, an online lending marketplace which matches borrowers and lenders, giving businesses access to finance, while **Lulalend** grants short-term business loans to businesses seeking a flexible alternative to banks.

Iji adds that, in Nigeria, "**SunTrust Bank** opened shop late in 2016 and claims to be Nigeria's first digital-only bank, aiming to provide financial services online without the need for customers to come into a physical branch."

Nor are such innovations limited to Nigeria, with Morocco also getting in on the act. **Bouchra Belouchi** of **BFF Law Firm** says that digital payments are also on the rise there, with Moroccan businesses and its government offering citizens the right to pay their bills via the internet, and changes to banking law that "introduced significant changes which will allow the development of FinTech businesses in Morocco, particularly on digital payments".

Payment apps pursued

On the payment side, South African apps developed by companies like **wiGroup**, offer point-of-sale transactions (POS), integrating with retailers' own systems, while **Snapscan** provides cardless payment services to South African retailers, much like **Apple Pay** or other apps do in Europe.

Britton said the use of such technology, including by his own company is an example of "efficiently using resources and appropriately collaborating with key partners around the world, and that's why Africa is well-placed to benefit greatly from these technologies".

Iji agrees that businesses are also embracing mobile technology, with a decrease in the acceptance of cash payments. She notes: "Many small businesses have taken up POS machines to take payments for goods or services. Several also utilise internet banking services provided by the banks."

Likewise, **Leishen Pillay**, a partner with Hogan Lovells in South Africa, sees "traction in the payments sector, with a variety of payment apps, including the payment for and delivery of food".

He adds: "Blockchain is being looked at closely by the banks, specifically in relation to Know Your Client and interbank/cross-border projects."

There is, he says, also interest in Etherium, an open-source, public, blockchain-based distributed computing platform featuring smart contracts, used to safeguard apps from fraud.

Innovation is not limited to retailers. Bhandari cites the agricultural sector as benefiting, pointing out that **FarmDrive**, a Kenyan-based social enterprise, connects unbanked and underserved smallholder farmers to credit, while helping financial institutions cost-effectively increase their agricultural loan portfolios.

The app, he notes, helps enable smallholder farmers to gain loans that would allow them to grow and diversify their businesses. As a result of this, and other apps, he says, "there has been a lot of focus of using FinTech in more predominantly rural areas, to assisting in farming commodity exchanges, small scale lending which is definitely cutting in on the more predominant bank lending".

Can regulators keep pace?

There are, however, limitations. Pillay notes that, while a specially formed consortium is looking at creating global standards for blockchain, including private blockchain, and Blockchain ID processes have just been launched, which he calls "exciting", regulators are beginning to grapple with the new technology; for example, the South African regulator is looking at blockchain to understand how it works.

Likewise, although Kenya's government is "constantly advising Kenyans on new emerging trends and regulatory issues with respect to mobile based businesses in Kenya", Kenyan regulators are also cautious about blockchain technology, crypto currencies and the like.

Bhandari notes a recent *Bloomberg* report that highlighted Kenyans moved a record USD 38 billion via mobile money platforms in at the end of 2016, with a potential growth market of USD 1 billion, but he acknowledges: "Currently the regulatory authorities have not accepted Bitcoin as being legal tender in Kenya," although he admits that this is "more so to do with currency regulation, than any non-acceptance of blockchain technology which is already in place".

Overall, Kenyan companies are overwhelmingly keen on FinTech, he says, with hundreds of start-ups working in the industry, and "the

government has been quite favourable in doing what it can to open up the markets and streamline regulation, in cutting out the bureaucratic red tape associated with doing business in Kenya".

The African picture is not uniform, however, as Bhandari says there are "certain restrictions in both West Africa and parts of Southern Africa with respect to business set-up, investor remittances and the like, hence the particular focus on East Africa". While Iji points out that not all businesses in Nigeria share alike, saying: "There are a significant number yet to fully embrace mobile banking."

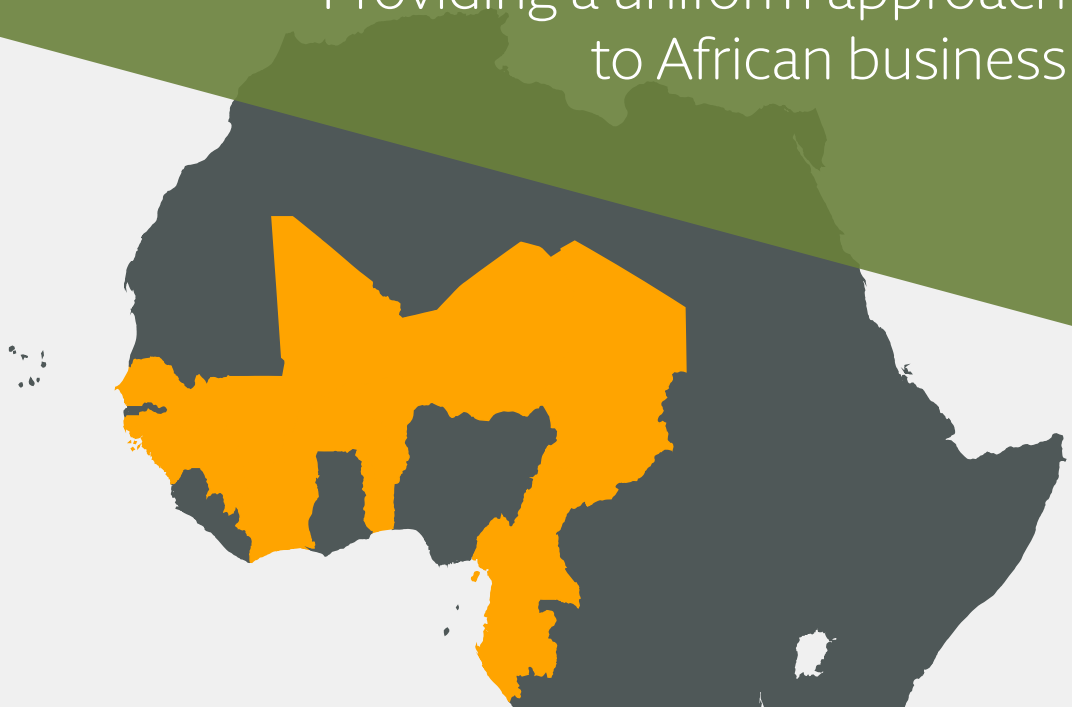
Nigeria is also more cautious, with mobile money not as popular; Iji points to the **Central Bank of Nigeria's** (CBN) refusal to give telecommunications companies (telcos) licenses to sell products, independently of banks, despite having consumer reach.

Telcos, he notes, want to lead mobile money payments without a banking licence and the CBN, as the financial regulator, "is walking a tightrope between allowing a telco-led or a bank-led mobile payments system". With over 60 million Nigerians reportedly unbanked even though they have mobile phones, he says, "Only mobile money can bring inclusion of more consumers".

South Africa, meanwhile, saw M-Pesa withdraw, partly because of the stringent regulatory regime and partly because it struggled to grow its consumer base. That is not to say, however, that law firms are disheartened by such developments.

They are not. All those *ALB* spoke to were upbeat about the prospects which FinTech offers. Iji's words speak for them all: "The adoption of mobile technology is on the rise and there is a scramble for the soul of consumers. Businesses with faster, more engaging and responsive technology will get and retain the cream of customers, and consumers." ■

Providing a uniform approach to African business



Although it already benefits investors in Francophone West and Central Africa, OHADA's full value should be realised in the coming years, particularly in dispute resolution. Andrew Mizner of *African Law & Business* assesses the benefits of that pan-African organisation

Any organisation that offers the chance to work across borders without having to negotiate different sets of laws, is always going to be popular with international investors, particularly in a region where there are plenty of obstacles to doing business. In West and Central Africa, OHADA does just that, providing uniform laws and settling disputes.

The Organisation pour l'Harmonisation en Afrique du Droit des Affaires was founded at a meeting in Port Louis, Mauritius in 1993. Consisting originally of 14 nations, it now has 17 members, all Francophone countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, Togo and Democratic Republic of Congo.

For investors, it offers a more uniform business environment around the region, particularly through its nine Uniform Acts, which provide a unified approach to commercial law, commercial

companies and economic interest groups, co-operative companies, securities transactions, debt recovery, bankruptcy, corporate accounting, carriage of goods and arbitration.

Economic growth in countries including Senegal and Ivory Coast cannot be solely attributed to membership of OHADA, but it is a contributory factor. The value of OHADA is reflected in the development of similar organisations across Africa, such as the East African Community, relaunched in 2000.

Khaled Houda of **Cabinet D'Avocats Khaled A. Houda** in Senegal says having uniform laws is an "advantage" to businesses. "If you are an investor here in Senegal and you want to develop your activities in another country, you can do it without other formalities and one [lawyer] could handle all these developments."

He adds: "It is very helpful for Senegal to be a member of this common law," picking out the accountancy rules in particular.

Thomas Kendra, an international arbitration partner with **Hogan Lovells** says OHADA "really encourages investment because investors know the law, it is a lot less work to know the law of one uniform law rather than 15 different laws".

Kendra adds that that as well as being transparent, "the laws are modern, they are well written". The securities law was revised in 2016, while the arbitration law is due a revision this year.

No disputing

The biggest value that OHADA provides is arguably in dispute resolution. On a continent where foreign investors and law firms tend to distrust local courts and arbitration centres and prefer to bypass them in favour of offshore arbitration at venues such as the **International Chamber of Commerce Court of Arbitration** (ICC) or **London Court of International Arbitration** (LCIA), OHADA's **Common Court of Justice and Arbitration** (CCJA) offers perhaps the best route to handling commercial disputes in Africa.

Based in Abidjan, Ivory Coast, though in theory it can convene in any member state, the CCJA serves as a supreme court for OHADA-related matters and as an arbitral seat. That the region has an institution that "is competent to render a final decision" on both questions of fact and law, says Houda, "is one of the exceptional situations in Africa and in the world".

Its 13 judges, are elected for single seven-year terms by the Council of Ministers, made up of justice and finance ministers from the member states.

Use of the CCJA is growing, Houda says, illustrating the point with the growth of cases at his firm, which has submitted litigation and arbitration to it every two or three months over the past year, and was appointed in the early 2000s to help integrate OHADA laws with the local system in Senegal.

The security that the OHADA provides to investors through the CCJA is attractive to investors and offers them relief from slow court systems that delay cases for years and act as a deterrent from entering those countries, he says:

"Parties today are aware about the protection of their rights and this protection is more efficient and more important in front of an arbitration court. And they win time because a final decision could be rendered by this arbitration court in six months, versus in a national court, you have to wait three, four, five years, it is not the same."

Although use of the CCJA is on the rise, given that the majority of disputes still tend to go abroad, it has struggled to establish its track record and fulfil its potential, but that is "a question of time", says Kendra, and has already grown significantly over the past eight years.

"OHADA offers you something pretty safe, pretty guaranteed, it has got a good reputation. I don't think it is used as much as it could be, and that applies to a lot of the centres in Africa, but it is there and people are using it and I would imagine that people will use it more as arbitration becomes more accepted in Africa."

In the meantime, a plethora of arbitral centres has sprung up across the continent, including the **Casablanca International Mediation and Arbitration Centre** (CIMAC), **Kigali International Arbitration Centre** (KIAC), centres in Mauritius, Nigeria, Egypt and Kenya, and a proposed one in Djibouti. As access to dispute resolution is a criterion in business rankings, in many cases, countries are developing arbitral centres as a way to improve their position

Despite the competition, the CCJA fares well in terms of its standards and costs, "it is very much on a par with other systems", says Houda's colleague and fellow corporate lawyer, **Julien Gilles Leroy** and is also perceived as being more likely to be free from corruption than local courts or dispute resolution centres, says Houda: "The main problems we have in our country and other African countries are the problems linked to corruption, to traffic of influence and other bad ways to judge the cases. So if an investor chooses the judicial procedures, he will be sure that at least this procedure will be fine and will be appealed by this common supreme court."

The CCJA has not been immune to problems of its own however. In 2014 the institution

allegedly undermined its own authority, when the CCJA court set aside a CCJA arbitral award which had been made in favour of French logistics company against the government of Guinea.

Then, last year, OHADA suspended CCJA president **Marcel Serekoisse-Samba** and chief executive of its school of magistracy, **Félix Onana Etoundi**, after a report alleged financial mismanagement. An investigation is ongoing, but Serekoisse-Samba's continued role as a judge during the scandal raised concerns.

However, the controversies should not have a lasting effect, believes Houda, who is a chartered arbitrator at the CCJA: "This negative step will be overlooked and the future is in front of us, because such new arbitration courts will be necessarily [face] some problems sometimes." He says staff turnover at OHADA has led to changes in the personnel involved in preparing cases, so "we have the feeling that the things are more controlled and are more in conformity with the law".

Kendra argues that the impact of the controversies has been more focused within the legal community, where the *Getma* decision "might have raised eyebrows" because the feeling among the arbitral community is that there was little wrong with the tribunal's original award.

He does acknowledge that OHADA may have been trying to distinguish itself from European rivals over arbitral conduct:

"That might be the point, that OHADA was trying to do something controlled. That is one of the criticisms of arbitration in Europe, that the costs spiral out of control, so you could say they were trying to keep control of that side of things."

Nonetheless, he agrees that it should not have a long term impact on the CCJA's reputation, reporting no drop in the use of OHADA dispute clauses in contracts. "In all [of these] cases, the facts were very specific – I would say you still trust the institution after that."

A positive future

Beyond the CCJA, some further improvements are needed at OHADA, mostly with the Uniform acts, which Leroy says "need to be improved, especially in terms of social law and labour law, there is yet to be a formalised uniform code, which would greatly help the 17 countries 'uniformise' their labour and social laws".

Kendra elaborates that there are flaws in OHADA law are more related to application, "gaps where local laws have to apply". He cites the arbitration law, where enforcement is still handled through local laws.

"OHADA generally is an amazing institution, a really amazing union, they have done a really fantastic job of bringing all these countries together in difficult circumstances with social problems in different countries at different times and the fact that they were able to have a solid, modern legal system which is generally applied, pretty uniformly, is pretty impressive," he concludes. ■

International arbitration: Places to watch

The development of Africa's arbitral institutions continues to impress international observers. Ben Rigby and Andrew Mizner of *African Law & Business* take a snapshot of five countries that are developing and changing their arbitration regimes; Djibouti, Morocco, Rwanda, Nigeria, and South Africa

Djibouti

Recent court cases have brought Djibouti into the headlines, but given its strategic location, and the development of international port facilities aimed at expanding trade between Africa and the Middle East, it is no surprise that investors are interested in the former French colony.

Hogan Lovells' Nathan Searle tells *ALB*: "As with other African countries, the Republic of Djibouti has seen an increase in investments in the past ten years and this has inevitably led to an increase of disputes involving parties from the Republic."

Yet given the risks of judgments from the local courts lacking in independence, investors would be wise to consider international arbitration as an option. Searle says that given a strong arbitration tradition in international trade, and a general reluctance of foreign investors to go before local courts, "international arbitration on the continent has seen very considerable growth. Djibouti is no exception to that".

Add in a lack of capacity by the courts to deal with sophisticated and large transactions, international arbitration remains the preferred option for investors to resolve their disputes.

As the legal framework for arbitration is currently under development in Djibouti, investors have generally been opting for either well-recognised international rules and seats, like the **International Chamber of Commerce** (ICC) in Paris, or the **London Court of International Arbitration**, (LCIA), or seats and rules in the broader region such as **Kigali International Arbitration Centre** (KIAC), or the **Cairo Regional Centre for International Commercial Arbitration** (CRCICA).

Some investors choose Dubai, in the Gulf States, which, in the last decade, has become "a leading financial hub and an established arbitral seat with many options offered to the arbitration users".

He warns, however, that the enforcement of awards must be taken into account, noting that "a prevailing view is that enforcing arbitral awards on the continent is very difficult; this in part results from deep-seated prejudices and stereotypes with regards to the judicial systems in African countries."

That view, he says, "derives more from the absence of information or the lack thereof as it does from evidence." One positive, however, is Djibouti's adherence to the New York Convention, which allows foreign arbitral awards to be recognised – in this case, as submitted to the *Tribunal de Première Instance*.

Things are on the move, however, says Searle: to appease regional sensibilities in the area, the Intergovernmental Authority on Development (IGAD), an eight-country trade bloc which spans countries in the Horn of Africa, the Nile Valley and the Great Lakes states of Kenya and Uganda, are planning, with Djibouti's Chamber of Commerce, to set up an international arbitration centre – with government support.

The aim, says Searle, is to create the **Djibouti International Arbitration Centre** (DJIAC), which will offer the countries in the region and member states of IGAD a suitable forum for the resolution of disputes.

Alongside that, will be Djibouti's first arbitral code. Here, the Permanent Court of Arbitration is working with government lawyers and the Chamber of Commerce to both draft – and implement – Djibouti's first arbitration code. The code will be based on the UNCITRAL Model Law, which Searle says will "provide a state of the art legal framework for international arbitration conducted in the Republic".

Morocco

Morocco has been working towards the enhancement of its arbitration legal framework in the past years in line with the government's vision to have Casablanca become a major financial hub in Africa through the development of the Casablanca Finance City (CFC), a public-private partnership.

The picture which is now emerging for the Maghreb is one of greater political stability and increased economic prosperity, a combination making it a distinctly attractive base for foreign investors.

As **Fatima-Zahra Fassi-Fihri** and **Bouchra Belouchi** of **BFF Law Firm** have noted elsewhere in this publication, generally, Morocco is aiming to develop foreign investment and to make Morocco a hub for African business.

To do that requires a place for businesses to resolve their disputes. Searle points out that Morocco has some strong advantages for investors in any event, being party to the New York Convention, and the World Bank's ICSID Convention, which allows investors recourse against states, if the latter fail to respect international investment protection law.

Morocco's arbitration law, adopted in 2007, is also being revised, while the CFC's arbitration centre- the CIMAC (**Casablanca International Mediation and Arbitration Centre**) has been re-launched recently and will unveil its new rules at the Casablanca Arbitration Days in November 2017.

Writing in *ALB* at the foundation of CIMAC, in 2015, CIMAC was described as bringing "a more stable, more credible and more open environment", according to **Salima Bakouchi**, co-founder and partner at Casablanca firm **Bakouchi & Habachi**, while **Amin Hajji**, co-founder and partner at **Hajji & Associés**, said that no other local arbitration body is able to operate on a comparable scale, calling it a credible alternative to other established seats, like Paris and Geneva – with the requisite cost advantages.

The new centre, lawyers believe, will crystallise arbitration around Casablanca, allowing the city to become a new base for businesses interested in the Maghreb; as Hogan Lovells' Searle says, "CIMAC's goal is to become the reference point for international dispute resolution not just as the interface between Europe and North African region but also for the whole of sub-Saharan Africa".

Rwanda

Hogan Lovells' **Thomas Kendra** says that the Kigali International Arbitration Centre (KIAC) is a good example of how regional arbitral institutions are developing in Africa.

He has good reason to be optimistic; Rwanda's arbitration legislation, and the rules of the KIAC uphold the standards provided for, both by the UNCITRAL Model Law, and by the Chartered Institute of Arbitration's London Centenary Principles; while the country's courts have rarely, if ever, refused enforcement of an award; and the country's pro-arbitration legal infrastructure supports its emerging position as a 'safe' seat for arbitration, New York Convention-compliant and all - to date, despite a few challenges made to courts, no award from KIAC has been set aside.

That commitment to arbitration, says Kendra springs from Rwanda's impressive economic growth and stability in recent years, and a perceived need by regional businesses that parties needed a choice regarding the resolution of disputes, resulting in the establishment of the KIAC.

The government has included commercial arbitration in the 'Justice, Reconciliation, Law and Order Sector Strategy', one of the key components of the government's medium-term development aims, and ensured the quick development of the centre by negotiating for arbitration clauses in its contracts with suppliers as a compromise position.

As a result, many of KIAC's cases to date have involved a Rwandan governmental entity as one of the parties. For businesses, shy of the delays and difficulties courts bring, at its heart is a vision of a centre that settles disputes confidentially in a local forum, at a low cost that provides a neutral venue for East African regional commercial investors.

That neutrality can be seen in cases in which awards have been rendered; in cases involving a state entity, the majority have been decided against the Rwandan public body and have also gone on to be enforced – voluntarily.

Since then, Kendra says, KIAC has become an important aspect of its business offering, although not without challenges. However, as a centre still in its relative youth in the region, the challenges KIAC has faced, he feels are also probably typical of such centres; such as raising awareness, and developing the institutional architecture necessary to support it.

The KIAC, says Kendra, has worked hard to raise awareness through a broad publicity campaign, including newspaper articles, radio programmes and appearances on Rwandan television, as well as regular industry-focused seminars and events, and has sought to bring on board Rwandan lawyers and judges by offering training and symposium style discussions.

The centre's infrastructure and knowledge has also been developed, thanks to investment in training programmes for arbitrators, which Kendra says is "not only a necessity owing to the shortage in the country but also a way to foster an arbitration culture". It has proved highly popular: from having just a handful of qualified arbitrators at the time of KIAC's launch, Rwanda now boasts over 350 associates of the Chartered Institute of Arbitrators.

Despite the inevitable time lag, Kendra notes the centre has seen excellent results. Since its launch in 2012, 54 cases have been registered; with a total in dispute of USD 100 million, suggesting it has the largest caseload of all African arbitral institutions.

Finally, he says, the KIAC has purposefully kept its costs low so that it can be used by all investors. Indeed, he says, "Arbitration will only truly develop as a dispute resolution mechanism of choice in Africa if investors have access to it locally, working with local people."

Otherwise, he feels: "As such, KIAC aims to offer investors an institution they can trust without the added complications and cost of dealing with institutions thousands of miles away."

Nigeria

Talk to Nigerian lawyers, and you will find them upbeat. Take **Kolawole Mayomi** of **SPA Ajibade & Co**; he tells ALB that the market for arbitration services in Nigeria is "steadily growing".

In part, Mayomi says, this is because disputes in some traditional sectors, such as oil and gas, maritime, franchising and the like, continue to generate significant arbitration work, while other commercial enterprises has also witnessed an upwards surge in demand for arbitration.

Because of its speed and flexibility, arbitration is also gaining in popularity with local investors, particularly in growth sectors such as real estate.

Mayomi says the growth of the arbitration market can be traced to two major factors; first, the intensive campaign for commercial parties to consciously inset arbitral clauses in their contracts, which he says, are gradually bearing fruit.

Second, the Nigerian courts have realized that overflowing dockets impairs the efficiency of

the civil justice system, and that many commercial cases are more suited for ADR. It's a view shared by Searle, who says that arbitration is usually quicker than the local courts which have multiple levels of appeal and are extremely busy, leading to long delays in the final resolution of a dispute.

For such reasons, says Mayomi, the courts are referring lower to middle value general commercial disputes to arbitration and mediation in particular, with the exception of tax disputes, which the appellate courts have confirmed are not arbitrable in Nigeria.

Investors often want the flexibility of being able to enforce against assets held outside Nigeria, notes Searle, and as Nigeria is a signatory to the New York Convention, awards rendered in Nigeria are enforceable under that convention in more than 150 other states.

Searle adds that, while the courts are generally supportive of arbitration, due to their extremely busy workload and limited resources, there can be substantial delays in enforcing an arbitral award as challenges may be appealed all the way to the Supreme Court.

Despite such uncertainties both men agree, the general trend of growth in the demand for arbitration services has continued.

Mayomi says that local law firms have done a very remarkable job of upping the quality of their services to satisfy multinational businesses, while Searle notes that an increasing number of Nigerian arbitration practitioners are on the boards and other governing bodies of leading global arbitration institutions.

That process is also becoming established among the young, says Searle, with the establishment of the Young Association of Arbitrators of Nigeria promoting arbitration amongst the next generation of legal practitioners.

Similarly, says Mayomi, arbitral centres have sought to improve their range of services to cater for big-ticket arbitral business seated in Nigeria. These improvements include developing a wider pool of experienced and responsive arbitrators, the employment of experienced case managers and other support staff, and installation of seamless video conferencing and other facilities.

Searle agrees, noting that local arbitral institutions such as the **Lagos Court of Arbitration** and the **Lagos Regional Center for International Commercial Arbitration** are building their reputations, while Moyemi says that aside from the LCA, which he praises for its work, the **International Center for Arbitration and Mediation Abuja** (ICAMA) is a relatively new entrant based in Abuja, and has already gained ground as a centre.

South Africa

South Africa is overhauling its international dispute resolution landscape, writes ***Andrew Mizner***. 2017 should see South Africa introduce two new laws, designed to attract international investment and arbitration, and lay the groundwork for a new future as an arbitration centre.

The International Arbitration Bill 2016 and Protection of Investment Act 2015 both offer international dispute resolution mechanisms, but it remains to be seen whether they can repair the country's reputation as an investment destination.

South Africa's decision, beginning in 2012, to withdraw from its bilateral investment treaties (BITs) with many, mostly European nations, alarmed South African businesses and foreign governments.

Without protection for their investments through investor-state arbitration provisions, there was a concern that international parties would be reluctant to invest in a country where there is a risk of reform and expropriation through the Black Economic Empowerment (BEE) programme, designed to correct decades of economic injustice under apartheid.

The International Arbitration Bill was approved by parliament in 2017, having been tabled in was tabled in the South African Parliament for discussion in April 2017, and is poised to be signed into law by President Jacob Zuma sometime later this year, as part of a long overdue overhaul of arbitration legislation that has been untouched since the Arbitration Act 1965. That law remains, overseeing domestic arbitration, but international disputes will be the preserve of the new Bill.

The Bill adopts the **United Nations Commission on International Trade Law** (UNCITRAL) Model Law, while the second facet of the Bill replaces the Recognition and Enforcement of Foreign Arbitral Awards Act 1977, updating the country's enforcement obligations to recognise foreign awards under the New York Convention. The applicability of the REFAA will be repealed in its entirety once the Bill comes into effect as legislation.

Likewise, the Protection of Investment Act introduced investor-state mediation and carves out certain areas of industry as being of public importance, exempting the government of duties towards the investors, in treating international investors with the same rights as domestic ones.

Practitioners have expressed concerns about both laws, particularly the investor-state legislation. Others are more upbeat about the Bill.

Danika Wright, writing on the Hogan Lovells website, says: "The promulgation of the Bill is highly desired by various corporate entities and legal professionals involved in this area of dispute resolution."

She adds: "The Bill… will provide commercial and legal certainty… especially now in times of instability. The promulgation of the Bill aims to increase African cross-border transactions and provide comfort and security to those entities looking to invest in Africa."

South Africa's dispute resolution scene is in a period of transition, but despite flaws and concerns expressed over the draft legislation, those practising in the sector remain optimistic that the country will be able to attract a new wave of work that will grow the disputes sector and establish South Africa's position as a venue for arbitration. ■

Notes

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Securing reliable, up-to-date information can often prove difficult for companies looking to invest in Africa.

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