Made in Africa

Exploring international and local legal considerations for investors in, and from, Africa
Welcome to Issue 15 of our market leading publication Made in Africa. In this issue we continue to focus on the latest legal and market developments, with our partners across Africa, that are of interest to investors and businesses operating on the continent.

From an international perspective, we look enviously at the key markets in Africa and see relative stability, positive deregulation, investment promotion and growth. Whereas in the UK, due to Brexit, we have been beset by political leadership battles, fluctuating currencies and stock markets, and short-to-medium term macro-economic uncertainty as well as legal and regulatory uncertainty.

As we report on in this issue, there have been positive developments in Nigeria with the Central Bank (CBN) finally announcing the deregulation of the Nigerian foreign exchange regulations. This has been touted as the most significant re-ordering of the market since the repeal in the 1990s of its historical exchange controls. Although some details are outstanding, this step should give investors more certainty on their ability to invest in the country, which will hopefully boost new investment. There have also been real efforts made by the CBN to promote local exports.

In terms of new investment in the region, we report on significant relations between China and Nigeria, with steps being taken to utilise Chinese will and finance to develop sizeable energy and infrastructure opportunities in Nigeria. More generally in Africa, the energy and infrastructure sector is in need of long term capital and is being boosted by existing and new entrants, such as Themis Energy, a new energy development company, with big ambitions.

A healthy source of capital for Africa continues to be private equity funds and their investors. Together with SAVCA, we report on the numbers, showing that funds raised by managers have reached new highs, a good example being Investec Asset Management’s second pan-African fund with its successful final close reported in this issue. The common question remains as to how these managers deploy the capital raised. This is increasingly being achieved through innovative strategies and structures such as “buy-and-build”, investment platforms and follow-on growth investing, rather than typical buy-outs.

We also look at the trends in the mining sector, which has seen a period of subdued activity but sizeable divestments have occurred and opportunities remain for savvy investors. We see new regulations in the resources space, in countries such as Mozambique and Angola, to adapt to the prevailing market conditions.

In other jurisdictions such as Kenya, change has been a long time coming. With the launch of the new Companies Act, the country has brought its legislation substantially in line with the modern UK Companies Act, which will further comfort investors targeting this region.

In South Africa, further scrutiny of compliance with the black economic empowerment laws is expected and in Zimbabwe there has been some clarification of the changeable indigenisation laws.

In this issue we also focus on managing and mitigating risk and consider the importance of international arbitration in resolving disputes between parties on the continent.

This year is also the 10th year of illa which our firm founded to support legal capacity building in Africa. We celebrate this milestone with an interview with the Executive Director of illa, Anna Gardner.

We expect there to be something of interest for anyone active in Africa so do please read through this issue and contact the authors or any of your usual KWM contacts to take matters forward for you.

We look forward to representing you through 2016 and beyond.
For the next five years, Nigeria is reported to require US$166 billion to provide energy and infrastructure for its growing population. Demand for energy and infrastructure in Nigeria, Africa’s largest economy, is ever increasing as its population grows. Consequently, so has the demand for viable financing solutions to support investment in such infrastructure projects, which according to the African Development Bank has an infrastructure deficit of US$300 billion. In fact, overall infrastructure spending (and in turn demand for financing) in Nigeria is expected to grow from US$23 billion in 2013 to US$77 billion in 2025.

Where will this financing come from? Nigeria has recently attracted Chinese financial and technical support for its ambitious infrastructure plans. This article will look at the role and significance of Chinese investment and key trends relating to how Chinese infrastructure financing transactions are typically structured.

Nigeria’s infrastructure challenges have become protracted due to a number of reasons, which include:

- dwindling oil revenues, which makes up around two third of the country’s revenue due to the fall in global oil prices;
- instability in Nigeria’s oil producing Delta region, due to a series of attacks on oil pipelines in southern Nigeria by militants causing crude output to hit the lowest levels in decades;
- US dollar scarcity; and
- currency exchange risk volatility.

According to the Nigerian Bureau of Statistics, these macroeconomic challenges have obstructed infrastructure investment in Nigeria and contributed to Nigeria’s gross domestic product (“GDP”) growth rate contracting 13.7% in the first quarter of this year to a 25 year low. Nigeria’s GDP growth is forecasted to be 3.8% in 2016, as investments will seek to somewhat rebound an economy, which has grown around 7% per annum for the past decade.

In light of the challenges, President Muhammadu Buhari’s government intends to address the infrastructure funding gap and support businesses which now need competitive, cheaper and longer term financing to fund infrastructure and other related projects in Nigeria.

China and Nigeria loan commitments

One of the mechanisms to address the infrastructure funding gap has been a US$6 billion loan commitment from China to fund infrastructure projects in Nigeria. It is understood that the Nigerian government can access this credit facility by identifying and putting forward the relevant projects to the Chinese presumably through a series of tranches in respect of each identified project.

The loan commitment coincided with a currency swap deal agreement between the Industrial and Commercial Bank of China Ltd (“ICBC”), which is China and the world’s largest bank, and the Central Bank of Nigeria (“CBN”). The swap deal should facilitate the settlement of Nigeria-China trade by removing the dollar from transactions and trading instead in yuan, whilst in tandem boosting imports from China, whose exports represent some 80 per cent of the total bilateral trade volume. It is anticipated that this in turn should reduce the demand for dollars on the CBN.

The swap deal also fits neatly in CBN’s plans to diversify its foreign exchange reserves away from the dollar by switching a stockpile
into yuan. This may accelerate plans by the Nigerian government to issue its first ‘Panda Bond’ (renminbi-denominated bonds sold by overseas entities in mainland China), to plug the current record budget deficit currently standing at approximately US$11.1 billion and assist to improve the value of the naira, which has weakened against other currencies and choked off growth in the economy.

The entry into these two agreements also coincided with the signing of several memoranda of understanding (“MoUs”) and/or definitive agreements for several infrastructure development projects, which reportedly include:

- North South Power Company Limited and Sinohydro Corporation Limited (“SCL”) signing an agreement valued at US$478 million dollars for the construction of a 300MW solar power in Niger State;
- Granite and Marble Nigeria Limited and Shanghai Shibang signing an agreement valued at US$55 million for the construction and equipping of a granite mining plant;
- Infrastructure Bank of Nigeria and SCL signing an agreement for the construction of a greenfield expressway for Abuja-Ibadan-Lagos valued at US$1 billion;
- the signing of a US$2.5 billion agreement for the development of the Lagos Metro Rail Transit Red Line project in Lagos State; and
- the signing of a US$1 billion facility for the establishment of a hi-tech industrial park in Ogun-Guangdong Free Trade Zone in Ogun State.

More recently, the Nigerian National Petroleum Corporation (“NNPC”) arranged an investor roadshow in China with the objective to bridge the funding gap in the country’s oil and gas infrastructure sector, including pipelines, refineries, power facilities and upstream projects. MoUs between NNPC and several Chinese counterparts were signed worth approximately US$80 billion.

Experience of Chinese infrastructure financing transactions

In light of the above, the financing structures for the funding of these projects by Chinese counterparts may not vary too much from western project financings. However, from our extensive experience of advising sponsors, borrowers and lenders on a significant number of China outbound infrastructure financing transactions there are certain dynamics one can expect to encounter.

Historically, Chinese infrastructure financing in Africa was often structured as commodity linked and government to government (“G2G”) transactions. In this instance, the Chinese lenders would extend a loan to the government or the Ministry of Finance (“MoF”) in respect of an infrastructure project to be constructed by a Chinese contractor in exchange for access to a commodity (in the case of Nigeria, crude oil). This G2G loan is then secured by a sovereign guarantee provided by MoF and security is taken over the commodity offtake arrangements.

Whilst in some cases this model may still prevail, going forward, we are also seeing a shift in the funding dynamics from China. Chinese counterparties are in some cases moving away from G2G transactions (not in its entirety) and are willing to engage with private sector sponsors on a business to business (“B2B”) basis. As such, Chinese counterparties (mostly state owned enterprises) with an appetite to operate in Nigeria or lend to Nigerian projects are doing so on an arm’s length basis and paying
particular attention to project specific risks and project bankability issues.

The mechanism used to document the obligation of a contractor to construct the infrastructure project is the turnkey contract, which is typically in the form of an Engineering, Procurement and Construction (EPC) contract. Chinese EPC contractors have emerged as serious, technically competent and economically competitive players in the global infrastructure space. What makes Chinese EPC contractors even more competitive now for Nigeria is their ability to procure project financing from their relationship banks (like ICBC), export credit agencies (like China Exim Bank) and development finance institutions (like China Development Bank and China-Africa Development Fund) all supporting the export of the EPC contractor’s services (and any Chinese manufactured equipment). These participants are particularly active on China outbound transactions into Nigeria. In addition, we expect to see the Asian Infrastructure Investment Bank (an international development financial institution that aims to support the building of infrastructure in Asia) feature more on these infrastructure financings after recently confirming that it intends to expand its lending activities beyond Asia and into Africa.

Features of Chinese outbound loan agreements can (but not necessarily always) include relatively longer tenures and at times cheaper margins compared to domestic bank lenders, though much depends on the individual facts, such as the nature of the projects and the domestic risk profile.

Financing structures
In the case of the NNPC related financings, we would expect to see a guarantee from MoF in addition to security over a long term crude offtake arrangement with NNPC. In the case of pure infrastructure financings on a B2B project, we have seen Chinese lenders focus less on the points relating to micro-project risks during the diligence process. This is perhaps because finance from Chinese lenders is typically given on the basis that there are enforceable guarantees (often bank guarantees) in place from various counterparties participating in the project. Project guarantees have formed the basis of the security package that Chinese lenders have sought to have in place. Depending on the nature of the project, guarantees are sought from the following counterparties (amongst others):

- equity providers and sponsors (in proportion to their equity interest in the project);
- feedstock suppliers;
- project offtakers; and
- the EPC contractor.

Therefore, the counterparties providing these project guarantees will also need to get comfortable around the project risks associated with the development.

Human resourcing
Human resourcing of Chinese funded and EPC contracted projects has proven to be a controversial issue for stakeholders involved in these infrastructure projects. It goes without saying that one of the political upsides of financing infrastructure projects is the microeconomic benefits that would derive from such projects (i.e. direct and indirect job creation). There is perhaps a misconception (this may be due to historical factors) that Chinese EPCs not only come with their equipment but also with their own human capital. This approach is seen to prevent job creation opportunities for local workers and the negative backlash can often frustrate the progress of infrastructure projects in-country.

Going forward, Nigeria and its Chinese counterparts will need to address up-front the topic of human resourcing of Chinese funded and EPC contracted projects. Whilst it is reasonable to expect that the EPC contractor would want to have its lead engineers and trained workers on the ground to construct the project, this however, needs to be tempered with the needs of the host country in order for its people to benefit from job creation opportunities.

Conclusion
The MoUs signed between Chinese funders/EPC companies and the Nigerian government/indigenous companies marks a new direction towards finding financing solutions that will work for Nigeria. It is important to note that historically, some MoUs have been signed between China and Nigeria with very little progress made or projects financed to completion.

There is still a process of education from both participants in respect of understanding how each counterparty operates, the project risks they are willing to accept and devising/documenting structures on a project-by-project basis that can work in a Nigerian context, but which also satisfies the funding requirements of Chinese parties.

It goes without saying that collaboration between the two countries in relation to infrastructure projects can work (for Nigeria, it needs to work) and over the coming months King & Wood Mallesons hope to play a significant role in facilitating to financial close projects between China and Nigeria that can bridge the infrastructure gap.

Introducing
James Douglass

James Douglass is the King & Wood Mallesons EMEA Head of Energy, Resources & Infrastructure and has over 20 years’ experience in M&A, project development and financing in the oil & gas (including LNG), petrochemicals, power, infrastructure and mining sectors. James advises numerous Chinese SOEs, banks and companies on outbound investments in the energy and resources sectors as well as international clients looking to do business in China and on oil and gas and LNG projects worldwide. James has one of the strongest China outbound finance credentials of any international lawyer in London.
New Energy

Establishment of a new energy and infrastructure project development company

The Abraaj Group, a leading investor in growth markets, recently announced the establishment of a dedicated project development unit to further extend its investment capabilities in the energy, power and infrastructure sector. As a member of The Abraaj Group, Themis Energy will leverage the Group’s local teams, global network, execution capabilities and existing infrastructure team to develop and manage energy and infrastructure projects in Africa and other growth markets from concept stage to operation.

Abraaj has the stated aim of addressing the large power deficit in growth markets where a lack of well-structured, quality and bankable projects is inhibiting economic development. Abraaj’s global strategy is aimed at capturing value throughout the life-cycle of primarily renewable and energy efficiency projects. With the establishment of Themis as its development arm, Abraaj will be able to unlock a supply of bankable quality energy assets developed on a proprietary basis.

Themis was independently launched in 2013 by Marc Mandaba and other professionals with a strong track record in energy project development. The company has collaborated in energy projects under development in excess of 1,300 MW and has advised several African governments and lending institutions on energy and civil infrastructure related projects.

Themis consists of a team of highly experienced infrastructure project developers who will enable Abraaj to benefit from deeper execution capabilities in the energy infrastructure sector. As part of the Abraaj Group, Themis will lead or partner with other project developers in order to bring projects from concept to bankability and mobilise debt and equity towards financial close.

Tas Anvaripour, former chairperson of Themis, joined Abraaj as a Partner in the energy infrastructure team to help direct Themis, following her previous roles as Chief Executive Officer of Africa 50 and other senior positions in the sector. Marc Mandaba, Founder of Themis and former private infrastructure investment officer at the African Development Bank, now acts as Managing Director and Head of Themis.

In relation to the addition of Themis to the Abraaj Group, Sev Vettivetpillai, Partner and Global Head of Abraaj’s Thematic Fund Business said that “Abraaj’s ambition is to effectively manage capital across a number of energy sub-sectors and through all stages of the energy asset life cycle, from early developments through greenfield to operations. We believe that we can successfully achieve this objective by expanding our scope of activities to include a dedicated focus on project development.”

The Abraaj Group, founded in 2002, has invested c. US$ 1 billion in ten investments in global growth markets to date. In October 2015, Abraaj announced a partnership with the Aditya Birla Group to build a gigawatt scale renewable energy platform focused on developing solar power plants in India. The Abraaj Group were advised by a King & Wood Mallesons team comprising Barri Mendelsohn (Managing Associate, Corporate), James Douglass (Partner) and Francis Iyayi (Associate), in the Energy and Infrastructure department and Patrick Deasy (Partner, International Funds).
After prolonged waiting and speculation, the Governor of the Central Bank of Nigeria (the “CBN”) on June 15, 2016 finally announced certain far-reaching changes to the foreign exchange regime in Nigeria. The announcement was quickly followed by the release of a new set of guidelines for the implementation of the changes. (The new guidelines comprising the (a) Revised Guidelines for the Operation of the Nigerian Inter-bank Foreign Exchange Market; and (b) Guidelines for Primary Market Dealership in Foreign Exchange Products, are together referred to in this article as the “New FX Guidelines”).

Although some of the practical details are still being developed, there is no doubt that the changes represent the most ambitious and extensive reordering of the foreign exchange market in Nigeria since the repeal in the 1990’s of the Exchange Control Act of 1962.

As market participants and the advisory community continue studying the changes and watching the markets to determine their exact ramifications and impact on both foreign investors and Nigerian businesses, this article is intended to provide a brief insight to the foreign exchange regime which existed in Nigeria prior to the issuance of the New FX Guidelines and then highlight some of the headline changes made to the old regime by the New FX Guidelines.

### The Old Foreign Exchange

In order to encourage foreign investments and generally liberalise the economy, the Federal Government of Nigeria (the “FGN”) in 1995 repealed a number of laws which contained stringent exchange control rules. In place of those repealed laws, the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (the “Foreign Exchange Act”) was enacted. The Foreign Exchange Act relaxed the strict exchange control rules then in place in Nigeria and established an autonomous foreign exchange market (the “AFEM”) on which the sale and purchase of foreign exchange were to be conducted by the CBN, banks and other institutions issued with a licence to deal in foreign exchange (the “Authorised Dealers”), bureaux de change, hotels or other corporate bodies authorised by the CBN to sell and purchase foreign currency (together, the “Authorised Buyers”), foreign exchange end-users and other persons recognised by the FGN. The foreign exchange market was further expanded in 1999 by the introduction of the Nigerian inter-bank foreign exchange market (the “NIFEX Market”), thus creating a dual foreign exchange market in the country.

Besides the Foreign Exchange Act, dealings in foreign exchange were (and continue to be) regulated by the Foreign Exchange Manual issued by the CBN and such circulars, notices and directives issued from time to time by the CBN in furtherance of its general powers to regulate the procedures for transactions in the foreign exchange market and other related matters.

The existing laws on foreign exchange in Nigeria cover a wide range of issues including the manner in which investors can import and repatriate capital, the utilisation of...
export proceeds, the CBN-approved list of transactions which qualify for the purchase of foreign exchange from the AFEM and the NIFEX Market (“Eligible Transactions”), the manner in which Authorised Dealers and other market participants can sell and purchase foreign currency, the establishment of foreign currency domiciliary accounts, the qualifications for appointment as Authorised Dealers and Authorised Buyers, transactions which were not permitted to be concluded in cash, the rules governing the exportation of goods and services from Nigeria and a host of other issues.

Some of these issues are pertinent to the current discourse. In particular, under the foreign exchange regime in place before the introduction of the New FX Guidelines on June 15, 2016:

(a) there was a dual foreign exchange market – the NIFEX Market – on which banks bought and sold foreign exchange amongst themselves and with members of the public requiring foreign exchange for Eligible Transactions; and the CBN foreign exchange window on which the CBN sold foreign exchange to Authorised Dealers for the purpose of enabling them fund underlying Eligible Transactions;

(b) each licensed bank in Nigeria was generally permitted by the CBN to operate as an Authorised Dealer and could therefore transact directly with the CBN on a wholesale basis for the purpose of purchasing foreign exchange; and

(c) the exchange rate of the Naira to the US Dollar and other convertible foreign currencies was fixed or determined by the CBN.

Following the crash in oil prices (a commodity which accounts for about 95% of Nigeria’s foreign exchange earnings) and the attendant reduction in foreign currency inflow to Nigeria and the dwindling of Nigeria’s external reserves, there was significant internal and external push for the FGN to take aggressive steps to reorganise the structure and operations of the foreign exchange market, attract or stimulate more investments into the Nigerian economy (including through a devaluation of the supposedly overvalued Naira), and assist in clearing the significant backlog of unmet foreign currency demand from such users as: investors seeking to repatriate the proceeds of their investments from Nigeria and Nigerian companies or individuals requiring foreign currency for their international trade and other Eligible Transactions.

Whilst the government resisted appeals from several sectors to formally devalue the Naira, the CBN implemented several measures aimed at reducing the volatility of the Naira and ensuring foreign currency liquidity in the system. Those measures were not successful in ensuring foreign currency liquidity, and hence contributed to driving up the exchange rates on the black market. The CBN was subsequently forced on May 24, 2016 to announce an intention to introduce a more flexible foreign exchange regime. Three weeks after that announcement, the CBN finally introduced the New FX Guidelines and thus radically altered the structure of the Nigerian foreign exchange market.
Highlights of the New Foreign Exchange Regime

Below is a summary of some of the key changes introduced by the New FX Guidelines:

A single market with “uncapped” and flexible prices

Among other things, the New FX Guidelines discarded the much-criticised artificial peg on the Naira to U.S. Dollar rate of exchange. In addition, the New FX Guidelines have abolished what used to be a dual foreign exchange market comprising the AFEM and the NIFEX Market, and established in its place a single market structure for foreign exchange which shall be the restructured inter-bank/autonomous market window (the “New FX Market”).

As a consequence of the above, exchange rates in the New FX Market will no longer be dependent on nor determined by the CBN but will instead be driven by market forces on a daily basis using metrics from the FMDQ Thomson Reuters Order Matching System and the Conventional Dealing Book.

The sale and purchase of foreign exchange in the New FX Market shall be on a two-way quote basis between the Authorised Dealers via the FMDQ Thomson Reuters FX Trading System (or any other platform approved by the CBN).

Participants in the New FX Market

The following are all entitled to participate in the New FX Market: Authorised Dealers; Authorised Buyers; oil companies; oil services companies; exporters; end-users (i.e. businesses and members of the public requiring foreign exchange for Eligible Transactions); and any other entity designated as a market participant by the CBN from time to time.

The Arrival of “Preferred” Authorised Dealers

Under the New FX Guidelines (in particular, the Guidelines for Primary Market Dealership in Foreign Exchange Products), the CBN has created two categories of Authorised Dealers: Foreign Exchange Primary Dealers (the “Primary Dealers”) and Foreign Exchange non-Primary Dealers (the “Non-Primary Dealers”). The primary dealership system is one whereby entities appointed as Primary Dealers by the CBN are accorded access to transact or trade in foreign exchange and related products on a wholesale basis directly with the CBN in the New FX Market and to act as professional counterparties and market participants.

Initially, the qualification criteria for appointment by the CBN as a Primary Dealer included the satisfaction of at least two of the following three quantitative conditions as of May 31, 2016 (i.e. prior to the release of the New FX Guidelines): (a) minimum shareholders’ funds of at least N200 billion unimpaired by losses; (b) minimum of N400 billion in total foreign currency assets; and (c) minimum liquidity ratio of 40%. In addition to these, the applicant is required to have some additional qualitative capabilities including strong foreign exchange trading capacity; deployment of all FMDQ Thomson Reuters foreign exchange trading systems or any other systems approved by the CBN; dealing room standards with adequate back-end support; active participation in the NIFEX Market; and adequate computerisation of its foreign exchange trading, reporting and settlement processes.

Concerned that many Authorised Dealers may not meet these criteria and that restricting the Primary Dealers to a limited number of Authorised Dealers could potentially lead to collusion, price fixing and other fraudulent practices, the CBN reserved for itself the right to review the qualifying criteria for the appointment of Primary Dealers and has, since its initial announcement of the qualifying criteria, changed the rules in order to qualify more Authorised Dealers as Primary Dealers. The CBN has therefore dispensed with or at least deferred the three stringent quantitative requirements listed above and instead now permits all the licensed national and international banks operating within Nigeria to perform as Primary Dealers. As a result, local regional banks and merchant banks are ineligible to trade as Primary Dealers although they remain qualified as Authorised Dealers to participate in the FX market but as Non-Primary Dealers.

Interventions and “Quantitative Easing” by the CBN

The New FX Guidelines empower the CBN to participate in the New FX Market through periodic interventions to either buy or sell foreign exchange as the need arises. Presumably, this would enable the CBN to ensure continuous liquidity in the New FX Market and keep the exchange rate within check from time to time (without necessarily stipulating the rates in the ordinary course of business).

The CBN could exercise the above power by either purchasing or selling foreign exchange directly into the New FX Market using the two-way quote system or by selling foreign exchange on a wholesale basis to Authorised Dealers or on a retail basis to end-users through the Authorised Dealers (provided that such end-users require the foreign exchange for Eligible Transactions and submit appropriate documentation).

In the first week of trading at the New FX Market, the CBN exercised this power and intervened to provide liquidity in the market by injecting over US$4 billion to clear a backlog of matured foreign exchange obligations of banks as well as to fund some current demand.

For the purpose of such interventions and other purposes relating to the New FX Market, the CBN will now trade only with the Primary Dealers.

Derivatives Products in the New FX Market

Authorised Dealers may provide hedging products such as over-the-counter (“OTC”) Naira-settled foreign exchange futures to end-users. Such OTC foreign exchange futures must be backed by trade transactions or evidenced investments. The benchmark for the valuation and settlement of the OTC foreign exchange futures and other derivatives in the New FX Market shall be provided by FMDQ. Any foreign exchange OTC futures and forwards offered by Authorised Dealers will count as part of the foreign exchange trading positions of the Authorised Dealers.

In the same vein, in order to enhance liquidity in the New FX Market, the CBN may also intervene to offer long-tenured foreign exchange forwards to the Primary Dealers who may purchase such OTC foreign exchange futures for their own account or sell to other Authorised Dealers (presumably the Non-Primary Dealers) or end-users. The CBN may also offer such products to end-users (through Authorised Dealers) for trade-backed transactions. In the exercise of this power, the CBN has in fact recently intervened in the New FX Market as a pioneer seller of the Naira-settled derivatives when it kicked off the new derivatives market by acting as the seller of OTC foreign exchange futures contracts for certain defined tenors, thus providing liquidity in products that will enable businesses and investors to efficiently manage their foreign exchange risk exposure.

These derivatives products under the New FX Guidelines are in addition to other hedging products already approved by the CBN under the January 2011 “Guidelines for FX Derivatives and Modalities for CBN FX Forwards” which enabled operators and end-users to hedge against losses arising from exchange rate fluctuations. The introduction of the OTC foreign exchange futures transactions in the New FX Market...
is expected to reduce the demand for foreign exchange on the spot market (and discourage hoarding or frontloading of foreign exchange) by moving non-urgent foreign exchange demands from the spot market to the futures market offered by both the CBN and the Authorised Dealers.

For foreign investors, the settlement amounts (i.e. the differential between the OTC foreign exchange futures and the NIFEX Market fixing on the settlement date of the OTC foreign exchange futures contracts) paid by the Authorised Dealers on OTC foreign exchange futures transactions may only be repatriated by the foreign investors upon presenting (i) the certificates of capital importation (“CCI”) issued to them at the time of their making the underlying investment into Nigeria; and (ii) an OTC foreign exchange futures settlement advice issued by the FMDQ.\(^6\)

**Upward Review of Foreign Exchange Trading Position for Authorised Dealers**

The daily foreign exchange trading position of Authorised Dealers has a significant impact on their ability to meet the increasing foreign exchange demands of their clients. Incidentally, on 17 December, 2014, the CBN directed each Authorised Dealer to immediately reduce its foreign exchange trading position from the then existing 1% of shareholders’ funds unimpaired by losses to zero percent of shareholders’ funds as daily foreign currency trading (rather than the fixed rate which existed under the old regime).

Interestingly, under the New FX Guidelines, Authorised Dealers (whether Primary and Non-Primary) now have the leverage to maintain higher daily foreign currency trading positions in order to support their obligations as liquidity providers in the New FX Market. The Authorised Dealers are required to have a maximum limit of +0.5%/-10% of their shareholders’ funds unimpaired by losses as daily foreign currency trading position limits. To ensure flexibility, an Authorised Dealer which requires a higher position limit to trade on any day in order to accommodate a customer trade could seek the approval of the relevant director at the CBN who, in his discretion, could approve or decline such request depending on the circumstances of each case.

**The Notorious 41**

Under the New FX Guidelines, the notorious 41 goods and services (including toothpicks!) which were declared “Not Valid for Foreign Exchange” and hence disallowed access to the AFEM or the old NIFEX Market by the CBN remain ineligible for the purchase of foreign exchange from the New FX Market.

**More Naira for Foreign Investors**

Foreign investors importing capital into Nigeria and persons receiving money in Nigeria through any of the international money transfer systems may now have more Naira upon conversion of the foreign currency to Naira (whether for the purpose of obtaining CCIs or for any other purpose). This is because the New FX Guidelines allow the proceeds of foreign investment inflows and international money transfers to be purchased by Authorised Dealers at the market-driven rate in the New FX Market (rather than the fixed rate which existed under the old regime).

**Conclusion**

Although the New FX Guidelines have ushered in significant changes to the foreign currency regime in Nigeria, there has been no change to the modalities for importing investment capital into Nigeria or repatriating investment proceeds from Nigeria. This is because investment capital is still required to be imported into Nigeria through an Authorised Dealer who then issues a CCI upon conversion of such foreign capital into Naira. Similarly, foreign investors will still be required to present their CCIs when seeking to purchase foreign currency from the New FX Market for the purpose of repatriating their investment proceeds.

Going forward, the key and immediate impact of the New FX Guidelines on foreign investors are that (i) the rate of conversion of their foreign capital into Naira is no longer a pre-determined rate and they may now have more Naira for their foreign currency; and (ii) the derivatives products in the New FX Market seem to provide some assurance of liquidity on the settlement dates for repatriation of imported capital.

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1. The repealed laws are (a) the Exchange Control (Anti-Sabotage) Act; and (ii) the Second-Tier Foreign Exchange Market Act.
4. Some of the common measures taken include controversially outlawing the use of foreign currency for domestic transactions, banning importers of certain locally consumed items from accessing the dual foreign exchange market, insisting on strict compliance with a CBN rule which requires exporters to repatriate the proceeds of their exports into Nigeria within a specified time frame and to utilising such proceeds only for certain limited purposes, stopping the sale of foreign currency to BDCs and endorsing the policy which banned the withdrawal of foreign currency from their bank accounts by domiciliary account holders.
5. CBN Circular No. FMD/DIR/GEN/07/001 of June 24, 2016.
6. CBN Circular No. TED/FEM/FPC/GEN/01/026.
7. CBN Circular No. TED/FEM/FPC/GEN/01/001.
8. This was done by the CBN via Circular No. TED/FEM/ FPC/GEN/01/010 of June 22, 2015.
Introducing KWM's new corporate partner, Greg Stonefield

Greg Stonefield has recently joined KWM in the London office having spent 12 years as a partner at White & Case and 2 years at Mayer Brown.

Greg has a broad corporate finance practice focusing on ECM related transactions (including IPOs (equity and GDRs), introductions, secondary offerings, block trades, private placements) and on domestic and international public and private M&A.

He has significant experience in advising clients on the UKLA Listing Rules and Disclosure and Transparency Rules, the Prospectus Rules, the AIM Rules and general corporate law. He has a wealth of experience in representing both issuers and underwriters on equity transactions and in bringing overseas companies to the London Stock Exchange. Greg also regularly advises both purchasers and sellers on a variety of M&A transactions (domestic and international).

Greg has advised clients from a broad array of industry sectors including real estate, oil and gas, mining and metals and telecoms.

With a strong track record in cross-border M&A to complement his domestic work, Greg has advised on innovative transactions involving a number of African jurisdictions - building strong links and connections with leading firms including in South Africa, Nigeria and Ghana. Greg is recommended as an Africa specialist by Legal 500 2015.

He recently advised Standard Bank and Renaissance Capital as managers to the US$98.7 million sale of shares in Umeme Limited, an energy distribution network company in Uganda, by Umeme Holding Limited as well as Guaranty Trust Bank and Diamond Bank on their offer of GDRs and admission to trading on the LSE.

Greg has also acted for Guaranty Trust Bank on its acquisition of a 70 per cent stake in Kenya’s Fina Bank Limited for US$100 million (₦16 billion). At the time Fina Bank had total assets of US$338 million with operations in Kenya, Rwanda and Uganda. Greg has also acted for Afren plc in its US$125 million equity raising by way of open offer, its move up from AIM to the main market of the LSE and on its acquisition of Black Marlin, the East Africa focussed energy company with assets in Kenya, Madagascar, Ethiopia and Seychelles.

As an expert in structuring international investments in Africa, Greg is frequently approached by international media for comments on trends and developments on the continent.

Greg was recently interviewed on investment trends in Africa infrastructure by Reuters (Money Matters AM) as well as on the opportunities for local and international investors in the African Telecoms sector by The New Economy magazine and is a frequent contributor on CNBC Africa.
60 Seconds with Greg Stonefield

What did you want to be when you were little?
International man of mystery – 007

Where were you before KWM?
Enjoying time with family and friends, but if you meant which law firm I was last at, then Mayer Brown.

What was your first job?
Vet’s assistant

What was your worst experience as a trainee, clerk, junior?
Not having slept for three nights and realizing at the closing meeting that I had two different shoes on… fortunately everybody else was equally tired and didn’t notice (or were too polite to say anything!)

If you weren’t working for KWM what would you want to be doing?
Sipping Nigerian Guinness whilst watching the sun set in Cape Town.

Who do you most admire and why?
Without a doubt Madiba, Nelson Mandela, who I was most fortunate to have met. One of the giants of our century, a man who embodied magnanimity, reconciliation, generosity and humility. He perfectly understood that people are dependent on other people in order for individuals and society to prosper.

What is the best thing about your job?
The dynamism of law, finding solutions for clients, learning about new industries and working with incredibly bright, motivated people.

What project or accomplishment do you consider to be the most significant in your career so far?
Making partner many moons ago!

What is your life motto?
Nothing ventured nothing gained!

Who is your favourite character from history?
King Solomon

Who is your favourite singer or group?
Neil Diamond, much to my children’s embarrassment.

What is your claim to fame?
My Sunday brunch!

What is your favourite holiday location?
The Pacific Coast of the USA.

If you could have any super power what would it be?
Dual powers of mind reading and invisibility.

What book do you think everyone should read?
Treitel on Contract law
Opportunities for the Bold

Africa mining M&A in 2016 and beyond

After 2015’s race to the bottom, the start of 2016 has seen a gradual rallying of the mining industry in Africa. Commodity prices and equities have rebounded, driven by local currency weakness against the US dollar, lower input costs and a focus on deleveraging.

However, the upswing in M&A activity that many predicted for 2016 has yet to materialise. A recent note from Macquarie Research highlights that the sector’s share of global deal-making is currently at 3%, the lowest point in over a decade, with only a handful of deals completed in Sub-Saharan Africa so far this year. With ongoing volatility, a slower rate of global economic growth, oversupply in key commodities and poor investor sentiment, further pain is expected in 2016 before the market sees any significant resurgence in deal-making activity.

While the immediate outlook is subdued, we believe that there are a number of bright spots and once in a generation opportunities for those with an eye to the medium and long term.

The rise of gold

Gold has been the standout performer so far in 2016 amid a wave of M&A activity in West Africa. Recent deals have included Perseus Mining’s expansion into Côte d’Ivoire and Sierra Leone by taking over LSE-listed Amara Mining, Teranga Gold’s acquisition of Gryphon Minerals* (an ASX-listed company with fully permitted operations in Burkina Faso) and Endeavour Mining’s buy-out of another West African gold miner, TrueGold Ltd, for US$180m.

The majority of acquirers are well-capitalised North American and Australian gold producers looking to consolidate and geographically diversify. As the gold industry was the first in the sector to restructure, many producers are ahead of the pack and in a position to take advantage of healthy balance sheets and strong cash flow amid strengthening gold prices.

Gold is currently sitting at around US$1,350/oz after a prolonged run fuelled by uncertainty, low interest rates and inflamed by Brexit. Looking forward, with the US Federal Reserve likely to hold on rates until the end of the year, ongoing global political volatility and declining production in the near term, the price of gold is set to rise further. This is good news for producers given the strength of the US dollar relative to local currencies. As project costs are usually paid out in local currencies, while gold is sold for US dollars, the increase in profits will create favourable conditions for the acquisitively-minded.

We therefore expect that the remainder of the year will see further consolidation in gold with a focus on pre-production opportunities where many African juniors remain undervalued or in distress. We would also expect to see the South African-based producers such as Sibanye Gold, Harmony Gold and Gold Fields to take advantage of market conditions and increase their portfolios in West Africa.
Gearing up for divestments?

Despite the uptick in commodity prices since the beginning of the year, miners remain distressed. As in the rest of the world, miners in Africa are shedding non-core assets in order to strengthen balance sheets and maintain overall liquidity. This includes cash-strapped majors such as Anglo American, Glencore and Freeport-MoMoRan who have all kicked off disposal processes for a mixture of coal, iron ore and copper assets throughout South Africa, Botswana and the DRC. But, with market headwinds and a value expectation gap between buyers and sellers, few deals have been closed to date.

While we anticipate that distressed assets will continue to come to market throughout 2016 and into 2017, we do not expect this to be the catalyst for a large increase in M&A activity. Miners have become more risk-averse since the peak of the last cycle, capital remains scarce, execution risks are high and proportionately few upper quartile assets are likely to appear on the blocks. In this environment we see the next 6-12 months as more a period of careful and disciplined acquisitions rather than opportunistic bargain hunting.

For those miners in a position to pursue distressed deals, there are once in a generation opportunities and the focus will be on those that offer growth and genuine long-term value, whether by realising improved operating synergies, commodity and geographical diversification or (as is likely among the mid-caps) consolidation which paves the way to becoming leading producers when prices rebound. Justifying such value propositions will be particularly important to publicly-listed entities as shareholders remain wary of any new buying spree.

We expect that with a greater focus on quality and aversion to risk, distressed assets in stable and well-understood mining jurisdictions, like Ghana, Botswana and Namibia, will be particularly attractive. Nevertheless, copper, iron ore, platinum and coal assets in South Africa and the DRC (especially those being sold by the majors) will also attract attention purely because of their high quality, notwithstanding political instability, corruption issues and regulatory uncertainty within those jurisdictions.

Chinese and Private Equity eyeing opportunities

With much of the industry capital constrained, cashed-up Chinese companies and private equity players have the funds to pursue countercyclical opportunities in Africa. We expect to see further activity from both these corners of the market as the year progresses.

Chinese buyers are looking to take advantage of challenging conditions to secure strategic assets that wouldn’t be sold but for debt. The ‘new normal’ and slowdown in demand for industrial metals also means that Chinese miners are pursuing commoditisation diversification strategies to ensure they are in a stronger portfolio position when heading into the next cycle.

For example, China Molybdenum’s recent US$2.65 billion acquisition of Freeport’s majority stake in the Tenke Fungurume mine in the DRC provided China Molybdenum with not only another prime copper asset, but also significant exposure to cobalt – one of the specialty metals used in rechargeable batteries and medical equipment.

Based on what we have seen in recent months, astute Chinese miners, like China Molybdenum, are willing to pay full value for strategic assets.

Despite sitting on an estimated US$7-10 billion in raised funds earmarked for mining, investment by the private equity firms has been elusive in 2016. Activity in Africa has been particularly thin, with only very small deployments such as Tembo Capital’s US$4.75 million placement in Strandline Resources’ Tanzanian mineral sands project. Nevertheless, there has been substantial interest and tyre-kicking, suggesting that it may only be a matter of time before more of the private equity players make their move.

While private equity has a good hand at the moment, Bert Koth, Managing Director of Denham Capital’s mining division, has noted that private equity funds cannot compete for strategic assets with Chinese buyers that have a much lower cost of capital.

With this in mind, we see real opportunities for private equity in the small-mid caps, especially given the potentially greater yields that can be generated from backing development stage projects and the increasingly distressed disposition of the junior market. This also aligns well with the landscape in Africa, which is dominated by small developers, and we expect to see an increase in the number of deals involving funds and low-cost start-ups that are run by teams with genuine track records, in stable jurisdictions and in commodities that have a strong future (e.g. copper, zinc, nickel, gold, platinum, tungsten and rare earth elements). We are also seeing increased interest by private equity firms in South African uranium and coal opportunities.

Pursuing non-operating interests

Takeovers may have dominated the deal activity in Africa’s mining industry in 2016, but the acquisition of smaller non-operating interests is becoming increasingly attractive as a low-risk strategy to take advantage of a bottoming market.

Acquiring non-operating interests provides a much needed life-line for project proponents but also allows investors to share risk with the majority owner while facilitating cost effective diversification, as multiple interests can be purchased without the need to pay control premiums. It also allows investors to strengthen their reputation with operators and stakeholders in key markets, secure off-take and add value through the application of technology, geological insight or commercial know-how.

In the context of Africa, we see this strategy playing to the strengths of the acquisitive Japanese trading houses such as Sumitomo, Mitsui and Itochu (Mitsubishi being a notable exception given recent announcements that it does not intend to increase its net exposure to resources for at least the next three years).

These trading houses are comfortable with non-operating interests, have a need to secure long-term off-take and have built up a portfolio of financial, infrastructure, power and transport assets in Africa (particularly East Africa), which can be brought to bear in supporting project development.

They are also sitting on large cash reserves (Citigroup estimates that corporate Japan has some US$3 trillion in holdings) and have been actively encouraged by the Japanese Ministry of Economy, Trade and Industry to pursue investments in Africa.

As such, we expect that the latter half of the year will see the more assertive of these trading houses begin to take up minority positions with offtake agreements in base and industrial metals, including by way of opportunistic approaches. However, only prime assets with associated infrastructure opportunities are likely to capture their attention.

The tech effect

In Africa, the big-hitting commodities have traditionally been diamonds, iron ore, gold and copper. But with the global energy landscape rapidly changing and disruptive technologies on the rise in 2016, many investors are turning their attention to opportunities in specialist technology metals during the current downturn.
King & Wood Mallesons has continued to support long-term client China Molybdenum Co., Ltd (“CMOC”) on its global expansion, advising CMOC on the two largest mining acquisitions by a Chinese company this year - the US$1.5 billion acquisition of Anglo American’s niobium and phosphates businesses in Brazil and the US$2.65 billion acquisition of Freeport’s indirect 56% interest in Tenke Fungurume located in the Democratic Republic of Congo (DRC).

The same core King & Wood Mallesons team from the United Kingdom, China, Australia and Hong Kong advised CMOC on all three transactions. The team also advised CMOC’s largest shareholder Cathay Fortune on an earlier USD 850 million off-market takeover bid.

The full team was led by anti-trust partners Susan Ning and Liu Cheng, Corporate partner Xu Ping and Securities partner Rebecca Chao in Beijing, Corporate partner Tim Bednall and managing associate Michaela Moore in London, Corporate partner Raymond Wong and senior associate Sherman Chan in Hong Kong, and Corporate partners Stephen Minns, Paul Schroder and Jingchuan Zhao (PRC Law) in Australia.

Tim Bednall, Corporate partner at King & Wood Mallesons who led on the Anglo American deal said, “We are delighted to have once again leveraged our global capability and deep local expertise to support CMOC. These latest investments reflect CMOC’s ambitious strategy to become a world-class mining player and King & Wood Mallesons is pleased to be able to assist CMOC as it executes these strategic transactions that will deliver long-term value to the company and its shareholders.”

However, long term fundamentals remain strong and it may only be a matter of time before M&A normalises in African mining. In the meantime, the boldest and most well positioned companies will take advantage of lower prices and a glut of assets to ready themselves for the next phase of the cycle.
Since the discovery of vast coal reserves in 2005, Mozambique has attracted the attention of foreign investors, looking at the country's huge export potential. According to the Mozambique Mining Report Q2 2016, the country's coal production is expected to grow from 8.0mnt in 2016 to 9.5mnt by 2020, representing an average growth of 4.2% y-o-y over 2016-2020.

The Mozambique coal sector is currently dominated by international mining companies such as Brazil’s Vale, Coal India and more recently International Coal Ventures, which acquired Rio Tinto’s assets in 2014.

Nevertheless, other Asian firms are likely to join Indian companies in order to secure long-term access to mineral resources. This is the case of the Japanese trading house, Mitsui, who bought a 15% participation in Vale’s Moatize coal mine and 35% in the Nacala Logistics Corridor in 2014.

Recognising the key role the mining sector may play in the country’s development, the Mozambican government recently approved a new set of legislation, repealing the existing regulatory framework. The new regulatory framework includes:

(i) the new Mining Law (Law No. 20/2014, of 18 August 2014), which repealed the 2002 Mining Law;
(ii) the new Mining Tax Law (Law No. 28/2014, of 23 September 2014);
(iii) the Regulation on Mining Work (Decree No. 1/2015, of 23 July 2015);
(iv) the new Mining Law Regulation (Decree No. 31/2015, of 31 December 2015); and
(v) the new Mining Tax Law Regulation (Decree No. 28/2015, of 28 December 2015).

The main features of this legislation are the promotion of local participation in the mining sector and the increase of control over mining activities.

Local requirements

The new Mining legislation stipulates that the mining titles required to undertake mining activities in Mozambique can only be granted to Mozambican natural or legal persons, even though legal persons can be foreign-owned. In addition, the new Mining Law states that the government shall promote the listing of mining companies on the Mozambican Stock Exchange. However, it remains unclear as to whether this will be mandatory and, if so, how much of the share capital of the company is to be listed.

Furthermore, the new Mining Law and its implementation decree set out local content requirements for the procurement of goods and services for mining activities.

Increasing government control over transfers

The new law also includes a government consent right upon any direct or indirect transfer of mining titles, including through a direct or indirect sale of shares. This prevents exit transactions which are structured in order to avoid the need for prior Mozambican government consent. This consent will obviously affect exit strategies, as all sale transactions, irrespective of the way they are structured, will require a government consent condition precedent.

Fiscal provisions

Under the new regulatory framework, mining operators shall pay: (i) income tax; (ii) VAT; (iii) tax over the mining production; (iv) tax over the surface; (v) tax on income from mineral resources; (vi) municipal tax, where applicable;
and (vii) any other relevant taxes required by law.

The new Mining Tax Law sets out that fiscal stabilisation can be negotiated for a 10-year period from the date the mining activities begin. This period can be extended up to the end of the initial mining concession, provided that the concessionaire pays an additional 2% of tax over the mining production from the 11th year of production.

It is worth noting that pursuant to the new Mining Law, mining titles are revoked if the concessionaire fails to pay taxes specific of the mining sector.

## Conclusion

The approval of the much anticipated new mining legislation enables foreign investors who are intending to invest in Mozambique to decide on how to structure their investments and to approach the country.

While the new legislation establishes a regime more favourable to Mozambique, it continues to welcome foreign investors to develop the mining sector.

Furthermore, this new regulatory framework ensures greater competitiveness and transparency and guarantees the protection of rights. As a consequence, it is expected that Mozambique will continue to attract great interest from overseas investors as they position themselves for an improvement in resource pricing and an end to commodity cycle downturn.
Asian Influence

Singapore’s increasing role in Africa

The Asia – Africa relationship has generally focused on a discussion of the relationship between various African countries and China. However, as well as China, Singapore is reacting positively to Africa's improving investment climate despite the effect of low commodity prices.

The rise in investments

Africa has emerged as the leading destination for foreign direct investment (“FDI”) globally with significant investment from the UK, US and China. As a result of the increase in viable long-term opportunities in industries that Singaporean businesses have significant experience in, more and more investment relationships between African jurisdictions and Singaporean companies are being explored.

Some notable Singaporean investments have spurred an interest in Africa. In 2013, Temasek reportedly became a significant shareholder in Seven Energy, an oil and gas group based in Nigeria. In the same year, Pavilion Energy, a subsidiary of Temasek, was reported to have made its first acquisition in the continent by acquiring a stake in three gas blocks off the coast of Tanzania.

It has since been reported that investments into Africa from Singapore have been growing at more than 11 per cent annually since 2008.1 Notable recent examples of indirect investment include those of sovereign wealth funds (“SWFs”). In March of this year, the Government of Singapore Investment Corporation (“GIC”) was reported to have invested USD100 million in two African-focused private equity funds - Actis Real Estate Fund III and RMB Westport’s Real Estate Development Fund II. Though, GIC does not currently have a significant investment portfolio in African jurisdictions, these investments could see the beginning of a change of tactics for the SWF.

There is also a history of Singaporean family offices investing in mining assets in certain jurisdictions in Africa.

Trade relationships

Singapore has one of the highest trade to GDP ratios and its growing partnership with African jurisdictions may reflect a motivation to achieve greater diversification among trade and investment partners.2 The government’s international trade initiative with Africa is an example of ‘the powers that be’ seeking to take advantage of another opportunity. The role of Singapore’s International Enterprise (“IE”) so far has been to foster relationships between African and Singaporean companies. IE Singapore is part of the State’s Ministry of Trade and Industry. In 2013 the body opened two overseas centres in Johannesburg and Ghana to facilitate business links between Singapore and the African countries. IE also launched the Africa Singapore Business Forum (the “ASBF”) in 2010.

The ASBF is a biennial event attended by a number of business and government leaders seeking to improve relations between the two regions. The next ASBF is due to be hosted in Singapore this August and aims to discuss the strategic growth of both regions.

Focus on East Africa

The East African region has emerged as a viable trade partner for Singaporean companies. In 2014 the Singapore Business Forum and IE Singapore organised a business mission to Tanzania and Kenya with the objective to promote bilateral economic cooperation and trade and investment opportunities. The business mission resulted in the signing of two memorandums of understanding between Kenya and Singapore. At the time the group director for Middle East and Africa at IE Singapore stated "East Africa’s geographical proximity and historical trade links with Asia make the region a natural gateway into Africa for Singapore companies".

Since then, in April this year, Singapore’s minister of trade and industry announced two East African ambitions; the intention to use the Dar Es Salaam Port in Tanzania as a trade link between the two states, with the offer of exchange programmes for Tanzanians to work at Singaporean ports; and a desire to share bilateral trade experience with Uganda, with a particular emphasis on agriculture.

The East African connection is also boosting the energy sector in both Singapore and East Africa. Singapore is growing as an oil and liquefied natural gas (“LNG”) trading hub.
in Asia and countries such as Tanzania and Mozambique are undergoing development to take advantage of their natural gas supply. With both regions facing the Indian Ocean, Singapore could play a bridging role, connecting LNG producers in East Africa to buyers in Asia, according to some commentators.

Infrastructure investment

The lack of infrastructure in the majority of the African nations coupled with the increasing middle class offers many prospects for investment in African infrastructure by Singaporean investors.

Recent transactions have shown that Singaporean companies may be able to leverage off of their commercial experience in areas such as ‘urban planning’. Both Surbana International Consultants and Jurong International played a role in the urbanisation and industrialisation of the Singaporean landscape. In May 2015, Surbana entered into an arrangement with the Democratic Republic of Congo (“DRC”) for an urbanisation plan for DRC’s capital city. This arrangement would be one of a number of projects that Surbana has worked on since 2005 in different African jurisdictions. The two companies have since merged and it has been reported that Surbana Jurong sees Africa as a land of many opportunities amid strong demand for infrastructure, affordable housing and job creation through industrialisation. Since the merger, further contracts in Gabon and Ghana have been secured bringing the value of contracts for the last quarter of 2015 and first quarter of 2016 alone, to S$30 million.

A relationship that is not without its difficulties

Whilst the opportunities are there, some work still needs to be done with regard to the co-operation frameworks between African jurisdictions and Singapore. One key concern that has been noted is the lack of free trade agreements. In addition, the availability of bank finance can be a barrier for some Singaporean SMEs where projects are not seen as bankable, though with more successful cross border transactions this trend should change.

However, despite these difficulties, progress is being made: developmental experience is being shared through training programmes and study visits. IE Singapore continues to promote overseas growth of Singapore-based companies and international trade. Some bilateral investment treaties have been negotiated and the Ministry of Trade continues to host delegates from African governments supporting cooperation wherever possible. Singapore also has double taxation agreements with key jurisdictions in Africa such as Mauritius and South Africa.

Conclusion

Despite the economic slowdown in some of the major African jurisdictions, investment from Singapore to African jurisdictions presents a promising opportunity for Singaporean companies and African entities. With the need for infrastructure development, financial resources and expertise, this opportunity could prove mutually beneficial. Although the international framework between Singapore and African jurisdictions is not yet at an advanced stage, bilateral treaties are being agreed.

The aforementioned, coupled with the various cooperation arrangements will make for a robust base to solidify a Singapore – Africa investment relationship.

Finally, Singapore’s experience in the investment needs of these developing economies from other economies in the Asia-Pacific region such as India (significantly within the infrastructure sector) should serve to be an enabling factor for the growth of the Singapore – Africa investment narrative.

3 J. Khoo, ‘Africa beckons, as Surbana Jurong eyes 40-60% of revenue from overseas in 3-5 years’, The Business Times, 7 March 2016
King & Wood Mallesons (KWM) were the winners of the Private Equity Africa Funds Legal Advisor of the Year Award 2016 at the Private Equity Africa Awards held in London in June. KWM also won the award in 2014. KWM were also a top two finalist for the Fund of the Year award for their work on Investec Africa Private Equity 2 which raised just under US$300 million, led by South African based funds partner Cindy Valentine. The award is testimony to KWM’s leading role in private equity in Africa, with the firm currently acting for over 20 active managers and advisers with a focus on Africa. The international expertise brought to Africa by leading KWM lawyers based in South Africa and London means that innovative tax and platform structuring, efficient investor negotiations and top class international European and US regulatory advice is available to Africa focused investors. Cindy Valentine, Patrick Deasy, Jonathan Blake and Ravi Chopra were on hand to receive the award.
Reaching New Heights

Private equity fund raising for Southern Africa reaches record high
Funds raised by private equity managers investing in South Africa and other African markets reached R29.0 billion in 2015, the highest on record for the industry and up a significant 145% from R11.8 billion in 2014. This is according to the SAVCA 2016 Private Equity Industry Survey, the annual survey of private equity and venture capital activity in Southern Africa.

A substantial majority of the funds raised during 2015 (75.9%) were from South African sources, and largely by independent fund managers from third-party investors for late-stage investment mandates. Pension funds, international development finance institutions and funds of funds were the most prominent investors into the industry.

Speaking at the survey launch, CEO of the Southern African Venture Capital and Private Equity Association (SAVCA), Erika van der Merwe, said that the notable pick-up in fund raising was the outstanding theme to emerge from this year’s survey, and is an indication of the sustained interest by local and international institutional investors into private equity investments in Southern Africa. "UK, US and European investors are prominent investors in private equity in this region, with non-South African sources accounting for more than 45% of industry funds raised to date and not yet returned.

The brisk capital raising contributed to the growth in industry-wide funds under management: Survey results reveal that South Africa’s private equity industry, including both government and private funds, managed R165.3 billion of funds at 31 December 2015, an increase of R15.0 billion from 31 December 2014. This represents a compound annual growth rate of 11.9% since 1999, when the SAVCA survey first began.

SAVCA, along with research partner KPMG South Africa, surveyed 72 managers, representing 82 funds, with a mandate to invest in South Africa and in other African markets. This research information was augmented through alternative sources for a further 10 managers representing 18 funds.

Van der Merwe explains that, of the industry’s funds under management, R40.6 billion in undrawn commitments -- contractual capital commitments by institutional investors to private equity funds -- will be called upon in the next few years as private equity fund managers implement their strategies. Around half of this capital is earmarked specifically for South African investments.

The invested component of funds under management is allocated across a range of sectors, mainly in the form of expansion, development and buyout capital. Private equity investment activity in South Africa during 2015 totalled R10.5 billion across 534 deals, of which R4.4 billion was for follow-on investment and R6.1 billion for new investments. By value, the most popular sectors for deal-making in 2015 were banks, financial services and insurance (15.9%), retail (15.7%), infrastructure (14.2%) and manufacturing (11.8%).

Nearly two-thirds of the value of deals done in 2015 entailed investee companies with a BEE rating of four or higher. "Black economic empowerment participation in investments is fundamental to the South African economy and remains a significant driver of private equity activity in South Africa," says Van der Merwe.

Proceeds from asset realisations -- exits from investee companies -- totalled R4.5 billion in 2015, with trade sales being the most prominent exit route by value. Sales to other private equity houses were the second-most popular exit route. The private equity industry returned R8.9 billion to investors in 2015, representing proceeds from exits as well as dividends, loan repayments and interest payments.

Van der Merwe concludes: “The significant increase in funds under management evidences the attractive returns, sustained growth and long-term confidence of investors in the Southern African private equity and venture capital industry.”
Africa Funds

New approach to implementation of ESG policies by Investec’s Africa Fund 2

Investec Asset Management (“IAM”) was launched in South Africa in 1991, and now, over two decades later, is one of the first asset management firms to build a global franchise from emerging market origins. Managing approximately US$109 billion in assets globally, the team offers a broad and successful range of Africa-specific investment strategies across a number of funds.

One notable jewel in IAM’s crown is the Investec Africa Private Equity Fund 2 L.P. (the “Fund”), which first closed in mid-2014, and which most recently had its final closing in early 2016. King & Wood Mallesons (“KWM”) was shortlisted for ‘Fund of the Year’ in the Private Equity Africa 2016 Awards for its work on the Fund, spearheaded by International Funds partner Cindy Valentine, who has worked alongside IAM throughout the life of the Fund.

With significant investors in the Fund being development finance institutions, the Fund places a strong emphasis on ensuring that appropriate governance structures are in place, providing hands-on monitoring and guidance to the management of investee companies.

As with many funds investing primarily in African interests, the Fund has a committed focus on the sustainability and ethical impact of investments. In light of this, IAM developed an approach to streamline the often differing investor approaches to the adoption of environmental, social and corporate governance policies (“ESG Policies”) by the Fund with investors.

During the negotiation of the Fund’s constitutional documents, it was agreed that a cornerstone investor’s ESG Policy would be adopted by other investors to the extent required as a single uniform ESG Policy, with any additional requirements of a particular investor being documented in their own side letter. This approach promised to ensure equality across all investors, and represented an alignment not only on paper but also in the universal commitment to responsible and sustainable investing.

This is a commitment shared by IAM, the Fund’s investors, and KWM, who each ensured that the ESG Policies in the investors’ side letters reflected the Fund’s forward-thinking approach to investment.

With investors from across the globe, including supranational organisations with strict internal policies, the Fund’s ESG Policies meet not only the standards of each of the jurisdictions in which the Fund invests, but also higher global standards. To manage the implementation of ESG Policies throughout the life of the Fund, IAM’s dedicated and well-resourced ESG team is on hand to implement and monitor these high standards in a dedicated way throughout the life of the investments, ensuring that they are not simply seen as a box-ticking exercise.

With the sub-Saharan economy having quadrupled in size since 2000, the market for sustainable and rewarding private equity investing in Africa continues to expand. The work that KWM carries out alongside IAM and other African funds demonstrates a commitment to sustainable investing in Africa to ultimately generate thriving growth in the region.
Invest Responsibly

UNPRI publishes a standardised DDQ on responsible investing

Environmental, social and governance (ESG) issues have become increasingly important to private equity and venture capital fund managers and their investors over the last few years. And as well as the various pressures to ensure responsible investment, there is some evidence that ESG policies may have a positive effect on returns. Managers starting the fund raising process are therefore subject to numerous due diligence requests, and the Principles for Responsible Investment (PRI), an investor initiative in partnership with the United Nations, have recently released the “Limited Partners’ Responsible Investment Due Diligence Questionnaire” (DDQ) to assist investors and encourage more standardised due diligence.

As well as assisting those investors who may not have a formal ESG policy, or who have not previously submitted questions at the due diligence stage about ESG, standardised questions could also help managers by cutting down on the time and cost required to answer different questions on the same subject. In fact, the creation of the DDQ was partly in response to requests from managers who have signed up to the PRI for more consistency across the industry. The PRI have been keen to point out that the DDQ should not be used as a checklist and is by no means exhaustive, but more a tool to establish a dialogue between investors and managers, and that investors may well want to tailor the questions or indeed add some of their own.

The DDQ covers four areas: the ESG policy of the fund and the influence of ESG factors, management of ESG related risks and value creation, contribution to ESG management at portfolio company level, and communication with LPs on ESG related matters. There are 21 questions in total, but it is also accompanied by a guidance document which provides useful background to the questions posed as well as case studies and examples of how some LPs and GPs work in relation to ESG. The guidance document also includes further "developed questioning" that LPs may want to put to GPs, which expand on the initial questions and many ask for examples of past situations where an ESG issue has arisen or descriptions of procedures that are in place to identify and manage ESG incidents. There are also links to publicly available resources to assist LPs, such as the CDC toolkit for ESG.

There is no doubt that ESG will continue to be an important issue for managers and their investors, and resources such as the DDQ and the CDC toolkit that encourage greater consistency in approach across the industry should be welcomed. As with any attempt to standardise, whether it be reporting, due diligence questionnaires or other issues, it is important to remember that a "one-size fits all" approach may not always be suitable. And the PRI have made it clear that this is not the intention, with the aim being to promote discussions between all parties and that consideration needs to be given to the diverse nature of private equity as an asset class when approaching issues such as ESG.
In our last issue of Made in Africa (Issue 14), we discussed increasing interest in permanent capital vehicles (PCVs), covering an overview of the key drivers for PCVs, limitations in respect of investor appetite and a high level comparison of PCV structures and terms as compared to a “typical” PE fund structured as a fixed life, self-liquidating limited partnership (a “Typical Fund”).

In this piece, we focus on a key feature of the PCV formulation: valuation. The method of valuation of the assets of the holding vehicle impacts, for example, upon the economics of investor admission, as well as fees, which are often calculated in full or in part on NAV, and incentivisation. Investors therefore seek a robust approach to valuation in part to ensure they are not overpaying in any of these areas. If a PCV lists on a stock exchange, the valuation of the PCV assets will also tie into the market price and the perception of whether, absent other market considerations such as the relative attraction of different sectors, the valuation presented by the manager is reasonable.

With Development Finance Institutions (DFIs) and other investors increasingly looking at investment in longer term capital vehicles and alternative structures, managers need to ensure they get their approach to valuation right. Below, we discuss high-level issues around the impact of valuation on investor admission, management fees and incentivisation.

Investor admission
One of the attractions of raising capital through a PCV instead of a fund with a fixed fundraising period (usually 12-18 months) for managers is that they can fundraise on an on-going basis or via multiple rounds of fundraising. This can fit an organic growth strategy, where fundraising can be matched with the more immediate asset pipeline. There is also the possibility, which can be particularly attractive for first time fund managers, to raise capital to fund a track record, with the performance of the existing asset base potentially making subsequent fundraising more attractive to prospective investors.

Managers using a PCV therefore must determine on what basis (if at all) to ‘equalise’ investors coming in at different times such that they share in the investments made prior to their admission to the vehicle. In a Typical Fund, subsequent investors are drawn down upon admission to fund their proportionate share of the existing assets and expenses, i.e. they are “equalised” across the fund. This equalisation payment (plus interest) is then returned to the first or earlier close investors who have essentially funded the subsequent investors’ proportions, so that all investors have funded the same proportion of their subscribed commitments. The interest payment recognises the time value of money in respect of the amounts originally drawn down from the earlier investors on behalf of the subsequent investors.

With fundraising for PCVs taking place over a longer period of time (or even an indefinite period in the case of evergreen vehicles), fund managers however need to assess whether an amount equal to interest is appropriate in a PCV. The value of the fund’s assets may increase significantly more than an assumed rate of interest over the period of time in which capital is raised in a PCV. Existing investors will be averse to see their holdings diluted, with subsequent investors receiving the benefit of asset performance for an effective cost (i.e. a lower interest rate) below the market price. There could also be an incentive for
prospective investors to wait to see if they can gain a price advantage upon admission.

The entry price for subsequent investors in a PCV therefore reflects better alignment for investors if admission corresponds to the net asset value (NAV) of the existing assets to ensure the earlier investors are properly compensated for the dilution of their holdings. Managers need to be careful from a governance perspective to manage a perceived conflict whereby higher prices can deter incoming investment but protect existing investors, whereas lower prices can incentivise incoming investment but may overly dilute existing investors. Setting the right valuation price is therefore key in ensuring investors are comfortable on admission and have confidence in the Manager. Managers may therefore need to obtain periodic third party valuations of the vehicle’s assets, with such valuations adjusted appropriately (e.g. a cash adjusted and/or projected growth basis) for when subsequent investors are admitted.

There is also the question as to whether to equalise all. If subsequent investors are equalised, then all investors are drawn down to the same extent, which has the advantage of all investors being in the same position. However, managers also need to consider whether this unduly exposes earlier investors to further cash drag and whether it would be more equitable to leave earlier investors fully drawn and issue units at a NAV-based price when drawing down from subsequent investors.

Management fee

A longer term vehicle may lead managers to contemplate charging management/advisory fees on a different basis from a Typical Fund (where the fees are generally structured on commitments during the investment period and then on the acquisition cost of unrealised investments until the end of fund). One reason for this is that the time and attention required to manage an asset may not correspond to the original acquisition cost of such asset over the longer term. Equally, where an asset has decreased in value below its acquisition price for a long period of time, investors may be averse to paying management fee based on the original acquisition price, especially if there is no requirement to realise the asset.

Like listed funds, PCVs therefore commonly implement valuation based management fees (sometimes after a commitment based fee for an initial investment period). Contrary to the perceived conflict in valuing the entry price for subsequent investors mentioned above, investors would want to ensure that assets are not over-valued and they are not paying too high a management fee, whilst managers would want to avoid under-valuation, which would result in a lower fee. A straightforward answer to balancing the valuation concerns in respect of entry price and fees is to ensure a robust valuation process to give both existing and prospective investors comfort that the valuation is reasonable.

Accordingly, managers should carefully consider detailed valuation policies, tailored to the asset classes being invested in and the appropriate type and frequency of independent checks (which may range from audits, in respect of private equity, to independent valuations in respect of real estate and infrastructure), in order to give investors comfort on the consistency of the valuation methodology in the long term.

Performance incentivisation

Whereas the investments of a Typical Fund are required to be realised during, e.g., a 10 year lifespan (usually with opportunity for a 1-2 year extension), the investments of a PCV may not be realised for extended periods of time, if at all. Managers therefore may need to look to structure incentivisation to take account of unrealised value.

There are many variations to consider when considering incentivisation, including factoring in investor requirements. Where, for example, a vehicle has a pure yield focus, this may point to a performance fee based on exceeding a certain yield threshold. Where assets are intended to be exited regularly across the life of the vehicle (though the acquisition cost base of such assets may be reinvested), a share of distributable cash (similar to a Typical Fund) may also be appropriate.

Where a PCV has a focus on capital accretion without realisations (including alongside a yield focus), managers may need to depart from the Typical Fund model in order to capture the unrealised growth in value of the vehicle’s assets. In this regard, a robust valuation methodology becomes more important than ever. Hand in hand with this goes the approach to handling dips in valuation subsequent to performance fees being paid out to the manager.

The exact performance incentivisation model can vary significantly from manager to manager, taking into account the asset base, the investor base (including the negotiated position) as well as the management fee (which, if NAV based, can itself be perceived as a kind of performance fee). While there are various detailed permutations that may be considered, one simple, high-level approach may be to structure performance incentivisation to take into account the value of the assets as at the end of certain pre-determined performance periods, with performance related amounts accruing to the manager if the total return exceeds a hurdle threshold. How this performance is then paid across to the manager may then depend on the cash liquidity of the PCV and, absent cash, whether the manager seeks to be able to drawdown from investors to fund performance fees or, if the intention is to list the PCV after a certain period of time, crystallise incentivisation by way of a share issuance upon IPO.

Conclusion

Permanent capital vehicles and longer term hybrid vehicles raise many interesting issues, of which valuation is just one. Valuation impacts on various aspects, including the investor admission, compensation and incentivisation mechanics. It is fundamental to get the valuation mechanics right at the outset in order to get investors comfortable that the economics of the vehicle will work effectively and that there is an alignment of interests of the investors (including amongst themselves), and the manager.
Following a competitive tender process that brought interest from over 30 companies from across Europe, Africa and North America, Private Infrastructure Development Group (PIDG) subsidiaries the Emerging Africa Infrastructure Fund (“EAIF”) and GuarantCo have appointed Investec Asset Management (“IAM”) and Cardano Development, respectively, as new fund managers.

PIDG mobilises private sector investment to assist developing countries in providing infrastructure vital to boosting their economic growth and combating poverty. PIDG is funded by the governments of the UK, the Netherlands, Sweden and Switzerland as well as private sector banks and development finance organisations.

Emerging Africa Infrastructure Fund (EAIF)

Established in 2002 as a subsidiary of PIDG, the EAIF provides debt finance to private sector infrastructure projects in sub-Saharan Africa. To date, it has committed over US$ 1.2 billion to 63 projects in 20 countries. EAIF seeks to catalyse African infrastructure projects and invest in sustainable businesses to help reduce poverty in Africa while delivering on investment-specific and development goals.

Launched in South Africa in 1991, IAM is one of the first asset management firms to build a global franchise from emerging market origins, offering a broad range of Africa-specific investment strategies.

IAM took over the management of the approximately US$ 670 million EAIF fund on 9 May 2016. IAM will manage the entire investment process for EAIF, from seeking out projects, evaluating loan applications, carrying out due diligence and managing the administration of transactions. IAM will also market the EAIF fund internationally and monitor the loan portfolio.

GuarantCo

GuarantCo is a public/private partnership that helps finance privately-sponsored infrastructure projects in Africa and Asia’s emerging and frontier markets, providing local currency guarantees to local and regional banks so that they can raise medium and long-term debt for deployment in infrastructure projects. GuarantCo also provides dollar-denominated guarantees in fragile and conflict affected countries.

Originally set up to help promote economic development and reduce poverty, GuarantCo has to date issued guarantees totalling US$ 513 million for 36 infrastructure projects in 14 lower-income countries, creating 275,000 jobs and giving 32.2 million people improved access to infrastructure. It has an ambitious target to have outstanding guarantees of greater than US$ 1 billion by 2020.

Cardano Development B.V. was started in 2010 as a subsidiary of Cardano, one of the leading Dutch firms involved in strategic risk management and implementation, executing between €80 billion and €120 billion notional of OTC-derivatives and LDI oriented bond programmes annually the last five years on behalf of pension and insurance clients. Cardano, with a strong reputation for managing risk, will seek to leverage their wealth of experience working on local currency funding to help GuarantCo increase its impact on...
development in Africa and help expand its activities in Asia. Cardano Development will seek out projects, evaluate loan applications, carry out due diligence and manage transactions on behalf of GuarantCo.

The PIDG’s end goal is to improve tangible infrastructure in Africa with the expectation that such improvements will have exponential benefits which will trickle down through the economic system to the daily lives of the African population. As recently appointed fund managers, IAM and Cardano Development have been charged with deploying public and private capital to deliver on the EAIF’s and GuarantCo’s ambitious development targets.

With increasing opportunities for private capital investment in developing African and Asian economies and the support of European and the Australian governments, the scene is set for a successful collaboration to create a positive impact on African and Asian economic development.

EAIF and GuarantCo were advised by MDY Legal and Riverhill Partners LLP, as well as by Cindy Valentine and Brendan Gallen of King & Wood Mallesons LLP.

“WE ARE DELIGHTED TO HAVE HELPED OUR LONG TERM CLIENTS ACHIEVE THEIR OBJECTIVE OF APPOINTING MANAGERS THAT UNDERSTAND THE FUNDS’ DUAL OBJECTIVES OF DEVELOPMENTAL IMPACT AND FINANCIAL SUSTAINABILITY. LEADING THIS COMPLEX TRANSACTION THROUGH A UNIQUE GLOBAL RETENDERING PROCESS, MANAGEMENT OF A VARIED STAKEHOLDER GROUP AND WITH A MIX OF PUBLIC AND PRIVATE CAPITAL REQUIRED VERY PROACTIVE MANAGEMENT. THE BOARDS ARE ENTHUSIASTIC FOR THE FUNDS’ ONGOING AND FUTURE IMPACT.”

LAWRENCE CHAPMAN, RIVERHILL PARTNERS LLP
The London office recently hosted its 8th Annual Africa Group Braai to “Celebrate Africa” with 150 clients and contacts of the firm’s Africa Group in attendance.

As guests enjoyed the beautiful weather, traditional African food and the City’s surroundings atop the roof terrace, we were fortunate enough to welcome Jyrki Koskelo as guest speaker, who was introduced by Barri Mendelson, Corporate Managing Associate and Cindy Valentine, Co-Head of the Africa Group. Jyrki spoke about his unique perspectives as an investor in Africa over more than two decades.

Jyrki has more than 30 years of global private sector experience in developing markets, overseeing until late 2011 $29+ billion in investments as Vice President Global Industries at the International Finance Corporation (IFC), a member of the World Bank. Known best at the IFC for his role as leader in decentralization, and expansion of Financial Sector activities from $1.5 billion to $8 billion between ’04-11, both focused in Africa. Since late 2011, Jyrki acts as a professional Board and Advisory Board member and investor/innovator.

In Africa his most noteworthy activities include a specialized agri-fund with KfW/Deutsche bank, Atlas Mara – a unique London listed investment vehicle for banking in Africa, My Bucks, which represents the evolution of traditional banking/micro lending to inclusive electronic banking and Africa4U, a logistics / car hailing start up. In addition, Jyrki was formerly a Board member at listed fund ADC African Development Corporation, the African regional bank Banc ABC and a chairman of RSwitch, the national switch in Rwanda.

The event was a great success with many clients and colleagues staying to network late into the summer evening.
Now in its tenth year, ilfa is an award-winning secondment programme that aims to build legal capacity in Africa by equipping African-qualified lawyers with additional legal skills and expertise in a range of key areas including, corporate law, international dispute resolution and project finance as well as legal practice skills.

The programme, which was founded by Tim Taylor QC of King & Wood Mallesons (which still houses ilfa in its offices) and others, now has a strong alumni network of over 140 lawyers across 20 different countries in Africa who continue to spread the good work of ilfa on the continent.

This year King & Wood Mallesons is delighted to host two candidates; Ayodeji Atere, an associate in the Litigation department of Aluko & Oyebode (Nigeria) and Chinedum Umeche, an associate in the Dispute Resolution team at Banwo & Ighodalo (Nigeria) who will be seconded to King & Wood Mallesons’ London and Dubai offices respectively.

Interview with Anna Gardner

Executive Director, ilfa

Gambian-born Anna Gardner is a charity worker, rule of law activist, and international lawyer. Anna gained her LLB at Nottingham University in 1991 and qualified as a solicitor in England in 1994. Her 20 year legal career includes tenure at the BBC, Accenture and Hewlett-Packard. In 2010 she was recognised by the Law Society of England and Wales with an award for In-House Counsel of the Year.

In addition to her role as Executive Director of ilfa, Anna is the founder of Tesito (a UK charity which partners with local communities in Gambia to improve the lives of ordinary Gambians) and a patron of Conserve Africa (a non-governmental organisation that aims to promote and implement sustainable development).

Tell us a bit about your background before your current position as Executive Director of ilfa.

Anna Gardner (“AG”) I qualified in 1994, with the media firm Davenport Lyons who did a lot of work for the BBC at the time and when I qualified I then joined the BBC as an in-house lawyer. I went on to work for International Computers Limited (later taken over by Fujitsu), including a secondment in Norway. I subsequently joined Accenture, starting off in the outsourcing unit before taking on a country counsel role in South Africa before a nine year stint as general counsel for the Middle-East, the Mediterranean and Africa for Hewlett-Packard.
What attracted you to working with ilfa?

AG For me, ilfa embodies everything that I believe in, and it was an opportunity to pull together different strings of my professional life, my culture and my heritage into doing one thing that I really believe in.

There are undoubtedly many inspiring stories from your work, but is there anything in particular that stands out and highlights ilfa's efforts paying off?

AG There are countless stories and when we launch the celebrations for our tenth year anniversary next year you will hear different voices of ilfa alumni from different countries, different jurisdictions celebrating the programme and how it has helped them. The nicest thing I am hearing now is that the ilfa alumni are referring work to each other, and to me that is really exciting. I am tremendously proud to be a part of this.

How does ilfa raise awareness of its work to a wider audience?

AG We do a lot of outreach and as Executive Director part of my job is to attract more sponsors by building awareness of the ilfa brand. We do that in a number of ways; we have events, we partner not only with law firms, but with other like-minded organisations like the Business Council for Africa, the Law Society, the Royal Africa Society and we are looking at universities now. So in addition to the universities of Oxford and Cambridge we have partnered with King’s College London and are about to complete a partnership with SOAS, University of London. We are broadening our brand in this country in that way.

In Africa we have started working very closely with the Law Societies in each of the countries and we have launched a product called Angaza African law training and that aims to provide CPD accredited training to African lawyers who may not be able to access that sort of training. So it is an affordable way of accessing world class CPC accredited training. We have also got a very active president in Dame Linda Dobbs who is involved in a huge number of projects through which she raises the profile of ilfa.

What do you think from your perspective, are the biggest challenges for international law firms and other organisations trying to work in Africa and generate business in Africa?

AG The challenge I think for the international law firms is how to access the individual markets in Africa and getting good quality, reliable intelligence from the people on the ground in the timeframe that they need it by. The way that we do business in Africa is very different and it’s about relationships – you have to be there. People want to see you, they want to get to know you and that sort of thing takes time.

What is the main challenge currently facing lawyers in Africa in terms of capacity building?

AG The main challenge, to be honest Oféi, is a cultural one. With the exception of a certain category of the larger firms that are in the world class category, there is a significant group of firms that tend to be family law firms or single lawyer. Therefore there is a need for consolidation which can then drive standards up through investment and more practice areas (which increases specialisation). The second challenge relates to how management at local firms value the people that work for them. Improvements could be made in terms of associate remuneration and there is a cultural shift and a mind-set change that needs to happen in this regard.

Do you want to share with us some of your plans for ilfa over the next 12 months, including, you know, any plans or the initiative to expand?

AG We have got some fantastic plans coming up next year; 2017 is ilfa’s tenth anniversary. It has gone so quickly! So we are planning a conference in September in London for three days which will bring together a mixture of academics, alumni, sponsoring law firms and business people interested in Africa. It will be a really exciting opportunity, not only to showcase what we have done in the last ten years, but also a chance to celebrate Africa and the different cultures of Africa. So that is one thing that I am very much looking forward to and already we have got a number of organisations that wish to participate in that, so it promises to be quite a good event.

Where do you see ilfa in five years’ time?

AG For us, on the ilfa board, we are a capacity building organisation and at some point we are hoping that capacity will have been built. What I am excited about is the connections that we are facilitating between the international law firms and ilfa lawyers, but also the intra-Africa connections that are being formed.

This year we had the intra-Africa secondment in Lagos and we had lawyers from six different African countries travelling to Lagos. This is a model that we would want replicated in South Africa and in Kenya.

I would also like to see Angaza Africa Law Training become the go-to resource for African lawyers, showcasing African talent and know-how.

You are very passionate about what you do. What would you say is the most rewarding part of your work?

AG Every September when the candidates arrive, seeing that look of anticipation and excitement is wonderful, because of the work, preparation and organisation that has taken place behind the scenes. Seeing what the candidates are like at the end of the three months is also really rewarding, because you can see just how much they have gained in confidence and how much they have grown.

What is the best advice you have ever been given?

AG Do not turn opportunities down and always trust your gut.

What is the most difficult career decision that you have had to make?

AG Whilst at Hewlett-Packard, I was offered a general counsel role prior to the entire leadership team being relocated to Dubai. I could not realistically make this move because of my family. It was difficult to say “no” because I had worked very hard to build up my career at Hewlett-Packard but it was the right choice and it was a choice we made as a family.

How can law firms and other organisations register their interest in ilfa and more importantly show and maintain their support?

AG Well, the process is incredibly simple. If you are interested in ilfa, email me (anna.gardner@ilfa.org.uk) or call me. Let us have a meeting and let us understand what it is you are looking for from the ilfa programme and see what we can offer you.
Vivendi has launched its project, CanalOlympia, focused on the development of entertainment facilities in West and Central Africa.

Vivendi is an integrated media and content group. The company operates businesses throughout the media value chain, from talent discovery to the creation, production and distribution of content. The main subsidiaries of Vivendi include Canal+ Group, its subsidiary Studiocanal, Vivendi Village (which brings together Vivendi Ticketing, MyBestPro, Watchever, Radionomy and the Paris-based concert venue L’Olympia) and Dailymotion.

The CanalOlympia project, which involves the development of entertainment facilities in West and Central Africa, will be the first network of cinema and live performance venues in Africa. This is the first CanalOlympia venue in Africa, located in Yaoundé, Cameroon. This venue was inaugurated on June 14 by Cameroonian Prime Minister Philémon Yang and Vincent Bolloré, President of Vivendi’s Supervisory Board.

The CanalOlympia venues have a unique architectural design, which permits them to accommodate three hundred people indoors and several thousand people outdoors. These venues are outfitted with state-of-the-art digital projection and sound equipment and are eco-friendly: in Yaoundé, for example, the entire building is powered by 720 m² of solar panels.

King & Wood Mallesons advised Vivendi on all legal aspects of the infrastructure project, including the structure and the deployment of this eco-responsible project, operated in Cameroon by Talents & Spectacles Cameroon.

The KWM team was led by Paris partner, Richard Mugni, assisted by counsel Charles-Antoine Erignac and associate Joana Becquet-Zardi.
Kenya’s New Companies Act
1948-2015 in the making

It has taken over half a century to revamp the Kenyan Companies Act and in September 2015 the Kenyan government passed the Companies Act 2015 (the Act) replacing the previous Companies Act (Cap 486). Cap 486 had been modelled on the now outdated UK 1948 Companies Act and the overhaul brought about by the new Act was therefore a welcome move.

Overhauling Cap 486 was part of the Kenyan government’s long term development policy, to transform Kenya into a newly industrialised middle-income country and a regional commercial hub for East Africa. In a bid to provide an investor-friendly framework cognisant of global practices from more competitive jurisdictions, the Act has borrowed from the United Kingdom’s Companies Act 2006 (the UK Act).

Key changes
The Act brings about key changes that affect corporate, board, shareholding and capital structures. It also has brought in new elements of corporate governance and shareholder protection.

Corporate structures
While Cap 486 required that a limited liability company must have a minimum of two shareholders, the Act now permits single member companies. This avoids the need for the usual corporate gymnastics (involving trust structures backed by various corporate agreements) to ensure that the beneficial owner would be able to acquire legal title as and when necessary.

Similarly, the minimum number of shareholders for public companies under the Act has been reduced from seven to two.

Board structures
Cap 486 also required a company to have a minimum of two directors. The Act now permits just one director for private companies, provided they are a natural person or a corporation sole.

Shareholding and capital structures
The Act closely mirrors the UK Act by abolishing the concept of authorised share capital. Under the Cap 486 regime companies would have been incorporated with a set amount of share capital. On incorporation the shareholders were not obliged to take up all the shares and could for example each take up one share each leaving the remainder to be allotted at a future date in time.

Companies under the Act no longer need to create an excess share capital to allow for future allotments and will now only allot...
the amount needed on incorporation. Future allotments can be made by the directors, either as provided under the company’s articles of association or by special resolution of the shareholders.

The Act also modernises capital maintenance rules by permitting a company to buy-back, divide or consolidate its shares.

**Corporate governance**

The definition of ‘director’ now covers both directors validly appointed to the office of director (de jure directors) as well as persons who have not been validly appointed, but who nonetheless act as directors (de facto or ‘shadow’ directors). De facto directors, although not validly appointed, are treated as directors under the Act and are therefore expected to comply with all directors’ duties.

Accordingly, as Cap 486 did not explicitly provide for directors’ duties, the Act additionally codifies various common law duties and, in doing so, provides clarity on a director's role, duties and circumstances leading to disqualification.

**Shareholder protection**

Shareholder protection has also been increased, with the Act providing for statutory pre-emptive rights unless disapplied by the company’s articles or a resolution. Directors are financially liable for damage/loss suffered by existing shareholders due to failure to respect this right.

The Act has also expanded the range of circumstances in which a derivative action can be brought. Any shareholder of the company may bring a derivative claim even if they were not a member when the action complained of occurred. This makes it easier for shareholders to hold the directors of the company to account for their actions.

**Enhanced disclosure**

The Act adds to other legislation enacted in 2015 and 2016 aimed at increasing the disclosure of information about the interests held in Kenyan public companies. The Act creates the right for a public company to request (either on their own motion or having received a request from a shareholder(s) holding at least 10% of the company’s paid up share capital) any person who the company knows or reasonably believes to: (a) hold an interest in the company shares; or (b) have held such an interest at any time during 3 years immediately preceding the date of the request, for information on the nature of the interest held.

What constitutes holding an interest is broad and includes having an interest arising out of contract or a right of some description over the shares. A person is also taken to have an interest in shares in which the person’s spouse or any child of the person under the age of 18 years holds an interest. The definition of a spouse under the Act includes a person who is co-habiting with another person. While the UK Act also extended the definition of having an interest in shares to include interest held by a spouse it did not extend it to cohabitees. This addition creates a number of social and succession issues and is sure to create some headline grabbing news items when implemented.

**A corporate revolution?**

It is still early days to judge the success of the new Act partly because not all parts of the Act are in force. However, based on the Government’s set objectives a preliminary analysis can be made.

**Increased ease of doing business?**

The Act simplifies the incorporation process, now requiring only one form to be completed instead of the previous three. The Companies Registry also published a “3 Step Guide to Register Your Company” once operationalized this 3 step guide will make it easier to incorporate. In addition, the cost of incorporation is now a flat fee of KES 10,000 (approximate USD 100) and stamp duty which was previously payable on incorporation has been exempted. It will therefore be cheaper and easier to incorporate in Kenya.

The Act also provides for various corporate and capital structures that were previously unavailable. This is an added bonus to start-ups either seeking to set-up a new company in Kenya or investors seeking various ways to invest their money and have different ways available to extract their investment at the point of exit.

There are however some areas where the administrative burden has increased. For example, if a company was to change its directors instead of completing the one form and paying a nominal fee KES 200 as provided under Cap 486 the Act now requires five forms to be completed (each costing KES 500) instead of the previous single form (and KES 200).

In addition, the Act is by far the largest single piece of primary legislation in the history of Kenya, with 1022 pages containing 1026 sections, not to mention the accompanying rules and regulations. It is a large Act for any individual to digest and will take a while before businesses understand and comply with the new requirements.

**Competitive advantage**

Embracing modern and accepted corporate structures will be significant in meeting the Government’s long term development policy. However, the Act in isolation cannot satisfy this objective.

The efficiency of the Kenyan Companies Registry and the automation of processes and embracing electronic platforms will be vital to bringing this strategy to fruition. In a sense, the real work is only just beginning.
The year 2016 marked the beginning of the overhauled, and more stringent, broad-based black economic empowerment (“B-BBEE”) landscape in South Africa.

Among the most significant changes that have come into effect this year are the criminalisation of fronting practices, which are aimed at deliberately circumventing the B-BBEE laws, and the establishment of the B-BBEE Commission, which will oversee compliance with the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended ("the B-BBEE Act"). These changes are aimed at addressing the unintended consequences of B-BBEE.

At a recent conference hosted by the South African Department of Trade Industry (“DTI”) and the B-BBEE Commission, the DTI noted that fronting practices significantly derail economic transformation. At the same conference, the Minister of Trade and Industry, Rob Davies, stated that fronting undermines deserving companies, which should easily be awarded certain tenders but are overlooked because B-BBEE scorecards favour companies that are fronting.

In light of the significant changes and recent commentary relating to fronting practices, it is imperative for enterprises operating in South Africa, particularly in the B-BBEE arena, to:

- understand the concept of fronting practices;
- and
- safeguard themselves from the risk of being a “fronter”.

**Background to B-BBEE**

By way of background, B-BBEE is a strategic policy of the South African government, which aims to rectify the legacy of apartheid through increasing meaningful participation in economic activities by previously disadvantaged South Africans. The B-BBEE Act is the primary legislation through which the B-BBEE policy is implemented. In terms of this Act, B-BBEE consists of measures and initiatives that aim to –

- increase levels of equity ownership by black people in businesses operating in South Africa;
- increase the number of black people in management positions of business;
- improve the skills of black employees;
- assist small and medium businesses that are majority-owned by black people; and
- procure goods and services from businesses that are good contributors to B-BBEE and corporate social investment.

The South African government and state-owned enterprises are obliged to take B-BBEE into account when procuring goods and services.

**What is a fronting practice?**

A fronting practice is defined in the B-BBEE Act as a transaction, arrangement or other
act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act and/or the Codes of Good Practice ("the Codes"). A fronting practice usually involves reliance on data or claims of compliance based on misrepresentations by the party claiming compliance with B-BBEE.

The B-BBEE Act classifies fronting practices into three broad categories, namely:

1. **Window-dressing**, which includes instances where black people are appointed to an enterprise on the basis of "tokenism" and are discouraged or inhibited from substantially participating in the core activities of an enterprise.

2. **Benefit diversion**, which includes:
   - the implementation of initiatives where the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio as specified in the relevant legal documentation; and
   - the conclusion of a legal relationship with a black person for the purpose of the enterprise achieving a certain level of B-BBEE compliance, without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person.

3. **Opportunistic intermediaries**, which includes the conclusion of an agreement with another enterprise with a view of achieving or enhancing the enterprise’s B-BBEE status in circumstances in which:
   - there are significant limitations or restrictions on the identity of the suppliers, service providers, clients or customers;
   - the maintenance of business operations is reasonably considered improbable, having regard to resources available; and
   - the terms and conditions were not negotiated at arm’s length and on a fair and reasonable basis.

According to the DTI, there are several ways to identify that an enterprise is fronting, such as:

- the black people identified by an enterprise as its shareholders, executives or management are unaware or uncertain of their role within an enterprise;
- the black people identified by an enterprise as its shareholders, executives or management have roles of responsibility that differ significantly from those of their non-black peers;
- the black people who serve in executive or management positions in an enterprise are paid significantly lower than the market-related salary, unless all executives or management of an enterprise are paid at a similar level;
- the black enterprise put forward, as the contracting party cannot operate independently without a third party because of contractual obligations or the lack of operational or technical competence; and/or
- there is no significant indication of active participation by black people identified as top management at strategic decision making level.

The above-mentioned practices create the false impression that an enterprise is B-BBEE compliant, thereby allowing it to unduly benefit from certain incentives, such as government tenders, licences and permits.

Knowledge and consequences of fronting

Any person who knowingly engages in a fronting practice commits an offence. The key question is: what is “knowingly”? In terms of the B-BBEE Act, "knowingly" means that the person in question has actual knowledge of the fronting practice or is in a position in which he/she ought reasonably to have:
- had actual knowledge;
- investigated the matter to the extent that would have provided him/her with actual knowledge; or
- taken other measures that, if taken, would reasonably be expected to provide him/her with actual knowledge of the matter.

If a person is found guilty of a fronting practice, he or she could face a fine and/or a prison sentence of up to 10 years. If the guilty party is a juristic person, such as a company, it could face a fine of up to 10% of its annual turnover. In addition, such an enterprise may not contract or transact any business with any state body or public entity for 10 years and must, for that purpose, be entered into the register of tender defaulters, which the National Treasury may maintain for that purpose. Lastly, significant reputational harm could be suffered by an enterprise involved in a fronting practice.

Conclusion

As is evident from above, a fronting practice creates a false illusion and prevents South Africa from truly addressing the imbalances of apartheid and achieving real economic transformation.

Many South Africans are optimistic that, through the implementation of stricter rules and regulations and the active role of the B-BBEE Commission, fronting practices can be curbed, thereby creating a platform for black people to actively and meaningfully participate in the South Africa economy.

Accordingly, enterprises should be cautious of claiming B-BBEE to which they are not entitled. To do this, we recommend that enterprises conduct a substantive review of their current B-BBEE structures, or those they wish to implement, so as to ensure that they are not accused of engaging in a fronting practice and thereby causing detrimental risk to their reputation.
Indigenisation Law in Zimbabwe

President clarifies the Government’s position on its indigenisation and economic empowerment policy

What is Zimbabwe’s indigenisation law?

The primary aim of the Indigenisation and Economic Empowerment Act passed in March 2008 (the “Act”) as amended by the 2010 regulations is to deliberately involve “indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation’s resources”. This aim is achieved by obliging all foreign-owned companies with a minimum asset-value of at least US $500,000 (in theory) to dispose for value of 51% of their ownership to indigenous Zimbabweans. In practice, all foreign-owned businesses, regardless of their minimum asset value, are affected by this law.

An indigenous Zimbabwean is defined as “any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest”.

Essentially, a foreign investor wishing to conduct business ventures in Zimbabwe is required to partner with an indigenous Zimbabwean, in such a manner that should see the latter with a shareholding of at least 51% and the former with, at most, a shareholding of 49%. This law applies to all existing investors who must realign the ownership structure of their businesses to reflect the 51:49% shareholding structure in favour of indigenous Zimbabweans. The law also applies to any inbound investors, who must obtain an indigenisation compliance certificate from a government ministry which oversees the sector in which the potential investor wants to invest.

From its inception the indigenisation policy has been stated to be characterised by inconsistencies and lack of clarity as in the 8 or so years that this law has been in existence, the Ministry of Indigenisation has been overseen by 5 different Ministers, each with their own views and implementation modalities in respect of the policy.

Some have advocated for stricter application of this law by setting deadlines for foreign-owned companies, including banks, to dispose for value of at least a 51% stake to indigenous Zimbabweans within given timelines, whilst others have preferred a sectoral approach whereby line ministries are given the mandate to receive submissions for indigenisation implementation plans for their approval. These would be evaluated against the line ministries’ own set indigenisation targets and recommendations or measures.

If the foreign company met the requirements, a compliance certificate would then be issued within 14 working days. The role of Indigenisation Ministry itself would only be to issue compliance certificates on the recommendations of line ministries. This approach was sanctioned through the Finance (No.3) Act 2015 which amended the implementation of the indigenisation policy.

In March 2016 there was, however, a directive from the Ministry of Indigenisation for line ministries to take steps to cancel the licences of “non-compliant businesses” in their sectors. Non-compliant businesses were given 1 April 2016 as a deadline for submitting their indigenisation plans. This caused confusion and alarm in the business community. Since that deadline for submission of indigenisation implementation plans by “non-compliant businesses”, there have been further developments on the indigenisation front, culminating in the release, through the Ministry of Media, Information and Broadcasting Services, of a Presidential Statement signed by President of Zimbabwe and dated 11th April 2016, entitled – Presidential Statement to Clarify the Government Position on the Indigenisation and Economic Empowerment Policy.

The statement acknowledges that “there (have) been conflicting positions” in the interpretation of the indigenisation and empowerment policy which have “caused confusion among Zimbabweans, the business community, current and potential investors, thereby undermining market confidence”. An example of conflicting positions causing confusion was the recent disagreement between two Ministers over whether or not foreign-owned companies in the banking sector have complied with the indigenisation and economic empowerment law and policy. The purpose of the statement was, thus, to “provide clarification on this very vital policy, for the guidance of Government Ministers, the business community and current and would be foreign investors.”
The statement then points out the following, that:

(a) The indigenisation policy distinguishes 3 economic sectors, namely: the natural resources sector, non-resources sector, and the reserved sectors; and

(b) The three sectors must be approached differently in terms of implementation of the indigenisation policy.

Regarding each sector, the statement states that:-

1. Pertaining to the natural resources sector, that is, minerals and other natural depleting resources, the Government attaches the greatest importance to the indigenisation of this sector hence compliance is non-negotiable. As such government will hold 51% stake in all foreign businesses in this sector through designated entities, with the remaining 49% belonging to the “partnering investor”. However, the statement further clarifies that for existing businesses where the Government does not have 51% ownership, in those cases compliance with the indigenisation and economic empowerment policy should be through ensuring that the “local content” retained in Zimbabwe – that is value in the form of wages, taxation, community ownership schemes and activities such as procurement and linkage programmes – is not less than 75% of the exploited resources. This, in our observation, qualifies as a major policy change.

2. Pertaining to the non-resources sector, eg the financial services sector, businesses in that sector should “exhibit socially and economically desirable strategic objectives that contribute towards the socio-economic transformation of the country, eg transfer of skills and technology, providing financial facilities for key economic sectors and projects, creation of employment and granting ownership or employee share ownership for value to indigenous Zimbabweans as may be agreed between the parties”. Thus, it is important to note that there is no mention of a mandatory 51-49% ownership framework in this sector. Instead, sector-based empowerment credits or quotas will be granted to reflect the contributions made by investors in their various businesses which are in line with the national development efforts. With special reference to financial services, these should continue to be regulated under the Banking Act “to promote financial stability” whilst the insurance sector should continue to be under the auspices of “the Provident and Insurance Act”.

3. Pertaining to the reserved services sector, businesses under these categories (numbering 11 in total) are reserved for “Zimbabwean entrepreneurs”. Some of these sectors include retail and wholesale trading, transportation (passenger buses, taxis, car hire services) grain milling, tobacco processing among others. Those foreign businesses already operating in these sectors will be given “special dispensation” licences.

In summary:

1. The role of the Minister of Youth Development, Indigenisation and Economic Empowerment has further been clarified as to being chiefly that of “coordinating the activities of line Ministries in the implementation of the policy”; and

2. Where the current Indigenisation and Empowerment Act may not conform to the above policy position, the law would be accordingly amended.

Conclusion

The President’s pronouncements have inarguably brought about a major policy shift to this contentious piece of legislation. For instance, the role of the Minister of Indigenisation has been clarified. Further, the sectoral approach to implementation of the policy seems to be the favoured approach as opposed to a mandatory 51-49% ownership arrangement in favour of indigenous Zimbabweans across all economic sectors which may have been favoured in the past. In addition, and perhaps more importantly, the clear directive that existing businesses in the natural resources sector wherein the Government does not have 51% ownership, should be assessed for compliance on the basis of “local content” retained, is a major policy change from the recent past.

Be that as it may, it should be noted that the statement makes it clear that the President’s pronouncements are merely spelling out government policy and are not law. It, therefore, directs that the law be amended where “the Indigenisation and Economic Empowerment Act may not sufficiently conform with this policy position”. No amendments have, as yet, been promulgated in light of the above statement and if they are made, it still remains to be seen whether such changes will restore investor confidence and sway them to invest in Zimbabwe.

In our observations, which are informed by our investor clients whom we have assisted to obtain the relevant indigenisation approvals, as well as our own regular interactions with the authorities, this policy shift is welcome. It allays some of the fears and concerns that our clients have expressed regarding the Indigenisation law and policies. The policy shift also comes at a crucial time where there is a recognition by all stakeholders that Zimbabwe needs to re-engage the international community as well as to improve the ease of doing business so as to make the country an attractive and viable investment destination.

Manokore Attorneys remains available to assist and advise clients on such matters.
Oil in Crisis

The impact of the oil price crisis in the Angolan market

As an economy that is heavily dependent on its oil resources, following the drop in oil prices Angola has been struggling to maintain its traditional high growth in GDP rates and to be at the forefront, as one of the most promising emerging economies in the world. The golden era when the price of the oil barrel was well above US$100 seems to have long gone and economies like Angola must urgently adapt to this new reality.

This is exactly what the Angolan government has been doing and it is anticipated that steps taken by the government should position the country well economically in the long run. The Angolan government is showing a strong commitment to a policy of diversification of the local economy by promoting investments in areas as diverse as agriculture, fishing, manufacturing, tourism, IT, electricity and water, transportation and logistics.

Foreign investment is seen as a positive force and benefit to the Angolan economy and welcomed. The Angolan government has made several legal reforms which are aimed at making the local business environment more attractive and acceptable to foreign investors.

One of the most important steps in this respect was the enactment of the new private investment law in August 2015 which is now in full force and effect. The new investment law eliminated the former minimum threshold of US$1 million for foreign investments as well as the mandatory waiting-period before investors could repatriate dividends. The new private investment regime also simplified the approval process for new private investments projects.

Under the new regime all new investments with a value not exceeding US$10 million must be approved by the government department in charge of the sector in which the investment will be made. This should afford foreign
Financing in Angola

KWM advised ICBC on its US$2.5 billion loan facility to the Government of Angola for the purpose of funding Angolan social housing and infrastructure projects. Proceeds from an oil supply contract between Sonagol and a Chinese oil buyer served as security. KWM designed the financing structure, drafted documents and negotiated with the Angolan counterparties. This deal was awarded “Energy & Natural Resources Deal of the Year” at the China Law & Practice Awards.

investors the comfort that their projects will be assessed by an authority with the most experience and sensitivity in the relevant area. However, some sectors now require the establishment of local partnerships, in which the local partner must hold at least 35% of the share capital and an active participation in the management of the company. These include (i) power and water; (ii) hotels and tourism; (iii) transport and logistics; (iv) civil construction; (v) telecoms and IT; and (vi) media.

Another major accomplishment was the approval of the new labour law which, among other things, brought an end to fixed term employment contracts being an exception to the rule and the fact that they may be used for longer periods of time. The previously significant imbalance that existed in favour of employees in this respect has been corrected and a greater balance created between employers and employees.

The capital markets sector has also seen a major boost with the approval of new regulations in both private equity and real estate funds, which have been positively perceived, particularly considering the significant tax benefits that may be involved. There is new legislation for locally incorporated investment funds, which are already a reality and seem to be the new trend for private investment. However, the existing funds are still clearly (if not exclusively) oriented to the real estate sector.

Finally, the Angolan government also approved a new leasehold law which is aimed at the modernisation of the leasehold market and is expected to play an important role in controlling the country’s rate of inflation by establishing that all new contracts must set the amount of the rent in local currency. These developments may boost international investment as well as the local banking sector due to the increase in the opportunity for a more developed mortgage market.

With the intent of better implementing its economic diversification strategy, the Angolan government has also recently initiated conversations with the IMF for a 3-year Extended Fund Facility programme, which is expected to be capped at a total amount of US$4.5 billion. Besides representing an important financial boost to the Angolan economy, it is anticipated that the IMF’s assistance should encourage the Angolan government to implement more structural reforms and to modernise the local economy making it more transparent and more attractive to investors.

The oil sector will continue to play a major role in the Angolan economy, but there is no doubt that the Angolan government is heavily committed to making the country less vulnerable to fluctuations in oil prices, by enhancing other sectors of the economy and by creating better conditions to attract private investment.

Angola is definitely going through a transitional period with all the inherent difficulties that this entails, but it is undeniable that there are plenty of opportunities to invest and those which are ready to invest in Angola will surely be part of its future.

Gulf Rugby Goodwill Hunters

Tom Calnan, a real estate partner based in the Dubai office of King & Wood Mallesons, joined the rugby players of the Air Seychelles Mike Ballard Foundation Conquistadors to make their mark during a goodwill tour of Madagascar. The Mike Ballard Foundation was set up in 2014 to raise funds for the rehabilitation of the Abu Dhabi Harlequins player who was paralysed after a back injury sustained during a match. The team played against the Madagascar National XV, ranked 42 in the world. Tom returned from Madagascar with tremendous goodwill and stories of heroics on and off the field.
Financial Regulation in South Africa

New developments in the financial sector

South Africa’s financial sector is currently undergoing significant regulatory reform, which will likely result in the establishment of a “twin peaks” model of regulation in the near future through the enactment of the Financial Sector Regulation Bill at some point during 2016.

This article summarises the outcomes of the past few years of reform efforts since the Government first announced its reform program in 2011, looking at: the institutions that will be established, the importance of financial stability and the enforcement and review mechanisms that will be put in place when the reforms are passed. It also provides an overview of further reforms of the financial sector that are in the pipeline.

Recent financial sector reform

Twin peaks institutional model

The Director-General of the National Treasury – Lungisa Fuzile – recently told the Association for Savings and Investment South Africa Conference:

“We remain committed to seeing a financial sector, which is transformed and supports financial inclusion. We would like to see a financial sector, which continues to innovate, but also treats customers fairly and properly through offering them the right products and services. We would like to see a financial sector, which continues to be well regulated and therefore embraces the good intentions behind the Twin Peaks model of supervision. We are keen on a sector which continues to support key government initiatives on infrastructure without compromising hard earned investor or client’s savings.”

The twin peaks regulatory model gives responsibility for financial sector regulation to two separate independent bodies:

- The existing Financial Services Board will be reconstituted as the Financial Sector Conduct Authority (FSCA). The FSCA will have the role of enhancing and supporting the efficiency and integrity of financial markets and protecting financial customers, including by promoting fair treatment of them.

- A new body, the Prudential Authority, will have responsibility for prudential regulation of financial institutions. The focus of its work will be enhancing the safety and soundness of financial institutions and market infrastructures (such as stock exchanges) and protecting financial customers against the risk that those institutions will fail to meet their obligations. The Prudential Authority will be an independent body but, because of the close linkages between its work and the role of the South African Reserve Bank (SARB), the Authority will be located within SARB’s administrative framework and SARB will provide the Authority’s resources.

The Bill requires the two agencies to cooperate in carrying out their roles.

A centrepiece of the reforms is the ability of the Prudential Authority and the FSCA to make wide-ranging prudential and conduct standards to apply to financial institutions.

Prudential standards will be aimed at ensuring the safety and soundness of financial institutions.
financial institutions. They will be able to impose requirements on financial institutions including in relation to capital adequacy, minimum liquidity, “fit and proper persons” and risk management.

Conduct standards will be directed towards ensuring efficiency and integrity of financial markets and protecting and treating financial customers fairly. They will be able to impose requirements on financial institutions including in relation to “fit and proper persons”, disclosure, risk management and governance, as well as the design and suitability of – and marketing and distribution of – financial products and services.

It remains to be seen how the new FSCA will craft these “product suitability” standards and how it will balance the need for innovation and risk taking against the objective that financial institutions treat customers fairly through offering them the right products and services.

Financial stability
The reforms also focus on the improved arrangements for monitoring and managing “financial stability”, which means that financial institutions are able to provide – and continue to provide – financial products and services without interruption and there is confidence that that will occur. SARB has overall responsibility for financial stability, and the reforms include a number of new powers for SARB as well as new consultative bodies to advise SARB in carrying out this mandate.

Enforcement and review mechanisms
The reforms provide the two regulatory bodies with a comprehensive set of investigation and enforcement powers, including directives, enforceable undertakings and administrative penalties.

They also set up a new Tribunal, which will have extensive powers to review or reconsider regulated decisions. However, the Tribunal will only be able to substitute its own decision in very limited situations. In addition, the reforms provide for an ombud scheme, including the establishment of an overarching Ombud Council.

Future reforms
Once these reforms are implemented, we expect a further round of reforms to bring sectoral laws into line with the current reform agenda and to effect the Government’s objective of “treating customers fairly” in the financial sector.

In addition, work is underway to create a comprehensive scheme for dealing with financial institutions in distress (resolution). This work comes on the back of the failure of at least one bank recently, and will be guided by developments in overseas jurisdictions, particularly the UK.

It is expected that this work will be concluded by the end of 2016 and will include reform measures such as “bail in” arrangements, regulators’ ability to step in prior to insolvency and a deposit guarantee scheme to protect customers of financial institutions that fall into distress.
Nigeria – Boosting Local Exports

An overview of the recent scheme by the Central Bank of Nigeria for diversification of the Nigerian economy
Since the discovery of petroleum in Nigeria in 1956 at Oloibiri in the Niger Delta region of the country, the Nigerian Government has invested extensively in the oil and gas sector leading to the country’s dependence on the proceeds of petroleum exports, which account for about 90% of its gross earnings. The result of this development is that the Nigerian Government has, over the years, relegated the non-oil export sectors of the economy with minimal investment in these sectors.

In light of the recent volatility in the price of petroleum products and the oil price crash in the international market, the Nigerian economy has been put under severe pressure, particularly as the country depends on the proceeds of its oil exports to fund its budget and foreign exchange reserves and, therefore, relies substantially on crude oil exports for its yearly expenditure.

Various administrations have, over the years, indicated their willingness to place less reliance on crude oil exports, and to diversify the economy. For example, in April 2010, the Central Bank of Nigeria (“CBN”) during President Goodluck Jonathan’s administration established the ₦300 Billion Power and Aviation Intervention Fund in a bid to catalyse the financing of the real sector of the Nigerian Economy.

In March of the same year, the CBN launched the ₦200 Billion Small and Medium Enterprises (SME) Credit Guarantee Scheme, which was expected to fast-track the development of the manufacturing sector.

However, experts are of the opinion that financing of the non-oil export sectors is still inadequate in spite of the initiatives of the government and private banks to encourage their customers to diversify into non-oil exports.

Consequently, the Federal Government through the CBN has designed two export-financing programmes known as the Non-Oil Export Stimulation Facility (ESF) and the Export Re-discounting and Re-financing Facility (RRF) to improve non-oil export in the country, with a view to encouraging the diversification of the Nigerian economy.

The ESF, which was unveiled in June 2016, is designed to provide financial assistance of up to ₦5 Billion to non-oil exporters in Nigeria in the form of a low interest facility with a tenure not exceeding 10 years. The essence of the ESF is to offer non-oil exporters in Nigeria additional opportunities to upscale and expand their businesses in addition to improving their competitiveness. The ESF is also intended to attract new investments and encourage re-investments in value-added non-oil exports production and non-traditional exports as well as to diversify and increase the level of contribution of non-oil exports revenue towards sustainable economic development.

By virtue of the provisions of the Non-Oil Export Stimulation Facility Operating Guidelines recently issued by the CBN, it is envisaged that the mechanism for the implementation of the ESF would be by the issuance of a ₦500 Billion debenture, and the investment by the CBN in the debenture, which essentially inflows sufficient finance to support the issuance of the ESF by the Nigerian Export-Import Bank (“NEXIM”), acting as the managing agent of the ESF. NEXIM would, thereafter, make available the ESF to participating financial institutions (PFIs) including Deposit Money Banks (DMBs) and other Development Finance Institutions (DFIs) for the purpose of on-lending the facility to eligible non-oil exporters in Nigeria.

In addition, the CBN has expanded the RRF by ₦50 Billion to support the DMBs in the provision of short-term pre and post-shipment finance, with a tenure not exceeding 360 days, to exporters for undertaking export transactions. This essentially involves the provision of finance to eligible DMBs, who seek to access the rediscount window of the CBN with a view to liquidating income from export credit made available to non-oil exporters in Nigeria.

An integral benefit of the RRF is that the CBN would essentially take an active role in the moderation of the cost of non-oil export credits and indirectly influence the cost of providing finance to the non-oil export sectors.

The RRF makes provision for refinancing and rediscount facilities. While the rediscount facility is transaction specific, the refinancing facility is intended to encourage banks to provide longer term export credit in support of export activity than is available under the Rediscounting Facility. The rationale behind the refinancing facility is that banks and guarantors, which have extended loan facilities to customers for non-oil exports, would be able to obtain some respite on their lending commitments.

In implementing the RRF, as with the ESF, it is intended that NEXIM would issue a debenture, which would be invested in by the CBN. This would essentially create an avenue for the inflow of finance to NEXIM for the purpose of facilitating the creation of a discount window to add liquidity to the export credit transactions of DMBs, and accordingly improve exporters’ access to export credit as may be required.

The RRF is also expected to provide finance to exporters awaiting receipt of the export proceeds of their shipments and/or encourage the provision of deferred payment arrangements by exporters to their counterparties to enhance competitiveness.

With the current energy trends moving away from fossil fuels in favour of cleaner and renewable energy, especially in light of the key lessons from the annual Conference of Parties held in Paris in 2015, it is expected that reliance on income from oil exports would soon be unsustainable for Nigeria. Therefore, it is imperative that the country takes more active steps to ensure that there is substantial and accessible financing for non-oil production in Nigeria to facilitate the success of the Nigerian Government’s efforts to diversify the country’s economy effectively and efficiently.
Africa is said to be on the rise. So is competition law enforcement throughout the continent. Despite initially facing challenges in establishing competition authorities, more and more African countries have adopted competition policies and enacted domestic legislation aimed at prohibiting anti-competitive behaviour and preventing mergers from being implemented before they are scrutinised for anti-competitive consequences. In addition, Africa has seen the development of a number of regional competition regimes, most notably, the Common Market for Eastern and Southern Africa (“COMESA”), the Central African Economic and Monetary Community (“CEMAC”) and the East African Community (“EAC”), to name but a few.

This article considers some developments of African competition law enforcement and merger control through these regional competition law authorities. In addition, we note a number of important multi-lateral co-operation treaties which have been concluded recently.

Common Market for Eastern and Southern Africa

The COMESA currently consists of 19 Member States and the COMESA Competition Commission (“CCC”) is the responsible body for competition law enforcement and merger regulation in cross border transactions affecting its Member States. Although its Rules were already established in 2004 by multilateral treaty, the CCC officially commenced operations only in January 2013, amidst great confusion about the scope of its jurisdiction in respect of merger control. In particular, there was no prescribed monetary threshold which filtered out merger transactions without a common market dimension. The filing fees were also prohibitively expensive and the competition authorities of many of the Member States did not recognise the authority of the CCC.

However, this situation is now much improved following the publication of monetary thresholds, merger assessment guidelines and a significant reduction in the filing fees. The CCC has also found its feet and its merger control process is for the most part efficient and rational. It is important to note that it is not required for COMESA jurisdiction for a firm to have established a branch or a corporate entity in the COMESA region; the mere earning of revenue from COMESA through exports to Member States constitute as qualifying “business operations” within the region. Unfortunately, all the jurisdictional issues have not been resolved as yet, as certain of these Member States have not passed legislation to incorporate the COMESA treaty into their domestic laws. Therefore, these States, notably Kenya and Ethiopia, still require merger filings in respect of transactions occurring in their territories despite the fact that a filing with the CCC is made. COMESA is in the process of establishing co-operation agreements with each Member State’s competition authority (a co-operation agreement was recently entered into with Kenya) but it is not clear how soon this will result in finally resolving these turf wars.

The CCC investigated 13 transactions in 2013. This number rose significantly to 44 in 2014. However, only 18 mergers were notified to the CCC in 2015, probably as a result of the introduction of monetary thresholds. This brought the total number of transactions before the CCC to 77 in a period of two years. This dedication is commendable in light of the short period in which the CCC has been in existence. The CCC investigated 13 transactions in 2013. This number rose significantly to 44 in 2014. However, only 18 mergers were notified to the CCC in 2015, probably as a result of the introduction of monetary thresholds. This brought the total number of transactions before the CCC to 77 in a period of two years. This dedication is commendable in light of the short period in which the CCC has been in existence.

According to the COMESA Annual Report (2014) the majority of the CCC merger notifications since 2013 fell within the financial services sector, with 75% of those transactions involving acquiring firms from South Africa and Kenya. Interestingly, the CCC has assessed a merger that related to 12 COMESA Member States, illustrating the breadth of its regional reach. This merger, which comprised the African leg of the global acquisition of Lafarge by Holcim, reportedly created the largest player in Africa in the cement production industry. Other industries in which the CCC conducted merger reviews are agriculture, petroleum, telecommunications and the fast moving consumer goods.

Despite the level of growth and effectiveness it has reached with regard to introducing competition policies and a merger control regime, the CCC has not been very active in antitrust enforcement cases, especially those relating to cartel behaviour in the region. The CCC has reportedly alluded to the challenges it faces in this regard, which include jurisdictional issues between the CCC and some of the domestic competition authorities and corporations in terms of sharing of information and investigations between Member States. These challenges may have hindered the progress and the potential benefits that could derive from the competition enforcement by the CCC. That said, the CCC’s executive director, George Lipimile, indicated in August 2015 that the CCC would be commencing a series of antitrust investigations. These investigations would include a sector inquiry into shopping malls as well as investigating cartels in the fertiliser, bread and construction industries.

Eastern African Community

The EAC is a bloc consisting of 5 Member States (namely Burundi, Kenya, Rwanda, Tanzania and Uganda with South Sudan possibly coming on board at some later stage) and its Ministers’ Council has adopted the East African Competition Amendment Bill (2015) which provides for the establishment of the Eastern African Community Competition Authority (“EACC”). The EACC, however, has
not yet been established owing to a variety of challenges including the fact that some of its Member States do not have a background in domestic competition law enforcement. As a result of this challenge, Member States without fully established competition law and institutions (Rwanda, Uganda and Burundi), could not submit nominees for the posts of Commissioners for the EACC owing to the lack of competition law enforcers in their respective jurisdictions. According to press reports, EACC is expected to start operating in July 2016.

Four of the countries of the EAC bloc overlap with COMESA Member States. It is therefore not entirely clear which regulatory authority will have primary jurisdiction over a transaction or prohibited practice concerning overlapping countries. The need for some agreement between the two authorities to define these boundaries before the EACC opens its doors will be paramount lest confusion reigns.

It will be interesting to observe how the EACC will conduct its investigations once the EACC has been fully established. It appears that numerous transactions will require the EACC’s approval, considering the similarities between the Member States’ economies and trade. When these firms expand across borders they are more than likely to be subjected to merger regulation by the EACC.

Central African Economic and Monetary Community

The CEMAC is made up of six Member States (namely Gabon, Cameroon, the Central African Republic (CAR), Chad, the Republic of the Congo and Equatorial Guinea) and is responsible for regulating against anti-competitive practices within its Member States in terms of Regulation No. 1/99/UEAC-CM-639 of 25 June 1999 (“Regulation”). In terms of the Regulation, concentrations of a community dimension must be subject to a prior notification and merger control review by CEMAC’s competition authority, which is called Organe de Surveillance de la Concurrence.

It appears that the CEMAC has adopted a European approach in that the Regulation provides that the CEMAC enjoys exclusive jurisdiction on merger reviews falling within its jurisdiction and naturally Member States do not have the authority to review those mergers. This approach surely eliminates any challenges that may arise as a result of concurrent jurisdiction between the CEMAC and Member States. There is a view that perhaps other regional authorities should adopt this approach and so avoid confusion for businesses as to where to seek approval.

Southern African Development Community (“SADC”)

Despite the SADC not having an established regional competition authority as yet, a memorandum of understanding (“MOU”) was recently entered into by SADC Member States with a view to achieving competition co-operation amongst Member States’ competition authorities. Since this MOU may be the precursor of a regional competition authority in due course and is likely to improve cross-border enforcement of competition laws, it commends a brief discussion.

The MOU was signed by ten of SADC’s 14 Member States (namely Botswana, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania and Zambia) on 26 May 2016 and it follows the signing of the SADC Declaration on Regional Corporation in Competition and Consumer Policies of 2009.

Considering South Africa’s position as the most established authority in the region, the South African Competition Commission is more than likely to take a leading role in this union in driving co-operation between competition authorities. The co-operation between the Member States may extend to the following:

1) exchanging information and views on significant developments in the competition policies, laws, rules, and enforcement thereof in their respective countries;

2) organising and participating in workshops and seminars;

3) participating in joint research on issues of common interest;

4) co-operating and co-ordinating with one another in the investigation of mergers and complaints; and

5) harmonising the rules and procedures for filing of mergers and applying for leniency or immunity.

The fulfilment of these duties will be overseen by a joint working committee that will be established by Article 4 of the MOU. This committee will develop an annual work plan of activities.

Third party information submitted as part of a merger investigation or cartel leniency process is protected, in that no Member State is obliged to communicate information to any of the other Member States if such communication is prohibited by the domestic laws of the party possessing the information. A Member State competition authority is however obliged to use its “best endeavours” to obtain a waiver from the relevant third party if such information is required by another Member’s competition authority.

South African co-operation agreements

In line with the globalisation trend, it is noteworthy that the South African Competition Commission has in the past 6 months signed similar co-operation agreements with two other trading blocs:

- In May 2016, it signed a multi-lateral co-operation agreement with the competition authorities of the so-called BRICS countries, of which South Africa is a member together with Brazil, Russia, India and China.
- In June 2016 it signed a co-operation agreement with the European Competition Commission.

Conclusion

The African regional competition authorities have shown significant determination in enforcing their merger control regimes. The message is very clear: doing business in Africa will require careful consideration not only of national, but also regional competition laws. In this regard, attention should be given not only to the effect on competition but also the public interest. Failure to do so may result in severe consequences.

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1. Also referred to as the Communauté et Monétaire de l’Afrique Centrale or Economic Community of African States (CENAC).  
2. Member states include Burundi, Union of Comoros, Congo DRC, Djibouti, Egypt, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Swaziland, Seychelles, Uganda, Zambia and Zimbabwe.  
3. At least two of the merger parties should have COMESA turnover or assets in excess of US$10 000 000 and the merging parties should have a combined asset value or turnover exceeding US$50 000 000.  
5. Although it is still quite pricey, at 0.1% of COMESA turnover or asset value, up to a limit of US$200 000.  
The South African Competition Act enjoins the South African Competition authorities to consider the public interest in assessing mergers which are filed with them. In earlier times, the main focus in this regard was on preserving employment for the staff of the merging firms. However, since the merger of Walmart and Massmart in 2011, other public interest factors have received more intense focus, such as preserving and promoting local supply chains, promoting small and medium enterprises and those controlled by Black people, and industrial development. This then typically results in a range of public interest conditions being attached to the merger approval.

The Minister of Economic Development has a statutory right to participate in merger investigations to advance the public interest and he has done so in two recent large cross border transactions. In the merger of three Coca-Cola bottling operations in May 2016 the Minister’s intervention has resulted in merger conditions relating to retention of the African head office in South Africa, an increase in shareholding of Black people in the merged entity to 20%, localisation of the supply-chain, establishment of a ZAR800 million fund for development of agricultural outputs for barley, hops and maize, as well as to promote entry and growth of emerging and black farmers in South Africa. The investment will also be utilised for enterprise development through the creation of a dedicated business incubator facility, which will provide South African suppliers with training to develop various skills, and to introduce new low or no alcohol products into South Africa.

AB InBev has undertaken that it will continue SAB’s policy and practice of maximizing local production of beer and cider. In this regard, it will ensure that South Africa maintains at least the same ratio of local production as pre-merger.

In order to address any potential impact that the merger may have on the South African suppliers of input products such as glass bottles, cans, ends, crowns, paper labels, kegs and raw materials required for the production, the merged entity must source its inputs from local suppliers and comply with the terms and conditions of SABMiller’s existing supply agreements.

The merged entity must within 2 years from the closing of the transaction propose to the Minister and the Competition Commission a scheme to secure ownership of Black people in the South African business of the merged entity.

It is expected that this trend will continue, especially in regard to cross border investment into South Africa. In fact, the Competition Commission has signalled its intent in this regard on 8 June 2016 by publishing a set of formal guidelines for the assessment of public interest effects in merger investigations. These guidelines attempt to provide guidance on the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds when assessing mergers.7

The guidelines consider in detail how the Competition Commission will view the four public interest grounds set out in the Competition Act, namely:

(i) the effect of a merger on particular industrial sector or region;

(ii) employment;

(iii) the ability of small businesses controlled or owned by historically disadvantaged persons to become competitive; and

(iv) the ability of national industries to compete in international markets. It is expected that in future far more detailed information will have to be presented to the Commission during the merger investigation process.

Whilst the guidelines set out the general approach that the Commission is likely to follow in assessing the public interest effects of a merger, it should be borne in mind that the detailed evaluation of these factors will be conducted on a case by case basis. It is therefore incumbent on merging parties to put forward comprehensive fact based argument to the Commission during the merger assessment process in order to demonstrate that the merger will not compromise the public interest. In particular circumstances, it may expedite the process to propose public interest conditions with the merger filing or at an early stage of the proceedings.

Many African countries have public interest provisions in their competition legislation and have started to flex these muscles. Given the multitude of regional authorities and cooperation agreements, we expect that other countries may soon follow the South African example in ensuring that mergers are not contrary to the public interest.
Developing Africa

Mauritius eyes economic collaboration with Côte d’Ivoire

On 21 and 22 April 2016 the 5th Economic Forum of the General Confederation of Enterprises of Côte d’Ivoire (CGECI – Ivorian National Council of Employers) took place in Abidjan, Côte d’Ivoire, and is also known as the CGECI Academy. Mauritius was the guest of honour of the event.

The Mauritius government delegation to the Forum was led by Hon. Xavier Luc Duval, Deputy Prime Minister and Minister of Tourism and External Communications of the Republic of Mauritius. He praised the exemplary journey Côte d’Ivoire has been forging since the country’s political crisis came to an end. The Hon. Duval further said his presence at the Forum confirms the interest of Mauritius to develop closer cooperation ties with Côte d’Ivoire and with other countries in western Africa and that he hopes that his presence at the Forum will “encourage Mauritian entrepreneurs to become aware of investment opportunities in western Africa and particularly in Côte d’Ivoire, which is one of the strongest economies on the continent.” He went on to say that the “country now positions itself as a true leader in the region and presents numerous investment opportunities”.

The Forum followed a lengthy preparatory mission with an Ivorian delegation visiting Mauritius in August 2015 and April 2016, with the objective of exploring and developing business collaboration opportunities between Mauritius and Côte d’Ivoire. The Hon. Duval added that he believes that the stage is now set for the private sectors of Mauritius and Côte d’Ivoire to work together to develop numerous business opportunities.

Further to signing an agreement in New York on 4 March 2016 for the establishment of future diplomatic relations and the strengthening of economic cooperation, on 20 April 2016 Côte d’Ivoire and Mauritius inked an important treaty for the protection and promotion of investments (IPPA). Other agreements include a framework for economic and financial cooperation, a memorandum of understanding on strengthening co-operation between the Board of Investment, the Mauritius agency for the promotion of investments, and its Ivorian counterpart CEPCI.

During the Forum, officials from both countries indicated that the real estate development of the Village of Information Technology and Biotechnology (VITIB) of Grand Bassam in Côte d’Ivoire could be an interesting pilot project in the implementation phase of these new agreements. Meanwhile, the two countries have entered into negotiation for the signing of a Double Taxation Avoidance Agreement (DTAA).

During his speech, the Prime Minister of Côte d’Ivoire, Daniel Kablan Duncan described Mauritius’ economic development as an inspiration, urging the Ivorian private sector to use the Mauritius International Financial Centre (IFC) to develop their projects.

The theme of the Forum focused on financial challenges faced by entrepreneurs and small and medium enterprises (SMEs), and what innovative financing solutions are available. The team from ABAX, a provider of integrated corporate, advisory and business services headquartered in Mauritius, with offices in Africa, including in Côte d’Ivoire, was present at the Forum.

Speaking at a round table dedicated to the advantages of using the Mauritius IFC, Richard Arlove, the CEO of ABAX, urged young Ivorian entrepreneurs to live their dreams and to move forward to ensure their projects materialise. This message was also relayed with passion by renowned industry leaders on the continent, namely Dr Chris Kirubi (Kenya) and Tony Elumelu (Nigeria).

Arlove further added that “the CGECI Economic Forum has been a great opportunity for entrepreneurs and investors to share their experience and ideas for the development of the economy of Côte d’Ivoire. Indeed, with an annual economic growth close to 9%, the country is currently confirming its position as an important business hub for the western African region. This Forum is a fabulous opportunity for the Mauritian private sector and international investors alike since the country presents several business opportunities. Côte d’Ivoire, which has a population of 24 million, gives indirect access to a market of 300 million people as it is part of the West African Economic and Monetary Union (WAEMU) and of the Economic Community of West African States (ECOWAS)”.

The CGECI Economic Forum 2016 attracted close to 6,000 international participants, including investors, project developers, Development Finance Institutions and entrepreneurs, as well as some big names from the African business world. With many considering Africa as the last growth frontier, the future editions of the CGECI Economic Forum are expected to gather more and more entrepreneurs and participants willing to fast-track Africa’s development.
On June 14 Energy & Infrastructure partner, Richard Mugni, alongside Anne-Laure Vincent (Counsel) and Charles-Antoine Erignac (Counsel), hosted a workshop on Risk Management & Litigation in Africa at the Paris offices of King & Wood Mallesons (“KWM”). Richard Mugni has over 15 years of experience and specialises in public-private partnerships and infrastructure projects relating to the energy sector (oil & gas, mining) and transport infrastructure. Richard has particular expertise in the negotiation of projects between governments and public authorities, sponsors, lenders and operators.

Anne-Laure Vincent is a leading counsel in the Paris office of KWM specialising in commercial and civil litigation. She has advised both French and international clients on a wide variety of areas including operations related to contract law, business and commercial law, unfair competition, real estate, private equity and LBO transactions. Anne-Laure regularly advises clients on pre-litigation issues and frequently appears as counsel before French civil, commercial, criminal, and administrative courts.

Charles-Antoine Erignac is a leading counsel in the KWM Paris office Energy & Infrastructure department. He has deep knowledge of the structuring and tendering process, negotiating of various types of concessions and PPP in France and in Africa. Charles-Antoine has strong knowledge of all aspects of public law and complex contractual relationships. He has also worked on various litigation cases before the administrative jurisdiction of the European authorities. He advises public entities, private investors, funds and operators on these various matter.

At the workshop, the King & Wood Mallesons team shared their knowledge and experience on the African continent. The discussion focused on how to adapt one’s legal strategy to the objectives sought during litigation. Means by which to mitigate financial, reputational and legal risks during pre-litigation and litigation stages were also covered. The latest trends in litigation were also discussed, such as the development of means to obtain evidence from the opposing party in certain civil law countries.

The workshop was followed by a cocktail reception.
The Congress of the International Council for Commercial Arbitration (commonly known as “ICCA”) is the largest regular conference devoted to international arbitration. It takes place every two years, on each occasion in a different city and country, bringing together eminent judges, arbitrators and practitioners specialising in the field of commercial arbitration under one roof. The 23rd ICCA Congress was held in Mauritius from the 8th to 11th of May 2016. This was the first ICCA Congress held in Africa in its 50 year history.

By choosing Mauritius, the ICCA recognised the considerable and continuing efforts of Mauritius to establish itself as a neutral and state-of-the-art arbitration venue for a region of the world that could derive great benefit from more effective dispute resolution processes in light of the ever-increasing number of arbitrations involving African related parties and projects. ICCA Mauritius 2016 was attended by over 800 delegates, of whom about a third came from Africa.

This year’s theme was centred on international arbitration’s contribution to, and conformity with, the rule of law. As the new ICCA president, Mr Donald Donovan, stated in his welcome message to the delegates prior to the Congress: “[w]e have a lot to absorb and much to gain”.

An intrinsic link between international arbitration and the rule of law

The principle of the rule of law is at the heart of international arbitration. They are inherent to each other since international arbitration must be governed by a system of clear and predictable laws, which are applied equally and fairly.

Dr Mohamed ElBaradei, prominent Nobel Laureate, provided a reality check at the opening ceremony of the Congress, observing that international arbitration still requires some fine-tuning to fully conform to the rule of law and highlighting possible avenues which could improve the dispute resolution process. These included increased transparency, an international framework in furtherance of a coherent development of case law and the possible establishment of an appellate body to review arbitral awards. His concluding words, however, in respect of the ever-increasing development of international arbitration as a dispute resolution mechanism were to the effect that the aim is to “strengthen the foundation, not destroy the temple”.

In his first official visit in Mauritius, Ban Ki-moon, the Secretary General of the United Nations, applauded the role of the United Nations and UNCITRAL, its core legal body in the field of international commercial law, in the harmonisation and development of the Model Law on international commercial arbitration. He further saluted the strides made by Mauritius in developing its legislation in line with the global trend of internalisation of arbitration.

A panel of economists, political scientists and jurists focussed on the necessity, both for economic development and human rights protection, to ensure the protection of the rule of law through a robust legal system.

International arbitration is in effect a system separate from, and in addition to, national court systems, and offers an alternative to resolving disputes before the national courts. There is a need for strong collaboration between national courts and arbitral tribunals at the points at which the two systems meet.
Participants in further lively panel sessions discussed the extent of the powers of the arbitral tribunal to ensure conformity with the rule of law, such as policing the examination of witnesses and placing limits on the length of written submissions or the volume of documentary evidence. It further emerged from the dialogues that there is a link between ineffective advocacy or poor preparation and ineffective arbitral deliberations, which in turn may result in awards open to criticisms. In that respect, practitioners in the field of international arbitration also shoulder the duty of ensuring conformity with the rule of law.

Mauritius: a window on Africa for international arbitration

Mauritius is very well suited to play a leading role in developing the theory and practice of international arbitration in Africa, reflecting the institutional development and economic growth of the region. The Congress was an opportunity for Mauritius to showcase the steps taken by the country over the last few years to establish itself as a venue and centre of excellence for international arbitration.

The Mauritian legal framework on international arbitration brings into play international arbitration principles in an entirely new body of rules, completely separate from those governing domestic arbitration, and which are designed to be in line with the international principles and practices underlying the UNCITRAL Model Law. The rules and procedures under the Mauritian arbitration regime are clear, predictable and establish the conditions for a harmonious co-existence between the national court and arbitral tribunal.

The Mauritian judiciary is also keen to encourage the efficient progress of international arbitration, as facilitated by the concept of “Designated Judges”, specialised in the field of international arbitration and hence safeguarding a coherent development of the jurisprudence. A comprehensive report of the salient judgments of the Supreme Court of Mauritius in matters of international arbitration to date is provided in the book written by the same authors as this article entitled “Why Mauritius: A National Court in Support of International Arbitration” (2016).

To further show the commitment of the judiciary in support of international arbitration, there were no sittings at the Supreme Court of Mauritius on the days of the Congress as all the 20 Judges of the Supreme Court in addition to 15 Magistrates attended the event.

Moreover, in addition to the already existing MCCI Permanent Court of Arbitration, the creation of an office in Mauritius of the Permanent Court of Arbitration of The Hague and the launch of the LCIA-MIAC, set up in cooperation with the London Court of International Arbitration (LCIA), have further established Mauritius as a leading venue for international arbitration in Africa.
The legal framework is significantly evolving in Tunisia and this will have a deep positive impact on its business environment.

Since the revolution in 2011, it is undeniable that the business environment in Tunisia has had a difficult time. The social unrest caused by the population’s expectations, the weakness of non-elected rulers and the instability of neighboring Libya were contributing factors.

Five years later, the situation has stabilised and there are legal changes that allow for optimism regarding several key business sectors. Since Tunisia successfully and peacefully held its first free and transparent elections in 2014, the resulting legitimate Government have worked on legal reforms to improve the local economy and business environment.

Below is an overview of the current situation, the changes to watch for, and the changes that have already started in the areas of Investment, Tax, Banking, Oil & Gas, Public Private Partnership and Renewable Energy.

Investment regulation: liberalisation and simplification

Tunisia has had an Incentive Investment Code since 1993. Focused on a list of specific business activities, it provides for various tax, financial and labor incentives. However, over time the list of activities has been reviewed and updated, making it an unclear source of regulation due to several amendments.

The proposal of a new code arose in 2007, and the final draft is now ready to be voted in by the Tunisian Parliament as well as its three application decrees. The result is a draft much lighter than the current code, due to tax aspects and related provisions being regrouped and inserted into a separated new General Tax Code.

The Investment Code draft provides for the following:
- Full opening in the Code of all activities to private investment without restriction, namely without restriction based on the nationality of the investor;
- Limitation of the number of activities requiring an authorisation under specific regulation and review of the terms of specifications when they exist;
- Increase of the number of foreign employees that can be hired freely in a local offshore entity from 4 to 10;
- Possibility of foreign participation in Tunisian companies owning agricultural lands (direct ownership will remain prohibited);
- Creation of a Tunisian Investment Authority that will be the sole vis-à-vis of investors for any issue they may have;
- Simple and precise procedures for the foreign investor with deadline and tacit approval in case of non-response; and
- Settlement of investment dispute opened to international arbitration.
Tax regulation: gathering of texts and decrease of the corporate tax rate

A new General Tax Code is currently being prepared and is expected by the end of 2016. Aiming for clarity, such Code will gather all the provisions related to general taxes, value-added tax, tax investment incentives and customs duties.

Considering they are complementary, the new Investment Code evoked above and the new General Tax Code are supposed to be enacted simultaneously. Nevertheless, and in order to not hinder the promulgation of the Investment Code, the Ministry of Finance and the Minister of Development, Investment and International Cooperation have already agreed that, if the General Tax Code is not ready in time, a law dedicated to tax incentives will be promulgated together with the Investment Code. Such tax incentive law shall then be incorporated in the General Tax Code once promulgated.

Accordingly, the corporate tax rates are expected to be amended and will be as follows:

- 35% for companies in specific business sectors (finance, telecoms, hydrocarbons);
- 20% for the companies (the current rate is 25%); and
- 10% for the exporting companies.

Banking: independence of the Central Bank and regulation of Islamic banks

Law n°2016-35 dated April 25th, 2016 provides for new bylaws of the Tunisian Central Bank, aligning them with international standards regarding independence and purpose. Indeed, whereas the Tunisian Central Bank was previously bound to, inter alia, “lend support to the State economic policy”, it is now an independent structure that is neither submitted to nor influenced by the Government or the Parliament. Its mission is focused on prices and financial stabilisation.

In addition, law 2016-9 has been voted in by the Parliament early June 2016 and is expected to be published shortly. Among the various input, we can mention the clarification of the definition of banking operations and of activities covered by the law (such as leasing and factoring) as well as the provision of a legal framework for Islamic banking and finance.

Oil & Gas: transparency and unconventional resources

The Tunisian Hydrocarbons’ Code is also being reviewed. The amended Code draft is expected by the end of this year for a promulgation in 2017 and officials have already communicated on the main issues it will address.

The new Code will take into consideration Article 13 of the second Tunisian Constitution promulgated in 2014. The latter provides expressly for the sovereignty of the State over its natural resources and for Parliament’s approval concerning all related investment agreement. This impacted the granting process of hydrocarbon’s title provided by the Hydrocarbons’ Code and resulted in the non-granting of any exploration permit since 2012. The amendment of the code will clarify the granting process and end a period of uncertainty. Currently, officials say there are three exploration permits under negotiation.

Apart from the clarification of the granting process, the new Hydrocarbons’ Code will also provide for a regulatory framework for unconventional resources in order to enable their exploration/exploitation. Negotiations for an exploration permit of unconventional resources occurred in 2013 but the regulatory and tax framework were not fit for this type of resources whose exploration/exploitation have specific needs. According to the Tunisian General Director for energy and mines, preliminary estimations shows that Tunisia could have a significant quantity of shale gas in its underground.

Finally, the third main issue addressed is the transparency in the granting process and the good governance. In this context, it is worth noting that Tunisia is in the process of joining the Extractive Industries Transparency Initiative and that the Tunisian Ministry for Energy and Mining has launched a new website in mid-June 2016 dedicated to open data. This website contains all documents related to the energy sector such as the agreements signed by the National Oil Company and International Oil Companies for exploration and concessions. By doing so, the Ministry intends to comply with international open data standards within the energy sector.

Public-Private Partnerships and renewable energies

During 2015, two laws relating to renewable energy and public-private partnership (PPP) have been promulgated although in the absence of application decrees further clarity is needed.

Law n°2015-49 dated 27th November, 2015 relating to the partnership agreements between the public and the private sector defines the general framework of public-private partnership contracts, their elaboration as well as the mechanisms of their implementation and control. Contracts may be concluded in response to a need expressed by the State or further to a spontaneous proposal from the private sector. The granting of decisions are published by the public partner.

The purpose of law n°2015-12 dated 11th May, 2015 relating to the production of electricity from renewable energies is to encourage the development of renewable energies in Tunisia and to liberalize the production and exportation of electricity. Amongst other provisions, this law provides for three schemes regarding projects of electricity production from renewable energies:

- Self-use consumption;
- Independent electricity production for local consumption; and
- Export of electricity.

Conclusion

Many of the reforms mentioned above are still at the discussion and voting stage, and they can be amended or will be effective once their application decrees are voted through. Nevertheless, and considering the fact that they are recommended and supported by international institutions, their implementation looks likely: In other words, there could be minor delays in the future, but the liberalisation process will continue and the business environment in Tunisia will continue to develop in a positive manner for international investors.
Our Africa Group

For advice on transactions in Africa or, if you are an African client seeking legal or transaction advice in Europe, East Asia, Australia and the Middle East, please contact us.
Selected experience in Africa includes advising:

- **The Abraaj Group** on the establishment of the Themis Energy project development company and other matters
- **Vivendi** on CanalOlympia, the first network of cinemas and live venues in central and west Africa
- **China Molybdenum** on the US$2.65 billion acquisition of Freeport’s indirect 56% interest in Tenke Fungurume in the DRC
- **A private equity investor** on its co-investment with Abraaj into The Tiba Group/Thebes Schools, the leading Egyptian education business
- **Coronation Capital** on its captive fund establishment and related transactional work
- **South32** on the demerger from BHP Billiton of its aluminium, manganese and coal assets in South Africa, Mozambique, Australia and South America with South32 listed on the ASX, the JSE and the LSE
- **Green Investment Bank plc** on its international renewable energy investment programme, including key jurisdictions in Africa
- **A leading shipping services group** on its transactional work in Africa and elsewhere
- **Meridian Port Services** on the US$1.5 billion expansion project of Ghana’s busiest seaport terminal, Tema Port
- **Bolloré Group** on the construction and operation of 1,205 km of rail infrastructure linking Cotonou (Benin) to Niamey (Niger)
- **A large Chinese SOE consortium** on an iron ore joint venture project in Africa
- **ICVL** on the acquisition of Rio Tinto’s 2.6 billion tonnes coal resource in Mozambique
- **ADC** on the sale of the leading Rwandan payments business Rswitch to Millicom
- **Atlas Mara Co-Invest Limited** on its acquisition of a 77% controlling stake in the commercial arm of the Development Bank of Rwanda (BRD) and other matters
- **Warburg Pincus** on its lead investment of up to US$600 million into Delonex, the East African-focused oil and gas exploration company
- **ADC** on the consortium investment into Union Bank of Nigeria plc involving a US$750 million equity investment
- **A leading African conglomerate** on its auction bid and proposed acquisition of Fan Milk, a leading West African FMCG business and other matters
- **Baiyin and China Africa Development Fund consortium** on the takeover of ASX and JSE listed Gold One with gold assets in Southern Africa
- **Glencore** on its Burkina Faso copper joint venture with ASX listed Blackthorn Resources and Glencore’s acquisition of a 13% stake in Blackthorn
- **Helios Investment Partners** on the US$1.145 billion acquisition of South Africa’s INM Outdoors Limited, the leading outdoor advertising business in Africa with operations in 13 African countries
- **Investec Asset Management** on the final closing of its second pan-African private equity fund at just under US$300 million
- **South Suez** on its Africa Fund II fund of funds offering
- **British American Real Estate** on its Africa Renewable Energy Fund and transactional work
- **The sellers of Aureos Capital** on the sale to Abraaj Capital to form a combined global private equity fund management group with c. AUM US$7.5 billion under management
- **CNODC** on multiple projects in Africa including oil transportation and supply agreements and export pipeline arrangements
- **African Development Partners II L.P.** on its US$20 million equity investments in Université Privée de Marrakech of Morocco’s private universities
- **Government of Lagos State** on the US$1.2 billion light rail mass transit rail system known as the Blue Line and on a separate PPP agreement
- **Helios Investment Partners** on the groundbreaking US$170 million acquisition of a 24.99% stake in listed bank, Equity Bank Limited of Kenya and on its acquisition of Family Bank, Uganda
- **AfricapInvest Capital Partners** on a €9 million investment in a Libyan soft drink and bottled water business and on KES 918 million investment in Family Bank, the second largest microfinance bank in Kenya
- **Africa Opportunity Fund** on its AIM listing and US$125 million fundraising for strategic and opportunistic investments in Africa
- **Aureos Capital** on the global emerging markets fund manager’s US$380 million Africa Fund as well as on its US$100 million African healthcare fund
- **Development Partners International** on their deal flow in a number of jurisdictions in both Anglophone and Francophone Africa
- **Masawara plc** on its admission to AIM and US$25 million placing and on its acquisition of the downstream assets of Shell and BP in Zimbabwe
- **Satya Capital** on its co-investment in Cheri & Cotex Industries, the Tanzanian FMCG business
- **China Guandong Nuclear Power Group** on the acquisition of a 43% share of Kalahari Minerals Plc for £632 million (US$991 million) cash
- **Sinopec** on the construction of a US$850 million LPG gas pipeline and processing plant in Ghana
- **Diageo** on various joint ventures with Heineken and Namibian Breweries in South Africa, Kenya, Namibia and Uganda
- **Investor** on the development of a 100MW hydropower plant in Guinea
- **Investors in Africa** acting on various mandates for the Bill and Melinda Gala Foundation, DEG, FMO, OPIC, Norfund, EBRO, IFC and ADB
Commitment to capacity building

King & Wood Mallesons and International Lawyers for Africa (ilfa) have been working in partnership for almost ten years to provide secondment opportunities for African lawyers in leading City law firms.

King & Wood Mallesons was instrumental in the setting up of ilfa, which counts 148 alumni from 20 different African countries.

The Financial Times recognised our achievement by presenting our firm with the FT Innovative Lawyers Award and The Lawyer publication awarded us the Pro Bono Firm of the Year Award.

We are also hosting this year’s ilfa Welcome Dinner.

For more information, please contact:

Ofei Kwafo-Akoto
ofei.kwafo-akoto@eu.kwm.com

Anna Gardner
anna.gardner@ilfa.org.uk

kwm.com

This newsletter is intended to highlight potential issues and provide general information and not to provide legal advice. You should not take, or refrain from taking, action based on its content. If you have any questions, please speak to your King & Wood Mallesons contact.

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