Doing Deals in Africa – Reflections on What is Different and What is Not
Clement N Fondufe and Sara Mansuri*

Globalisation has certainly translated into opportunity and prosperity for businesses and investors around the world, but of particular interest is the key role now being played by certain emerging countries, known as the BRICS (Brazil, Russia, India, China and South Africa). The recent inclusion of South Africa in the BRICS is a strong signal that the time is ripe to change our view on Africa as a whole, and to view this continent through a new lens of optimism for increased international business, financial flow and cross-border legal activity.

This article offers some reflections for lawyers on how to navigate a complex, developing market and introduces some elements that are different for transactions in Africa. While economic opportunities for foreign investors and lawyers seeking to develop a ‘niche’ practice abound, significant challenges must also be recognised, including the continent’s diversity, rapid social change and varying legal systems.

* Clement N Fondufe is Global Chair, Africa Practice Group, Latham & Watkins LLP. Mr Fondufe is based in Paris and New York and can be reached by email at clement.fondufe@lw.com. Sara Mansuri is a former Chair (2008–11), International Business Transactions Subcommittee, International Law Committee, New York City Bar Association, New York City. Ms Mansuri is a corporate lawyer with cross-border experience. She is admitted to the Bar in New York and can be reached by email at saramansuri@gmail.com. The authors would like to acknowledge the invaluable insights and contribution of Anthony Giustini, Co-Chair of the Worldwide Project Group and Co-Chair of the Africa Practice Group, Clifford Chance LLP, Paris, France.

The article is provided with kind permission of the International Bar Association and was originally published in Business Law International, 2013, Vol 14 issue 2.
Africa – the last frontier?

Heightened talk about Africa’s steady rise in the business and legal community should come as no surprise – the continent is poised to become the investment destination of the 21st century.\(^1\) The economic figures speak for themselves. Africa’s gross domestic product (GDP), at US$1.6tn in 2008, is roughly equal to that of Brazil or Russia.\(^2\) Today, the rate of return on foreign investment is higher than in any other developing region in the world. By 2020, the continent’s GDP is projected to reach US$2.6tn and, with a fast-emerging middle-class, consumer spending is projected to reach US$1.4tn.\(^3\) Overall, the combined GDP of the continent’s 54 nations makes it the fifth-largest economy in the world, after the United States, China, Japan and India. Additionally, the continent includes seven of the world’s ten fastest-growing economies and average growth outpaces that of the United States and Europe.\(^4\) Succinctly put, it is ‘Africa’s turn’ and now, more than ever, is the time for multinationals to invest in this region given the rate at which its economic pulse has quickened.\(^5\)

But there are other factors at play, beyond the pure economic drivers described above, which enhance the attractiveness of Africa and contribute to a more positive outlook generally. Most notable of these factors is the political climate and relative stability. While democracy is yet to take root firmly, there have been fewer military coups d’états. The successful organisation of several presidential elections in countries such as Senegal and Ghana that proceeded without any violence and resulted in political alternation is a testament to the improving political climate in the continent. This political transition from autocracy to a road leading to greater democracy, transparency and the rule of law\(^6\) vastly improved global perceptions about Africa. In addition, other factors\(^7\) such as sounder macroeconomic policies, greater openness to foreign investment and trade and higher education improved economic performance and prospects. As concluded in the June 2010 McKinsey seminal study ‘What’s driving Africa’s growth’:\(^8\)

\(^1\) African Economic Outlook 2012.
\(^2\) Ibid.
\(^3\) Ibid.
\(^4\) www.economist.com/The hopeful continent: Africa rising 2011-12-03.
\(^7\) http://carnegieendowment.org/2011/03/03/africa-must-improve-investment-climate-to-sustain-its-economic-growth/1zbc.
\(^8\) www.mckinseyquarterly.com/What’s_driving_Africa’s_growth_2601.
The key reasons behind this growth surge included government action to end armed conflicts, improved macroeconomic conditions, and undertake microeconomic reforms to create a better business climate. To start, several African countries halted their deadly hostilities, creating the political stability necessary to restart economic growth. Next, Africa’s economies grew healthier as governments reduced the average inflation rate from 22 per cent in the 1990s to 8 per cent after 2000. They trimmed their foreign debt by one-quarter and shrunk their budget deficits by two-thirds.

Not surprisingly, we are witnessing a rush by foreign investors to bid for opportunities in the most lucrative industries – the ‘scramble’ for Africa is on.

Who is eyeing Africa and why?

The continent’s transformation has led to boundless opportunities for foreign investors in diversified sectors such as mining, oil and gas and other commodities, power, banking, infrastructure, telecommunications, agriculture including consumer and retail transactions. The entities that are participating in the investment boom in Africa are naturally those that are interested in these sectors. They include: the traditional multinationals and industry leaders like ExxonMobil, Total, Shell and ConocoPhillips in the oil and gas sector; BHP Billiton, Rio Tinto and ArcelorMittal in the mining industry; Goldman Sachs, Citigroup and Standard Chartered Bank in the banking industry; Carlyle and Helios in the private equity industry. In addition to these household names, several junior oil and gas exploration as well as mining companies are actively involved in the exploration for and development of resources in Africa. A special mention must be made of Chinese investors, whose overall interest in Africa is well documented and is driven primarily, but not exclusively, by the strategic need for resources.

In the consumer industry, while the 2011 US$2.4bn acquisition of Massmart Holdings Ltd, South Africa by Wal-Mart Stores Inc remains one of the largest transactions to date, there is an increase in the number of high-end luxury brands that are steadily establishing and broadening their Africa presence.  

---

9 In the oil and gas sector, relatively young companies such as Afren Plc (operations in Congo, Côte d’Ivoire, Ghana, Kenya, Nigeria, Tanzania, etc) and Tullow Oil plc (operations in Ghana and Uganda) are good examples. In the mining industry, African Minerals, the developer of the Tonkolilli iron ore project in Sierra Leone is an example.


11 Porsche recently set up a branch in Lagos, Nigeria while Pernod Ricard announced that it was opening four new subsidiaries in Kenya, Angola, Morocco and Nigeria as part of its Africa strategy: www.beveragedaily.com/Markets/Pernod-Ricard-grabs-African-growth-passport-with-new-regional-subsidiaries.
The infrastructure sector continues to attract a lot of investments, given the opportunities that investors see in the significant infrastructure gap that exists between Africa and other parts of the world. Examples of infrastructure transactions include the Rift Valley Railway project for the construction of a railway line to provide reliable transport between Uganda and Kenya, with funding from various sources, including the African Development Bank. In some instances, the infrastructure is primarily intended to support, and is a component of a wider, natural resource development. An excellent illustration of this is Rio Tinto’s ongoing Simandou integrated iron ore project in Guinea, where the development of a world-class iron ore mining facility is coupled with the construction of ‘a 700-kilometer trans-Guinean industrial railroad to transport 95 million tons of high-grade sinter fines to a new deepwater port that will be constructed near Conakry’. Similarly, in 2001, De Beers entered into a US$7bn agreement to develop a diamond mine in Botswana, but that deal was combined with a commitment to build a diamond storage facility that created 3,000 jobs. The common theme in all these projects is the lack of a viable transport system for moving the resources from the mines to the sea port for export to international markets, which then creates opportunities for entities that have the expertise and financial means to fill the gap.

In the food and agricultural sector, Carlyle led a private equity investment of US$210m in November 2012 with an African agricultural commodity trader that is one of the world’s largest traders of cashew nuts, the Export Trading Group in Tanzania, a company in which Standard Chartered Bank had previously made a significant investment. In the power sector, Globeleq in October 2012 closed the financing for the US$450m expansion of the Azito independent power project in Côte d’Ivoire.

One category of investors that is often overlooked is Africans making investments in other African countries. The Nigerian Dangote Group has

---

12 According to the World Bank’s report, ‘Africa’s Infrastructure: A Time for Transformation’, the state of Infrastructure in Sub-Saharan Africa undermines national economic growth by two per cent every year and reduces productivity by 40 per cent. World Bank sources estimate that to close the infrastructure gap and achieve development targets within ten years, an annual spending of US$93bn is required.


14 www.riotintoironore.com/301_simandou.asp.


16 www.ft.com/intl/cms/s/0/5bb7c8fe-2db4-11e2-8ece-00144feabdc0.html#axzz2Hg93eQzR.

invested in cement operations in Ghana, Benin, Senegal, South Africa and Zambia, in addition to its operations outside its head office in Nigeria, while South Africa’s MTN Group Limited now has a broad continental presence owing to its investments in many African countries, including Botswana, Cameroon, Côte d’Ivoire, Nigeria, Republic of Congo, Rwanda, South Africa, etc. Citing the United Nations Conference on Trade and Development, the Wall Street Journal\(^\text{18}\) concluded in a July 2012 article that even as overall foreign investment into Africa has contracted, investment between African countries has almost doubled in the past five years, to 13 per cent of new projects started on the continent and that African investors are playing a larger role in projects on the continent.

The above examples are illustrative of the variety of business opportunities and how these opportunities translate into significant volumes of work for international law firms that are actively involved in structuring the transactions.

International law firms have also recognised the opportunity for growth in Africa as a key emerging market and an important component of their global portfolio. Historically, Paris-based lawyers have established and operated Africa practices for a long time, after the continent first began attracting foreign investment in the 1970s and 1980s.\(^\text{19}\) However, today, because of the legal, linguistic, cultural, colonial and historical links, both London and Paris have emerged as the hubs for legal work in English-speaking and French-speaking African countries respectively.\(^\text{20}\) This is likely to continue for the foreseeable future because although many African countries now have national bar associations, the majority of their lawyers are still trained locally and, therefore, do not have sufficient exposure to international and complex legal work.

To benefit from the investment explosion in Africa, many international law firms have decided to develop an Africa strategy by establishing an Africa-focused practice. Some have established integrated offices in Africa\(^\text{21}\) while

\(^{18}\) http://online.wsj.com/article/SB10001424052702304830405577496371147637932.html.
\(^{19}\) ‘From Paris to Africa’ The American Lawyer (1 July 2010).
\(^{21}\) White & Case has long had an office in Johannesburg; Clifford Chance, Allen & Overy and Norton Rose have offices in Casablanca; Herbert Smith Freehills recently announced that it will open an office in Conakry in early 2013 and SNR Denton has an office in Cairo and several associate offices in many African cities, eg, Accra, Cape Town, Lagos, Johannesburg, Maputo and Luanda.
others have established alliances\(^\text{22}\) with existing African firms.\(^\text{23}\) In addition, several law firms in South Africa have been steadily growing their Africa presence or broadening their network in this region.\(^\text{24}\) Another factor that might affect where future legal services are sourced for work in Africa is that an increasing number of African lawyers who have received a Western legal education (including in some of the most prestigious law schools in France, the UK and the US) and have some transactional experience working in international law firms in Europe, the UK and the US are now settling in Africa.

It is not clear whether, over time and in light of these developments, London and Paris will remain the major hubs for business in this continent. It is likely that more law firms will establish offices in Africa, which will reduce the dependence on, and the costs of, hiring lawyers from London and Paris to work on transactions in Africa.

**Africa does not have one legal system – it is not one size fits all**

*Distinguishing characteristics of legal systems in Africa*

It is important to note that there is no such thing as ‘African law’ or an ‘African legal system’. Therefore, an understanding of the legal systems prevalent in Africa and the new legal frameworks that developed over time is critical to the successful structuring and implementation of a transaction in any African country. The 54 African countries mostly inherited their respective legal systems from their colonial masters. Thus, many foreign investors are not likely to be in completely unfamiliar territory because these countries, to a certain degree, adopted legal systems based on the same legal foundations as those in Western Europe. However, despite this familiarity with general principles of law, foreign investors and lawyers should take note of the existence of a substantial body of local legislation when making and structuring their investments.

Three major systems exist: common law, which prevails in most of English-speaking Africa; civil law, present in most parts of French-speaking Africa; and Sharia law,\(^\text{25}\) which exists predominantly in Muslim countries in North Africa.\(^\text{26}\)

\(^\text{22}\) Linklaters recently announced an exclusive alliance with South Africa’s Webber Wentzel: www.thelawyer.com/linklaters-seals-alliance-with-south-africas-webber-wentzel/1015861.article.

\(^\text{23}\) ‘From Paris to Africa’ Legal Week (7 July 2010).

\(^\text{24}\) By way of example, Webber Wentzel is part of the African Legal Network of firms that gives it access to almost 12 African countries; and Bowman Gilfillan also has offices in Tanzania, Kenya and Uganda and a special alliance in Nigeria.

\(^\text{25}\) Sharia law is the moral code and religious law of Islam. Though interpretations of Sharia vary between cultures, in its strictest definition, it is considered the infallible law of Allah.

\(^\text{26}\) In certain limited jurisdictions, there exists a hybrid of common and civil law, eg, Somalia and Cameroon. In Cameroon, the English common law operates in the two English-speaking regions of the north west and south west and the French civil law operates in eight French-speaking regions of the country (ie, Adamaoua, Centre, East, Far North, Littoral, North, West and South). However, this is not common.
The common law system is mostly based on English law, while the civil law system is based on the French legal system that has its origins in the Napoleonic Code. However, France’s influence on some of the continent’s civil law systems is not exclusive – there are some traces of Italian law, which can be identified in countries such as Somalia and Libya, with Somalia having English common law as part of its legal system as well. Another example is South Africa with a legal system that can be traced to Roman-Dutch law and, following the period when South Africa came under the dominion of the British Empire, the English common law system. Several other countries in the Southern African region have a similar system, for example Botswana, Lesotho and Namibia.

As indicated above, these African countries have a legal framework that would, in terms of the fundamental principles, be recognisable to foreign lawyers. They have, however, adopted their legal systems, through a variety of international treaties, national laws, decrees and ordinances, to take into account their political, cultural and economic circumstances. In addition to the national legal frameworks described above, several countries are now beginning to adopt regulations that harmonise their commercial laws, based on internationally accepted principles, in order to foster international investment. OHADA, which is discussed below, is the leading example of such an initiative in Africa.

**Development of OHADA and its significance for business**

OHADA is the French acronym for ‘Organisation pour l’Harmonisation en Afrique du Droit des Affaires’, which translates into ‘the Organisation for the Harmonisation of Business Law in Africa’. OHADA, supported and financed by France, was founded on 17 October 1993, by 16 West and Central African countries, with the objective of establishing a uniform commercial legal system in its member states. These 17 countries in the OHADA area decided to harmonise their commercial laws by executing the Port Louis (Mauritius) Treaty.

---


28 Those countries are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte D’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.


Before the adoption of the OHADA treaty, the implementation of a cross-border transaction involving a number of OHADA countries (eg, the Chad Cameroon pipeline project) would have required the sponsors of the project to comply with different sets of laws in these two countries about the same matter, for example, the registration of a mortgage in favour of their lenders. Now, under OHADA, the rules for the registration of such a mortgage are uniform in both jurisdictions, thus reducing costs and saving time. For lawyers working on these transactions, the benefit of dealing with one set of clear rules cannot be overemphasised.

How OHADA operates is unique. Its official working languages are English, French, Spanish and Portuguese, reflecting the official languages of the countries that constitute the membership. Under Article 53 of the OHADA treaty, any member state of the African Union may become a member. Member states have ceded some level of national sovereignty to establish a cross-border regime of uniform laws called ‘Uniform Acts’. Much like the European Union, where EU regulations are immediately applicable within the national legal systems of each member country, the Uniform Acts are also directly applicable to the member states.\(^\text{31}\) In fact, under the OHADA treaty, the Uniform Acts also prevail over national laws, in case of any conflict.\(^\text{32}\) The adoption of several Uniform Acts is a remarkable achievement, but some of the relevant ones for investors are on: general commercial law; corporate law and rules concerning different types of ventures; secured transactions; securities; bankruptcy; debt collection procedures and accounting law.\(^\text{33}\) The primary objective and benefit of OHADA is, therefore, to facilitate the conduct of commercial transactions across a vast geographical region by adopting a uniform set of rules that govern such transactions. We briefly describe below two frequently used Uniform Acts: the Uniform Act on General Commercial Law and the Uniform Act on Commercial Companies and Economic Interest Groups.

**Uniform Act on General Commercial Law.** All businesses registered within OHADA member states are subject to the provisions of the Uniform Act on General Commercial Law (UAGCL). The provisions of the UAGCL are mandatory and apply to every trader, regardless of whether such trader is a natural person or a corporate entity or an economic interest group, as long as their place of business or registered office is located in a contracting state.\(^\text{34}\) The definition of ‘commercial transaction’ is quite broad and includes almost

---

\(^\text{31}\) Prof Georges Vandersanden, *Droit des Communautés Européennes*, Vol 2 (Institut D’Etudes Européennes, Université Libre de Bruxelles, Belgium 2010).

\(^\text{32}\) There will be more on the securities aspect later in the article.

\(^\text{33}\) See Art 1.

\(^\text{34}\) See Art 1.
every aspect of commerce, including ‘the industrial exploitation of mines, quarries and any natural resource deposit; manufacturing, transportation and telecommunication operations; transactions carried out by commercial companies’.

Interestingly, Article 9 of the UAGCL provides a list of individuals and entities whose status precludes them from engaging in a commercial transaction, which includes civil servants, staff of public entities and state-owned entities, court officials, attorneys and chartered accountants. This eliminates to a degree some of the corruption and self-dealing that occurs where the same civil servants who are charged with the supervision of key sectors of the national economy (eg, the award of exploration licences in the mining sector) end up awarding licences to companies that they own.

Further, the UAGCL provides for the establishment of a Trade and Personal Property Credit Register, which is the official record for the registration of natural persons who are traders and commercial and other corporate entities that are required to register as well as the record of all pledges (eg, of the shares of a commercial company or its equipment and motor vehicles) and leasing contracts. This makes it easier for a potential lender to conduct diligence to determine whether the property that is proposed to be pledged to it as security for a loan is already encumbered or not, thus eliminating unscrupulous practices where certain entities could provide the same security to two different lenders. The UAGCL further sets out rules that apply to:

1. commercial leases, their form (eg, written or unwritten) as well as their duration and businesses (including the definition of business, the methods of operating and transferring a business);
2. middlemen (ie, agents) and their scope of authority, the consequences of acts performed by middlemen and how to terminate their authority; and
3. commercial sales, the establishment of a contract of sale and the respective obligations of the seller and buyer, and the transfer of risk.

Uniform Act on Commercial Companies and Economic Interest Groups. The Uniform Act on Commercial Companies and Economic Interest Groups (UACCEIG) applies to all commercial companies whose registered office is located on the territory of any contracting state and its provisions are, with limited

---

35 See Art 3.
36 See Art 19.
37 See Art 69.
38 See Art 71.
39 See Arts 103 et seq.
40 See Art 148 et seq.
41 See Art 202 et seq.
42 See Art 1.
exceptions, mandatory.43 For lawyers working on structuring an entity that will conduct business as a special purpose entity in such jurisdictions, it is therefore primordial that these provisions are carefully observed. The UACCEIG specifically requires44 any person, regardless of nationality, who wishes to engage in a commercial activity in any of the contracting states to adopt one of the types of companies described below. In its 920 Articles, the UACCEIG describes the different types of commercial companies (including a private company, a sleeping partnership, a private limited company, a public limited company, a joint venture, a de facto partnership or an economic interest group) and sets out a set of rules peculiar to the formation, governance and management and dissolution of each such company. Finally, the UACCEIG sets out criminal provisions45 describing criminal liability that would attach in the event of certain crimes (including crimes relating to the formation of companies, the management of companies, general meetings and variation of capital).

The World Bank and the International Finance Corporation recently published a joint report in which they concluded that46 OHADA represents a serious effort from the member states to harmonise their business laws in order to provide certainty and predictability for investors. Since 2005, member OHADA states have passed 106 reforms and, like most parts of the world, the majority of those reforms focus on business formation, reducing the number of procedures required to set up a business by 25 per cent, delays by 29 per cent and costs by 67 per cent. In addition to the OHADA member countries, some common-law-governed African states have expressed an intention to apply for membership in OHADA so that they, too, can benefit from a harmonised business law. Once the common law states join in, there will be greater legal integration in Africa, which, it is hoped, will attract more foreign direct investment.

Although a detailed assessment of the degree of success of OHADA is outside the scope of this article, we should nevertheless note that in spite of these reforms, the region in which OHADA applies was classified47 as one of the most difficult regions in the world to do business, ranking after the Middle East and North Africa and far from the OECD countries. The 1648 countries were classified in the third rank of economies when it came to the facility

43 See Art 2.
44 See Art 3.
45 See Arts 886 to 905.
47 Ibid.
48 The study did not include the Democratic Republic of Congo, which was not yet a member state at the time.
of doing business in 2012. This is due, in part, to excessive and expensive regulations. For example, the establishment of a business in the Republic of Congo requires ten procedures and takes 160 days, the completion of an asset transfer between two local corporations in Guinea Bissau takes 210 days compared to one day in Portugal and two days in the country Georgia, while the resolution of a commercial dispute in court in Gabon takes 1,070 days compared to 230 days in Korea.

Some ways in which business practice may be different

Types of deals

The boom in business activity in Africa across multiple sectors has also triggered a corresponding increase in legal work that is done on the continent across different practice areas. These are mergers and acquisitions, private equity, oil and gas, energy, mining and metals, project development and finance, bank finance, infrastructure, arbitration and dispute resolution or joint ventures and other long-term strategic alliances. In sectors such as oil and gas and mining, it is mandated in certain countries to partner with the local national oil and gas or mining company. In addition, there is an uptick in the volume of capital markets work in the form of private and public offerings to raise funds for different investments. Many African governments have recently issued sovereign bonds, including Nigeria, Uganda, etc, thus providing volumes of legal work for international law firms that represent the issuers and underwriters in these transactions.

Although many financial institutions in Africa were affected to some extent by the global financial crisis of 2008, bank finance (including refinancing) remains an active practice area, since a lot of the business opportunities require financing. Private equity, active in Africa for a while now, is projected to play an even larger role, leveraging the anticipated growth in consumerism in Africa in businesses in the retail sector, insurance, banking, telecommunications, agri-business, health care, etc. This consumerism is a direct result of what analysts attribute to a booming population, increasing

49 For example, the new Mining Code in Guinea (Loi L/2011/006/CNT du 09 Septembre 2011 portant Code Minier de la République de Guinée) grants the state a right to participate in every mining project and own up to 35 per cent of it.
50 An African Loan Market Association was launched in late 2011 to standardise the loan documentation used in finance transactions on the continent: www.africanloanmarket.com/Content/Announcement.aspx?id=5.
incomes and the rise of a middle class.\textsuperscript{52} This has led to increased legal activity in the structuring and creation of investment funds and the representation of these funds in their investments. Funds work has not been limited to private equity funds. Several African countries have established,\textsuperscript{53} or are reported to be considering the establishment\textsuperscript{54} of, a sovereign wealth fund to better manage the revenues accruing from the monetisation of their resources and to deploy such revenues for the broader development of the country’s infrastructure. Further to the creation of these funds, it is expected that many of them will attract, and partner with, foreign sovereign wealth funds and act as engines of economic growth and infrastructure development.

\textbf{Are these deals financed in the same way as in the more developed markets?}

The financing of these transactions is generally consistent with the way transactions are financed in the more developed markets but with some variations to address the challenges posed by the African jurisdictions. Project finance is to date the traditional method by which debt capital is raised for the development of large projects that are increasingly developed in Africa in the extractive resources sector, but also in the power and infrastructure sectors. The Chad-Cameroon pipeline project, the Egypt LNG project and the various oilfield financings in Nigeria are excellent examples of the use of project finance.

The non-recourse nature of project finance coupled with the relatively high-risk profile of many African countries (some of whom have not enjoyed long periods of political stability, although the situation seems to be improving) make it an attractive means of financing the development of many large-scale projects in Africa. This is particularly true for the oil and gas, mining and infrastructure sectors where the projects, owing to their scale, tend to require significant amounts of capital. In such transactions in Africa, the major financings tend to involve export credit agencies that have a mandate to finance the provision of goods and services from companies in their home countries to projects abroad and tend to finance projects that provide a strategic benefit for their home countries,\textsuperscript{55} for example, developing natural gas, crude oil or a mineral that will be supplied to the home country. Another peculiar feature of financings in Africa is the involvement of multilateral financial institutions such as the

\begin{itemize}
\item \textsuperscript{52} See n 51 above.
\item \textsuperscript{53} Nigeria, for example, recently established the Nigerian Sovereign Investment Authority.
\item \textsuperscript{54} Tanzania was recently reported by Reuters to be considering the establishment of a sovereign wealth fund to manage the anticipated revenues from its massive gas discoveries, http://in.reuters.com/article/2012/08/02/tanzania-gas-fund-idINL6E8J21P220120802.
\item \textsuperscript{55} An example of this is the funding provided by the Export-Import Bank of the United States to the Chad-Cameroon pipeline project.
\end{itemize}
African Development Bank\textsuperscript{56} and the International Finance Corporation\textsuperscript{57} that: (1) are perceived as capable of protecting foreign investors from expropriation by host governments and therefore could mitigate some of the risk in a project; and (2) have a development mandate and are interested in financing projects that bring development to the host communities.\textsuperscript{58} The involvement of these institutions in project financing transactions tends to increase costs, affect schedules, as more time is required to vet issues, satisfy their requirements and build consensus among so many lenders. For lawyers working on these types of transactions, these deals require a lot of time, resources and expertise.

Other methods of financing include direct equity investments, private offerings and public offerings and bank finance, including mezzanine structures. Some of the private equity transactions, consistent with typical industry investments elsewhere, are funded through structures that utilise a combination of debt (through convertible loans) and equity. The banks providing the funding for these investments generally tend to be syndicates, consisting of both international and domestic commercial banks. Although there are many stock exchanges in Africa, only some of them enjoy high levels of investor confidence and, therefore, attract significant legal activity, such as the JSE.\textsuperscript{59} This, therefore, means the ability to raise significant amounts of capital on these stock markets is limited. This explains the relatively low volumes of capital market work in Africa today compared to other regions of the world, although today’s volumes look impressive when compared to a decade ago. Therefore, although bonds (including project bonds) are a source of financing in developed markets, they are yet to become a core source of funds for financings in Africa. Although there seems to be interest in Islamic finance,\textsuperscript{60} it does not appear to have taken root as a major source of

\textsuperscript{56} The African Development Bank is a multilateral development financial institution made up mostly of African countries with a mission to promote the economic development and social progress of its member countries.

\textsuperscript{57} The International Finance Corporation is a member of the World Bank Group.

\textsuperscript{58} With respect to project financing, one peculiar feature is the involvement of development financial institutions (DFIs) such as PROPARCO (France) and FMO (the Netherlands). These institutions have a mandate to ensure that the projects they finance effectively benefit the communities where these projects are developed and, therefore, they focus on governance, social programmes and environmental issues in a way that is not typical in projects in the more developed markets.

\textsuperscript{59} Johannesburg Stock Exchange.

\textsuperscript{60} Reuters reports that South Africa is planning to launch an Islamic bond offering, with Nigeria, Kenya and Tanzania set to follow: http://in.reuters.com/article/2012/07/04/safrica-sukuk-idINL6E8FJE4I20120704.
financing,\textsuperscript{61} even in those African countries with a sizeable Muslim population such as Nigeria and Guinea in West Africa, Algeria, Morocco or Tunisia in North Africa or Ethiopia or Kenya in East Africa.

Notwithstanding the opportunities to invest in Africa, there are risks and challenges associated with such investments, which are discussed below.

**THE RISKS AND CHALLENGES IN AFRICA TRANSACTIONS – WHAT DO TRANSACTIONAL LAWYERS NEED TO KNOW?**

Transactional lawyers must be aware of several risks, challenges and factors that are relevant when conducting business in Africa. This article now briefly discusses some of the major risks, challenges and factors in no particular order of importance.

*The judiciary.* The independence of the judiciary in several African countries, though enshrined in the constitution, is not firmly established as a matter of fact.\textsuperscript{62} The perception of corruption and political intervention in the local courts and the administration of justice as a whole result in a lack of credibility in the legal system on the African continent. Furthermore, many international transactions involve complex issues, such as ‘put’ and ‘call’ options and ‘tag-along rights’, that local courts and judges do not encounter on a regular basis and are not likely to have dealt with before. They therefore lack the requisite technical expertise required to analyse the various corporate law issues that may arise in such transactions and properly determine the rights and remedies of the parties.

Therefore, international arbitration in a recognised forum has emerged as a viable alternative to local courts and provides foreign investors with the necessary protection from the uncertainty of local courts. A related point is the sovereign immunity that sovereigns and many state-owned entities claim from proceedings, suit or arbitration or from the enforcement of judgment or the execution of an arbitral award against them or their assets. From the foreign investor’s perspective, the resolution of disputes in the courts of a host country presents a risk. To mitigate against such risk, it is critical to

\textsuperscript{61} A March 2012 study cited several obstacles to the blossoming of Islamic finance in Africa, including a lack of qualified personnel skilled in Islamic finance, a lack of awareness of Islamic finance and the various products and a lack of infrastructure such as an Islamic money market to provide liquidity: www.zawya.com/story/KFH_Research_prepared_a_report_about_the_future_of_Islamic_finance_in_Africa-ZAWYA20120302112510.

\textsuperscript{62} In Cameroon, for example, Art 37 of the 1996 Constitution makes the President of the Republic (ie, the head of the executive branch) the guarantor of the independence of the judiciary and gives him the power to appoint members of the Bench and the legal department. It goes further to provide that he is assisted in this task by the Higher Judicial Council, which is the body that appoints, promotes and disciplines magistrates and judges.
ensure that disputes are resolved by international arbitration and to include a waiver of such immunity in the transaction documents.

**Regime change.** Owing to the relatively low levels of political stability and alternation in several African countries, a change in regime inevitably comes along with significant policy and regulatory changes in various sectors, especially those sectors that generate the majority of a country’s revenue, for example, oil and gas in Nigeria or mining in Guinea. Sometimes, these changes are not even linked to regime change but to the perceived imbalances (whether right or wrong) in the contractual arrangements between the foreign partner and the host government. Such perceptions could arise from the fact that the host government feels it is not receiving its fair share of the revenues from the monetisation of the resources that are the subject of a concession that, as in some cases, certain individuals and not the state or government have benefited from such arrangements and so they need to be revisited. Host governments typically address this either by new legislation or modification of the existing contractual arrangements. All of this creates an atmosphere of uncertainty and unpredictability about the law and the contractual arrangements and therefore an unstable investment environment. As such it is critical to seek protection through stabilisation of the applicable regulatory regime (including fiscal terms) and the contractual terms with host governments. While this may not necessarily prevent the host government from attempting to seek to amend the law or modify the arrangements, it at least provides the foreign investor with the legal basis for claim for indemnity or some other form of compensation. From a foreign investor’s perspective, it is not uncommon to require that the concession agreement or the mineral development agreement be approved and ratified at the highest levels of government (including parliamentary ratification) to provide the investor with the comfort that the transaction was properly discussed and all interested parties do approve the investment.

**Local content laws.** In many African countries, foreign investors are required increasingly to comply with ‘local content’ laws, which mandate the use of specified levels of host country citizens for various types of jobs, or local companies for the provision of goods and services. In Nigeria, for example, under the Nigerian Oil and Gas Industry Content Development Act 2010, certain benefits in the oil and gas sector only accrue to companies that

---

63 South Africa’s Broad Based Black Economic Empowerment Act of 2003 requires the ownership by ‘black’ South Africans of a certain percentage of every company. In Nigeria, the Nigerian Oil and Gas Industry Content Development Act 2010 seeks to increase indigenous participation in the oil and gas industry in Nigeria by prescribing minimum thresholds in connection with the utilisation of local goods and services. Besides such legislative initiatives, many concession agreements will set out a set of conditions along the same lines that the foreign investor is required to comply with.
qualify as ‘Nigerian Companies’ by virtue of the ownership of the shares of such companies by Nigerian citizens.

It is incumbent on international counsel when structuring their transactions to take into account such local content laws.

_Culture of corruption and the role of the FCPA._ The issue of corruption in Africa is well documented and addressed by many commentators. However, it always bears reiterating because the price can be quite high. In addition to the stiff financial penalties that several jurisdictions may impose, there is a reputational impact. In fact, certain organisations maintain a blacklist of companies and individuals with whom they cannot conduct business based on their involvement in acts of bribery or corruption. In fact, as part of the standard diligence that many financial and other institutions conduct (including any ‘Know Your Customer’ requirements), many investors do verify and ascertain that counterparties in their transactions are not on any list. Interestingly, there is a dearth of reported cases of African countries actually prosecuting foreign investors for corruption. Perhaps the most curious observation is that it is not the African governments, but the Western governments (notably the US Government through the Foreign Corrupt Practices Act and the UK Government through the Bribery Act 2010) that have taken effective legal action to eradicate corruption and hold corrupt companies and individuals accountable for their actions in Africa. Because of the increased efforts of the US and UK Governments in investigating and prosecuting companies involved in corruption, many white-collar lawyers are

64 See n 40 above.

65 In connection with the Bonny Island liquefaction project corruption investigation that was launched by the United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC), it was alleged that the joint venture company formed by its partners (KBR-Haliburton, Technip and ENI SpA) paid more than US$180m in bribes to obtain contracts valued at US$6.0bn. The partners settled the case with the DOJ and the SEC for the following fines and penalties: (i) KBR-Haliburton paid approximately US$600m; (ii) Technip paid US$240 as a criminal penalty and settled a civil case by agreeing to disgorge profits of US$98m; and (iii) ENI SpA agreed to settle for US$365m.

66 Examples of such organisations include: (i) the United States Office of Foreign Assets Control (OFAC), which maintains a list of ‘Specially Designated Persons’ with whom US persons are prohibited from dealing; and (ii) the World Bank, which maintains a ‘Listing of Ineligible Firms and Individuals’ who cannot be awarded a World Bank-financed contract for specified periods: http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984.

67 See, however, the prosecution of Dick Cheney in Nigeria, which was settled for a payment of US$32.5m to the Nigerian Economic and Financial Crimes Commission.

68 The Bribery Act (2010) is an Act of the Parliament of the United Kingdom that covers the criminal law relating to bribery. It was adopted in 2010 but came into force on 1 July 2011.
now actively advising businesses operating in Africa, either by: (i) defending these companies if they become the subject of governmental investigations relating to corruption; and/or (ii) assisting these companies with conducting proper due diligence prior to entering into any transaction and developing rigorous internal compliance mechanisms to avoid acts of corruption.

_Lack of capacity._ An often overlooked difficulty but frequently encountered issue is the lack of capacity, that is, the basic organisation, structure, resources and infrastructure that are necessary for the smooth functioning of any system, whether it is legal, financial or administrative. At times, it is simple things such as a proper system for archiving critical documentation and information that is lacking or the irregular publication of the official journal containing laws and decrees, thus rendering access to legal texts difficult. Computerised filing of information is not yet commonly used. Access to information could be challenging. Further, with respect to human resources, the absence of capacity manifests itself in various ways. Some examples include the absence of legal education and legal sophistication, financial exposure, industry knowledge and technical expertise, etc. These shortcomings make it difficult to understand the multiple ramifications in a large-scale investment and the associated contractual structure and financing arrangements including the ability to evaluate from a market perspective what the long-term forecast is for the resource in question. As a result, and although many governments do have recourse to advisers, the decision-making process tends to be longer and, therefore, costly and frustrating to the foreign investor.

_Governing law._ Generally, most foreign investors prefer not to be subject to the laws of the host country in which they are investing. In addition to the unsophisticated nature of the laws of some of the host countries, there is a perception that local laws could be modified from time to time to favour the host government or to change the fundamental terms of the transaction and thereby deprive the foreign investor of the underlying economic benefits that were initially agreed on. From the host government’s perspective, the basic argument is that its sovereign decisions should not be subject to the laws of another country. In many countries, the law specifically prohibits the state and all state-owned enterprises from agreeing to a contract that is governed by the laws of a foreign country. To resolve this situation, most parties tend to select the laws of a neutral jurisdiction to govern their commercial contracts. However, as a general matter, most concession and similar type agreements (eg, production sharing agreements) tend to be governed by the laws of the host country. In addition, concessions tend to be subject to

---

69 This is the case in Mozambique, for example.
a regulatory framework consisting of other applicable laws, decrees and implementation regulations of the granting country (eg, a mining code and its decree of implementation or a petroleum law and the relevant operations regulations). Thus, the concession contract cannot be read and understood in isolation but rather in the context of the regulatory framework. By and large, many investors have become comfortable with this position. However, while the governing law may be the law of the host government, the dispute resolution mechanism is almost invariably international arbitration in a recognised forum for the reasons outlined above.

The situation, however, is slightly different with more commercial agreements, such as supply contracts, construction contracts, sales and purchase agreements, off-take agreements, service agreements, etc. These contracts are primarily commercial in nature. Because they tend to deal with complex legal issues such as indemnities, ‘take-or-pay’ clauses\textsuperscript{70} that local law may not provide for and that local courts may not have addressed, the general practice is for such contracts to be governed by the laws of a jurisdiction that the parties are comfortable with and that has internationally recognised expertise in addressing such issues. Examples would be the laws of England and Wales or the laws of the State of New York. Sometimes, it is the financial institutions (who, as lenders, will take security over the borrower’s rights under such contract as part of the collateral package) funding the transaction that require the selection of the laws of a foreign jurisdiction, since they want to ensure that in an enforcement scenario, their rights under the agreement would be given full force and effect. However, there is no rule of thumb about this and it is not uncommon for some of such agreements to be governed by the laws of the African country.

\textit{Financing}. With respect to finance documents that govern the terms under which lenders will provide funding for the transaction,\textsuperscript{71} the governing law is typically either the laws of England and Wales or the laws of the State of New York. This is also largely due to the perceived sophistication of the laws and courts of those jurisdictions in dealing with the issues that are of concern to the lenders. It is interesting that even where governments and state-owned corporations are parties to finance documents, they do concede to such foreign law clauses. It is important to keep in mind that there are two types of security when considering the documents that govern the terms under

\textsuperscript{70} Under a ‘take-or-pay’ clause, the purchaser of the relevant product is required to take delivery of and pay for specified quantities of the product. Even if the purchaser fails to take delivery of such quantities of the product, the purchaser would still be obligated to pay for such products. This is subject to certain specified exceptions (eg, failure by the seller to tender the products for delivery).

\textsuperscript{71} Examples of finance documents would include the common terms agreement and the facility agreement.
which lenders take security over collateral provided by a borrower for the repayment of a loan. In large-scale projects that involve the sale and export of commodities (eg, crude oil, bauxite, etc), some of the security is offshore (ie, outside the country where the project is constructed) while the remaining security is onshore (ie, in the country). A typical example of such offshore security would be a foreign bank account that would usually be established in an internationally recognised financial institution in a major financial centre such as New York or London into which all the proceeds from the sale of such commodities are deposited. Payments from such accounts are typically subject to a cash waterfall, which allows lenders to control payments out of such accounts, thereby ensuring the repayment of the debt. A good example of onshore security would be the mortgage over the immovable assets of the borrower. Whereas onshore security documents are typically governed by the law of the country where the immovable assets are located, offshore security documents tend to be governed by the laws of the jurisdiction where the security is (ie, in the case of bank accounts, by the laws of the jurisdiction where the accounts are located, since that is where the security is perfected).

Uniform Securities Act of OHADA. It is not only local law that governs onshore security. As indicated earlier, the OHADA treaty also covers aspects of local security through the Uniform Act Organising Security Interests. While a discussion of the full details of this Act is beyond the scope of this article, it is important to note that, as modified, it establishes the various types of security interests that may be established in favour of a creditor. It explicitly recognises the right of a national or international financial institution to be appointed as a security agent on behalf of lenders where there are several lenders. These aspects of security include individual and personal guarantees, letters of guarantee, security with respect to movable property (eg, floating charges, pledges, etc) as well as immovable property (eg, contractual mortgages and legal mortgages that are created either by operation of law or by virtue of a court judgment). Further, the Act provides a clear and simplified procedure for the creation of these security interests, as well as their inscription and enforcement. It also stipulates a priority of security interests and their holders (with respect to both moveable and immovable property) for the purposes of distribution of proceeds in the event of an enforcement of such security interests. Generally, the Act provides for the registration of security over chattels and other movable goods at the Registre du Commerce et du Crédit Mobilier and for the registration of mortgages in respect of immovable

72 The Uniform Act Organising Security Interests was first adopted on 17 April 1997. It was modified on 15 December 2010.
73 See Art 52.
property in accordance with the laws of the relevant member state. It should be noted therefore that OHADA does not completely replace local laws; rather, in some instances, it complements and coexists with local law. However, it should be noted that the scope of application of the OHADA treaty is limited to the OHADA member countries. Because international lawyers are generally not licensed or qualified to practise in African countries, the perfection of security is a matter that must be properly vetted with local counsel. Local counsel will have to issue an appropriate legal opinion, both with respect to the underlying contracts and agreements that are governed by local law, as well as any security documents that are governed by local law (including, where applicable, the OHADA treaty) and provide confirmation that the documentation creates a first-ranking security interest that is effective and enforceable.

Local counsel. The choice of local counsel, with expertise in these matters and some exposure to international legal transactions, is essential to successfully structuring a transaction that complies with all applicable laws, including those of the country where the investment is made. In connection with OHADA, this includes perfecting the onshore security and navigating the multiple procedures and requirements laid out in OHADA or any other applicable legislation. As a general matter and with respect to local counsel in Africa, it is important to maintain a proactive and an interactive approach, anticipate issues and discuss them with local counsel and communicate frequently, otherwise there is a risk that the deliverables might not be ready when they are expected and could have a negative impact on the timing for the closing. It would be prudent to clearly set out expectations and not assume anything. At times, communication could be difficult due to the poor state of telecommunications so that regular access to email and downloading of large files via the internet could be challenging for local counsel. As indicated earlier, an increasing number of African lawyers have received all or part of their education in Western universities, are licensed to practise in internationally respected jurisdictions such as New York and have worked at major international law firms before returning to their respective countries. Through this exposure, many of them have acquired a better understanding of the exigencies of international legal work, thus making them better suited to assist international counsel in these transactions.

As a transactional lawyer, an awareness of the challenges and risks described above and the development of a methodical approach to identifying them in each transaction and developing appropriate mitigation strategies thereto is essential to successfully structuring and implementing a transaction in Africa.

74 See Art 195.
Conclusion

Africa’s appeal to a broad variety of investors and the legal practitioners that structure investments will continue to witness a corresponding growth, as its perception in the investment community is gradually transforming from the hunger-stricken, impoverished and conflict-ridden continent into one with significant investment opportunities for multinationals and African investors who are rewarded with a good return on their investments. The turnaround in Africa’s economy, reflected in the boom in business activity across multiple sectors, fuelled by increased global demand for its resources, a growing population and an emerging middle-class, the development of modern commercial laws and the relative decline over the years in political and other risks have generally resulted in long-term optimism that Africa will be a permanent member of the investment community, and the global economy. In other words, nowhere is this best captured than in: ‘If you ignore Africa, you do so at your own risk.’ However, there are challenges, risks and circumstances peculiar to Africa. We have discussed a range of those risks such as a biased judiciary, corruption that is not unique to this region, a lack of capacity found in an absence of legal education, legal sophistication and technical expertise, the latter being peculiar characteristics. A thorough identification, analysis and the development of appropriate mitigation strategies is vital to ensure the successful implementation of transactions, including appreciating that there are limits to precedent and that each country, in the context of a continent of 54 countries, presents unique features.