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# Africa Newsletter

December 2016

Welcome to the end of another year, and the December 2016 edition of the Hogan Lovells Africa Newsletter.

We start by sharing the exciting news about our new Africa campaign: Be a mountain, or lean on one. Our Head of Africa tells us about this Somali proverb and what it means to the Hogan Lovells Africa Practice.

The first of our articles takes us to francophone Africa where we look at arbitration reform in the OHADA zone. We then shift our focus to two recurring problems on the continent. In “Powering Africa”, we tackle the issue of a lack of reliable power and discuss why it is essential to look beyond increasing generation. Then we look at the problem of a lack of infrastructure and ask the question “What is hindering Africa’s infrastructure boom?” This section of Hogan Lovells’ articles then concludes with one by two partners in our South Africa office examining a recent court decision giving new guidance on the question of health and safety in mines, and mine stoppage instructions in particular.

After that we have two articles written by African lawyers who have spent time on secondment with us. Daniel Nigussie Tolosa from Ethiopia has just spent three months with us in London on the ILFA programme. He shares some things to consider when investing in Ethiopia. Then Vera Owusu Osei, who was seconded to us for two months last year, writes about mergers and acquisitions in Ghana. We are delighted to have spent time with these lawyers and to be able to benefit from their expertise.

At Hogan Lovells we not only work in Africa, we also respect it, which is why cultural events feature highly in our events calendar. Our recent events section starts with a write up about one of these: An art exhibition we have been sponsoring for three months at the Lagos Court of Arbitration. We were in Nigeria in September for that launch.

Our next big event took place in Johannesburg where we held our inaugural Hogan Lovells Africa Forum South Africa. It was a great success and we hope you enjoy reading about it. Back in London later that month, we held the third of our quarterly breakfast briefings, which is summarised in an article written by our London and Johannesburg colleagues. We end our events section with information about the recent networking event held in Kenya. We plan to repeat these events when we are visiting other African countries, so watch out for more news on this in coming months.

We also have our usual updates in the Up-Coming Events and Recent Work sections, and if you haven’t read our blog, The A Perspective, yet we encourage you to take a look.

We hope you enjoy this edition of the newsletter. As always, please get in touch if you have any questions. We take this opportunity to wish you all a Merry Christmas and a happy and successful 2017.

**The Hogan Lovells Africa team**



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# Be a Mountain or Lean on One

As Hogan Lovells launched its new Africa campaign ‘Be a mountain, or lean on one’, The A Perspective spoke to our head of Africa, Andrew Skipper on why he feels the new frontier of African businesses will break boundaries and achieve success. They are the mountains of today and the future, and we are the support they can lean on.

## Why ‘Be a mountain, or lean on one’?

We recently chose this African proverb to form the centre of our new brand campaign for Hogan Lovells Africa. This single, short sentence aptly summarises the words that the African continent associates with us. The words they know us by.

Any company that has ever embarked on a campaign to strengthen its brand knows that finding the right “tagline” is no easy task. It has to project the right message. It has to roll off the tongue. It has to be memorable. But most of all, it has to ring true.

This is why we made sure that we chose a campaign that truly reflects who Hogan Lovells Africa is and what we do on the continent. We wanted our branding to reflect the four pillars which form our core values for operating as a practice in Africa.

## Our core values in Africa - Four pillars

Firstly, we seek to understand Africa and to listen, not preach. We invest in our understanding through our recruitment, secondment and working programmes. We seek cultural and business awareness through the relationships we are constantly building in Africa – both with clients and the local firms we work with.

We are also fully committed to operating in Africa and have over 100 lawyers working in our South Africa office. Our African teams do not work in isolation, but as part of global network of experts who focus on the continent even though they may not reside there. We operate across Africa from our base in South Africa, but we also operate into Africa from our hub offices globally, including London, Dubai, Washington, Paris, Beijing, Shanghai and Tokyo.

It is also very important for us to continually invest in Africa. We have invested in our offices in Johannesburg and we will continue to support capacity building elsewhere through secondments and local training as we seek to do more.

Lastly, and perhaps most importantly, we respect Africa. We work in collaboration with clients and teams on the ground in Africa. We support a range of corporate social responsibility initiatives in Johannesburg and elsewhere and we are committed to cultural and social support.

## Working together to achieve success

However strong you are, you are made stronger with the right support, and our seamless global practice with its Africa focus provides just that on the continent. We believe in building relationships, which we know are at the heart of business on the continent.



We believe the proverb we have chosen reflects not only who we are, but also who our clients are or aspire to be. In Africa a mountain is considered a wise and supportive leader. It has gravity and strength. Of course this describes many of our clients already and we know that they demand the support of partners equal in stature. We can provide them that support. We are not just a law firm; we are experienced legal business advisors with an intimate knowledge of and passion for Africa. And that's why clients can lean on us.

But we also want those of our clients who are not yet mountains to know that they can lean on us. Africa is burgeoning with entrepreneurs and they can lean on us to expand, grow and move their business forward. The continent is constantly transforming. Generations of new visionaries are paving the way and we aim to be there as a strong guide and support to these clients.

## Commitment to Africa

Hogan Lovells has been working in Africa for decades, but we are less well-known on the continent than our reach and experience demands. With the growth and strength of our South African practice over the past few years we believe now is the time to place greater focus on promoting ourselves as the pan-African practice that we truly are. Now is the time for Hogan Lovells to be recognised as one of the leading brands on the continent. Not only because we have the skills, knowledge and experience, but because we are the mountain.



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# OHADA Arbitration: The first steps towards reform

## A year of reform

While the OHADA securities law was reformed in 2011, followed by company law in 2014, as of 2016 it's OHADA arbitration's turn to be modernised: a reform of the two pillars of OHADA arbitration – l'Acte Uniforme sur le droit de l'Arbitrage and le Règlement d'Arbitrage de la CCJA – is currently under consideration. While the Permanent Secretary of OHADA has considered reforming arbitration since 2009 with the IFC-FIAS Project relating to the amendment and improvement of uniform acts in force (which aimed to enhance the legal and institutional framework created by OHADA, thereby attracting increased investment), it announced more recently its intention to revise the arbitration acts in a report on 15 July 2015. To this end, a study has been commissioned which should be finalised in the near future.

## How do you modernize a law that's already modern?

The exact content of the study is still not known; however, given it involves an 'analysis of the way in which national and international centres of arbitration function' as well as 'documentary analysis and benchmarking international standards,' there is little doubt as to the project's ambition: to elevate the CCJA as a centre of arbitration that can compete with the world's main arbitral institutions.

It seems likely that the new study will build on the suggestions put forward in the summary note of March 2009 which came out of the IFC-FIAS Project. With respect to the Uniform Act relating to arbitration law, those suggestions included the following:

- putting in place a simplified arbitral procedure for small claims;
- introducing a definition of 'arbitration agreement';
- specifying the composition of the arbitral tribunal in the case of multiparty arbitration; and
- abolishing third party proceedings.

## How can the application of arbitration law by the courts be improved?

However, as welcome as any modernisation may be, the main concern with respect to OHADA arbitration generally does not relate to the content of the institution's treaty, implementing rules and uniform acts, which form the basis of a modern arbitration law, but rather to how these texts are applied in the different national courts making up the OHADA region. In this respect, a number of ways of directing the application of arbitration law by national courts have been suggested, focusing in particular on two areas for reform:

- The first relates to enforcement and involves reviewing the conditions under which provisional enforcement can be allowed and appointing within the court of appeal of each OHADA state a juge d'appui who is a specialist in arbitration law.
- The second relates to annulment and suggests specifying, or even eliminating, certain grounds for annulment with the aim of preventing national courts from reviewing the substance of awards. This might be achieved in the following ways: firstly, the general grounds for annulment of an award due to the arbitral tribunal acting beyond its powers (*ultra vires*) could be replaced with an exhaustive list of *ultra vires* acts that would justify annulment. Secondly, it could be stipulated in relation to national courts' ability to evaluate the legal reasoning of an award that awards cannot be annulled on the basis of unsound legal reasoning but only on the basis of an absence of reasoning. And thirdly – and more radically – cases relating to the annulment of arbitral awards in each OHADA state could be assigned to a specialised court composed partially of judges and specialists in arbitration law. Indeed, they could even be assigned exclusively to the CCJA, with a view to preventing inconsistent application of the law by the different national courts.

The project to reform OHADA arbitration could potentially play a role in helping to remedy some of these concerns, providing for, amongst other things, hearings with judges presiding as *juges d'appui* for arbitration.

## A timely reform

The proposed reform to the OHADA uniform arbitration act is closely entwined with the development of international arbitration in Africa over the last decade. Arbitration as a form of dispute resolution has been rapidly increasing in popularity on the continent generally, with various arbitration centres springing up and a general arbitration focus on the continent's development as a hub. Just by way of example, the International Council for Commercial Arbitration was held in Africa for the first time in 2016, with a spotlight on Africa and much discussion on how to "Africanise" international disputes involving the continent, so that local parties can feel involved and properly represented.

In this context, the reform of the OHADA uniform arbitration act can only help to attract more attention globally to OHADA arbitration and continue to build on the CCJA's position as one of the pioneering and most well-established arbitration centres in Africa.

*This article first appeared in French in the Africa newsletter produced by our Paris office: [Dynamiques Africaines](#). You can read the full newsletter (in French only) at [www.hoganlovells.com/en/publications/dynamiques-africaines](http://www.hoganlovells.com/en/publications/dynamiques-africaines) Please contact us if you would like to receive this newsletter regularly.*



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# Powering Africa

Of all the challenges facing Africa's economies, one of the most pressing is meeting the growing demand for energy in a region where two thirds of the population do not have access to electricity.

It is a mammoth task and one which is becoming more daunting by the day. Currently, 600 million people across sub-Saharan Africa lack reliable power, and that figure is expected to rise to 645 million by 2030 as supply struggles to keep pace with population growth. Governments and developers face two problems: generating sufficient power to meet rising demand, and ensuring that the power is distributed to the businesses and consumers who rely on it for their livelihoods.

## A question of supply and demand...

Until now, the focus has been on building new generation capacity, and with good reason. McKinsey estimates that energy demand will grow fourfold by 2040, necessitating an additional investment of USD 835 billion just to keep pace. In South Africa, for example, General Electric is currently adding 9.6 GW of steam power capacity.

Outside South Africa, the need to increase supply is even greater. The Rainbow Nation is home to over a third of sub-Saharan Africa's capacity, while the remaining 47 nations in the region (with a combined population of 860 million) generate less power than Spain (with a population of just 47 million). Policy makers cannot be said to lack ambition – the Grand Inga Dam envisaged by the Democratic Republic of Congo, for instance, would be the largest infrastructure project in history, generating twenty times as much electricity as the Hoover Dam – but many projects have not got past the drawing board.

Part of the difficulty is converting schemes into bankable investments. Fabio Borba, Managing Director of the Energy Infrastructure Team at the Abraaj Group and Themis Energy (leading investors in growth markets), points to the uphill struggle to attract funding. Last year only 23 projects in Africa reached financial close and all but seven were in South Africa. Long lead times, averaging seven to ten years from inception to financial close, can deter all but the boldest and most determined investors, who may still wait decades to see a return on their investment.

According to Borba, the solution to making these projects bankable may lie in development finance institutions (DFIs). "DFIs are a great bridge between the public and private sectors," Borba explains, and not just in terms of providing financing: "They can provide support to governments in undertaking legal and regulatory reforms." One such initiative is Power Africa. Launched by USAID in 2013, it combines funding and support from the World Bank, African Development Bank and various other DFIs with over 120 private sector partners. Power Africa projects are expected to add 29 GW to capacity, with over 4.6 GW of projects having already reached financial close.

The bitter irony is that although its energy supply is underdeveloped, Africa boasts abundant energy resources. While coal remains the single largest energy source, the share of production through gas, hydropower and renewables is growing, and McKinsey predicts that 40% of power in Africa will be gas-generated by 2040. In the long term, the potential for renewables is huge: solar capacity in sub-Saharan Africa is conservatively estimated at 11TW, enough to meet over half of the entire world's current energy needs. Harnessing renewable sources would go a long way towards closing the gap in energy supply.

## ...Or a question of availability

It is a mistake to assume that the solution to Africa's energy crisis is simply to increase supply. Supply struggles to meet demand, but outdated or overburdened transmission and distribution infrastructure compounds the problem. Power outages have become a fact of life in many African countries: in sub-Saharan Africa, businesses experience on average 40 hours of blackouts per month, resulting in up to 16% lower sales. Last year, Ghana experienced 159 days of blackouts (almost half a year), and load shedding remains a frequent annoyance for South Africans, despite having the most developed generation capacity in the region.



The unreliability of the grid also means that businesses and communities must rely on expensive redundancy options such as diesel generators or, in many households, kerosene lamps. Even for non-energy intensive businesses, these form a significant head of expenditure, holding back plans for growth. Investment to improve the availability of Africa's power is therefore also critical to providing the continent with reliable and economically viable access to energy.

Bringing power to "off the grid" industries and communities poses a further challenge. Simply increasing the energy supply to the main grid does nothing to satisfy demand in rural areas which are not connected to the grid. Regional disparities are huge: In Nairobi, 90% of households are connected to the grid, but this figure drops to just 10% in the rural north-west of Kenya.

Increasingly, governments are turning to temporary, interim power solutions. "It's a practical way to keep the lights on now, while giving governments and industry time to think for the long term," explains David Edwards, Managing Director for North Africa at Aggreko. Aggreko can provide a 200MW facility from greenfield site to commissioning in under four months, compared with 10 or more years for traditional power stations. One project powers a remote gold mine using stranded natural gas, which it would have been uneconomic to exploit using a traditional build – a "quick win", in Edwards' words, when it comes to bridging the energy gap.

Historically, off-grid markets have been overlooked by traditional utility companies and investors, meaning that the voluntary sector and innovative start-ups are, in many cases, pioneering the effort to satisfy off-grid demand. Barefoot College, a NGO, provides solar panels and lamps to rural villages. To ensure that they are a sustainable source of power for the community, it also trains illiterate and semi-literate women in the villages to maintain them.



Meanwhile, in East Africa, Kenyan-based start-up M-KOPA uses mobile and solar technology to offer an off-grid, pay-as-you-go solution to over 400,000 customers.

Such projects are now catching the attention of major investors and DFIs. In October, the Green Climate Fund announced its anchor investment in a \$3.5 billion debt fund investing in off-grid renewables, initially focusing on Benin, Kenya, Namibia, Nigeria and Tanzania.

### The future for energy policy

Policy-makers are faced with a difficult juggling act: powering up energy supply to industry and a burgeoning urban middle class, without neglecting the issues of availability facing predominantly rural communities and small enterprises. While investment in new generation is essential, energy policy must go beyond simply increasing the load on congested transmission and distribution infrastructure. The twofold challenge is to ensure access to an adequate supply of energy, without which many of Africa's population could be left in the dark.

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# What's hindering Africa's infrastructure boom?

## What's hindering Africa's infrastructure boom?

Any debate regarding the role of infrastructure development in driving economic growth is now settled. Policymakers from across the political spectrum accept that, when done properly, it will provide a short term economic stimulus and drive growth in the long term.

The McKinsey Global Institute recently estimated the rate of return at around 20 cents for every dollar spent on infrastructure, which provides a healthy base for GDP growth over the life of the asset. It is also widely recognized that the world's leading economies are struggling to find growth and are increasingly looking to emerging markets to become stronger trading partners and increase their contribution to the global economy.

Despite infrastructure's positive impact on economic growth there is a well-documented global deficit - Africa alone is estimated to require a minimum spend of circa \$100bn per annum over the next 30 years in order to fill the infrastructure gap. This annual requirement could be met almost entirely from Foreign Direct Investment (FDI) sources, as in 2014 they accounted for \$87bn of investment into Africa. Additionally, the methods to deliver infrastructure projects are well established, both in terms of legal and financial frameworks, as well as engineering.

## What is preventing infrastructure development?

At a recent Africa Forum held at Hogan Lovells in London, a panel of experts questioned why infrastructure is not happening as quickly as we'd like despite the overwhelming need and the ample needs available. The broad conclusion was that a solid idea in the field may not be sufficient to overcome underlying political currents and their interplay with markets. Whilst this may seem obvious, political currents are often overlooked either because they are not adequately visible or, even when identified, difficult to discuss openly. The result is that they are ignored only to assert themselves in unexpected, and often costly ways.

Take Brexit into consideration. In hindsight, European economic collaboration may not have been put at risk had there been an open debate over the merits of a federal Europe, and how London might reach a new settlement with the rest of the country from which it has become so detached. Instead the debate was dominated by fear of remaining (immigration and loss of control) and leaving (economic and political annihilation), neither of which were pertinent to the real issue at hand.

Democratic processes in Africa can often disrupt infrastructure investment as it brings about a change in government every four years. In practice, new governments come in and apply themselves energetically to infrastructure development policy, only to discover after three years that despite enormous progress, they only have a year to run the procurement process and award the contract. This causes private sector partners to look beyond the promises given by the new government on arrival, and seek to understand and support their capability to deliver.

Many African nations find simple "government to government" agreements attractive as they can be closed relatively quickly – usually well within four years - and don't require costly advisers; this is where China has achieved a leading role in delivering infrastructure in Africa. However, haste when handling infrastructure can be counterproductive, causing a government to overlook necessary steps to ensure their domestic market can take advantage of the investment. China's solution to such difficulties include providing labor and purchasing materials produced by the infrastructure.

Despite addressing the immediate problem, the solution deprives the African domestic economy of the short term stimulus, and of downstream market opportunities provided by the infrastructure.

## Solutions to overcome disruptions

In the short term, potential investors should seek advice and support on the political climate in Africa, and on how to develop a proposal that palliates the effects of the election cycle. It is highly likely that the relevant government will engage on strategy and policy discussions to ensure the project will boost the domestic economy.

In the medium term, policymakers outside of Africa should work collectively to tackle the problem of political currents in Africa. Mass migration flowing through nations like Libya has become an existential problem for Europe, and requires heavy investment in the affected nations' infrastructures to assist with recovery and economic growth. Efforts from both sides of the Mediterranean are needed to achieve stability and reduce the economic pull factors driving migration.

It is becoming a priority, not just for those countries but for Europe as a whole that the economic gap is reduced, in order to achieve stability and reduce the economic pull factors driving migration. In essence, a form of coordinated Marshall Plan may be necessary to align the immediate need for infrastructure with long term political and economic objectives.

Policymakers may wish to align their long term infrastructure planning with trade and industrial development policies. Where possible, governments should build strong trading relationships with regional partners to create and stimulate markets which the infrastructure will support, rather than relying on infrastructure as the main stimulus. Building these trading relationships will also encourage the contributors to invest in the common market, benefiting their partner to become economically stronger, and thereby increasing their own value as a trading partner.

Finally, African nations are now considering themselves as a hand-up, not a hand-out; a positive shift that will undoubtedly influence key decision makers surrounding infrastructure investment.

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## Mine stoppage instructions under the spotlight – again

Whether or not instructions issued in terms of Section 54(1) of the Mine Health and Safety Act, No. 29 of 1996 (“the MHSA”) have achieved the stated outcome, namely improvement of health and safety at mines, has been the subject of extensive debate amongst stakeholders in the mining industry. The range of views that have been expressed include the view that instructions issued in terms of Section 54(1)(a) of the MHSA (“the Section 54 Instructions”) have had a positive impact on health and safety at mines, on the one side of the spectrum, to criticism on the other, of the disruption that Section 54 Instructions cause, while not necessarily improving health and safety.

These criticisms are often however couched within the context of an acknowledgement that there must be continuous improvement of health and safety at mines, but that there are various mechanisms available to the Mine Health and Safety Inspectorate (“MHSI”), which may be better suited, in particular circumstances, to achieving the objective of improved health and safety, such as orders and instructions in terms of Section 55 of the MHSA which do not include closure of the mines, but which require the mine owners to take specified steps within defined time periods. The criticism has been aimed, primarily, at those Section 54 Instructions which stop entire operations at a mine, rather than focusing on a particular workplace, where an occurrence, practice or condition endangers or may endanger the health and safety of persons in that workplace.

Further criticism has been levelled against the lack of guidelines relating to the circumstances under which Section 54 Instructions may be issued and, if issued, in relation to the scope (the whole or a part of a mine). Following the setting aside by the Labour Court of the Enforcement Guidelines, previously issued by the MHSI, the MHSI relies on the interpretation and application of Section 54 of the MHSA by the relevant Inspectors, which has, unfortunately, been inconsistent, making it extremely difficult for the stakeholders at the mines (the employers, mine management, and the trade unions) to efficiently and proactively address and engage with the MHSI in the circumstances where the MHSI intends to, or actually issues a Section 54 Instruction.

Employers have, historically, attempted to address these uncertainties through on-going, positive engagement with the MHSI, and, in limited circumstances, by approaching the courts.

The courts have provided useful guidance regarding what constitutes a mine (the geographic scope of application of the MHSA), and the circumstances under which the MHSI may issue a Section 54 Instruction, including the judgment in *Bert’s Bricks (Pty) Ltd and Another v Inspector of mines, Northwest Region and Others (2012) ZAPPHC (9 February 2012)* (“the Bert’s Bricks Judgment”).

In relation to what constitutes a “mine” the court held that the manufacture of bricks on a property, in proximity to the property where clay was being extracted, did not constitute a “mine”, and that the MHSA, did not apply to the area where the bricks were being manufactured.

With regard to the circumstances under which a Section 54 Instruction could be issued, the court held that Section 54(1)(a) and (b) of the MHSA meant that (a) objectively, a state of affairs must exist which would lead a reasonable person to believe that the circumstances may endanger the health and safety of any person at the mine, and (b) the Inspector may only give an instruction which is necessary to protect the health or safety of that person.

The court concluded, on the circumstances prevailing in the matter, that there were no objective facts which could lead a reasonable person to believe that damage caused to a single trackless mobile machine (forklift) necessitated the suspension of the operation of all trackless mobile machines. The court was critical of the MHSI for not making use of the various powers and functions set out in Section 50 of the MHSA, and for not engaging, more meaningfully, with the stakeholders. The court also expressed the view that the order / instruction, to stop all trackless mobile machines (including at the brick-making facility) was out of all proportion to the danger that was observed by the Inspector that conducted the inspection at the premises.

Until recently, the Bert's Bricks Judgment was relied upon as a primary source of guidance for the circumstances under which a Section 54 Instruction could and should be issued. On 4 November 2016 the Labour Court handed down its judgment (unreported Case No. J2459/16) in the matter between AngloGold Ashanti Limited, the acting Chief Inspector, the relevant Principal Inspector, and the Inspector that issued the Section 54 Instruction ("the AngloGold Ashanti Judgment"), in favour of AngloGold Ashanti.

The relevant background, for present purposes is that on 17 October 2016, an Inspector conducted an inspection on Level 44 of Section 12 of AngloGold Ashanti's Kopanang Mine, situated in the district of Orkney, in the Northwest Province. The area where the inspection was conducted constitutes a small part of the overall mining operations at the mine. A series of six instructions were issued in terms of Section 54 of the MHSA. The first two instructions prohibited the use of explosives at the entire mine, and all underground tramming operations. The effect was that the entire mine was closed from 17 October 2016 at a significant loss.

On 18 October 2016 AngloGold Ashanti made representations to the Principal Inspector in an attempt to set aside and/or amend certain of the instructions. The representations were supported by the trade unions (also cited as parties to the application by AngloGold Ashanti). The Principal Inspector refused to amend the Section 54 Instruction, and on 19 October 2016, AngloGold Ashanti appealed to the Chief Inspector against the instructions issued by the relevant Inspector and Principal Inspector, respectively. On 20 October 2016, AngloGold Ashanti was advised that the Chief Inspector required time to consider the appeal. On 21 October 2016, AngloGold Ashanti filed an application to the Labour Court, for an interim order, suspending the operation of the Section 54 Instruction. On the same day, 21 October 2016, the Chief Inspector dismissed AngloGold Ashanti's appeal and confirmed the instructions issued by the Principal Inspector and relevant Inspector, respectively.

The Labour Court granted AngloGold Ashanti an interim order, and, subsequently, in its judgment dated 4 November 2016, a final order suspending the Section 54 Instruction.

The Labour Court was required to address a number of preliminary points raised by the Respondents. One of these was that when AngloGold Ashanti brought the application for an order suspending the Section 54 Instruction, AngloGold Ashanti had already complied with the instructions of the Principal Inspector and the relevant Inspector involved. The Labour Court found, in relation to this preliminary point, that because AngloGold Ashanti was still in the process of carrying out certain of the instructions, this preliminary point, did not prevent AngloGold Ashanti from bringing the application. Although this point was determined in favour of AngloGold Ashanti (because the instruction had not fully been complied with at the time that the application was made), it is our view that a mine that has fully complied with an instruction from an Inspector, cannot thereafter seek the suspension of the instruction by the Labour Court. It was held in the Bert's Bricks Judgment that once an instruction has been complied with, it falls away.

With regard to the merits, the court found that the workplace (Level 44) is, relatively speaking, very small in comparison to the entire mining operations, and that only a small percentage of the entire workforce, was employed on Level 44. The court found further that conditions on Level 44 were not automatically representative of the entire mine, and no specific circumstances existed on Level 44 which rendered the whole mine unsafe, or constituted circumstances upon which the relevant Inspector could rely, to issue instructions in respect of the entire mine.

In summary, the court held that:

- Section 54(1) of the MHSA requires an Inspector to objectively establish a state of affair which would lead a reasonable person to believe that it may endanger the health and safety of any person at the mine, and contemplates an instruction that is limited by the extent to which it is necessary to protect the health and safety of persons at the mine;
- The standard of safety prescribed by the MHSA, in Section 2, makes it clear that the standard of care is one of reasonable practicality. This is a standard that is consistent with an employer’s common law obligation to provide a reasonably safe working place. By definition this is not an absolute standard, and its nature and scope requires an objective assessment of the work concerned and the hazards associated with this work;
- Although Section 58 of the MHSA provides a right of appeal against a decision by a Chief Inspector (to the Labour Court), any decision made in terms of Section 54 and/or Section 55 constitutes administrative action for the purposes of the Promotion of Administrative Justice Act (“PAJA”) and therefore a decision to issue a Section 54 Instruction is subject to review under Section 6 of PAJA;
- Proportionality forms part of the right to reasonable administrative action, and the essential elements of proportionality are balance, necessity and suitability. Here the court stated “...it is the notion that one ought not to use a sledge hammer to crack a nut”;
- In relation to the observations made by the Inspector on rail switching devices, an objective state of affairs did not exist which could lead a reasonable person to believe that it may endanger the health or safety of any persons at the mine. In respect of explosives and training instructions, an instruction that applied to the whole mine was not necessary to protect the health and safety of persons at the mine. The mining operations of Level 44 comprised a very small portion of the total mining operations on the whole mine, and the conditions on Level 44 were not representative of conditions elsewhere. No circumstances existed on Level 44 which rendered the whole mining operation unsafe or on which the

relevant Inspector could rely to infer that not only Level 44 was unsafe, but also the whole mine;

- The Section 54 Instruction, insofar as it related to a prohibition across the entire mine in respect of explosives and training, was out of proportion to the issues identified by the relevant Inspector, and at worst, the instructions ought to have been confined to Level 44;
- The MHSI must be able to refer to specific, objective facts and circumstances, that render the whole mining operation unsafe, before issuing a Section 54 Instruction which applies to the entire mine.

It is hoped that the AngloGold Ashanti Judgement will be regarded as useful guidance to all stakeholders in the industry, going forward. It is important for all stakeholders to carefully consider the judgment and to engage, meaningfully, to ensure the ultimate objective, that of zero harm.



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# Investing in Ethiopia, in the light of the growth and transformation plan (GTP)

Despite its current instability, Ethiopia remains a good investment opportunity for foreign investors. According to the FT, by 2020 Ethiopia will be ranked 66th in the world ahead of Bulgaria, Guatemala and Kenya. However in order to invest in Ethiopia an investor has to do preliminary work. As well as understanding the local militia politics, it is essential that they build trust with the government, and invest in line with what the government wants to achieve.

The Ethiopian government follows an integrated 5 year development plan, the Growth and Transformation Plan (GTP). The first plan ran from 2010-2015, and the second plan took effect in 2016. These plans have driven Ethiopia's demand for and openness to foreign investment. An investment in line with this plan would be viewed favourably.

## The areas of investment open to foreign investors

It is important to note from the outset that some areas are simply not open to any investors (foreign or otherwise). Under the Investment Proclamation No 769/2012 areas of investment exclusively reserved for the Government are:

1. Transmission and distribution of electrical energy through the integrated national grid system;
2. Postal services with the exception of courier services; and
3. Air transport services using aircraft with a seating capacity of more than fifty passengers.

Within the same proclamation under Art 6(2) areas of investment that can only be done jointly with the Government are:

1. Manufacturing of weapons and ammunition; and
2. Telecom services.

Other areas are reserved for Domestic Investors (Ethiopian nationals) and there are set out in art 3 of the Council of Ministers Regulation No. 270/2012:

1. Banking, insurance and micro-credit and saving services;
2. Packaging, forwarding and shipping agency services;
3. Broadcasting service;
4. Mass media services;
5. Attorney and legal consultancy services;
6. Preparation of indigenous traditional medicines;
7. Advertisement, promotion and translation works;
8. Air transport services using aircraft with a seating capacity up to 50 passengers

All this does not mean that there are no opportunities in Ethiopia for a foreign investor. The Growth and Transformation plan particularly encourages investment in areas such as manufacturing.

Furthermore, the following areas of investment are expressly stated as being open to foreign investment.

These include:

- Food Industry;
- Beverage Industry;
- Textile and Textile product Industry;
- Leather and Leather Product Industry;
- Wood Product industry;
- Paper and Paper product industry (except the printing industry);
- Chemical and Chemical Product industry;
- Basic pharmaceutical and Pharmaceutical industry;
- Rubber and Plastic Product Industry;
- Other non –Metallic Mineral Product Industry;
- Fabricated Mineral Products Industry excluding machinery and equipment;
- Computer /Electrical and Optical Industry
- Machinery and Equipment Industry
- Vehicle Trailers and Semi-Trailers Industry
- Animal Production
- Hotel and Tourism
- Construction Contracting
- Real Estate Contracting
- Education and Training
- Health Service
- Architectural and Engineering Work
- Import Trade, Export Trade and Wholesale Trade.

If a foreign investor seeks to work specifically within one of the above mentioned areas then this will help to ensure local support.

## The Pros and Cons of investing in Ethiopia

Investing in Ethiopia is interesting for the following reasons:

- Cheap labour costs
- Cheap energy costs
- Relative proximity of the market to Europe and the Middle East.

However, an investor should also bear in mind that the energy supply is unreliable (sometimes 30-40% will be down); the local skill set can be limited and labour productivity has historically been low (although this is improving); and access to finance is not always easy. It is also important to be aware of the following risks:

- **Debt** – The Ethiopian government owes a lot of money to foreigners particularly from the International Monetary Fund (IMF), Chinese government and Chinese banks. If the current instability continues the creditors are even less likely to be paid. Even before the start of the current crisis, the IMF referred to this as “Debt stress”.
- **ForEx** – The ForEx is controlled by the National Bank of Ethiopia. Many investors need to get their money out but there are considerable delays. There are very little reserves of foreign currency in the treasury of the National Bank of Ethiopia.
- **Politics** – The current political situation in the country has led to considerable uncertainty.
- **Local Politics** – Although central government assures any potential investor that land is available for their investment operations, often the local community does not want this and many conflicts around land rights have arisen.
- **Corruption** – Historically corruption has not been a major issue in Ethiopia, but there are signs that this is changing. While central government has moved towards a developmental state model, it seems as though this has somehow brought about a change of mentality in the country, and there are increasingly high levels of corruption being recorded.

## Local content rules

In general there is not requirement for foreign businesses investing in Ethiopia to use locally produced raw material, local labour, etc. However, in some specific sector areas such rules are in force. For example, under the Proclamation to Regulate Petroleum Operation (Proclamation 295/1986) contractors and sub-contractors are required to give preference to the local employees of Ethiopia rather than expatriate employees. Even in this situation though, the proclamation does not set out a minimum quota.

## Registering business in Ethiopia

Another thing to bear in mind when considering investment in Ethiopia, is commitment needed to register a business there. Although the process is not lengthy and legal fees are not extortionate, it does require regular visits to the Ethiopian Investment Agency and considerable patience and perseverance from the person on the ground. “Come back tomorrow” is a frequently repeated phrase.

## Conclusion

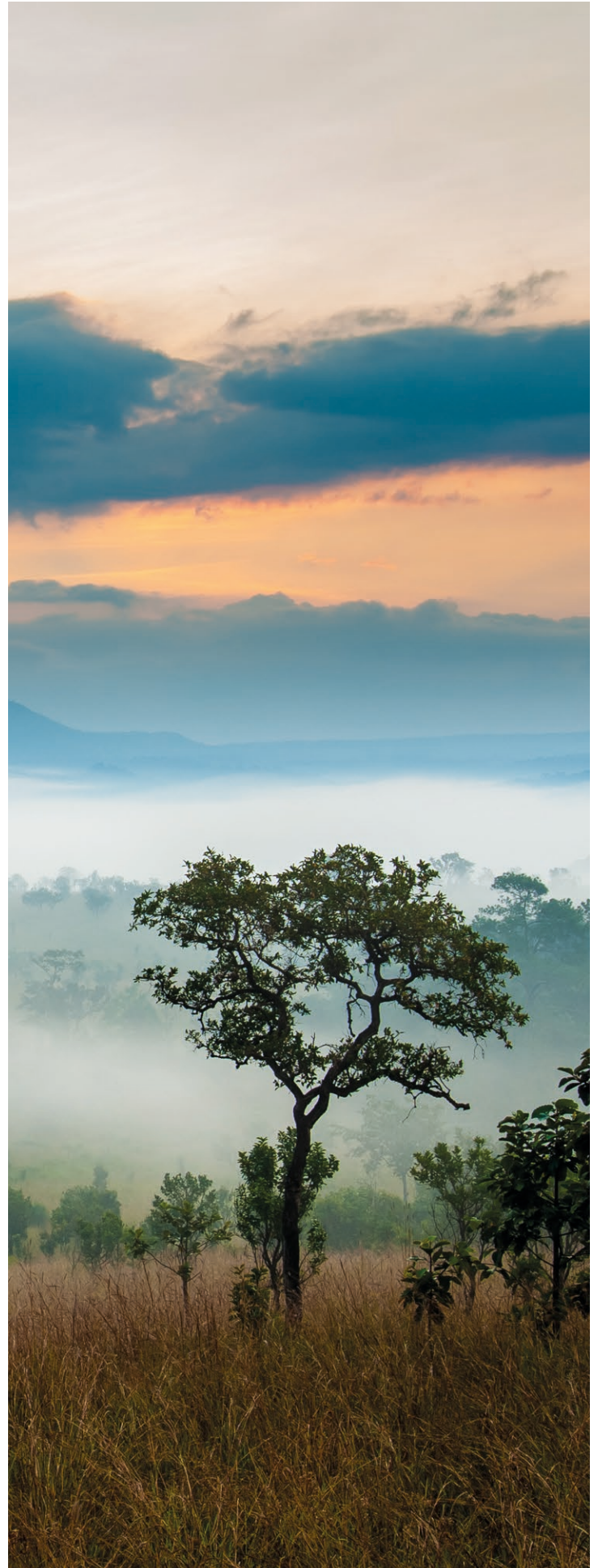
Investing in Ethiopia can be challenging for a foreign investor, but if they take advice, build trust with the government, invest in line with the Growth and Transformation Plan and make big investments, then there can be rich rewards.



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# Mergers and acquisitions in Ghana – foreign investor considerations

The corporate world of Ghana is changing and market watchers have predicted an increase in mergers and acquisitions (M&A) in Ghana. This is as a result of continuous growth in the economy, increased interest from international markets and the desire of domestic companies to expand their operations across Ghana's borders. Experts in the industry say that as Ghana's economy continues to expand and mature, more and more domestic institutions should develop aspirations or potential to expand their reach beyond Ghana's borders and M&A will be key for securing a broader geographic footprint.

Ghana has attracted the attention of well-known international businesses investing in all sectors of the economy. Examples of M&A in various sectors that illustrate this growing interest include the recent acquisitions of Provident Life and Express Life by Old Mutual and Prudential respectively in the insurance industry, the acquisition of Benso Oil Palm Plantation by Wilmar Group in the agriculture sector and the acquisition of Fan Milk International by Abraaj. The banking industry has also experienced several M&A transactions. There are two main reasons for this in the banking sector. Firstly the recapitalization requirement of the Bank of Ghana (BOG) and secondly interest from international banks seeking to acquire existing banks.

The growing size and depth of Ghana's economy is creating more opportunities for M&As. If these opportunities are taken, expect corporate takeovers and mergers to become increasingly common, and the structure of corporate Ghana to keep changing. What then should foreign investors bear in mind?

## Foreign Ownership/ Shareholding Restrictions

Generally under Ghana's investment laws where an investor intends to undertake a joint venture with a local person, the foreigner has to invest foreign capital of at least \$200,000 in cash or capital goods relevant to the investment or a combination of both by way of equity participation, and the local person must have at least 10 % equity participation in the joint enterprise. In the case of a wholly foreign owned company the investor must invest a minimum of \$500,000 in cash or capital goods relevant to the investment or a combination of both. Additionally, a foreigner engaged in trading activities must invest at least \$1m in cash or goods and services relevant to the investments.

## Mergers & Acquisitions

A company seeking to do business in Ghana may acquire an equity stake in an existing company ("Investee Company"), but they still need to comply with the minimum capitalization requirements. Where the industry or sector in which an Investee Company operates is regulated, the approval of the Regulator may be required. Additionally, the approval of the Securities and Exchange Commission (SEC) is required where an Investee Company is listed on the Ghana Stock Exchange (GSE). An acquisition of 30% or more of the shares of a listed company or its holding company trigger a mandatory takeover offer and is regulated by the SEC.

## Other Regulatory Restrictions

A number of sector specific laws restrict the level of foreign ownership in companies engaged in business in those specific sectors.

- **Banking Sector** – The Bank of Ghana (BOG) has to approve any agreement or arrangement that would result in a change in the control of a bank or its holding company. Consequently the sale, disposal or transfer of 10% or more of the capital or voting rights of the business of a bank (Significant Interest), an amalgamation or merger of a bank with another bank or institution or restructuring of the bank requires the approval of BOG.
- **Petroleum Sector** – The Petroleum (Exploration and Production) Law provides for notification to the sector minister where a merger or acquisition would result in the creation of a new company. A petroleum agreement cannot be assigned without the consent of the sector minister. The consent of the Minister is also required for the transfer of control of at least 5% of the shares in a petroleum company. If the merger or acquisition leads to the company ceasing operations, the Ghana National Petroleum Corporation (GNPC) has the first option in the purchase of its assets.

- **Mining Sector** – The acquisition of a stake in a mining company which vests in a person (alone or with an associate(s) ) control of more than 20% of the voting power at any general meeting of a mining company/its holding company needs the approval of the minister responsible for mines. The Mining Act is being reviewed to tighten regulations in areas of revenue, licensing and protection of the environment.
- **Fisheries Sector** – Fishing crafts operating in Ghana’s coastal waters and rivers in connection with any fishing activity have to procure a license for their activities. These licenses are not transferable to another person without the permission of the Fisheries Commission. Consequently, where a merger or an acquisition leads to the formation of a new company, a license granted to a fishing vessel owned by the old company cannot be transferred to the new company unless this permission has been obtained. Nationality restrictions are also likely to affect an M&A transaction in this sector. For example, the owner of a local industrial or semi industrial fishing vessel licensed under the Fisheries Act must employ a master, officers and crew of whom no less than 75% are Ghanaians.
- **Telecommunication** – The Electronic Communications Act 2008 states that the National Communications Authority (NCA) must approve the transfer of shares in a licensee company if the transfer would result in a change of control of that company and cause it to breach licence terms relating to its ownership structure.
- **Insurance** – In the insurance sector, the acquisition or sale of a Significant Interest in an insurance company also requires the prior written approval of the National Insurance Commission.

## Choice of Structure

The choice of structure to be adopted for M&A transactions largely depends on the nature of the acquisition, tax implications and regulatory requirements.

The Companies Act 1963 (Act 179) (as amended) expressly provides for arrangements and amalgamations. An arrangement is any change in the rights or liabilities of members, debenture holders or creditors of a company or any class or in the Regulations of a company, other than a change effected under any of the provisions of the Act or by the unanimous agreement of all the parties affected. An amalgamation is defined as any merger of the undertakings or part thereof or part of the undertakings of one or more companies and one or more bodies corporate. This is the most common kind of merger, which basically means that one company is absorbed into the other one.

There are a number of ways for businesses to merge in Ghana:

1. Merger of two or more companies into one of the existing companies
2. Merger of two or more companies into a new entity set up for that purpose (Special Purpose Vehicle)
3. Amalgamation or arrangement with court approval

The merger can take the form of acquisition by one party of the business and assets of the other party in return for a cash payment or an issue of shares or an acquisition by one party of the shares of the company being acquired in return for a cash payment or an issue of shares.

### (a) Asset Acquisition

This typically allows an investor to acquire some or all of the assets of the vendor company but the vendor retains the ownership of the corporate entity. With such transactions the vendor's business name may or may not be included in the sale, and the licenses, contracts and employees may or may not be transferred to the investor depending on the terms agreed. Investors are likely to opt for an asset sale enabling the investor to agree on the assets to acquire and exclude certain liabilities as well as reduce the level of tax payment especially in relation to stamp duties and investment taxes. It is important to note that the shareholders of the corporate entity may have the same rights after the merger. Formalities associated with such a transaction include the registration of the acquired assets (where applicable) and procurement/transfer of the relevant licences into the name of the purchaser.

### (b) Share Acquisition

Here the purchaser acquires all the shares in the company that owns the assets and the business. (This was the case for the acquisition by Total Outré-Mer S.A.'s takeover of Mobil Oil Ghana Limited). By acquiring the shares, the purchaser indirectly obtains ownership of all assets of the company. With a share acquisition, the business is transferred as a going concern (subject to change of control provisions in relevant contracts). It tends to be a more straightforward transaction. Only shares are transferred as opposed to all of the underlying assets of the business (for which separate transfers with different formalities may be required). The necessary legal formalities would have to be adhered to (e.g. completion and filing of the relevant statutory forms with the relevant statutory authorities) to ensure the effective transfer of the shares, and parties must comply with any restrictions on transfer of shares under the Companies Act and the Regulations.

### (c) Joint Venture Arrangement

An investor can also structure the transaction as a joint venture with the establishment of a separate corporate vehicle which the parties (two companies) will own together pursuant to a formal joint venture or shareholders agreement. Investors may opt for this structure considering the costs and risk sharing as well as other factors such as local content requirements for some sectors which may dictate a minimum level of local ownership and capitalization matters.

### Minority Squeeze Out

The Companies Act and securities laws of Ghana make provision for the acquisition of a minority shareholding if the acquirer obtains at least 90% of the value of the voting shares of the company being acquired within 4 months of making the offer. The person acquiring must offer the remaining shareholders consideration equal to the prevailing market price of the voting shares or the price offered to the other holders, whichever is higher, within 2 months of achieving the 90%. This happened in the HFC Bank takeover. Republic Bank pointed out that Ghana's securities laws demand that once an institutional investor's equity stake in a company listed on the GSE reaches 40%, then it must offer to buy out all the shareholders who own the other 60%.

### Restrictions on price (cash or shares)

Ghanaian law does not provide for any restrictions on the form of consideration to be paid for the shares in a private company. In respect of public companies, other requirements affect the consideration that is provided.

### Timeframe

This will depend on the nature of the transaction and the option adopted by the parties, the conclusion of any member/creditor and labour concerns. Generally, a merger process may take up to 120 days to complete. The period is usually longer in respect of regulated sectors where prior approval is required from the regulator.

In respect of public companies, the offer must be open for acceptances for a period of 30 days.

## Labour & Employment issues

Under Ghana's labour laws, where the restructuring/reorganization of a company will result in redundancies, the target company has to inform the Chief Labour Officer (CLO) and any trade union concerned with a minimum of 3 months' notice. Furthermore, where a merger or acquisition will result in an employee suffering any diminution in their terms and conditions of employment, the employer must make redundancy payments to the workers. If the investor takes on the employees of the company, new employment contracts must be provided, with consent of the relevant employees.

## Tax

Ghanaian law treats a gain from the realization of an asset (including the disposal of shares) as investment income, attracting the payment of the relevant tax. However, any Double Taxation Treaty (DTT) with the home country of the investor may be applicable to the transaction. Ghana currently has DTTs with the UK, France, Germany, Netherlands, Belgium, Switzerland and South Africa.

## Conclusion

M&A is akin to the concept of marriage. It offers vast opportunity for growth and success but it does not always blossom. Just as some marriages are unsuccessful, so are M&A's though the benefits outweigh the challenges. M&A is here to stay so long as businesses continue to seek growth. It is believed that the positive press about Ghana in recent times highlighting its open market has spurred growth and sustained foreign investment. As the structure of corporate Ghana continues to grow and keep changing, it is important for businesses to consolidate and become big. This way companies are able to withstand the shocks that come with the industry and are able to offer more to their clientele and reduce country specific risks.



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# Celebrating African Art

Hogan Lovells has been an on-going sponsor to an art exhibition in conjunction with the Lagos Court of Arbitration celebrating the legendary Prof. Bruce Onobrakpeya and his brain-child, the Harmattan Workshop.

Prof. Bruce Onobrakpeya MFR was born in 1932 and is one of Africa's most important experimental artists. He is celebrated for his unique metal foils, prints, serigraphs, plastocasts, sculptures, paintings and mixed media installations. He has received many local and international awards including an Honorable Mention at the 44th Venice Biennale in Italy in 1990, and was given a Living Human Treasure Award by UNESCO in 2006, and was honoured by the Smithsonian National Museum of African Art in Washington DC in 2014 during their 50th Anniversary. Onobrakpeya has exhibited his art around the world and his works are in many important public and private collections including at the Presidential Villa in Abuja, the Murtala Mohammed International Airport in Ikeja, the Vatican Museum in Rome, the Suomi Museum in Finland and the National Gallery in Nairobi, Kenya.

Onobrakpeya is one of the famous Zaria Rebels, Nigeria's foremost modern art movement which he pioneered together with Uche Okeke, Yusuf Grillo, Demas Nwoko and other students at the Ahmadu University in Zaria in the 1950s. Since his student days, Onobrakpeya has rebelled against copying western art forms and has become a master at creating new art techniques which showcase Nigeria's rich heritage and culture.

The Harmattan Workshop is the brain child of Onobrakpeya, and was started in 1998 when he decided to launch an informal training initiative for artists. He started the Harmattan Workshop in his hometown and has since organized two workshops a year at which over 1300 leading and emerging Nigerian and international artists have been trained in many exciting art forms.

The exhibition showcases 34 artworks by Bruce along with over 200 paintings, sculptures, ceramics and mixed media works created by 124 Nigerian and international artists who have attended Harmattan Workshops in Agbarah-Ottor, Delta State, since 1998.

The opening was held on 15 September 2016 and was attended by Andrew Skipper, Nathan Searle, Christopher Cross, Alison Diarra and a number of representatives from media houses and local firms and it will run until 15 December 2016.

The exhibition was curated by Sandra Mbanefo Obiagio – SMO Contemporary Art



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# Inaugural Hogan Lovells Africa Forum South Africa

Following our successful event in London, the inaugural Hogan Lovells Africa Forum South Africa was held in Johannesburg on 7 October 2016. We looked at the forces of disruption and the agents of change and innovation creating a new Africa narrative, from an African perspective in four panel discussions.

## Panel 1: New horizons – How African businesses are transforming the continent and transcending borders

Sub-Saharan corporates have blazed a formidable trail in Africa and beyond in recent years amidst challenging economic headwinds. We considered some of their stories and the innovations behind their success and asked what can be done to create more African success stories. We also looked at how these African corporates are dealing with the commodities slump, the lack of proper ICT and infrastructure as well as illiquidity and volatile exchange rates. As countries and corporates reposition their understanding of what it means and what it takes to do business in Africa and beyond, we looked at the opportunities that this shift in thinking creates for investors and corporates looking for the next big break.

## Panel 2: A new age of funding. The rise of alternative investments and co-investing in Africa

There is a shortage of credit for businesses in developing economies. Access to credit is particularly relevant in sub-Saharan Africa. We considered the effects of the rise of alternative investment funds dedicated to investing in debt products and how this has led to the disruption of the traditional bank lending. Is there an increase in competition and how does this affect liquidity, innovation and the destinations for capital? Is there room for alternative investors working alongside banks when banks are retreating and facing increased capital reforms? We debated who the likely winners might be.

## Panel 3: Solving the infrastructure conundrum – lessons from China

We know that poor infrastructure is a major impediment to economic development in sub-Saharan Africa. Lack of rail capacity, poor port and road management all prevent sustainable growth potential from being unlocked. In December 2015, Chinese President Xi Jinping announced a US\$60 billion loan and aid package to Africa to develop infrastructure, improve agriculture and reduce poverty on the continent. The relationship between China and Africa has not been without controversy. However, with a focus on improving infrastructure, China's ultimate goal is to improve Africa's manufacturing sector and economic growth. Can these two nations put the past behind them to realise Africa's true potential?

## Panel 4: Leaping ahead? How technology is transforming Africa

Has Africa embraced technology in the same way and at the same rate that Europe, Asia and the Americas have? Recently, the widespread adoption of mobile devices and new technology have allowed Africa to leap ahead in certain technological arenas. In our discussion we considered the ways in which these new technologies including widespread wi-fi internet connectivity, increased consumption of smartphones, mobile payments, bitcoin/ blockchain, and the Internet of Things could be used to accelerate Africa's growth. We asked how regulation might prevent the revolution.



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The background of the page features the Hogan Lovells logo in large, gold, 3D-style letters. In the foreground, there is a bouquet of white flowers with green foliage, partially obscuring the logo. The overall lighting is soft and blue-toned.

# Hogan Lovells

## Hogan Lovells Africa Forums

We hosted two Africa Forum conferences in 2016, the first in London on the 30 June and the second in Johannesburg on 7 October.

The on-going theme of the forum focused on the forces of disruption and agents of change and innovation on the continent.

For the Hogan Lovells Africa Forum London Report visit [www.hoganlovells.com/en/publications/2016-africa-forum-report](http://www.hoganlovells.com/en/publications/2016-africa-forum-report)

For the Hogan Lovells Africa Forum South Africa Report visit [www.hoganlovells.com/en/publications/africa-forum-south-africa-2016](http://www.hoganlovells.com/en/publications/africa-forum-south-africa-2016)

## Delivering Projects – Procurement Shocks and Strains

There can be no denying that in recent years, the African continent has become a popular investment hub for global investors. Increased investment and expansion into the African continent has led to a surge in infrastructure development projects, which have created exciting opportunities for bidders from different parts of the world.

At our recent breakfast briefing, we identified and discussed certain procurement issues that bidders and funders need to be aware of when getting involved in projects in Africa, especially when government tenders are involved. What follows is a summary of the discussion.

There are some African jurisdictions which have unique public procurement policy frameworks, as a result of policy reforms which have taken place over the years, following government independence.

Kenya and Ghana in particular, have had major procurement reforms driven by the intention to increase good governance, transparency and efficiency. The reforms have also been fuelled by a need to eliminate corruption and the mismanagement of public contracts.

In other African countries, indigenisation laws have been passed with the aim of protecting and advancing the well-being of local economies.

Generally, public procurement reforms and supporting laws are aimed at regulating foreign direct investment or correcting social and historical imbalances unique to that country.

In South Africa for example, procurement reform has been used as a means to cure the effects of its political history. The preferential procurement framework which is in place to advance this objective, sets out the procedure to be followed during procurement, by stipulating specific parameters on the categories of preference and the calculation of points, which are used in the evaluation of bids.

It must be noted at the outset that there is no general public procurement system that applies across the board for all African states, and the procurement laws of each country must be carefully considered as and when the need arises.

Generally, investors and funders may expect that with the commitment to provide funding, they will be allowed some latitude when negotiating certain conditions during the procurement stage, to safeguard their interests. Examples of such conditions would be:

1. Placement of funds in a bank account of its choice, generally in the same jurisdiction as the Funder;
2. The appointment of an Agent appointed by the Funder to act for the Employer Government in relation to the project;
3. The allocation of funds, how the funds will be used during construction and whether any elements of the project are to be self-funded by the Employer;
4. Specifying that the Contractor must be a company from a specific jurisdiction (the “Eligible Bidder Limitation”), procured via the tender process of the Funder’s choice;
5. Specifying the type of contract under which the Contractor is to be appointed.

Although these conditions may appear to be standard, they could conflict with the procurement laws and policies in place in particular African jurisdictions, in one or more of the following ways:

- The placement of funds in a Funder’s bank account of choice would be in contravention of laws which stipulate that all monies raised, or received by or on behalf of the Government, must be paid into the national account in some countries. This includes grants and donations but does not apply to loans.
- The appointment of an Agent by a Funder could constitute a restrictive trade practice as it could be construed as an agreement which has as its object or effect, the prevention, distortion or lessening of competition in trade in any goods or services.

- Specification of the Contractor could be construed as breach of constitutional obligations which stipulate that every person must be treated equally before the law. This obligation prohibits the states from discriminating directly or indirectly, against any person on any ground.

In some jurisdictions however, the principles relating to equity may be applied differently to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.

Another common mistake made by most bidders and interested parties, is going into the tender process without thoroughly researching the following critical issues:

- What the applicable rules say regarding a late or incomplete bid;
- The effect of a failure to follow the procurement process;
- The rules and procedures which are applicable in specific jurisdictions for challenging awards, should the need arise;
- In the event of such a challenge being brought, what the rules say about how to prepare a claim, the forum in which such a claim can be brought, the applicable time frames for bringing such claims and the available remedies.

There are examples of projects which are being prepared for market, but which have stumbled as a result of the procurement processes and requirements not being properly understood. Early consideration of procurement issues during pre-feasibility studies will help to avoid these scenarios occurring.

All these issues give a broad overview of what should be considered by interested parties, prior to any involvement in projects in African jurisdictions. There continues to be a lot of development in the various procurement regimes and it is an area that is constantly evolving. Parties should therefore always keep abreast of any developments that could potentially affect them in projects they are involved in, or they intend to be involved in.



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## East Africa Business Leaders Forum: disruption and innovation – the new world order

On Wednesday 9th November we held our first Africa Business Leaders Forum at the Capital Club, Nairobi. The Hogan Lovells international team was joined by Kenya's business, industry and government leaders for an interactive evening of discussion and networking. Andrew Skipper, Head of Africa at Hogan Lovells spoke on how disruption and innovation, in light of Brexit and the Trump victory in the US, is creating a new world order where "there is no new normal". Sohail Barkatali, partner in our Infrastructure, Energy, Resources and Projects practice, spoke on his experience as a Kenyan, on working in the country and the prospects and opportunities for the future.

It was great for us being in Kenya at such a pivotal time, meeting with old friends and business contacts. The feeling both in country and from the international community is that Kenya is in a transition period, having positioned itself as the poster child of the East African Community. It has successfully positioned itself as a tech hub and, should its growth trajectory continue to rise, is primed to be one of Africa's leading economies. We are confident and excited by the opportunities and prospects for the country and the wider East Africa region.

We hope to repeat these events in the future, both in Kenya and elsewhere on the continent, so if you would like to be added to our mailing list please contact: [sima.labane@hoganlovells.com](mailto:sima.labane@hoganlovells.com).



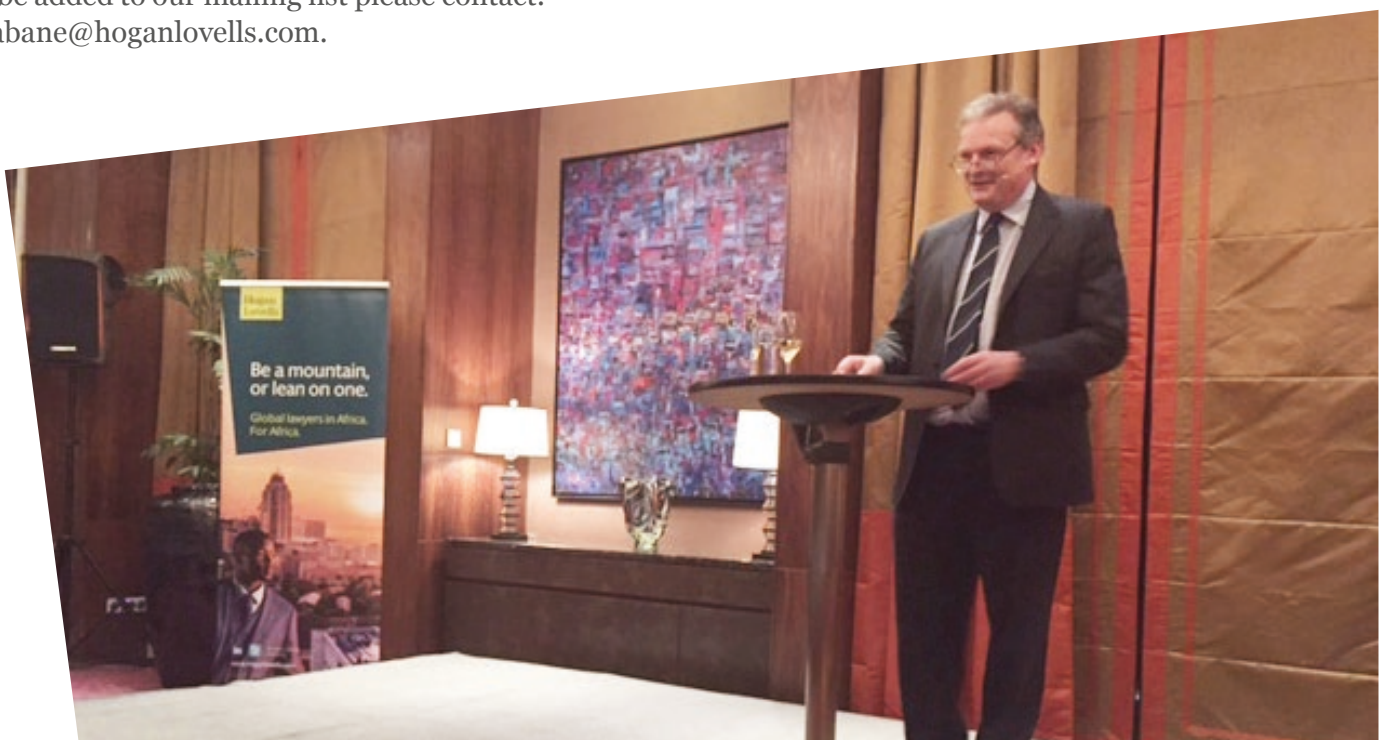
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## Upcoming events

### 10 January: West Africa Business Leaders Forum - Financing Infrastructure projects in Ghana

**Venue:** Kempinski Hotel, Ministries, Gamel Abdul Nasser Avenue, Accra, Ghana

**Time:** 6pm – 9pm

Hogan Lovells Africa team are delighted to be hosting our West Africa Business Leaders Forum – Ghana event at the Kempinski Hotel, Accra. We will bring together industry trailblazers, leading influencers and senior public officials to discuss some of the most topical issues affecting the business climate in Ghana today and across West Africa more broadly.

The theme for this event is financing infrastructure – transport, power and housing, and it has been organised in association with the Ghana Chamber of Commerce. We have a panel of expert speakers from some of the foremost financial institutions, project developers and power players. They will provide their candid views on the obstacles and opportunities in the sector and offer some insights into the winning ingredients behind successful infrastructure projects.

Please join us for what we expect to be a lively and engaging discussion, which will be followed by networking drinks and canapé reception.

This is an invitation only event. For further details, please contact [africadesk@hoganlovells.com](mailto:africadesk@hoganlovells.com).

### 25 January: From Bean to Bar – An African Cocoa story

**Venue:** Hogan Lovells, London

**Time:** 5.30pm – 9pm

As part of our commitment to celebrate African Art and Culture, we have teamed up with The Academy of Chocolate to host an event honouring the cocoa bean, its impact in many West African countries and the myriad of future opportunities for this much loved commodity.

A series of short talks will cover topics including:

- The genesis of cocoa – a macro overview
- Mega trends unpicked – sustainability and resilience
- A culture of cocoa

We will also be hosting a chocolate making and tasting experience with one of the country's leading artisan chocolatiers after the main talks.

This will be an evening of information, education and lots of chocolate eating from West Africa and beyond. Who has the best chocolate? Let your taste buds decide.

This is an open event. To register, please contact [africadesk@hoganlovells.com](mailto:africadesk@hoganlovells.com).

### 13 February: African Art with Bonhams

**Venue:** Bonhams, 101 New Bond Street, London, W1S 1SR, London

**Time:** 6pm – 10pm

Hogan Lovells has teamed up with Bonhams on the eve of their African art auction to host a private dinner for serious art collectors and those with an interest in collecting fine African art.

Having sponsored the exhibition of Prof. Bruce Onobrakpeya and the Harmattan Collection at the Lagos Court of Arbitration (LCA), we remain committed to the promotion of both established and new artists from the continent and supporting platforms that allow the great talent from Africa and the diaspora to be showcased to a global audience.

This is a closed event. For further details, please contact [africadesk@hoganlovells.com](mailto:africadesk@hoganlovells.com).

## 16 February: Hogan Lovells Africa Breakfast Briefing Q1 2017 – Steering the Course

**Venue:** Hogan Lovells, London

**Time:** 8.30am – 10am

Join us for our first Breakfast briefing of 2017, as we explore some of the key trends in the area of bribery and corruption. Five years on from the UK's Bribery Act, there is an increasing move towards making companies criminally liable for bribes paid in order to win business, not only by their employees, but also by third parties and intermediaries acting on their behalf.

Major companies keen to expand into Africa often engage people who are more familiar with local business environments. But how can companies manage third party risk, what does best practice look like, and how you can strike the right balance in dealing with third parties? We will delve into this increasingly important subject and review case study examples over some hot bacon rolls. We hope you can join us.

This is an open event. To register, please contact [africadesk@hoganlovells.com](mailto:africadesk@hoganlovells.com).

To view the second in our series of reports into bribery and corruption trends arising from our interviews with over 600 chief compliance officers, heads of legal and equivalent at the world's largest organizations, visit our Anti-Bribery & Corruption website at [www.hoganlovellsabc.com](http://www.hoganlovellsabc.com)

## 22 – 23 February: Private Equity in Southern Africa Conference (SAVCA)

**Venue:** Spier Wine Farm, Stellenbosh, South Africa

**Time:** All day

We are delighted to be the lead sponsor of the 2017 SAVCA conference. Join our international private equity and funds team alongside Africa's leading LP's and GP's, and senior industry professionals as we convene in South Africa.

This is the foremost conference for the African private equity and venture capital industry, where insights on the latest trends, including views on returns, longer-term risks and opportunities will be discussed.

If you would like to attend and book a meeting with one of our team, please contact Ashleigh Pelsner at [ashleigh.pelsner@hoganlovells.com](mailto:ashleigh.pelsner@hoganlovells.com).

## 29 March: An evening of Marimba magic with Education Africa

**Venue:** Hogan Lovells, London

**Time:** 6pm – 9pm

Due to popular demand, we are delighted to once again play host to an evening of entertainment and fun-raising, celebrating African music and art with Education Africa, a charity organisation which aims to improve the lives of underprivileged children from deprived townships in South Africa through education.

Last year, the girls rocked, playing to the beat of well-known African songs as well as popular songs from recent artists, which had our guests out of their chairs dancing.

This year's performance is set to be even better. Come and enjoy a relaxed evening of entertainment and cultural exploration for both young and old in support of a great cause. We look forward to seeing you there.

This is an open event. To register, please contact [africadesk@hoganlovells.com](mailto:africadesk@hoganlovells.com).



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## Recent Work

- Representing BayWa AG in the establishment of a joint venture with Barloworld Limited. Barloworld Limited disposed of its agricultural and material handling business to the joint venture entity through a complex group restructure. The transaction involved Hogan Lovells offices in Johannesburg, London and Munich.
- Acting for Telkom SA SOC Limited on a group restructure pursuant to which Telkom sold its enterprise development business to BCX Proprietary Limited for a consideration.
- Advising a business rescue practitioner with regards to an interim separation agreement to separate the Ferrochrome smelter activities from the chrome mining activities of the target and the sale of the land on which the smelter is built. We assisted the business practitioner in respect of the sale of land, the conclusion of the sale agreement and the registration and transfer of the land sale transaction.
- Acting for Mr Thomas Gosling, TG Investments Ltd and various property companies based in the UK and Mauritius on a new investment arbitration matter before ICSID against the Republic of Mauritius. The dispute under the UK-Mauritius Bilateral Investment Treaty arose from our clients' investments in two real estate developments in Mauritius. This case involves Hogan Lovells London and Johannesburg offices.
- We advised Intertoll Europe and Aberdeen Asset Management (Aberdeen), on the creation of a joint venture to be known as Intertoll Capital Partners. Hogan Lovells also advised Intertoll on the sale of the seed assets to the joint venture vehicle. Intertoll Europe will hold a 50.01% interest in Intertoll Capital Partners, with Aberdeen holding a 49.99% stake.
- We have been appointed by the Gabon Republic, following a request from Lazard, to advise on the inaugural Sukuk issue by the Gabonese Government in 2017. This was a direct result of the firm's recent successes in Senegal and Cote d'Ivoire for which we have won several awards.
- We have won a project to advise the Kenyan Ministry of Energy and Petroleum on a Policy and Institutional Review on Kenyan Petroleum Sector, which is likely to involve recommendations on organisational side regarding the establishment of a new Upstream Petroleum Authority and a Sovereign Wealth Fund.
- Advising a well-known U.S. university in its efforts to establish or increase institutional presence in Africa, including in South Africa, Uganda, and Angola. Our work has included coordination of branch registration of the university's affiliated non-profit entity, application for Public Benefit Organisation (PBO) status, drafting a services agreement for use with local vendors, and various employment-related guidance including preparation of secondment agreements for expatriate employees and employment contracts for locally-based staff.
- Advising a leading U.S. university on its operations and branch registration of its affiliated non-profit entity in Mozambique in order to carry out HIV/AIDS research and outreach sponsored by U.S. federal grants.
- Assisting a major U.S. university medical center with the preparation of federally-sponsored subaward agreements with various non-profit and medical entities in Africa including Rwanda to support student global health research.



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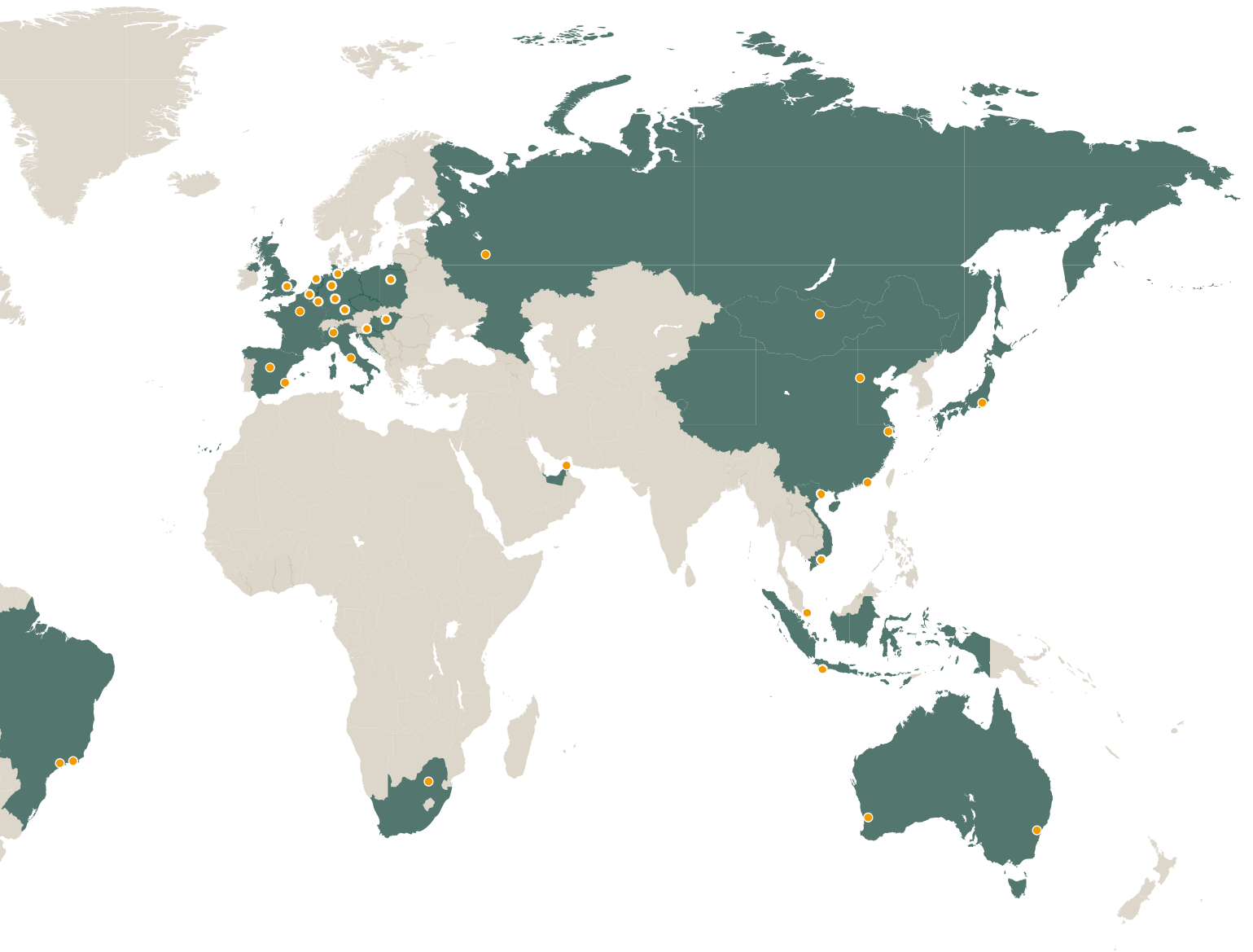


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