King & Spalding

Africa *Bulletin*

Foreword

We are pleased to introduce this edition of King & Spalding's Africa Bulletin. Our firm has a rich history of providing the highest-quality legal services to our clients in relation to their transactions across Africa. More than half of our lawyers have worked on deals and disputes in Africa, and many of them spend 80 to 100 percent of their time on Africa-related work. Africa has been and remains a core part of King & Spalding's international offering.

The following topics are covered in this issue:

- Macky O'Sullivan discusses the potential of Africa as an investment destination for investors, as well as key considerations and mitigants.
- Aaron Stephens and Naana Frimpong discuss anti-corruption enforcement in relation to private equity investments in Africa.
- Macky O'Sullivan and Fred Binka (managing partner, TIA Capital) discuss trends in the credit markets in Africa.
- Elodie Dulac and Caline Mouawad discuss the future of commercial and investment arbitration in South Africa.

We hope that you find *Africa Bulletin* interesting, and we welcome any feedback you may have on this publication.

Jawad I. Ali

Managing partner–Middle East offices, Head of EMEA Corporate, Finance and Investments team

Volume 2

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Editor

Macky O'Sullivan

mosullivan@kslaw.com

King & Spalding

Africa *Bulletin*

Subscriptions

Nancy Mokarem

nmokarem@kslaw.com

PRIVATE EQUITY

Africa Investment Opportunities: Risk and Reward

INTRODUCTION

It has been a busy few months for private equity activity in Africa. Statistics and transactions have illustrated a growing appetite for investment in the continent and, crucially, growing confidence and returns. A recent I&M Burbidge Capital/East Africa Venture Capital Association report showed that PE firms exiting East African investments are reaping returns of almost 25 percent while Nigerian tech startups secured more than US$110.9 million of investment in the first half of the year. The landmark US$1 billion initial public offering on the New York Stock Exchange of Jumia, the largest e-commerce operator in Africa, meanwhile, showed that flotations of African assets on the international capital markets are a reality. The launch of the operational phase of the African Continental Free Trade Area (AfCFTA) marks what many consider to be a potential game changer for the continent, creating the world's largest free trade area since the formation of the World Trade Organization, which covers a market of 1.2 billion people with a combined gross domestic product of US$2.5 trillion.

It is no surprise that investors are searching for investments in Africa. It is a diverse continent with emerging commercial and technological needs, apparent healthy returns, and structurally superior investment and growth prospects. Sub-Saharan Africa has consistently been the second-fastest-growing global region after the developing Asia region since 2000. A structural demographic dividend and a growing labor force underpin higher and sustained long-term demand for goods and services. Even so, these incentives come with a warning. Doing business in Africa, like in any other emerging market, carries risks that investors perhaps need not consider in more advanced markets.

KEY CONSIDERATIONS AND MITIGANTS

While investors may be comfortable with high-risk, high-reward investments, the macro socioeconomic and political situations in certain parts of Africa add a more complicated dimension.

Currency fluctuations can have significant effects on investments. African currencies can be difficult and expensive to source, and devaluation of local currency is a major concern in sectors such as hospitality where earnings are generated in local currency but payments to operators are often required to be in U.S. dollars. Obtaining hedging solutions tailored to the continent from financial institutions is critical. Political risk is another key factor. Anything from a change in government, resulting in sudden decisions to overhaul laws, contracts or agreements, to a coup, embargo or tariff can have a sudden impact on local companies. Another consideration is the international scope of the U.S. Foreign Corrupt Practices Act or the UK Bribery Act. Corruption attributed to an agent within an African investment can result in action before the U.S. or UK courts, making effective risk management procedures an essential requirement of doing business on the continent.

Risks are, of course, part and parcel of investments, especially in emerging markets. However, some of these additional risks go beyond simply taking a haircut on an investment. They could result in court action with a new government or facing regulators or criminal sanctions in foreign courts. Investors need to ensure that the risks are minimized as much as possible, and this will ultimately come down to a combination of adequate due diligence to identify country- and sector-specific risks and mitigating those risks with suitable commercial and legal structures.

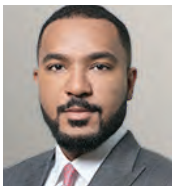
> *Investors are becoming increasingly aware of the potential of Africa as a viable, long-term market, but the balance between risk and reward can be a delicate one.*

Legal advice tailored to the target country is critical. For example, while there is a perception that having an investment contract governed by English law is a panacea to legal issues that may arise from the investment, this may be of no help where there are practical hurdles in enforcing judgments in the specific African country (Gambia, Namibia, Sierra Leone, etc.) because it is not party to the New York Convention. Understanding local ownership rules, tax and exchange control approvals is critical to identifying the best way to structure the investment.

Investors may find that structuring investments through offshore jurisdictions such as the Abu Dhabi Global Market, a free zone governed by English law where disputes can be presided over by judges in England via Skype, and which has the benefit of double taxation treaties with 13 African countries, may present certain benefits as far as tax and dispute resolution considerations are concerned. Difficulties in exiting investments on the continent due to the illiquidity, high transaction costs associated with African exchanges and limited options (exits via secondary buyout markets and to strategic buyers being the primary exit strategy) are a reality. Alternative investment products such as private credit are gaining momentum as an alternative means for investors to gain exposure to the continent. The appeal of private credit centers around attractive risk-adjusted returns with a built-in liquidity premium and a cash yield. Unlike private equity, private credit returns are contractual, so the investor has more visibility over the timing and quantum of return repayments over the life of the investment. There is less reliance on an "exit" to lock in returns. If things go wrong, debt has priority over equity in order of claims, and with adequate monitoring and covenant protection, your downside risk can be limited.

Investors are becoming increasingly aware of the potential of Africa as a viable, long-term market, but the balance between risk and reward can be a delicate one. Identifying key risks and implementing suitable mitigants is critical to achieving healthy returns on investment across the continent.

AUTHORS

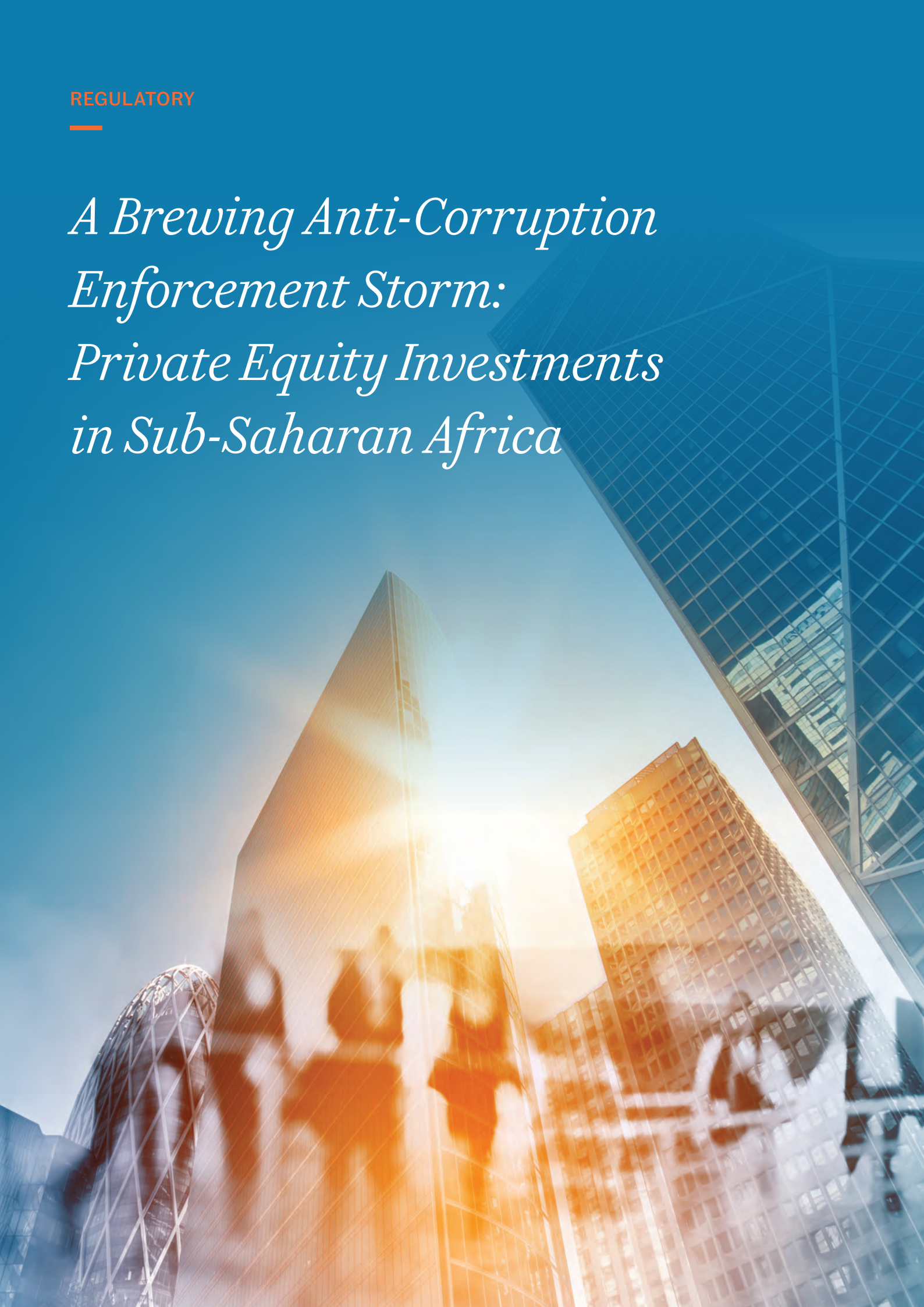


Macky O'Sullivan
mosullivan@kslaw.com
+971 4 377 9982

Macky O'Sullivan is a senior associate at King & Spalding. He has extensive experience advising asset managers, multilaterals, and sovereign wealth funds in connection with their fund formation, capital raising and co-investment activities across Africa. Macky has worked in the United Kingdom's House of Lords for Rt. Hon. Baroness Scotland of Asthal QC (secretary-general of the Commonwealth and former UK attorney general), where he advised on UK-to-Africa trade relations and foreign direct investment issues. He has been recognized by *Who's Who Legal* as a leading private funds lawyer.

REGULATORY

A Brewing Anti-Corruption Enforcement Storm: Private Equity Investments in Sub-Saharan Africa



INTRODUCTION

Private equity (PE) firms in developed economies sometimes suffer from a perception that they are too aggressive in their efforts to restructure portfolio companies–for example, using leverage to load portfolio companies up with burdensome or unsustainable debt. This perception stands in contrast to that of venture capital firms, which are often viewed favorably as the investors that inject much-needed cash and expertise into startup or early-stage businesses, helping them take flight.

However, PE firms focused on African investments can often be viewed in this more positive light because of the pseudo-developmental role they play in the African economies in which they invest. Such firms, unlike their counterparts in more developed markets, are often funded by development finance institutions (DFIs) like the UK's CDC Group and the African Development Bank. Backed by these institutions, the firms play an important role in steering significant sums of foreign direct investment into the economies of African countries, thereby helping small and medium-size companies to expand.

Accordingly, while Africa-focused PE firms are of course focused on producing profits for their investors, they are also in a position to drive economic and social development through their portfolio investments. For instance, DFIs typically require the funds in which they invest to meet certain environmental, social and governance (ESG) objectives. And the PE firms themselves tout their economic development achievements. For example, Helios Investment Partners, a leading Africa-focused firm, reports that it has invested over US$2 billion in African businesses and that since 2008 its management of its portfolio companies has generated over US$9 billion in revenue and created almost 6,000 jobs.[1]

This development focus includes heightened attention to anti-corruption measures. The ESG guidelines typically include reference to conducting anti-corruption due diligence and compliance assessments and adopting proper internal controls. For example, CDC's March 2017 Code of Responsible Investing requires its fund recipients to *"adopt and implement policies and procedures to prevent extortion, bribery, fraud, corruption and financial crime in accordance with local law requirements and relevant internationally recognized practices."*[2]

However, engaging in anti-corruption measures is not important only for the purposes of securing the DFI financing of Africa-focused investments, but increasingly also for more general risk management purposes.

This is due to a confluence of several factors:

- First, U.S. and UK enforcement authorities have been increasingly focused on identifying and rooting out corruption, fraud, and money laundering involving the financial services industry.
- Second, the number and profitability of Africa-focused PE firms have exploded in the past decade.
- Third, these firms are investing almost exclusively in economies where the corruption risk is high.

Engaging in anti-corruption measures is not only important for the purposes of securing the DFI financing of Africa-focused investments, but increasingly also for more general risk management purposes.

The evolution of an enforcement environment

Historically, the anti-financial crime enforcement authorities in the U.S. and the UK did not train their focus on PE firms or the wider financial services industry. However, in the past decade increased attention has been paid to the sector. For example, in June 2011 the then-director of the UK Serious Fraud Office (SFO) identified PE firms and their portfolio companies as having potential exposure under the Foreign Corrupt Practices Act 1977 (FCPA) and the UK Bribery Act (UKBA), stating that *"as owners of companies, private equity, as well as the big institutional shareholders have a responsibility to society to ensure that the companies in which they have a shareholding operate to the right standard. It may even be that it is a condition of investment by fund managers allocating funds to you to invest that you invest only in companies that are FCPA and Bribery Act compliant."*[3]

Less than a year later, on January 13, 2012, the SFO made the following statement in connection with the Mabey Engineering Holdings Ltd. case (in which Mabey agreed to pay back dividends it received from contracts that were secured through the payment of unlawful bribes to the Iraqi government): *"[S]hareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasize it enough. It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect."*[4] Subsequently, in October 2013, the UK Financial Conduct Authority (FCA) carried out a Thematic Review of anti-money laundering (AML) and anti-bribery and corruption (ABC) systems and controls at asset managers and published its detailed findings in order to drive higher standards among regulated firms.[5] Since that time, the FCA has brought several enforcement actions in relation to financial crime systems and controls failings, and a number of investigations are currently in progress.

In the U.S., the increased scrutiny of the private financial services industry began with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. Before Dodd-Frank, investment advisors managing private funds (such as hedge funds or PE funds) were able to avoid regulatory oversight because of a loophole that did not mandate their registration with the Securities and Exchange Commission (SEC) under the Investment Advisers Act of 1940. In 2011, however, the SEC implemented this aspect of Dodd-Frank and adopted rules requiring hedge funds and PE funds to register with the SEC.[6] In the aftermath of Dodd-Frank, the SEC also created two specialized units to focus on the investment advisory sector:

(i) the Asset Management Unit within the Enforcement Division, and

(ii) the private equity task force in the Office of Compliance Inspections and Examinations (OCIE).

Dodd-Frank also included robust whistleblower provisions and the establishment in the SEC of the Office of the Whistleblower, which increased the potential exposure of covered entities by providing financial incentives to individuals reporting misconduct. Pursuant to Section 922 of Dodd-Frank, whistleblowers are entitled to between 10 and 30 percent of any sums over US$1 million that the SEC recovers pursuant to enforcement actions for FCPA or securities violations.

Also in 2011, the SEC launched an investigation into a number of financial services firms to ascertain whether any of them had made corrupt payments in violation of the FCPA in their efforts to secure investments from sovereign wealth funds. Between 2011 and 2013, global PE firms and hedge fund managers such as Och-Ziff Capital Management Group LLC received several subpoenas from the SEC in connection with this investigation.[7] By 2014, the Department of Justice had reportedly joined this wide-ranging investigation.[8]

The increased oversight of the financial services industry was also evidenced by the fact that the SEC not only required registration of PE advisors, but also actively engaged with some of these newly registered firms to ensure that their practices complied with securities laws. Specifically, in 2012, OCIE conducted *"focused, risk-based examinations of investment advisors to private funds that recently registered with the Commission."* These "presence exams" focused on, among other things, fund marketing and fee allocation, as well as on *"how investment advisors solicit investors for the private funds they manage, including the use of placement agents."* By 2015, some of these presence exams had given rise to concerns at the SEC of potential FCPA liability, and the matters were referred to the enforcement division.[9]

> *The combination of increased regulatory oversight of the financial services industry, the explosion of growth in the African PE sector, and the fact that these PE firms primarily invest in countries with high corruption perception indices has the makings of a perfect storm of anti-corruption enforcement activity.*

Enforcement actions begin to appear

These various developments on both sides of the Atlantic led to a rash of speculation that PE firms were to face significantly increased scrutiny by regulators around their FCPA/UKBA compliance programs. The speculation proved to be accurate. The DOJ and the SEC brought an enforcement action, stemming from the 2011 sovereign wealth fund investigation, against hedge fund manager Och-Ziff, resulting in a 2016 settlement of US$412 million. The authorities alleged that Och-Ziff paid bribes to high-level government officials through intermediaries, third-party agents and other business partners, resulting in an investment of almost US$300 million by the Libyan sovereign wealth fund. Och-Ziff also allegedly paid bribes to government officials in other African countries (such as Chad, the Democratic Republic of the Congo, Niger and Guinea) to secure, in some cases, mining rights.

Although the DOJ and the SEC have not resolved any further FCPA enforcement actions against PE firms or hedge fund managers since the 2016 Och-Ziff settlement, such entities should remain vigilant. Complex financial enforcement actions take a number of years to investigate and resolve and will typically remain "below the radar" during this period. Indeed, Och-Ziff settled its enforcement action five years after it received investigative subpoenas from the SEC in 2011.

Further, it is clear that the U.S. enforcement authorities remain focused on PE firms. For example, in 2018, in connection with the SEC's review of the allocation of fees and expenses as fund costs, the SEC settled an enforcement against Yucaipa Master Manager, LLC, for allegedly not disclosing to its investors that it would allocate the compensation of in-house lawyers who prepared the fund's tax returns to the fund and not to the PE advisor.[10] In April 2019, U.S. prosecutors unsealed criminal charges against the heads of Dubai-based PE firm Abraaj for allegedly defrauding investors by inflating the valuations of the investments and misappropriating investor funds for improper purposes.[11] At the height of its success, Abraaj had approximately US$14 billion of assets under management. However, by the spring of 2018 the company had collapsed after investors (including a leading U.S. charitable foundation) began to raise concerns.

In addition, this increased oversight of the PE sector in the U.S. has not been limited to SEC reporting issues and the FCPA. For example, in 2018—in what is believed to be the first time that the DOJ has intervened in a False Claims Act suit against a PE sponsor—the government alleged that a PE firm's portfolio company (a pharmacy) engaged in inappropriate fee practices and paid kickbacks to induce prescriptions, ascribing liability to the PE firm as a result of its controlling interest.

According to the government, the PE firm had officers and directors on the pharmacy company's board and was intimately involved in the company's management, aiding in the adoption of illegal measures that increased the company's value and enabled a profitable exit.

Moreover, in February 2019, the Institutional Limited Partners Association (the ILPA, a leading industry group for investors in PE funds), as well as 35 of its member institutions, sent a letter to the SEC requesting greater oversight of the PE industry, particularly with regard to

(i) the fiduciary duties owed to limited partners;
(ii) standards for disclosures of conflicts of interest; and
(iii) cost allocations.[12]

This letter was the latest in a string of letters in which the ILPA urged the SEC to uphold fiduciary protections for investors in the PE market.[13]

Explosive growth of African PE investment activity and enforcement exposure

During this same period of heightened scrutiny in the UK and U.S., there has been an explosion in the growth of PE firms targeting African investments. These firms, relying on their deep knowledge of the local markets, have proved successful at reaping impressive investment returns for their limited partners via smaller-size deals ranging between US$50 million and US$100 million and by meeting their ESG requirements and other economic development goals. In 2010, fundraising by the emerging class of PE firms focused on African investments totaled a mere US$1.8 billion. However, by 2014 and 2015, that figure had doubled to US$3.0 billion and US$3.3 billion, respectively.[14]

Although the pace of PE investment in Africa slowed during 2016 and 2017 as many economies on the continent contracted from the global slowdown, there are signs that the sector is recovering. For example, since 2015 there has been a steady increase in the number of African PE deals, increasing from 158 deals to 186 in 2018.[15] Further, in a 2019 report by the London-based African Private Equity and Venture Capital Association, following a survey of 60 companies worldwide, PE investors continue to look favorably at African markets and intend to maintain or increase their investments in that market. As of January 2019, there are 215 African-focused PE firms with 307 offices in 27 different African countries. Ten of these firms have assets under management that exceed US$1 billion.[16] Further, in the past few years, an increasing number of large institutional investors from the U.S. and Western Europe—namely, public pension funds, endowments and insurers—have begun to invest in African PE funds.[17]

But anti-corruption concerns loom large in these investments. Transparency International estimates that six of the 10 most corrupt countries in the world are in sub-Saharan Africa.[18] So while the economies of many of these sub-Saharan countries have been marked by significant growth, that growth story continues to be marred by long-standing and systemic corruption. In addition, many of these economies remain cash-based with underdeveloped infrastructures, elevating the risks that companies take when engaging with local partners or other third parties.

Thus, despite financial and socioeconomic success, Africa-focused PE firms remain particularly vulnerable to an anti-corruption enforcement environment that has exhibited a tendency to target investors who profit from corrupt investments. This potential enforcement exposure exists whether the PE firm is UK based or U.S. based, or even if it is based in an African country with no direct jurisdictional ties to the U.S. or the UK.

For those firms with ties to the U.S. or the UK (and pursuant to enforcement theories espoused by the DOJ, SEC and SFO), a PE firm could face criminal or civil sanctions

(i) if it secures through corrupt means investments from sovereign wealth funds, and/or

(ii) if its portfolio companies engage in illicit or corrupt activity.

The use of U.S. dollars in tainted transactions may greatly increase the risk of U.S. enforcement action, even where precious few other links to the U.S. are present.

Where a PE firm is not linked to the UK or the U.S. (and/or has no intention to either list its portfolio companies on UK or U.S. exchanges or sell to UK or U.S. buyers at exit), there is still reason to exercise caution given the continued collaboration between enforcement authorities around the world. It is not outside the realm of possibilities that an African firm listed in Johannesburg, for example, could end up facing an enforcement action in South Africa that was prompted by information received by UK or U.S. authorities or one of the development banks active in the jurisdiction. It is notable that the SEC's 2015 case against Hitachi Ltd. (for alleged violations of the FCPA) was apparently supported by the African Development Bank's Integrity and Anti-Corruption Department as well as the South African Financial Services Board, and that the SEC stated that it hoped *"this is the first in a series of collaborations."*[19]

CONCLUSION

The combination of increased regulatory oversight of the financial services industry, the explosion of growth in the African PE sector, and the fact that these PE firms primarily invest in countries with high corruption perception indices has the makings of a perfect storm of anti-corruption enforcement activity. In this environment, proactive measures should be taken by Africa-focused PE firms to ensure that, as an initial matter, their dealings with sovereign wealth funds are UKBA/FCPA compliant. Further, these PE firms should also conduct robust due diligence before and immediately after making investments in these high-risk markets, with further monitoring and related controls and assessments during the life of the investment.

In discussing a recent update to the DOJ's Evaluation of Corporate Compliance Programs,[20] Assistant Attorney General Brian Benczkowski stated that *"[t]he importance of corporate compliance cannot be overstated. My deputies and I spend a lot of time talking about what companies can do to achieve the best result once the company or the Department learns of misconduct. But a company's compliance program is the first line of defense that prevents the misconduct from happening in the first place."*[21] In sum, these proactive anti-corruption measures will assist PE firms in weathering the storm. The measures will not only serve PE firms well in any potential engagement with enforcement authorities, but will also protect them from the significant reputational damage that could result from a failure to detect and remediate any compliance issues.

AUTHORS

Aaron Stephens
astephens@kslaw.com
+44 20 7551 2179

Aaron Stephens is a partner in the Special Matters and Government Investigations practice, twice named by *Law360* as White Collar Practice Group of the Year. He specializes in representing financial institutions, corporate clients, and senior individuals in highly sensitive litigation and investigations.

Naana Frimpong
nfrimpong@kslaw.com
+1 404 572 3593

Naana Frimpong is counsel with the Special Matters and Investigations practice at King & Spalding. Her practice focuses on white-collar criminal defense, internal corporate investigations and government enforcement actions (in particular with regard to violations of the Foreign Corrupt Practices Act), international arbitration, and international disputes generally, with a focus on the African continent.

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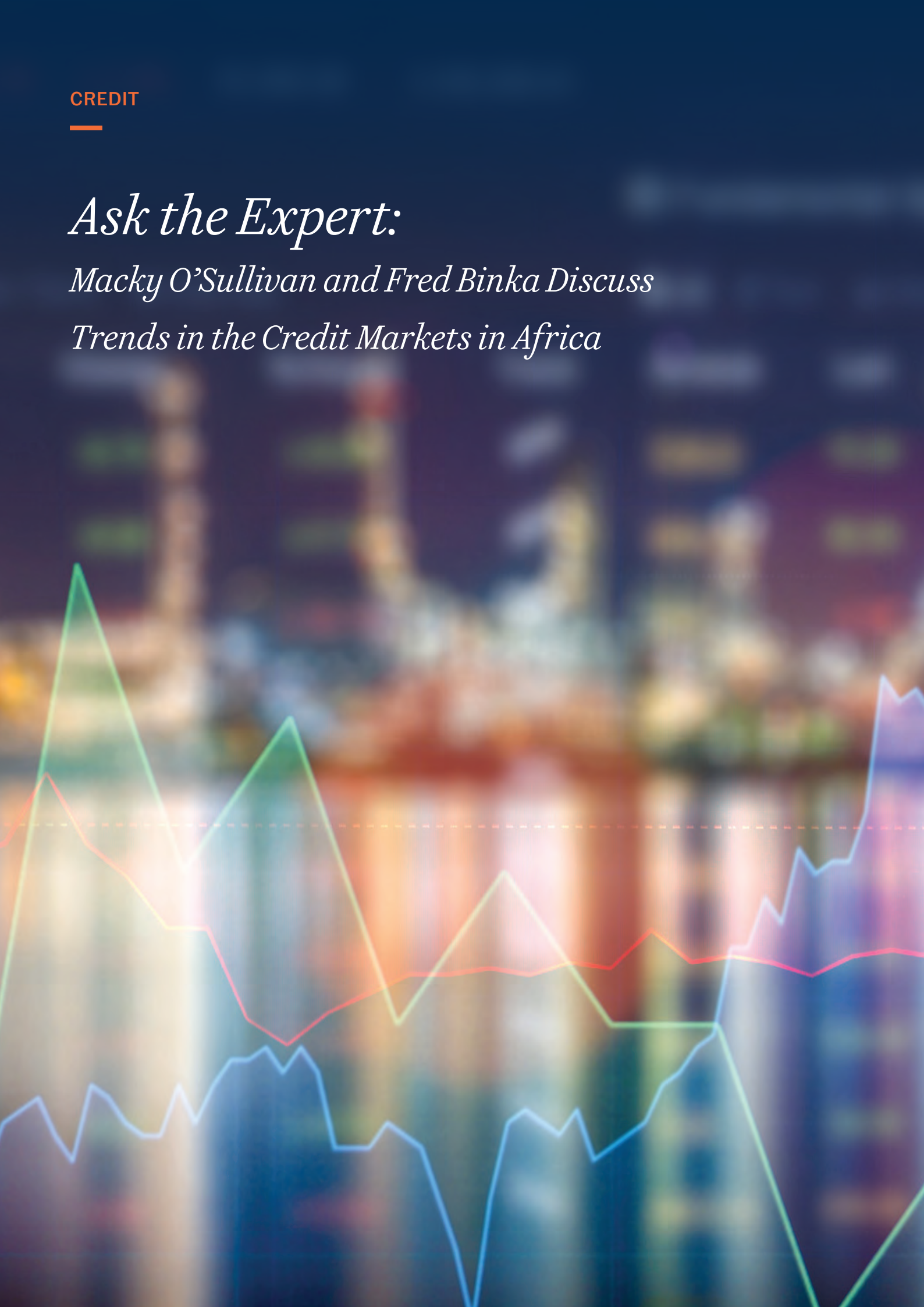
CREDIT

Ask the Expert:

Macky O'Sullivan and Fred Binka Discuss Trends in the Credit Markets in Africa



WHAT ARE THE KEY TRENDS YOU HAVE SEEN IN THE LAST YEAR OR TWO IN THE CREDIT MARKETS IN AFRICA?

Despite significant inflows into the African sovereign credit space in the past few years as many investors hunt for yield given low interest rates in many developed economies, there remains a dearth of capital to fund Africa's midmarket businesses, which along with small enterprises are the engine that will drive sustainable, inclusive growth on the continent. Many local credit markets suffer from being crowded out of the private sector as local financial institutions, buoyed by international capital, use cheap local deposits to acquire elevated local-currency government debt. This low-risk carry trade is exacerbating a pre-existing financing gap. This phenomenon arises out of a paucity of debt capital available from underdeveloped banking and capital market sectors that are failing to provide adequate, structured, affordable term-debt for companies, bankable projects and governments in sub-Saharan Africa (SSA).

The structurally underdeveloped banking sector faces an "incentive" dilemma as well as a capacity constraint. The former sees many take cheap deposits and buy high-yielding government treasuries, resulting in suboptimal lending to the "real economy." The latter is reflected in the lack of underwriting skills in these institutions if and when they do decide to extend credit. This is highlighted by the elevated levels of non-performing loans in many banks in the region.

As in other markets, non-bank financial institutions are needed to supply capital where regulated institutions are unable and/or unwilling. Unlike developed markets and many emerging markets, this opportunity is structural, not cyclical. This has been TIA Capital's core business for over a decade.

On the retail side, there has been an upsurge in startups trying to develop digital banking or digital lending on the continent in order to address a similar phenomenon for the mass market buoyed by the success of products like Safaricom's MPesa product. These new groups seek to use technology—especially the widespread use of mobile phones—to provide financial services including loans to the new urban middle classes as well as the unbanked rural dwellers. This move away from "bricks and mortar" banking models, while exciting, is still in its infancy and still faces some of the problems more traditional banking providers have, including the lack of effective credit bureaus and borrower tracking/identification mechanisms in many SSA economies. They are trying to address this through in-house solutions, including biometrics and step-up loan schemes, but to date few have been able to deploy these processes at scale successfully. Although some have ambitions to address the corporate sector, their loans are generally at a quantum that is below the sums being sought by small and medium-size enterprises and middle-market firms. However, if these retail platforms do take off, one of the resulting implications will be that the current established banks may see their "cheap deposit base" eroded and their cost of capital increase, and therefore the banks will need to increase their lending to the real economy to keep generating returns for their shareholders.

WHAT BENEFITS DOES AFRICAN CREDIT OFFER PROSPECTIVE INVESTORS SEEKING TO TAP INTO THE SPACE?

With the end of the latest commodity supercycle, and at a time of global uncertainty, fewer pools of capital are targeting direct investments in Africa due to the moderated growth levels in many of the major economies.

For those who are willing to look past the "Africa Rising" narrative, which so many investors were initially drawn to, there are a plethora of attractive risk-adjusted opportunities in Africa's credit markets today. Africa Rising unfortunately led many first-time investors in Africa to unrealistic expectations as to the returns that could be generated on the continent, driven by the very high growth rates the countries in the continent were posting and by popular investment themes such as the fast-growing urban middle class. Over the past few years, the growth trajectory on the continent has been less buoyant, and investors have had to deal with significant currency depreciation across a host of economies, putting into peril much of their returns on a hard currency basis.

Conversely, in the credit markets there are a number of opportunities that offer elevated yields while providing significant downside protection through their security packages. Further, one need not take first-order currency risk exposure, which has been the downfall of many public and private equity practitioners in the region. These credit opportunities also run the full gamut of the credit spectrum, from private corporate loans all the way to the more liquid international sovereign bonds, while offering sector diversification from infrastructure to financials and construction to resources. Even though developmental finance institutions were instrumental in developing the African private equity markets, they are truly leading the charge in turning their portfolios toward private debt. In 2018, 72 percent of DFIs and government agencies indicated plans to begin investing or to expand their investment in emerging-market private credit, which includes Africa.[1] Endowments and foundations are a close second.

We see increasing opportunities for private capital in this space. As traditional bilateral investors such as China and multilateral funders like the IMF face their own internal challenges, and with the withdrawal of many international commercial banks from these markets, traditional actors (multilateral agents and bilateral donors in particular) are seeking new investors to partner with that can provide capital to these markets to finance strong businesses and bankable projects. According to the Emerging Markets Private Equity Association 2018 Global Limited Partners Survey, all the target gross returns of limited partners in the private debt space are somewhat above the AVCA/ Cambridge Associates published gross numbers for 2018. This is axiomatically advantageous for the institutional investor.

WHAT CHALLENGES DO INVESTORS FACE?

Africa's diverse range of markets encompassing 54 countries—many at different stages in their development and each with its own cultural customs and norms — makes it a complicated region in which to invest. Post the commodity boom and the reduced levels of growth, the Africa story has become more complex, with fewer purveyors of capital willing to unpack its nuances. The geographical distance and preconceptions create more of a barrier. This has made attracting capital to the region even more challenging, but it has created a less competitive landscape for those who are focused on the space.

These complications can be overcome, and a focus on risk-adjusted returns demonstrates that high returns are possible from credit instruments in Africa. TIA is of the view that dedicated participants with a strong understanding of international and local credit markets, analysis, and pricing as well as an on-the-ground presence are well placed to monetize this opportunity while acting as a sustainable catalyst and supporter of economic growth and development in the region.

Investors need to have good knowledge of who their potential counterparties are, beyond what may be projected in mass media, and must ensure those they lend to have not only the ability but also the willingness to pay. Things can go wrong for cyclical and other reasons, and that is where properly constructed and enforceable (locally as well as internationally) downside risk protection kicks in. Through its local offices, TIA Capital has a close relationship with stakeholders in its focus countries, which means it is well positioned when it comes to sourcing the right deals with the right counterparties. The on-the-ground footprint also allows TIA to deploy a high-touch approach to its investments. Our investee companies know that we live and operate in the same markets and have access to the same level of market color they do.

We believe that all challenges are surmountable if the global principles of rigid diligence and thoughtful structuring are applied.

IN YOUR VIEW, WHAT IS THE OUTLOOK FOR SSA CREDIT MARKETS IN THE SHORT TO MEDIUM TERM?

Africa needs to attract more commercial international capital if it is to be able to fund bankable projects and developing businesses. Local pools of capital are increasing their investments locally, especially as pension reforms in many economies are leading to the aggregating of local savings into growing institutional pools of capital. This trend will continue to develop.

Many countries in the region have realized that they need to reduce the barriers to intra-African trade, which should exponentially increase the trade between African countries, and schemes like the African Continental Free Trade Area are steps in the right direction; increased trade will lead to increased investment. There has also been an increase in infrastructure investment in many countries, much of it funded by Chinese investment, but other investors seeing the opportunities are getting involved. This upgrade in local infrastructure will start to address some of the structural issues inhibiting growth in many countries.

More institutional pools of capital from Europe, North America, the Middle East and Asia are showing interest in funding such infrastructure projects, as well as in developing commercial lending and other credit opportunities, not just as part of their hunt for yield but also because they are drawn by increasingly interesting projects. The institutionalization of local champions in the private sector in order to attract international capital is also aiding this process. The main difficulty for international investors is finding the right local partners to guide them through the process, but interest is there. Emerging-market private credit fundraising by strategies in 2016-2018 (percent of total capital raised) ranked by popularity include special situations, mezzanine financing, direct lending and distressed debt,[2] but TIA Capital is of the view that all these strategies are relevant in different situations across different cycles in SSA.

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From an institutional asset manager perspective, many more investment programs are turning to the African opportunity following the general lean toward private debt after the global financial crisis. Chief investment officers who diversified into developed market private debt, then EM private debt, and who have been uncomfortable with frontier market private equity, are looking at frontier market private debt. The more advanced investment programs have been American.

Over the past decade, TIA Capital has been one of the few firms leading the commercialization of the non-bank lending markets in sub-Saharan Africa. During this period, TIA has utilized credit investments to provide essential growth capital for businesses and fund key infrastructure projects for the private sector and governments while providing consistent elevated returns to investors. TIA Capital is of the view that until domestic savings rates improve markedly, international credit capital will continue to play a significant role in Africa's growth story. For those who look at the continent as a strategic long-term investment play as opposed to a gambling chip, this asset class should continue to provide strong, elevated risk-adjusted returns for the foreseeable future.

AUTHORS

Fred Binka

Fred Binka is the managing partner of TIA Capital, an independent investment firm focused on sub-Saharan Africa (SSA). Established in 2009, TIA Capital serves as the SSA sub-advisor to a large institutional investor with over $20 billion in AUM. From its offices in Lagos, London and Nairobi, the TIA Capital team is responsible for sourcing, structuring, and advising on investments in corporate and sovereign credits in the region. Based in London, Fred leads TIA Capital's deal structuring and credit pricing capabilities as well as overseeing the strategic direction of the firm.

Macky O'Sullivan
mosullivan@kslaw.com
+971 4 377 9982

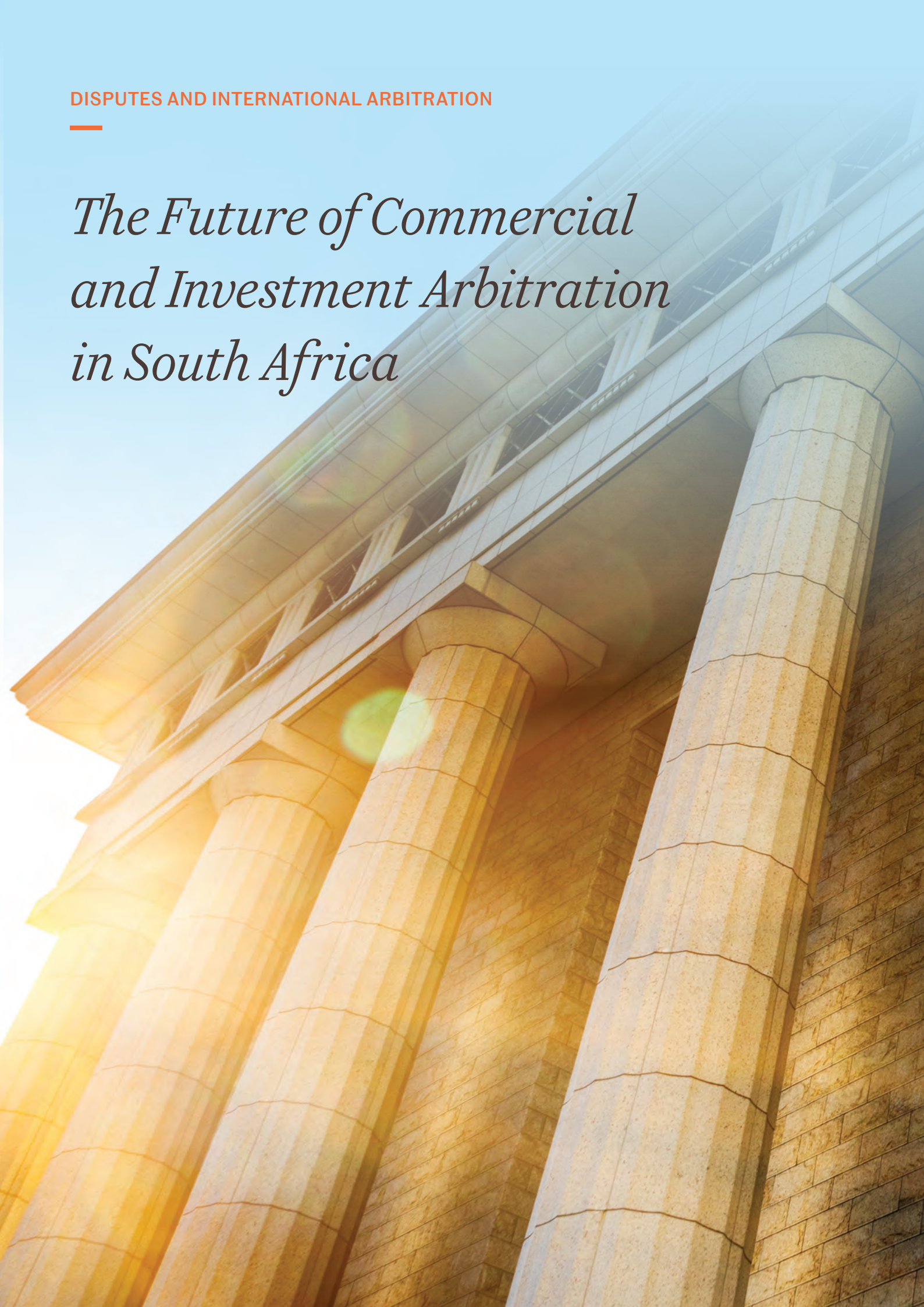
Macky O'Sullivan is a senior associate at King & Spalding. He has extensive experience advising asset managers, multilaterals, and sovereign wealth funds in connection with their fund formation, capital raising and co-investment activities across Africa. Macky has worked in the United Kingdom's House of Lords for Rt. Hon. Baroness Scotland of Asthal QC (secretary-general of the Commonwealth and former UK attorney general), where he advised on UK-to-Africa trade relations and foreign direct investment issues. He has been recognized by *Who's Who Legal* as a leading private funds lawyer.

[1] EMPEA 2018 Global Limited Partners Survey.

[2] EMPEA Industry Statistics. Data as of December 31, 2018.

DISPUTES AND INTERNATIONAL ARBITRATION

The Future of Commercial and Investment Arbitration in South Africa



South Africa modernized its International Arbitration Act (IAA) in late 2017 and showed potential to become the arbitral seat of choice for arbitrations involving African parties. Just a few months later, however, South Africa took a step in the opposite direction when its Protection of Investment Act 22 of 2015 came into effect and replaced all of South Africa's bilateral investment treaties (BITs) with watered-down protections for foreign investors and no right to investor-State arbitration. These mixed signals have serious implications for foreign investors looking to invest in South Africa, who should assess their investment risks against this background. On balance, foreign investors entering into commercial contracts with South African parties may consider South Africa the agreed seat for arbitration, while new investors investing in South Africa should channel their investments through countries that have BITs with South Africa that have not yet been terminated.

BACKGROUND: ARBITRATION IN SUB-SAHARAN AFRICA AND SOUTH AFRICA

In recent years, there has been an increase in the number of arbitrations involving sub-Saharan African parties, but no sub-Saharan African seat of arbitration has emerged for those disputes.

According to dispute resolution statistics for 2017 from the International Chamber of Commerce (ICC), the number of sub-Saharan African nationalities represented in 2017 filings rose from 109 in 2016 to 153 in 2017, and the number of cases involving South African parties doubled in 2017. However, parties seldom selected a sub-Saharan African country as the seat of arbitration in 2017: They chose Burkina Faso once, Cameroon once, South Africa thrice and Tanzania once.

South Africa is a good option for a much-needed seat for arbitration within Africa.

SOUTH AFRICA ADOPTS A NEW INTERNATIONAL ARBITRATION ACT

The new IAA, which entered into force on December 20, 2017, introduced three necessary improvements to the South African international arbitration system:

(1) the legal framework that applies to South African seated arbitrations are aligned with international standards;

(2) South Africa is now aligned with the New York Convention in terms of restrictive grounds to refuse recognition and enforcement; and

(3) certain obstacles to arbitration of disputes have been removed and party autonomy restored.

First, South Africa abrogated its outdated Arbitration Act No. 42 of 1965 as regards international arbitrations seated in South Africa and replaced it with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (as modified in 2006), with a few minor variations. The Arbitration Act No. 42 of 1965 remains applicable to domestic arbitrations. The UNCITRAL Model Law is widely regarded as encapsulating international norms and best practices for international arbitration,[1] and with it in place, international businesses can have more confidence in arbitrations seated in South Africa. The main welcome changes under the new IAA are the severability of the arbitration agreement, the statutory power of arbitral tribunals to determine their own jurisdiction (which did not exist under the 1965 act) and narrower grounds to set aside awards aligned on the UNCITRAL Model Law. The new IAA further expressly specifies that it applies to any commercial international arbitration to which a public body is a party.

> *From terminating BITs to promulgating legislation with diluted substantive and procedural protections of foreign investors, South Africa's actions have dramatically changed the legal climate and risk assessments for such investors.*

Second, the IAA replaced the Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977, which had been promulgated to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] The IAA gives effect to South Africa's obligations under the New York Convention, which it annexes as a Schedule 3. The grounds for South African courts to set aside an award rendered in South Africa are almost identical (Article 34). In short, the recognition and enforcement regime under the IAA allows for the setting aside or denial of recognition and the enforcement of an award only on limited grounds.

Third, the IAA removed an obstacle to arbitrating mining disputes by no longer requiring the permission of the minister of economic affairs to enforce foreign arbitral awards related to mining and production as was the case under the 1978 Protection of Businesses Act, which is no longer applicable. The IAA should encourage parties to arbitrate their mining disputes relating to South Africa, armed with the confidence that their foreign awards can be enforced in South Africa.

Turning to arbitral institutions, the Arbitration Foundation of Southern Africa (AFSA)[3] was founded in 1996. AFSA created AFSA International in 2017 to administer cross-border disputes except for China-Africa ones, which are to be heard by the China-Africa Joint Arbitration Centre (CAJAC) created in 2018. We are not aware of CAJAC having administered any arbitration yet. AFSA International itself is a young arbitral institution, although its international caseload has doubled since the enactment of the IAA.[4] Other alternatives involve having the ICC or other well-established arbitral institutions administer their cases seated in South Africa.

SOUTH AFRICA REJECTS INVESTMENT TREATY ARBITRATION

Just as South Africa made substantial progress on the commercial arbitration front, it took steps back on the investment treaty arbitration front. From terminating BITs to promulgating legislation with diluted substantive and procedural protections of foreign investors, South Africa's actions have dramatically changed the legal climate and risk assessments for such investors.

In 2007, investors from Italy and Luxembourg commenced an investment treaty arbitration against South Africa under the applicable BITs, claiming that policies inspired by South Africa's Black Economic Empowerment program—including requirements that foreign investors divest a portion of their equity stake to a local historically disadvantaged South African—amounted to expropriation of their investments in the granite sector.[5]

The arbitration generated intense debate about the interaction between South Africa's constitutional law and international investment law obligations and triggered South Africa's review of its BITs. The investors ultimately reached a settlement with South African mining regulators in which the investors were permitted to sell only 5 percent (rather than 26 percent) of their company to local historically disadvantaged South Africans.

In 2010, the South African government concluded the three-year review of its BITs and found that they *"open the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and are a direct challenge to constitutional and democratic policy-making."*[6] The South African Cabinet therefore decided in July 2010 that South Africa would:

(i) refrain from entering into new BITs unless there were compelling political or economic reasons to do so;

(ii) terminate its existing BITs; and

(iii) develop a new Foreign Investment Act.

To date, South Africa has terminated its BITs with Argentina, Austria, Belgium-Luxembourg Economic Union, Denmark, France, Germany, Netherlands, Spain, Switzerland and the UK by providing written notice of termination and/or by letting them expire. Further, South Africa has refrained from ratifying 27 BITs it had signed so that these never entered into force (e.g., with Angola, Canada, Ethiopia, Ghana and Tanzania). Only 13 South African BITs are in force as of today (with China, Cuba, Finland, Greece, Iran, Italy, Korea, Mauritius, Nigeria, Russia, Senegal, Sweden and Zimbabwe). South Africa has not entered into any new BITs since 2010.

Some of the terminated BITs contain so-called sunset clauses, meaning that the treaty continues to protect investments made prior to termination for a certain period of time following termination, such as 10 years (Denmark), 15 years (Netherlands) or 20 years (France, Germany, Switzerland and the UK). Some of the BITs (e.g., Mauritius) still in force can be terminated at any time by giving one year's written notice (and also subject to a sunset clause). Investors who channel their investments through Mauritius (as is common) will still be protected by a sunset clause of 20 years following termination of the Mauritius BIT. Other BITs have an ongoing period of validity—for example, in 2021 (Greece) and 2027 (Korea)—and could be terminated upon notice at least one year before the expiration of that period. The government intends to phase out all its BITs and replace them with the Protection of Investment Act 22 of 2015,[7] which came into force by publication of a notice in the *Government Gazette* on July 13, 2018. The Protection of Investment Act affords foreign investors less protection for their investments than they would typically receive under BITs. For example, investors are no longer guaranteed adequate compensation from expropriation under international law (and only have a right to property pursuant to Section 25 of the South Africa Constitution), and investors do not have the usual fair and equitable treatment protection (instead, they only have a right to administrative and procedural justice as provided for in the Constitution and applicable legislation). The Protection of Investment Act also provides a carve-out of the government's right to *"take measures that are necessary for the fulfilment of the Republic's obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the Republic."* Crucially, the Protection of Investment Act does not provide for investor-State arbitration. Instead, an investor-State dispute is to be mediated, and an investor may resort to South African courts for the resolution of such a dispute.

The government may consent to international arbitration, subject to the exhaustion of domestic remedies, but such arbitration is limited to State-to-State arbitration—i.e., arbitration between the home State and the host State. In sum, the Protection of Investment Act gives insufficient protection to investors investing in South Africa by limiting investors' substantive and procedural rights and is not a satisfactory substitute for investment treaty protection from the investor's perspective.

The same can be said of the only multilateral investment treaty to which South Africa is a party, the South African Development Community (SADC) Protocol on Finance and Investment.[8] The SADC was amended in 2016, with the amendment coming into force on August 24, 2017, to address concerns about investor-State arbitration. The amendment limits the application of the agreement to investors from SADC member States investing in another member State; preserves the right of host States to take regulatory measures consistent with social and economic policy objectives; and removes the right to investor-State arbitration, providing for settlement of such disputes through courts or tribunals of the host State.

With BITs terminated in favor of the Protection of Investment Act, foreign investors in South Africa are left exposed, and the investment protection options for foreign investors investing in South Africa are shrinking. Investors can still take advantage of treaty protection by structuring their investment—before a dispute is foreseeable—to fall within the scope of a South African BIT still in force and with a sunset clause (typically through the incorporation of a special-purpose vehicle in the counterpart country). Further, foreign investors should attempt to negotiate robust investment agreements with South Africa containing, for instance, stabilization clauses to safeguard their economic bargain in the face of changing legislation, as well as arbitration clauses. Conversely, South African investors can take advantage of treaty protection by structuring their investments through a home State that has a BIT with the host State. For instance, a South African investor investing in the UK (a top destination for South African foreign direct investment) could channel its investment through a special-purpose vehicle in Mauritius to benefit from the Mauritius-UK BIT.

In conclusion, foreign investors looking to invest in South Africa should consider structuring their investments to benefit from investment treaty protection despite South Africa's move away from investment treaties.

AUTHORS

Caline Mouawad
cmouawad@kslaw.com
+1 212 556 2172

Caline Mouawad is a partner in King & Spalding's New York office and represents clients in international commercial arbitrations and in investment treaty disputes with host governments. A partner in our International Arbitration practice, Caline counsels clients in an array of multijurisdictional disputes that span from Africa to Asia and from Europe to Latin America, and that concern such sectors as oil and gas, mining, consumer goods, and telecommunications.

Elodie Dulac
edulac@kslaw.com
+65 6303 6004

Elodie Dulac is a partner in King & Spalding's Singapore office, represents clients in international commercial and investment treaty arbitrations. She has particular expertise in the energy and mining sectors as well as in shareholders and joint venture disputes. In addition to her work as counsel, Elodie sits as an arbitrator. She is a co-founder and member of the Organising Committee of the Annual East Africa International Arbitration Conference. She has taught international arbitration and international investment law at the Universities of Addis Ababa, Mekelle and Bahir Dar in Ethiopia.

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1 See Resolution Adopted by the United Nations General Assembly, 112th Plenary Meeting, December 11, 1985 (referring to "the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems"), and Resolution Adopted by the United Nations General Assembly, 64th Plenary Session, December 4, 2006 ("[r]ecognizing the need for provisions in the Model Law to conform to current practices in international trade ... [b]elieving that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law").

2 Recognition and Enforcement of Foreign Arbitral Awards Act No. 40 of 1977, Article 4(1)(b)(v).

3 http://www.arbitration.co.za/pages/default.aspx.

4 https://arbitration.co.za/wp-content/uploads/2019/06/AFSA-Newsletter_JUNE-2019_1.pdf

5 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

6 Xavier Carim, deputy director general of the South African Department of Trade and Industry, at the WTO Public Forum in Geneva, September 25, 2012.

7 Available at https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000.

8 See https://www.sadc.int/opportunities/investment/.

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Our Africa practice spans general corporate, mergers and acquisitions, project development, public law, and dispute resolution matters in sectors such as real estate, hospitality, education, oil and gas, renewable energy, petrochemicals, and telecommunications. Our transactional expertise in Africa covers the full spectrum of activities necessary to move a project from conception through development and to final fruition. We also provide support on all concession and public law-related issues for project development–often key to the success of energy projects in Africa. Our lawyers work side by side with our clients over the entire project life cycle, always focusing on clients' business goals while helping them anticipate and mitigate their commercial, legal and political risks.

The strength of our sector expertise on the continent is exemplified by the fact that King & Spalding is one of the most active international law firms representing clients on energy matters in Africa and has established itself among the top projects and energy practices Africa-wide–a position we have achieved by providing our clients with a strong combination of African regional and local expertise and extensive commercial knowledge of the global energy industry. We are leading the way on many pioneering oil and gas projects in Africa, helping clients advance transformational projects that will have significant economic impacts on the countries in which they are located. In the previous year alone, the practice has advised on matters in Ghana, Algeria, Mauritania, Madagascar, Tunisia, Mozambique, Tanzania, South Sudan, Egypt, Guinea and Angola, spanning industry sub-sectors including oil and gas, LNG, mining, hydropower, and others. Among these are an innovative gas-to-power facility in Mauritania, one of the largest LNG export facilities proposed globally (in Mozambique); Guinea's largest-ever foreign direct investment; one of the first power projects financed under President Obama's "Powering Africa Initiative"; and a first-of-its-kind LNG project in Tanzania, among many others.

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DUBAI
Al Fattan Currency House
Tower 2, Level 24
DIFC
P.O. Box 506547
Dubai, UAE
Tel: +971 4 377 9900
Fax: +971 4 377 9955

LONDON
125 Old Broad Street
London EC2N 1AR
United Kingdom
Tel: +44 20 7551 7500
Fax: +44 20 7551 7575

NEW YORK
1185 Avenue of the Americas
34th Floor
New York, NY 10036-2601
Tel: +1 212 556 2100
Fax: +1 212 556 2222

PARIS
12 Cours Albert 1er
75008 Paris
France
Tel: +33 1 7300 3900
Fax: +33 1 7300 3959

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