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Gide Loyrette Nouel

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Legal tools to mitigate risks associated with African investments

Beijing / 北京

Gide Loyrette Nouel in the world

- Our law firm
 - ↳ Founded in Paris in 1920
 - ↳ 700 lawyers, 50 different nationalities
 - ↳ Consistently ranking No. 1 in France
 - ↳ 24 direct offices in 19 countries
- Our network
 - ↳ 3 offices in North Africa
Algiers, Casablanca and Tunis
 - ↳ 3 offices in the Middle East
Abu Dhabi, Dubai and Riyadh
 - ↳ 3 offices in China
Beijing, Shanghai and Hong Kong



GLN
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Gide Loyrette Nouel in China and Hong Kong

- GLN has provided a broad range of legal services to clients in China and Hong Kong for nearly thirty years
- 3 offices - Beijing, Shanghai, Hong Kong
- 70 lawyers qualified in English, Hong Kong, New York, French and PRC law
- Highly experienced in national and international finance and business law
- GLN acts for a full spectrum of clients and frequently advises government authorities for legislative and regulatory reforms
- The offices are increasingly involved in outbound transactions and the development of our clients' business interests in frontier markets including Africa



Our Africa Team

- Legal services dedicated to investment projects in Africa
 - ↳ Construction and infrastructures
 - ↳ Telecommunication
 - ↳ Water and Electricity
 - ↳ Mining, Oil and Gas

Mining, Oil & Gas

■ Legal services dedicated to Mining, Oil & Gas in Africa

↳ Merger & Acquisition

- Due diligence review
- Sale & Purchase

↳ Contract negotiation

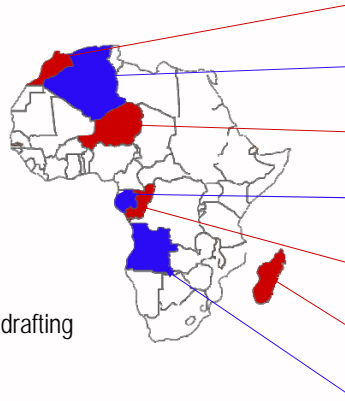
- Concession & PSC
- JV/JOA
- EPC/O&M/Offtake

↳ Governments

- Legislation review and drafting
- Comparative study

↳ Financing

- Project finance
- RBL



- MOROCCO
US\$5-10B JORF LARFAR
- ALGERIA
LICENSING ROUNDS
- NIGER
US\$5B AGADEM
- GABON
US\$6B BELINGA
- CONGO
US\$500M RBL
- MADAGASCAR
BEMOLANGA
- ANGOLA
BLOC 32

Mining, Oil & Gas

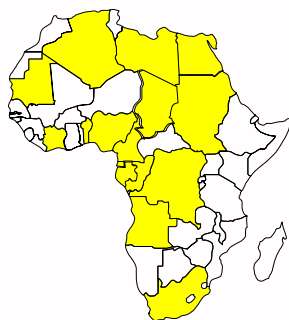
■ APPA - African Petroleum Producers Association

↳ Comparative analysis

- Legislation
- Regulation
- Model contracts

↳ Main standards, best practices & latest trends

- Balanced & attractive regime
- Model contract



CONTENTS



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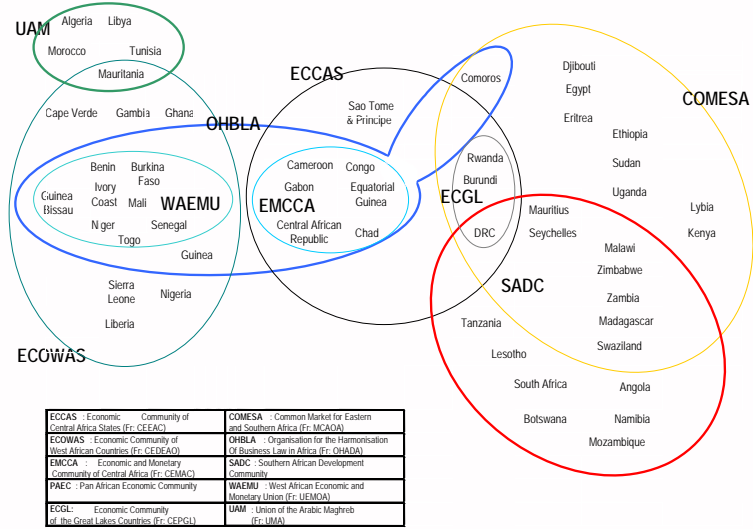
I – Legal environment in Africa



Legal environment in Africa: a patchwork of regional and domestic legislations

- Compilation of regional institutions
 - ↳ Regional institutions
 - North Africa: UMA
 - West Africa: CEDEAO, UEMOA, OHADA
 - Central Africa: CEEAC, CEMAC, CEPGL, OHADA
 - East Africa: SADC, COMESA
 - ↳ Harmonisation of business law
 - ↳ Establishment of common market
 - Customs duties
 - Exchange control
 - ↳ Coordination of national sector-based policy
 - ↳ Specific purpose institution
 - Intellectual property
 - Insurance
- Associated with domestic legislations

Main African institutions



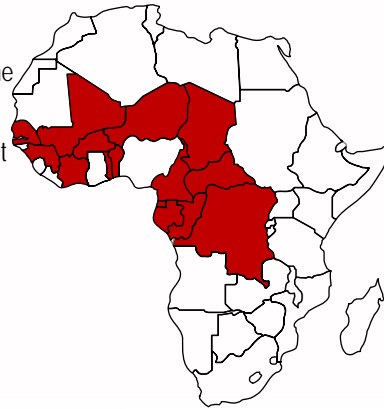
—Note: All these countries are also members of the CEPA (Pan African Economic Community) except Morocco, South Africa, Eritrea and Somalia

Main African institutions



OHADA: Organisation for the harmonisation of business law in Africa

- OHADA Treaty: Port-Louis – 17 October 1993
- 16 Member States
 - ↳ Benin, Burkina-Faso, Cameroon, Central Republic of Africa, Côte d'Ivoire, Congo, Comoros, Democratic Republic of Congo, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo
- Harmonisation purpose
 - ↳ Attract investments in the OHADA zone
 - ↳ Provide legal security to investors
 - ↳ Streamline business legal environment



OHADA: Uniform acts

- Supranational character of uniform acts
 - ↳ Directly applicable, without implementation
- 8 uniform acts
 - ↳ General commercial law
 - ↳ Commercial companies
 - ↳ Securities
 - ↳ Simplified recovery procedure
 - ↳ Collective proceedings for wiping off debt
 - ↳ Arbitration
 - ↳ Accounting system
 - ↳ Road transportation of goods

OHADA: Common court of justice and arbitration

- Consultative attributions
 - ↳ On request from national courts or member States
 - ↳ Interpretation of the Treaty or Uniform Acts
 - ↳ Advisory opinion
- Jurisdictional attributions
 - ↳ Supreme court attribution
 - Matters which involve uniform acts
 - Decision without appeal
 - ↳ Arbitration attributions
 - International arbitration institution
 - Arbitration rule: 11 March 1999
 - Grants *exequatur* to CCJA arbitral award

Custom and exchange control regulations

- UEMOA: West African Economic and Monetary Union
 - ↳ 8 member States
 - Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal, Togo
 - ↳ Purpose
 - Strengthen competitiveness of the member States in an open and competitive market
 - Create a common market between member States based on free circulation of persons, goods, services, funds
 - ↳ Harmonisation of custom and exchange control regulations
 - ↳ Coordination of national sector-based policy, including mining, telecommunication, energy and infrastructures
- CEMAC: Economic and Monetary Community of Central Africa
 - ↳ 6 member States
 - Cameroon, Chad, Congo, Equatorial Guinea, Gabon, Republic of Central Africa
 - ↳ Harmonisation of custom and exchange control regulations
 - ↳ Harmonisation of national sector-based policy, including pharmacy, agriculture, airport and education

Regional institutions with specific purpose

- African Intellectual Property Organization (AIPO)
 - ↳ 16 member States
 - ↳ Mission
 - ensuring the protection and the publication of patent rights titles;
 - making the legal framework attractive to private investment;
 - encouraging creativity and transfer of technology

- Inter-African Insurance Market Conference (CIMA)
 - ↳ 14 member States
 - ↳ Purpose
 - Develop insurance and re-insurance agencies
 - Encourage investments
 - Harmonisation and unification of insurance laws

A challenge in the African context : PRACTICE

- Enforcement of laws and regulations
 - ↳ Limited enforcement in practice, or against the laws and regulations
 - ↳ Practice may vary depending on the country, on the administration, or a person
 - ↳ Practice may change at any time

- Challenge: assess and manage the gap
 - ↳ Important risk in M&A transactions
 - ↳ Significant concerns in financing operations
 - ↳ Recurrent issues in operations management

Recent examples

- Chad
 - ↳ Mining permits frequently not published in Official Gazette
 - ↳ Significant issue for the enforceability of the mining permit
 - ↳ Risk management decision : acquisition was postponed

- Gabon
 - ↳ Mining permit issued in the absence of :
 - Feasibility Study
 - Environmental Impact Assessment
 - Mining Agreement
 - ↳ Significant issue for the validity of the mining permit
 - ↳ Sponsors require a legal opinion : Initial Public Offering was postponed

Another challenge in the African context : INSTABILITY

- Africa is particularly subject to political risks
 - ↳ *Coup d'Etat*
 - ↳ Change of government
 - ↳ Riots, civil unrest

- Challenges
 - ↳ Stability of investment
 - ↳ Security
 - ↳ Financing

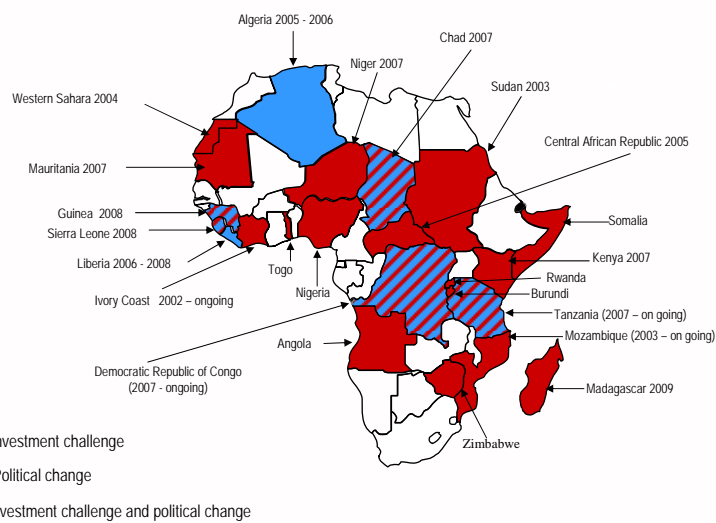
Another challenge in the African context : INSTABILITY

- Natural resources
 - ↳ represent an important part of gross domestic product
 - ↳ are subject to substantial price variation

- Challenge : Resources nationalism
 - ↳ Confiscation, expropriation, nationalisation
 - ↳ Change in legislation
 - ↳ Unilateral modification of the contract
 - ↳ Forced contract renegotiation
 - ↳ Breach of contract

- Resources nationalism
 - ↳ Mainly depends on a general economical balance

Political issues over the last decade



Recent examples

- Liberia – Mittal Steel convention
 - ↳ Unfair contractual provisions identified
 - ↳ Renegotiation
 - Indexation of iron selling price on international market price
 - Limitation of tax exemptions

- Guinea
 - ↳ Setting-up in June 2007 of CIRCAM, i.e. mining contracts renegotiation committee

- Tanzania
 - ↳ Setting-up in 2007 of a public/private committee to consider mining conventions revision

Recent examples

- Sierra Leone
 - ↳ Announced in March 2008 that the government will review mining conventions

- Democratic Republic of Congo
 - ↳ Setting up of a revision commission
 - ↳ Review of 62 mining conventions
 - ↳ Identifying unfair contractual provisions
 - Inequitable fiscal terms
 - No valuation of assets prior to the contract
 - Lack of mechanism to enforce the companies obligations
 - Insufficient participation of the State in the project
 - ↳ Conclusions of the commission
 - Cancellation of 22 conventions
 - Renegotiation of 40 conventions

Recent examples

- Algeria – hydrocarbons contracts
 - ↳ New tax rules created by 2005 Hydrocarbons law
 - ↳ Windfall profit tax applicable when oil price exceeds 30 US\$ per barrel
 - ↳ Applicable to all association contracts concluded under the 1986 Hydrocarbons law

- Chad – consortium Exxon Mobil, Chevron Texaco, Petronas
 - ↳ New law enacted in 2007
 - ↳ Option for existing convention
 - Comply with the provision of the 2007 Law
 - Renegotiate with the national negotiation commission within 1 year

II - Domestic Mitigation Tools



Domestic Mitigation Issues

- Due diligence
- General economical balance

Initial due diligence review

- Purpose
 - ↳ Assess
 - Scope of mining rights
 - Legal exposure and responsibility
 - ↳ Potentially
 - Reconsider the decision of investment
 - Restructure the investment in order to mitigate the risks
 - Readjust the purchase price
- Scope
 - ↳ As comprehensive as possible
 - Success will depend on balance review / risks
 - ↳ Legal
 - Mining rights and corporate matters
 - Tax and accounting
 - ↳ Political
 - Country information: legal and political system, safety situation, main business figures

Domestic legislations to consider

- Common law
 - ↳ Tax and custom regime
 - ↳ Environmental law
 - ↳ Labour law
 - ↳ Competition law
 - ↳ Contract law
 - ↳ Transportation law
 - ↳ Accounting law
- Specific activities law
 - ↳ Hydrocarbons law
 - ↳ Mining law
 - ↳ Electricity / Water law
- Investment law

Mining rights

- Check availability of the rights granted by the host government
- Respect of the applicable procedure
 - ↳ Application conditions
 - Legal status of the applicant
 - Feasibility study
 - Environmental impact study
 - Regulated procedure (competitive bidding process)
- Validity and enforceability of the legal instrument which grants the right
 - ↳ Capacity of the signatory (government / NOC)
 - ↳ Formalities (approval, publication)

Corporate matters

- Context
 - ↳ Acquisition of all or part of a company holding a going concern or mining/hydrocarbons rights
- Check the incorporation and good standing of the company
 - ↳ Request an extract of the registry of companies from the Administration
 - ↳ Check contributions from shareholders
- Check the appointment and renewal of
 - ↳ Board of directors and officers
 - ↳ Other corporate management bodies

Corporate matters

- Check the annual approval and filing of the financial statements
- Check share transfers
 - ↳ Prior approval
 - ↳ Pre-emption rights
 - ↳ Regulatory conditions
- Conduct a due diligence with respect to
 - ↳ Labour and social law issues
 - ↳ Environmental and land issues
 - ↳ General tax and accounting issues
- Confirm the absence of liquidation proceedings and general good standing

Due diligence review

- Periodic update of the initial due diligence review
 - ↳ Check
 - Scope of mining rights
 - Legal exposure and responsibility
 - ↳ Potentially
 - Remedy legal issues as necessary
 - Readjust management of legal issues and practice
 - Reduce and/or mitigate legal exposure
 - Prevent future legal issues and/or disputes
- Scope
 - ↳ As comprehensive as possible
 - Success will depend on balance review / risks

General economical balance

- Investments contracts require stability
 - ↳ Long-term investment
 - ↳ Capital intensive
 - ↳ Strategic natural resources or infrastructure
 - Mining conventions and oil & gas contracts
 - Public services concession: electricity, water, airport, port
- Stability requires general economical balance
 - ↳ To ensure win-win situation
 - ↳ To mitigate risks of frustration
- General economical balance is based on
 - ↳ Stability provisions

Insufficiency of general stability mechanisms

- *Force majeure*
 - ↳ External events which make performance of the contract technically impossible
 - ↳ Exempt the parties from their contractual liability

- Hardship clause
 - ↳ External unforeseeable events which affect the structure of the contract
 - ↳ Performance of the contract becomes more expensive for one party
 - ↳ Renegotiation/indemnification mechanism

Classic stability provisions

- Purpose:
 - ↳ Freeze the economic, legal, financial and fiscal conditions at the time when the contract was concluded (*stabilisation stricto sensu*)
 - ↳ Neutralise the host State's power to unilaterally change the terms of the contract (inviolability mechanism)
 - ↳ Protect an investment from the application of new laws and regulations
 - ↳ Protect against expropriation

- Scope:
 - ↳ Legal, financial and fiscal regime
 - ↳ Exceptions: environmental, safety and health matters

Classic stability provisions have proved unreliable

- Sovereignty
 - ↳ State can revise contracts unilaterally
- Prevent flexibility
 - ↳ Adapting the contract to changes is inevitable
- May not be enforceable
 - ↳ Absent of specific performance

Recent trends on stability provisions

- Evolution of stability provisions
 - ↳ Limitation of the scope of application
 - Mainly economic, financial and tax
 - No more general comprehensive legal stability
 - ↳ Focus on
 - Balancing of economic interests between the parties
 - Results of a possible unilateral revision
- Adjustment to ensure that the original terms will survive any change
- Mechanism to manage the impacts of new legislation on the contract

Recent trends on stability provisions

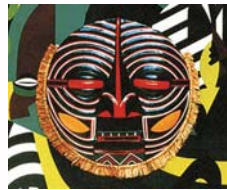
- Provisions for contract rebalancing
 - ↳ Negotiation procedure and requirements
 - ↳ Time limit

- Mechanism to prevent and manage failure to agree upon the changes
 - ↳ Compensation
 - ↳ Arbitration

General economical balance

- Periodic review general economical balance
 - ↳ To ensure and maintain the balance
 - ↳ To adapt the balance to changes
 - ↳ To prevent instability

III – International Mitigation Tools



International Mitigations Tools

- Arbitration
- Bilateral Investment Treaties
- Insurance

Necessity to export the forum in case of disputes

- Submission to arbitration constitutes an essential tool in the stabilisation mechanism
 - ↳ To escape the application of the legal system of the host State
 - ↳ To neutralise the jurisdictional power of the host State

- Arbitration clause
 - ↳ ICSID
 - ↳ ICC
 - ↳ CCJA (Common court of justice and arbitration)
 - ↳ *Ad hoc*

Bilateral investment treaties (BIT)

- Limited scope
 - ↳ protection against expropriation
 - ↳ protection against discrimination (fair and equitable treatment)
 - ↳ freely convertible currencies for transfers

- Limited number of BIT concluded between China and African countries
 - ↳ 12 out of 54 African countries

- Limited protection for investor
 - ↳ International liability of the host State towards the contracting State

International insurance

- Multilateral Investments Guarantee Agency (MIGA)
 - ↳ Purpose:
 - Insurance against political risks
 - ↳ Eligibility
 - Investments originating in any member country and destined to any member developing country
 - China - member since 1991
 - 44 African countries are members
 - ↳ Disadvantages
 - Expensive
 - Coverage limited to US\$ 210 Million
- World bank guarantee program
 - ↳ International Bank for Reconstruction and Development (IBRD)

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