



# EMEA

## briefings

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## Managing Risk: An African Business Reality

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For many multinationals, Africa is the last continent to be discovered but where an increasing number are now assessing the opportunities presented by its 54 countries. And what most are finding is that the continent does offer considerable potential, but you have to choose your markets — national economies are evolving at different rates, and demand for products and a willingness to embrace international investment can differ by border. Africa is not homogenous. It is a continent of disparate needs, opportunities and challenges.

To address this from a business-legal perspective, ACC recently ran a series of seminars this fall in New York, Paris and London, in association with Lex Mundi, drawing on the experiences of businesses already in Africa. The conferences highlighted legal challenges, and addressed how legal departments can manage new needs and mitigate risk as companies expand across the continent.

### The business reality

For businesses considering investing in Africa, the favourable statistics are clear. From 2000–2010, Africa was the fastest-growing region in the world; the average economic growth rate for sub-Saharan countries was more than 5 percent, with five countries considered among the top 20 fastest-growing economies in the world and experiencing closer to 10-percent growth.

A 2012 Goldman Sachs report, *Africa's Turn*, highlights opportunities for consumer businesses. The continent's improving political and economic stability is driving increased urbanization and an expanding middle class — estimated to exceed 100 million people by 2030.

Yet, despite the bigger picture, the day-to-day business reality is more subtle, insist general counsel. And Africa can be divided in many ways, not just by its internal borders. From a legal perspective, there is a mix of

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civil and common law between countries (even within countries), while colonial pasts still strongly influence business, administrative and regulatory practices. There may also be a strong local customary law influence, and increasingly, a growing influence played by Regional Economic Communities (RECs).

“Increased intra-African trade and a desire to attract more international investment are helping to blur many of Africa’s most severe legal distinctions. Nonetheless, even where common practices exist, there may be significant differences in the practice and implementation



Jo-Anne Hennigan (left), general counsel — Africa, Middle East and Eastern Europe, Michelin, networks at Paris event.

of rules between countries,” says Rémy Fekete, an Africa-focused partner with Paris-based law firm Gide.

Governments know, however, that international investors seek legal certainty as much as political and economic stability. Angola and Mozambique have noticeably based their new projects, finance and tax systems on Portuguese and Brazilian models; much East and Southern African commercial legislation is derived from the English common law system; and the French civil code is predominant in the Maghreb, Western and Central African countries. Last year’s accession of the Democratic Republic of the Congo to OHADA (*L’Organisation pour l’Harmonisation en Afrique du Droit des Affaires*) brought the number of African states that now utilise it as their default framework to 17.

## Risk mitigation

In the context of variable legal and business influences, a major preoccupation of legal departments when assessing their companies’ African activities and ambitions is inevitably mitigating the business risks.

“Our emphasis as in-house counsel is to manage risks. Correctly identifying and monitoring these in Africa can be more challenging than elsewhere,” says Tobias Trautner, general counsel of Louis Berger International, an engineering consulting group with over 40 years of experience managing projects for public and private clients in Africa.

He continued, “Understanding opportunities and risks in Africa also means for the in-house lawyer to regularly visit those places where your (internal) client has operations, and to listen very closely to those who are on the ground for longer periods. Local counsel also play an important role, particularly if you don’t have your own legal teams on the ground. If they’re good, they will have the legal, commercial and practical know-how that, as a lawyer sitting in the US or Europe, you simply cannot have to that degree.”

Other panelists in Paris included Marco Bollini, executive vice president and head of International Business Legal Area of Italian oil and gas major Eni; Yinka Edu, partner at Nigeria’s Udo doma & Belo-Osagie; Peter Koep at Namibia’s Koep & Partners; Angola-focused Irina Neves Ferreira and Mozambique-based Paula Duarte Rocha, both members of MLGTS Legal Circle. All agreed that expertise is not built overnight, and this applies to outside counsel as much as the in-house legal team. Some companies have worked with the same law firms for 20 years.

Genuine local expertise is obvious when you find it, as are firms that tell a good story yet have little on-the-ground expertise, suggest some general counsel. But companies in the infrastructure, energy, oil and gas sectors may meet additional barriers to finding dedicated local expertise. The expertise may simply not exist, and company legal departments

may therefore have to work with governments to develop their own legal infrastructure.

“In many cases, there is no local expertise, because there is no relevant legislation. We are now in countries which only a few years ago didn’t even know they had hydrocarbons,” says one oil company general counsel.

Some countries are thus more prepared for certain types of foreign investment than others, which itself raises clear risk issues. And while relatively few companies may need to help build their own regulatory framework, the day-to-day needs of most may still present significant commercial challenges.

For Jo-Anne Hennigan, general counsel (Africa, Middle East and Eastern Europe) at Michelin, the continent’s economic progression is clearly bringing new commercial opportunities — there are more vehicles on Africa’s roads than ever before — but also recurring legal concerns. “Fundamentally, we are a consumer goods company, and Africa is an expanding market. The issues we face are relatively simple but they often have a very local flavour, so we too are often very reliant on access to very specific expertise,” she says.

Michelin does not manufacture tyres in Africa but it does operate its own distribution entities in Nigeria and South Africa. Elsewhere, it has chosen to develop a network of distributors, the management of which often requires a certain degree of education to get across key commercial messages.

“We have a very strict system that defines the approach to selling our products and which we are very keen for our local partners to follow. This requires spending time with them, explaining why we adopt such an approach and why it works, but it is time well spent. It helps to clarify expectations and avoid misunderstandings and is ultimately in the local partner’s best interests. They invariably sell more products,” says Hennigan.

### Staying on top

Given the disparate nature of African rule-making, a key challenge for the corporate legal

department can also be to stay on top of legal and business developments. The corporate legal team may know their own business goals and processes intimately, but the difficulty is in applying them locally.

“It’s important not to convey a false sense of security to your internal clients in terms of how efficiently a country’s legal system works. There is no reliable, consistent pattern of how litigation or arbitration matters are being resolved. Predicting the outcomes of these types of disputes is never an exact science, but remains particularly difficult in many African jurisdic-



tions. In that sense, a nicely crafted arbitration clause — while always useful — will only get you so far when actually litigating, say, a payment claim. Your time is probably better spent negotiating more favourable payment terms,” says Trautner at Louis Berger International.

The upheavals of the Arab Spring have also thrown up some major challenges, he says. Governments that agreed to a contract before a revolution may no longer feel bound by it, or there may simply be nobody in the administration willing to make a decision on whether or not to proceed with a project or a payment demand for services provided earlier.

“There is tremendous opportunity in Africa and it’s evident that many organizations are looking for the kind of growth there that does not exist elsewhere. Don’t reign in that enthusiasm of your internal clients, but do

Panel at Paris event featuring (left to right) Peter Koep, Yinka Edu and Paula Duarte Rocha.

make all constituents aware that large upfront investments are still more at risk in Africa than elsewhere,” adds Trautner.

### Adapting practices

The practical approach to managing companies’ needs in Africa brings extra importance to having direct access to on-the-ground expertise. The colonial legacy of some countries may mean that the decision-making structures may seem familiar, from an outside perspective, but the regulatory processes can be anything but straightforward. Where apparently less formal decision-making structures do exist, it may offer

the scope to speed up processes but often also requires that company lawyers have to ensure that the officials with whom they are talking actually have the authority to give the approvals sought.

“Issues often particularly recur in relation to land rights. In many sub-Saharan countries, all land is owned by the State so the best title available to an international investor is

a lease. Companies may have to be willing to adapt to local business practices, albeit within the parameters of their own orange and red behavioural lines — particularly when addressing issues such as corruption and bribery,” says Fekete at Gide.

Companies also have to focus on the core commercial goals. “In most new and emerging African markets, our biggest concerns are not issues like counterfeiting, but rather contractual, agency and distribution issues. Our challenge is often to decide what contractual terms need to be on paper, and how we might enforce them, and what other means of influence we can exert — which may come down to a very tight management of credit lines or ensuring sufficient coverage for trade debts,” says Hennigan.

When it comes to enforcing contracts, Africa also presents issues. It may be the cost

of litigation and arbitration that most troubles companies in Europe and the United States, but across Africa, it is often a lack of satisfactory venues and an inability to enforce awards; the experience being that those awards rendered on the continent — such as through Mauritius, the OHADA Common Court of Justice and Arbitration in Ivory Coast, or via Dubai — stand the best chance of enforcement.

But the way investments are structured may also offer additional legal comfort. One company executive stated that, until relatively recently, his organisation gave relative little thought to how it entered a market, and the only protections it had were often those outlined in the service contracts agreed. The issue is particularly acute for those in the infrastructure and energy fields, note others, where operators invariably contract with a state entity and which will always insist on the use of local law. In order to avoid protracted litigation in the national courts, a potential solution for many has been to make a much deeper analysis of the benefits of operating through third countries, particularly where the Bilateral Investment Treaties (BITs) are available.

However, such protections are inevitably the “nuclear option” — when an operation is nationalised or you lose your licence. Litigation with the state invariably reduces the chances of winning any future business, general counsel acknowledge. But a judicial or arbitral decision rarely means the end of the dispute resolution process anyway, so it can also prove useful to explore the potential to enforce awards in another territory where assets are held. And while BITs may provide useful leverage for very serious disagreements, they offer no protection for your day-to-day operation — when it comes to local permit, employment or land issues, for example, you have to find other guarantees, and in some markets, this can be partially solved by operating through the right local partner.

**Across Africa there remains a relatively shallow pool of commercial experts, analysts and external counsel on which to rely, say many.**

## The right local partners

Operating alongside a local partner can prove beneficial even when it is not a mandatory means of doing business, say some. Countries such as Angola, Algeria or Zimbabwe, for example, may have specific stipulations regarding the need for local partners, depending on the industry sector or in relation to the ownership of land rights, but for the most part, each country takes its own view.

“We obviously need and want to know who we are dealing with and whether they pose a threat to our own reputation. All our business intermediaries are therefore vetted through a rigorous process, particularly in countries that are perceived as high-risk from a compliance standpoint,” says Trautner

Internal operational separations between the legal and compliance and investigatory function may be increasingly common within multinationals, but some general counsel still prefer to utilise external specialists alongside their own forensic experts.

“At Michelin, we do not have a dedicated compliance team, so for certain critical reputation issues, we have used a combination of approaches, including combining our in-house expertise with a handful of externals. But it is something of a cottage industry. You do tend to get a very thorough report but which may not always sufficiently address the issues you want determined,” says Hennigan.

Across Africa, there remains a relatively shallow pool of commercial experts, analysts and external counsel on which to rely, say many. For all the current business focus on Africa, it remains particularly difficult to find a law firm that is consistently good across a number of jurisdictions, given the regional, local and historical influences that can play on each market.

“One of biggest difficulties is explaining to our management that we cannot have three firms bid on each deal. The market is not deep enough. It is often difficult enough to find the right expertise that you need that spans more than a few countries,” adds Hennigan.

All agree, however, that international law firms, or regional teams within legal departments, can play a vital role in coordinating advice, to differentiate between the local and non-local issues and to assign responsibility accordingly, including where the professional liability should best lie. But local issues will always need the right local counsel, which inevitably requires an investment of time to find them.



And like Africa’s business markets, its legal markets have their own idiosyncrasies. A few are well served with a number of large, capable and responsive law firms. In most, however, the choice may come down to a handful of individual lawyers genuinely capable of handling the commercial needs of international clients. The challenges that face multinationals’ legal departments in Africa often mirror those of the company itself — opportunities and expertise exists, but you often have to choose your markets carefully. **EMEA**

Rémy Fekete, Gide; Tobias Trautner, Louis Berger International; Marco Bollini, Eni; and Jo-Anne Hennigan, Michelin, present at the Paris event.