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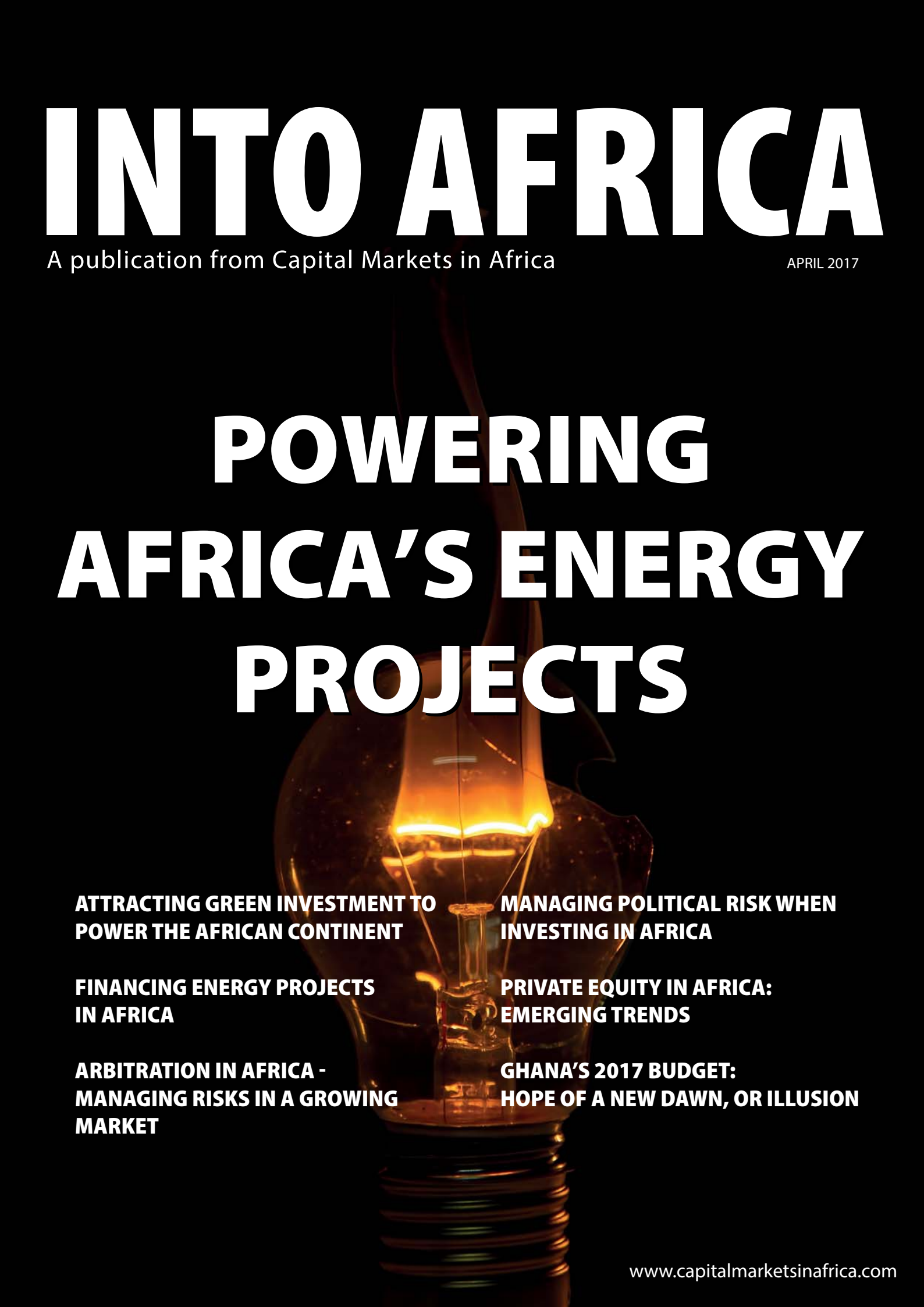

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ARBITRATION IN AFRICA – MANAGING RISKS IN A GROWING MARKET

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Introduction – Navigating Africa

Today, many areas of African economy are still growing despite considerable drawbacks due to the oil crisis. Besides the industries related to the continent's natural resources, especially infrastructure projects, banking and telecommunications are on the rise. In these areas and many others, Africa has a large untapped market with relatively low penetration and great potential for investment and business.

Yet such opportunities also involve risks. So it follows that investors and businesses are increasingly looking for legal certainty to protect their interests. Most investors and businesses are still reluctant to rely on local legislation and courts. Arbitration is, thus, the most attractive option:

What is Arbitration?

Arbitration is an alternative to state court litigation with the goal of obtaining a binding and enforceable decision rendered by legal and industry experts. The end product of arbitration proceedings is an "award". As a general rule, awards are more difficult to appeal and easier to enforce than domestic judgments, in particular abroad, based on international treaties, such as the New York Convention on the Recognition and Enforcement of International Arbitral Awards (NYC) or the Riyadh Arab Agreement for Judicial Cooperation (RAAJC). Arbitration can be split into two main categories: commercial and investment arbitration.

In commercial arbitration, which is by far the more relevant category for the resolution of disputes relating to business activities, the parties agree under a contract to submit their disputes to arbitration. Most commercial arbitrations are administered by arbitration institutions, such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA). Those institutions also provide the parties with procedural rules. Commercial arbitration permits parties to opt-out from state jurisdictions and mitigate legal risks (e.g. incomplete or non-existent local law, unspecialized state courts and political pressure on judges). Another advantage is that parties can select legal and industry experts who are the most qualified to resolve their disputes as their arbitrators.

Investment arbitration is a relatively rare, but powerful creature when it comes to protecting investors against political risks. Investment arbitration permits a foreign investor to seek remedies against a state for breach of protections granted under a bilateral or multilateral treaty. Such treaties are concluded between states, whereby each state undertakes to ensure that investments made by investors of another state party to the treaty are protected against unreasonable or arbitrary state action. An investor seeking to pursue such remedy must show which specific protection guaranteed by the treaty has been breached due to state action. Investment arbitration is often relevant for unlawful state interference with large-scale projects, such as infrastructure, energy, mining, etc. An example would be the expropriation of a telecommunications provider. Just as commercial arbitration, investment arbitration permits investors to bring their disputes with sovereigns to tribunals sitting outside the affected country and to obtain a binding and enforceable decision against the state. In addition to being enforceable inside and outside the affected state, many states confronted with adverse awards choose to pay voluntarily.

Africa accounts for about 836 Bilateral Investment Treaties (BITs). Virtually all Africa-related BITs have provisions for dispute settlement, and in the vast majority they refer to investment arbitration. 45 African countries have ratified the Convention of the International Centre for Settlement of Investment Disputes (ICSID). As of December 2016, 15% of ICSID's case load of registered cases was against sub-Saharan African countries and 10% against Middle East and North African countries. ICSID recently signed a collaboration agreement with the Lagos Regional Centre for International Arbitration. By this collaboration, ICSID arbitrations can now take place in Lagos, Nigeria.

Besides these BITs, there are also regional investment agreements like the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) Protocol on Finance and Investment, which contain provisions for investment arbitration. Other investment treaties, such as the Economic Partnership Agreement between the European Union and its Member States and the SADC States (Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland) provide only for a state to state arbitration dispute resolution system.

Concerns raised by civil society groups about transparency of investor-state arbitration proceedings and that poor and heavily indebted states are significantly disadvantaged in disputes against well-funded investors have led to questions about the balance of power in these disputes. Some countries are renegotiating and even terminating BITs to avoid investor-state arbitration. South Africa, for instance, has recently replaced its BIT regime with a new domestic law that does not permit the use of investment arbitration. The SADC Member States have also been considering changing their investment protection in the SADC Protocol on Finance and Investments by replacing investment arbitration with state to state dispute resolution.

Despite this skepticism, there has been a steady increase in investments in these areas, and an increase in the

number of bilateral investment treaties signed by African states, as well as an increasing number of investment codes that incorporate protections for investors. Investment arbitration cases involving African state respondents are significantly on the rise as well. COMESA for example plans to update its arbitration rules to enhance investment protection.

Where the disputes go

The growth of arbitration across Africa is supported by legal reforms across the continent. Several countries have modernized their arbitration laws, and 36 out of 54 African states have ratified the NYC.

Africa-related commercial disputes have traditionally been arbitrated in Paris or London under the ICC or LCIA rules. Africa-related disputes accounted for 5.5% of the ICC's case load in 2015. It is also noteworthy that Sub-Saharan Africa accounted for the highest percentage of state and state owned entities who were parties to ICC-arbitrations. Regarding the LCIA, Africa accounted for 6.4% in 2015, with disputes from Nigeria alone accounting for 2.1%. The LCIA has also entered into a joint venture with Mauritius in 2012 to create the LCIA – Mauritian International Arbitration Centre (LCIA-MIAC). The LCIA-MIAC has its own set of rules based on the LCIA Rules and it is conceived for parties who are familiar with arbitrating through the LCIA but want to resolve their disputes in Africa. It is important to note that the strong ties to Paris and London are by no means conceptually required, but may result simply from language conveniences. Parties are well advised to consider whether it is possible to obtain the same level of protection outside the traditional hubs.

Meanwhile, a number of home-grown African arbitration centers have also emerged. Arbitration lawyers and arbitrators are progressively calling for Africa-related disputes to be heard in Africa rather than 'exported' to international centers. The Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Lagos Regional Centre for International Commercial Arbitration are such Africa-grown institutions with an international reach. In Francophone Africa, OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires – the Organization for the Harmonization of Business Law in Africa) is a supranational organization aimed at harmonizing commercial law among its 17 member states and increasing investment in the West and Central African economic zone. OHADA also provides for an arbitration institution, the Cour Commune de Justice et d'Arbitrage (CCJA). Arbitral awards rendered under OHADA are final, binding and enforceable among its member states. This is particularly useful because five OHADA member states are not signatories to the NYC (Congo, Guinea-Bissau, Equatorial Guinea, Tchad and Togo).

Another popular alternative for international investors in Africa is the Dubai International Finance Centre (DIFC). One of the key attractions of Dubai for parties contracting in Africa is the availability of enforcement under the RAAJC. Eight out of the 20 RAAJC member states are African countries, and three among them are not members of the NYC (Sudan, Somalia and Libya).

Although there may be reasons to choose a local African arbitral institution, established arbitral institutions have a proven track record in efficiently administering large arbitrations: They possess the necessary infrastructural facilities required for the smooth conduct of proceedings. Moreover these international institutions have professionals with several years of experience in administering large and complicated cross-border disputes. Thus, parties are encouraged to assess carefully what institutions are best suited to handle a future dispute.

Conclusion

If a party wishes to arbitrate its disputes in Africa, it must choose a seat where the judiciary is known to be proactive and trained in the practice and procedure of arbitration, so that they support the arbitration process and enforce arbitration agreements and awards. It is also highly recommendable to arbitrate in a country with modern arbitration legislation. Security, political stability and corruption indices are other important factors that must be considered. It is equally important to choose an institution which has both adequate infrastructural facilities and technology and well trained professionals who are able to administer the dispute efficiently. Finally, the party should consider using legal counsels with experience with Africa-related arbitrations who know how to manage the dispute.

Contributors' Profile

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Burianski is the head of White & Case's German arbitration practice. He represents German and multinational clients in international arbitration proceedings. Markus has broad experience in dealing with large and complex cross-border cases. His clients come primarily from the automotive, electronics, energy (including renewable energy) and financial services sectors. Prior to joining White & Case, Markus worked in Brussels for a renowned US law firm, with a particular focus on litigation relating to competition and international trade law before the courts of the European Union. Markus is an active member of White & Case's award-winning International Arbitration Practice, which was ranked Number One International Arbitration Practice globally in 2016 by Global Arbitration Review and is consistently recognized as being at the top of its field worldwide.

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Federico Parise Kuhnle is a member of White & Case's German arbitration practice. He specializes in disputes over post M&A-issues, supply and service agreements and contractual liability with particular focus on the Automotive, Energy and Healthcare industries. Federico has studied and worked in Germany, France, Italy and Sweden and is fluent in four languages, allowing him to be at ease working in a multijurisdictional context.

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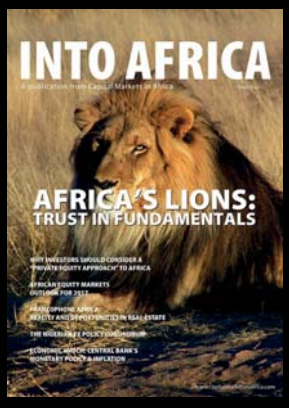

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