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Corporate governance, common markets and investor confidence

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Kenya has over time proved to be the preferred investment point in the East African region due to its strategic location and free market economy which places no significant restriction on the movement of foreign currency in and out of the market.

This guide will focus on changes to corporate finance legislation and their implications and potential challenges. The most important changes would include The Proposed Constitution of Kenya (the Draft), The Capital Markets Act (CMA) and other Commercial Bills pending before parliament.

There has also been a flurry of legislative activity in the East African region the pinnacle of which has been the recent ratification of the East Africa Common Market Protocol which heralded the unification of the markets of Kenya, Uganda, Tanzania, Burundi and Rwanda.

The proposed constitution of Kenya

A referendum of the Draft is being held on August 4 2010, and if passed it could become law by the end of August. It will be interesting to see what impact the Draft will have on the economic climate in this country given that there are some contentious and sensitive issues.

In particular the Draft contains clauses which limit the period which a foreigner may hold land to 99 years. This includes any company which has any element of foreign shareholding. It has already been pointed out to the Government that limiting the interest period to 99 years will not be conducive to foreign investors looking to invest in Kenya.

The Draft also provides that any interest in land that is currently held by foreigners which is in excess of 99 years will have the term reduced to 99 years and freehold land will be converted to 99 years leasehold interest. There is no provision for compensation to foreigners in the Draft.

The capital markets

The Capital Markets Authority (CMA), the country's capital market regulatory body, has drafted several regulations geared at safeguarding the interests of the investor and reducing the stranglehold that the stock brokers have on the Nairobi Stock Exchange (NSE). A significant number of amendments and regulations have been provided for in The Finance Bill 2010 which would see increased security and investor confidence in the capital markets restored following a particularly volatile year.

The Bill provides for the demutualization of the NSE which will see the conversion of Nairobi Stock Exchange Company from a company limited by guarantee to a company limited by shares. The CMA has already drafted regulations, the draft Demutualization (Nairobi Stock Exchange) Act, to that effect and is taking part in the implementation of key reforms which would see the shareholding of stockbrokers in the stock exchange reduced to less than 40% in three years.

The CMA has further introduced the Capital Markets (Corporate Governance) (Market Intermediaries) Regulations 2010 which shall govern stockbrokers, investment advisers, fund managers, investment banks and other authorised securities dealers. These rules provide that each market intermediary shall have a board of directors that shall be collectively responsible for the governance of its business.

The East African community

The Protocol on the Establishment of the East African Common Market which has been rat-

ified by all member states (including include Kenya, Uganda, Tanzania, Rwanda and Burundi) to the East African community is the authoritative legislation governing the interaction of the common markets. The protocol provides for free movement of goods, persons and labour, capital and services.

It provides in article 24 that any restriction on the free movement of capital shall be removed. Capital has been defined as direct investment, equity and portfolio investments, bank and credit transactions, payment of interest on loans and amortisation, dividends and other income on investments, repatriation of proceeds from the sale of assets, and other transfers and payments relating to investment flows.

This implies a wider capital base for companies seeking to raise funds through listing of shares as there shall be access to a wider capital base across the region. Barriers previously encountered by earlier efforts made by the NSE, in conjunction with neighbouring securities exchanges in pursuing an agenda for the development of cross listing of securities in the region with a view to attracting regional flows of capital and allowing issuers to tap into a wider capital base shall be no more.

Commercial bills pending before parliament

These bills are aimed at easing business activity and if the set of bills (the Limited Liability Partnership Bill, the Partnerships Bill, the Insolvency Bill and the Companies Bill) are passed and implemented, we will see numerous changes which would revolutionise business and with a view to attracting investments.

The Bills are also aimed at reducing red-tape and making both entry and exit from business faster and less costly'. The proposed Companies Bill 2008 allows for single member companies as opposed to the current Companies Act which sets the minimum number of persons allowed to form a private

company at two. The Insolvency Bill also proposes to prioritise corporate rescue over liquidation.

Applicants under the proposed Bills would be able to incorporate businesses by filling out forms provided by the registrar instead of having lawyers prepare lengthy memoranda of understanding and articles of association. Additionally, liquidation of insolvent businesses would become a last resort and limited liability partnerships would be allowed to continue even if the partners retire or die.

The Finance Bill seeks to amend the Banking Act to increase the limits of investments in mortgage financing and provide additional instances where banks can intervene in management and disposal of assets of institutions remaining unsold at the time of winding up and the provision of banking services through agents.

The Companies Bill also has several provisions regarding sending of resolutions by electronic means, sending of documents relating to meetings in electronic form, power to require delivery of information by electronic means and general provisions relating to electronic communication.

Financial and corporate

Recommended firms

Tier 1

Anjarwalla & Khanna
Kaplan & Stratton

Tier 2

Hamilton Harrison & Mathews
Walker Kontos

Tier 3

Coulson Harney
Daly & Figgis
Iseme Kamau & Maema

Tier 4

Muthaura Mugambi Ayugi & Njonjo

Foreign investment, growth M&A and project work makes for a confident legal profession, with one partner confirming: "Kenya is still very much the powerhouse of east Africa. No doubt about that". And confident it should be after the past 12 months. Notwithstanding recent political instability, Kenya's economy benefited from cross-border sales, an influx of multinational corporations setting up regional headquarters, and a load of infrastructure landing in the country. For lawyers, money flowing in from overseas meant one thing: mandates.

The regulated sectors of telecoms, energy and finance continue to draw the attention of foreign companies, with west African banks the latest to show interest. But the market has become more sophisticated recently with the arrival of private-equity work. Funds' initial interest has been directed towards small and medium enterprises, but lawyers expect them to look in other directions soon.

The year's biggest M&A transactions were Total Kenya's takeover of Chevron's local operations, and the \$10.7 billion acquisition of Zain Africa by India's Bharti Airtel. While work on these projects was reserved for the tier one and tier two firms, most corporate lawyers were kept busy with a flurry of small and mid-cap deals.

"The most exciting area in terms of projects coming on-stream, however, is project finance," according to one lawyer. The biggest is the \$760 million Lake Turkana wind project which is due to come online in two years, while proposals to improve all modes of the country's transport also has lawyers talking: "If all goes to plan, project finance will really pick up in the next few years".

But all this excitement may be jeopardised if the proposed constitution is passed in the upcoming referendum. At the time of publication, the draft document requires all land owned by foreigners - including companies with one foreign shareholder - to be converted to leasehold with a term of 99 years. This has kept investors and lawyers on their toes, with one explaining: "At the moment the constitution is the biggest question in our country. For foreign companies this is a serious problem."

Domestic companies have had less to worry about, with money not being too difficult to come by. Banks didn't suffer like their western counterparts, and although commentators say the banks "drew in their horns" according to partners, lending had picked up by mid-2009.

The latest way to raise funds, though, is on the bonds market. After the oversubscription of last year's landmark \$150 million Kengen bond, confidence improved and companies made some innovative offerings.

Telecommunications company Safaricom issued a KSh12 billion (\$147 million) MTN programme, the country had its first dematerialised listed note, and a number of equity-linked instruments appeared.

The much-talked of privatisations, including the National Bank of Kenya, continued to be little more than that. Some tenders have begun but lawyers that generally speaking work is only "lurching" ahead. They say the unification of markets within the East African Community is moving at a similar pace, but admit the real judgement can't be made until

sometime after labour and goods are able to cross borders unimpeded: "The real opening up of the border is in July [2010]. Then we will know the impact," says a partner.

Anjarwalla & Khanna

It might share the top tier, but Anjarwalla & Khanna is close to becoming Kenya's sole leading firm. The firm has a stronger regional presence than its peers, one of which describes the firm as "much more cutthroat and commercial [than others]. As a business they are very effective." Client feedback is almost infallible. One well-known multinational corporation describes the firm's services as "refreshing" compared to the work of others. "I've found them quick on their feet and extremely professional. I think they are coming out ahead of the pack."

Atiq and Karim Anjarwalla are consistently pointed out for their abilities lawyers; for Atiq, his personable nature wins as much praise. Partner Rosa Nduati-Mutero's approach is also appreciated by clients, with one saying: "In giving reassurance to me as a new client, she did it well."

The partners lead a capable team whose dedication is not taken for granted by clients. One explains: "They have a good grasp of each area. I get the impression that a lot of time goes into research. They are not afraid to ask for an extra day or two to let them get their advice right. This has given me a lot of comfort in their services."

Consistent with its reputation, the firm is involved in one of Kenya's biggest transactions in Bharti Airtel's acquisition of Zain Africa. As local counsel for the buyer, it coordinated the east African aspect of the \$10.7 billion sale of Zain's African telecom assets. The corporate team also advises Lake Turkana Wind Power on its long-awaited \$760 million project which is due to come online in 2012. The mandate showcases its depth of expertise across many fields, with work ranging from corporate structuring to off-take contracts to land acquisitions. The banking team advises on the equity and debt financing of the project.

Also in the power sector, last year Anjarwalla & Khanna closed Essar Overseas Energy's acquisition of 50% of the region's only petroleum refinery. The \$7 million deal saw the firm negotiate with a consortium of the world's biggest oil companies and spearhead the satisfaction of strict regulatory requirements.

Leading lawyers

Atiq Anjarwalla
Karim Anjarwalla
Sonal Sejal

Kaplan & Stratton

Two years after losing two partners to a break-away firm, Kaplan & Stratton is still in a precarious position. The firm holds onto its top tier ranking but the market predominately puts this down to partner Oliver Fowler, and is divided as to how long this will last. "As long as Oliver is there they will be leaders but after he goes I'm not sure," says one peer.

More than one competitor describes Fowler as the country's top lawyer while a leading partner says: "He's incredibly good. I'll be honest, I don't think I'm his peer". While one resources client casts doubts on the abilities of some of the firm's other lawyers, overall clients are still happy with the abilities of the firm. One project finance client says: "Oliver Fowler is the main guy but we'd be more than happy with [partner] Sam Wainaina." For project work, Wainaina is reputed as a strong lawyer and one client says the firm is its top choice: "For project finance I'd always go to Kaplan & Stratton on the sponsor side," the client says.

Irrespective of market opinion, the firm's ability to attract the best work secures its top tier ranking. In September 2009 it acted for Total Kenya in its landmark takeover of Chevron's local operations. The firm advised on the \$62.4 million syndicated loan which facilitated the acquisition of 20 Caltex petrol stations.

It also worked on the year's biggest capital markets deal, advising Barclays Bank and ABSA Capital as lead arrangers for Safaricom's benchmark bond issue worth KSh12 billion (\$147 million). On the equity side young partner Mahesh Acharya acted for Serena Group in a multifaceted transaction worth \$35 million. The deal saw the hotel group acquire four Tanzanian lodges by way of a share swap coupled with a rights issue and bonus issue.

Leading lawyers

Oliver Fowler

Hamilton Harrison & Mathews

Competitors are divided over the abilities of Hamilton Harrison & Mathews. Some rate the firm highly, while one says its strength is simply a pedigree of lawyers and a very capable leader in Paras Shah. Similarly, a number of clients are pleased with the firm's turnaround, pragmatism and commercial outlook, and now use it exclusively for finance and corporate matters. But a client which mandates a number of other Kenyan firms says: "They were at a place where they were leaders but not anymore."

One thing that the market does agree on is the abilities of Shah. He is considered the

backbone of the firm, and the young partner garners respect from all quarters. One international client praises the corporate partner for his ability to contextualise Kenya's business environment: "He is very good in applying the law to a local situation, which is important for us coming from a European perspective," adding: "We have worked with others but Paras is much better."

Hamilton Harrison & Mathews's deal portfolio shows that it is still performing at a high level. It is known for its capabilities in capital markets, corporate and privatisation work, and over the past 12 months has worked on some of these markets' biggest deals.

It recently finished work for Kengen on its landmark \$150 million bond issue. This is first infrastructure bond to be listed on the Nairobi Stock Exchange, was oversubscribed by 77%, and is considered the catalyst of the debt market's revival. Aside from pure debt work, in April 2010 the firm advised on the placement of an equity-linked note worth \$15 million. This issue was also oversubscribed by more than 50%.

On the corporate side Partner Richard Omwela advised Chevron (USA), Shell and BP (UK) in the consortium's disposal of half its local oil refinery. The firm is known for representing the government, but has recently shown its diversity in advising International Finance Corporation on its public-private partnership proposal to create a high-tech park.

Leading lawyers

Andrew Mugambi
Richard Omwela
Paras Shah

Walker Kontos

Walker Kontos is Kenya's pre-eminent boutique corporate firm. Highly regarded by competitors, the firm does a diverse portfolio of work for banks and its finance practice is close to the country's best.

However, a number of peers believe it lacks the depth and diversity of the tier one firms, and one suggests the firm is not as commercial. Clients, though, beg to differ: "I rate Mike Kontos very highly. He's a very good technical lawyer but also very commercial, he gives you solutions," says one.

Its project finance work is praised by one client who says: "I'd go to Walker Kontos on the debt-side always". This reputation helps it attract some of Kenya's best work in the field, including the Lake Turkana Wind Power project for which it acts for the loan arranger, African Development Bank.

On the corporate side the firm is assisting a South African bank on its \$26 million restructure. The reorganisation is to prepare for the sale of a majority stake in its insurance business to a Kenyan buyer, and involves regulatory approval in both jurisdictions. In March 2010 Alexandra Kontos represented I&M Bank on a deal which saw two key stakeholders increase their equity by \$17 million.

In June 2009 partner Deepen Shah completed the collateralisation of a \$14 million commodity-finance facility for the lender Eastern and Southern African Trade and Development Bank. The firm is suited to such contract-heavy transactions, with one client saying: "the quality of their documentation is excellent."

Leading lawyers

Alexandra Kontos
Michael Kontos
Peter Muhiu Mwangi

Other ranked firms

Coulson Harney moves up a tier after competitors report it has solidified its place in the market over the past 12 months. The corporate boutique firm has doubled in size since it opened in 2008, picking up talent from a number of top firms. Under the leadership of Philip Coulson and Richard Harney, former Kaplan & Stratton partners, the firm has excelled in M&A work in particular.

In August 2009 Coulson Harney acted for Kenya Petroleum Refineries, the region's only refinery, in the divestiture of half of its shares to Essar Energy. It was also involved in one of the year's few notable restructures, advising Liberty Holdings on its investment in the insurance business spun out of the struggling listed company CFC Stanbic Holdings.

Elsewhere Coulson Harney is one of the firms advising Kenya's Privatisation Commission on the proposed sale of the National Bank of Kenya.

Leading lawyers: Philip Coulson and Richard Harney

The market continues to say **Daly & Figgis** is not the firm it once was, with a number of peers saying it is propped up by a forthright and very capable head partner in the form of Hamish Keith. But its corporate and finance team - described as "very professional and efficient" by one client - is still the mainstay of the diversified firm, and was strengthened at the start of 2010 with the promotion of Dominic Robelo and Sean Omondi to the partnership.

Corporate lawyer Robelo is rated highly by clients, with one describing him as "very out-of-the-box in terms of pragmatism and find-

ing solutions.” The client adds: “He has the depth of knowledge but also is very alive to some of the challenges we face from a commercial perspective. He can translate a legal point into a solution.”

The firm secured instructions on two privatisations, advising the government in relation to the €100 million sale of Agro-Chemical & Food Company, and acting for the recently privatised East African Marine Systems throughout its sale and in subsequent restructuring and corporate advices.

On the banking side leading lawyer Ashwini Bhandari advised the African Development Bank on its \$30 million facility to an east African housing finance institution. The funds will be used to grant loans to housing developers in each country where the borrower is active. In a parallel transaction, Bhandari coordinated a subscription agreement between the parties’ whereby the bank took up a \$7.5 million equity participation in the borrower.

Leading lawyers: Ashwini Bhandari and Hamish Keith

Described by a peer as “well run and ambitious”, **Iseme Kamau & Maema** has had a busy year in the banking sector. Its most notable work saw it help launch the Fanisi Venture Capital Fund. The \$55 million fund will target investments in east Africa, and the deal required lead partner James Kamau to coordinate local counsel in Luxembourg, the US, Mauritius, France, Norway and Finland.

In 2010 the firm entered into an alliance with DLA Piper.

Muthaura Mugambi Ayugi & Njonjo is perceived as a young up-and-coming firm which “should be taken more seriously than they often are”, according to one peer. It has carved out a niche in air finance matters and recently advised on the \$15 million lease of two aircraft to Kenya’s fastest growing airline. It is also one of the firms advising the government on the privatisation of Kenya’s national bank.

Competitors say its young managing partner, Suzanne Muthaura, lacks the experience of the country’s leading lawyers, but they have a lot of respect for her abilities: “She’s a cool head and obviously very bright,” says one.