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MINING MERGERS AND ACQUISITIONS IN AFRICA

PRACTICAL LEGAL ISSUES FOR PRIVATE DEALS

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PRIVATE MINING M&A IN AFRICA





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DIVERSITY, COMPLEXITY AND OPPORTUNITY

LANGUAGE, LAW AND JURISDICTION



LINGUISTIC DIVERSITY



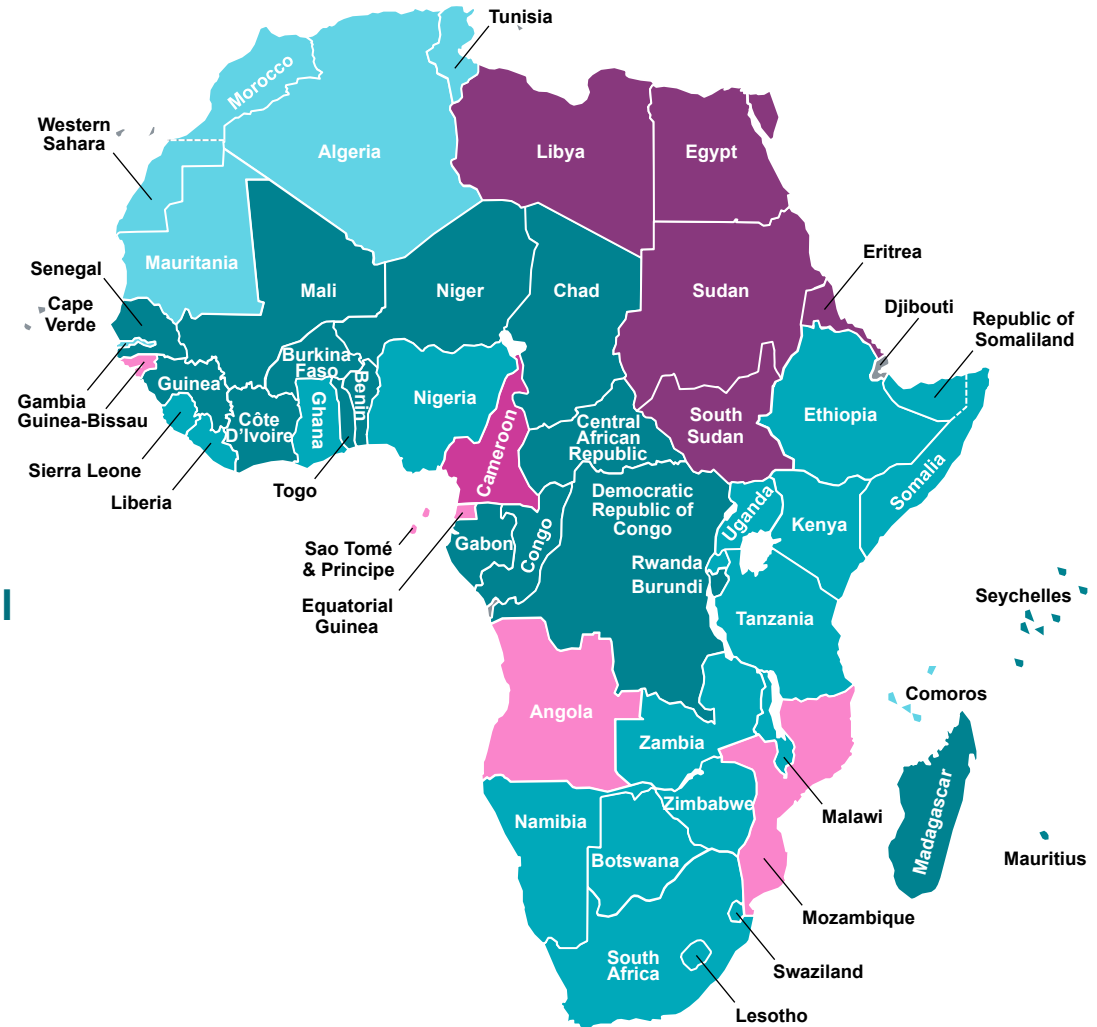
Some 2,000 native languages divide into six linguistic families...

- Afro-Asiatic
- Nilo-Saharan
- Niger-Congo A
- Niger-Congo B (Bantu)
- Khoi-San
- Austronesian

LINGUISTIC DIVERSITY

In addition to native languages, former colonial languages...

- French speaking countries
- English speaking countries
- Arabic / French speaking countries
- Arabic / English speaking countries
- French / English speaking countries
- Spanish and Portuguese speaking countries



LEGAL DIVERSITY



Civil law and common law-based systems operate alongside sharia law and customary laws...

- Systems based on civil law principles
- Systems based on common law principles
- Mixed civil law / common law-based systems

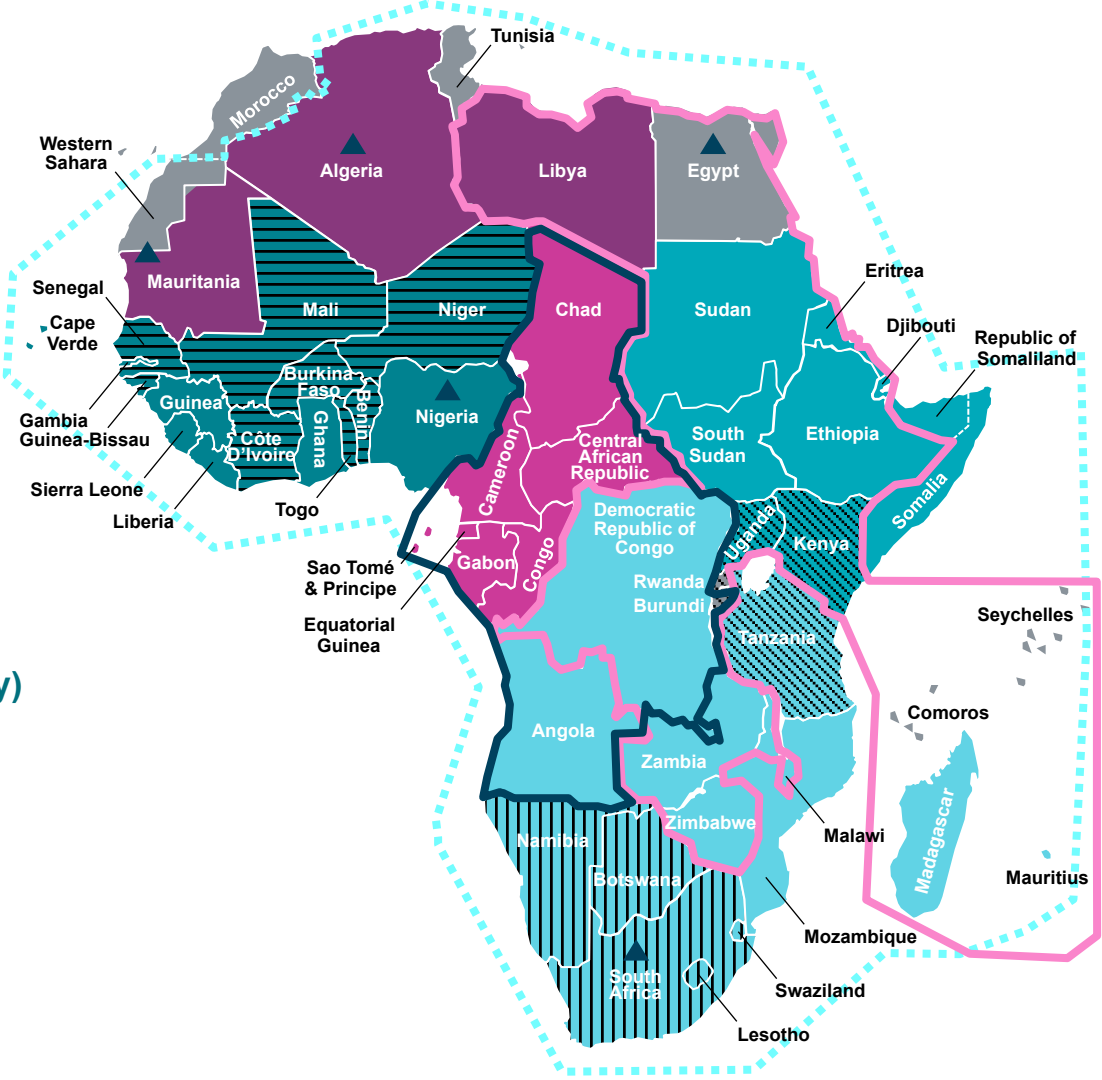
JURISDICTIONAL COMPLEXITY: 54 JURISDICTIONS

Economic organisations

- ECOWAS (Economic Community Of West African States)
- ECCAS (Economic Community of Central African States)
- IGAD (Intergovernmental Authority on Development)
- SADC (Southern African Development Community)
- AMU (Arab Maghreb Union)
- ≡ UEMOA (West African Economic and Monetary Union)
- ECCAS (Economic Community of Central African States)
- COMESA (Common Market for Eastern and Southern Africa)
- ▨ EAC (East African Community)
- ▨ SACU (Southern African Customs Union)

Multisectoral organisations (political, economic and security)

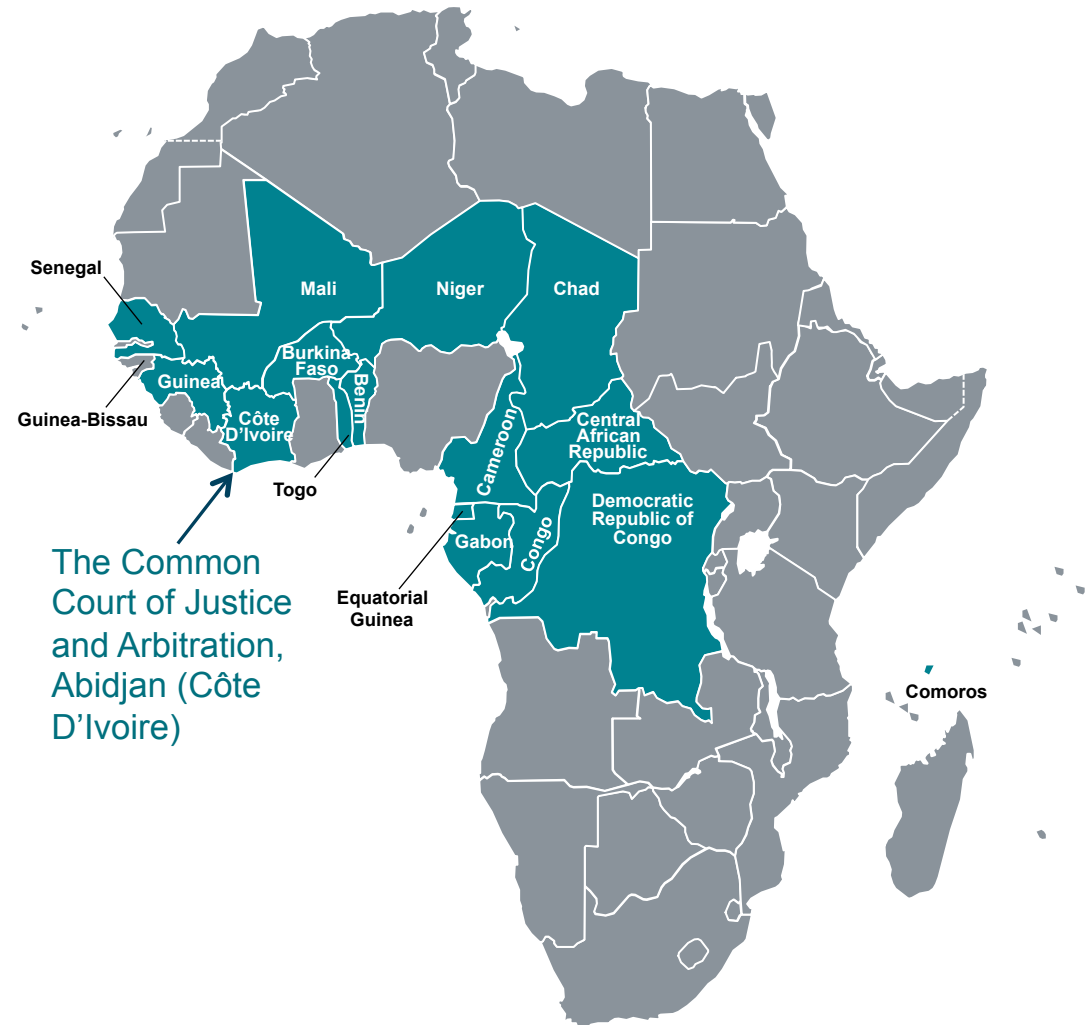
- ⦿ AU (African Union)
- ▲ Founder members of NEPAD (New Partnership for Africa's Development)



JURISDICTIONAL COMPLEXITY: OHADA

Organisation for the Harmonisation of Business Law in Africa (OHADA)

- 17 member jurisdictions
- 9 acts including:
 - commercial contracts
 - companies and joint ventures
 - security



INVESTMENT OPPORTUNITIES: NATURAL RESOURCES

- 8% year-on-year growth since 2007 (deal value)
- Natural resources sector accounted for seven of the top ten deals in Africa in 2013 - deal values are no longer just in the tens or even hundreds of millions of dollars: billion dollar African mining deals are becoming less and less unusual
- 62% of investors think sector will show increase in deal making activity in 2014, especially due to ever growing interest from Asian investors
- Minerals have been largely under-exploited, with estimates that Africa has 90% of the world's remaining platinum, 35% of its gold, 30% of its copper, 20% of its iron ore and 25% of its coal

INVESTMENT OPPORTUNITIES: MINING

Mineral resources in Africa

- Iron Ore
- Diamond
- Gold
- Platinum
- Phosphate
- Uranium
- Aluminium
- Copper
- Coal
- Bauxite



Source: The Economist, Feb 2012

TOP 10 BUSINESS RISKS FOR MINING INDUSTRY

- 1. Resource nationalism**
2. Skills shortage
- 3. Infrastructure access**
- 4. Maintaining a social licence to operate**
5. Capital project execution
6. Price and currency volatility
7. Capital allocation
8. Cost management
9. Interruptions to supply
- 10. Fraud and corruption**



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KEY PRE-SPA CONSIDERATIONS

STRUCTURING, DUE DILIGENCE AND PROCESS
MANAGEMENT



KEY PRE-SPA CONSIDERATIONS



I – STRUCTURING

Investment structure: key considerations

- Mining deals often structured as corporate share deals rather than asset deals
- Scope of acquisition: 100% vs. JV or staged investment:
 - Seller to consider:
 - *Clean exit* with minimum trailing liabilities
 - *Partnership*
 - Purchaser to consider:
 - *Degree of control* and consolidation
 - *Risk exposure*
- Form of acquisition: direct / onshore or indirect / offshore transfer
 - Seller to consider:
 - *Consents* (governments, JV partners) and feasibility of indirect transfer / restructuring
 - *Tax analysis* to minimise capital gain tax
 - Purchaser to consider:
 - *Maintaining protection from bilateral investment and double tax treaties*
 - *Setting up a new co ensuring appropriate allocation of liability* within the new group

II – DUE DILIGENCE

Importance of due diligence for purchaser

- Structuring/financing due diligence:
 - *Consents* (from onshore and offshore authorities and JV or commercial partners)
 - *Local rules on taking / perfecting security* if acquisition is debt funded
- Operational due diligence:
 - *Asset*:
 - Historical liabilities (e.g. tax, environment, employment)
 - Contracts with governments (e.g. stabilisation clauses, arbitration)
 - JV contracts (e. g. entrenched royalty rights and carried interest entitlements)
 - Business operations (e.g. commercial contracts, litigation)
 - *Asset's jurisdiction*: investment, mining, foreign exchange and local content rules (including process/limitations to repatriate profits out of the jurisdiction)

Due diligence by seller

- Consents
- Creditworthiness of purchaser/guarantor
- Reputational issues

Issues to address in the SPA

- No reliance / entire agreement clause: confirmation that purchaser has conducted own DD
- Scope of warranties: sale on “as is where is” basis or extensive warranties

II – DUE DILIGENCE: GOVERNMENT INVOLVEMENT

Government's consent

- Requirement for consent from onshore government, regulator or state company partner for direct / indirect transfer might arise from mining or foreign investment laws, mining, environmental or other regulatory permits or guarantees / undertakings given by seller group
- Often used to extract concessions (fees, settlement of disputes and licence / contract changes)
- Even if requirement unclear, government may argue that consent is required / use a breach of regulations to threaten to withdraw a permit or renegotiate the terms of the investment

Practical considerations

- Local authorities may be sensitive if they are not approached for approval; in some cases jurisdiction claimed despite unclear powers
- Distinguish which government entities are involved and in what capacity

II – DUE DILIGENCE: TAX, MERGER CONTROL AND ANTI-CORRUPTION

Tax

- Offshore: seller to consider *capital gains tax* and repayment of intragroup loans; purchaser to consider *withholding tax*
- Onshore: tax payments / audits triggered by change of control / direct or indirect transfers

Merger control

- Consider all relevant jurisdictions
- Africa: mixture of national laws (which vary from one country to another) and regional rules (including CEMAC, COMESA and UEMOA) which can diverge (in scope - application and thresholds, and procedure - mandatory or voluntary) and conflict

Anti-bribery and corruption / sanctions

- Key because states exercise influence over project development (consider issuance of permits / licences, purchasing / employment policies, community programs)
- Risks of sanctions imposed on counterparties, intermediaries or target

III – PROCESS MANAGEMENT

Communications and travel

- Language barrier
- Lack of publicly available documentation
- Logistical / planning difficulties: travelling on short notice (flight availability, visas, vaccinations, difficulty of travelling from one African country to another), organising site visits, ability to hold conference calls, internet access, etc.

Deal process

- Research the law / involve local counsel: sometimes lack of legal certainty, limited local experience and local advice may diverge from market practice
- Importance of confidentiality agreement: purchaser will insist on two way confidentiality and carve outs (e.g. re: debt and equity financing providers); seller will insist on scope of confidential information (transaction / previous exchanges) and 'no other purpose' clause
- Timeframe



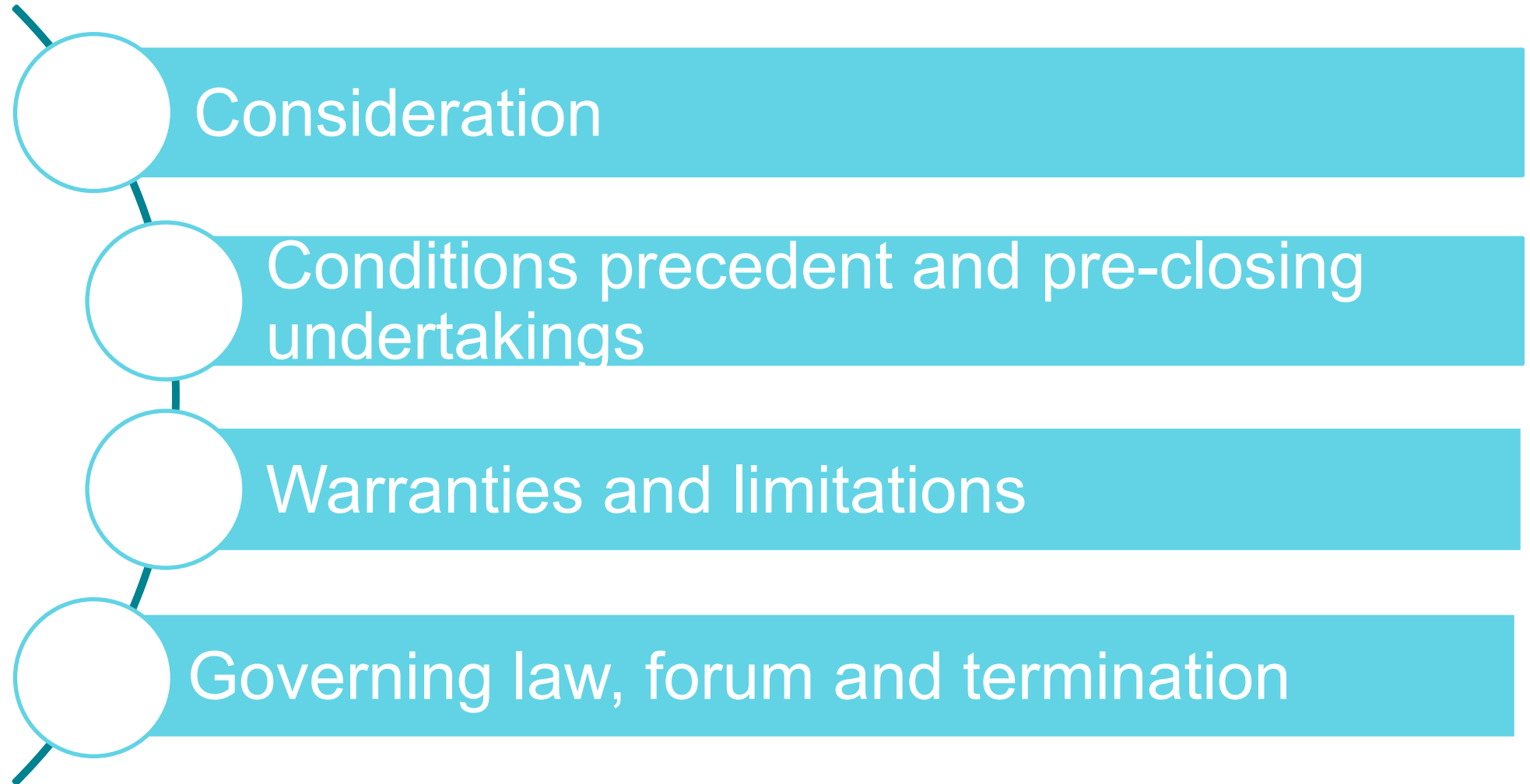
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KEY SALE AND PURCHASE AGREEMENT CONSIDERATIONS

KEY NEGOTIATION AND DRAFTING POINTS



KEY SPA CONSIDERATIONS



I – CONSIDERATION

Structure

- Locked box or completion accounts
- Adjustment for funding up to closing / leakage
- Deferred consideration or earn-out: may be interesting for greenfield projects

Protection of purchase price

- Parent company or bank guarantee (depending on purchaser)
- Non-refundable deposit or break fees: purchaser's commitment key given transaction risks

II – CONDITIONS PRECEDENT AND PRE-CLOSING UNDERTAKINGS

Conditions precedent

- Governmental / regulatory consents: in writing; terms / matter satisfactory of seller / purchaser; approval not withdrawn or materially amended
- Competition clearances
- Seller: *financing condition* re: price / closure obligations, full *release of PCG / LCs* and *no change of control* of purchaser
- Purchaser: *repetition of warranties* (possibly MAC standard) and *transitional services*

Fulfilment of conditions

- Which party should liaise with regulators
- Standard of obligation
- Waiver
- Consequences of failure to comply (proceed, defer, terminate)

Conduct of business between signing and completion

- Purchaser's legitimate interest in being involved vs. seller's ownership: particularly important in African deals given period to closing can be extended
- Normal course of business / access for purchaser to books, records and premises
- Purchaser to insist on comprehensive suite of covenants / seller to resist, especially if not involved in day-to-day project management

III – WARRANTIES AND LIMITATIONS

Seller warranties

- Core warranties
 - Title to shares / power, authority / accounts
 - All regulatory consents obtained
- Business warranties
 - Mining licences (compliance, good standing)
 - Compliance with laws
 - Assets, borrowings, properties, litigation, employees, insolvency, tax, etc.
- Standard of disclosure
 - Fairness / accuracy / completeness tests
 - Estimates and grade, quality and consistency of mineral resources / reserves
 - “No undisclosed liabilities” warranty

Purchaser warranties

- Title to shares / power, authority / anti-corruption and employees

Key issues / limitations

- Repetition at completion (all / some / none)
- Disclosure (schedules / data room, timing)
- Time and monetary limits (cap, de minimis and threshold – basket or deductible)
- Indemnity or loss-based
- Seller knowledge (and actual / constructive)
- Purchaser knowledge / mitigation / sums recoverable from third parties / no double recovery / third-party claims / claim costs
- Indirect / consequential loss
- Changes in law

IV – GOVERNING LAW, FORUM AND TERMINATION

Choice of governing law

- Generally, no requirement to use the laws of the assets or target jurisdiction
- Local laws will remain relevant:
 - Regulatory filings and consents
 - Representations and warranties
 - Security

Dispute resolution

- Obligation to negotiate
- Arbitration outside of target country and appointment of process agent

Termination

- Material adverse effect: purchaser may seek extensive rights to terminate SPA so that it can walk away in the event of political changes, etc.
- Longstop date



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CONCLUSION

KEY TAKEAWAYS



CONCLUSION – KEY TAKEAWAYS

Opportunities and challenges

- Under exploited mining opportunities
- Growing interest from Asia-Pacific investors
- Linguistic and legal diversity (54 jurisdictions)
- Transaction costs and timing (but improving)

Addressing these issues

- Structuring of investment
- Detailed due diligence
- Negotiation of SPA



-  Herbert Smith Freehills office
-  Associated office
-  Group

Legal services are provided in Indonesia, in Jakarta, through Herbert Smith Freehills LLP's ("HSF") association with Hiswara Bunjamin & Tandjung ("HBT"). HSF and HBT are two independent firms which have a formal association in Indonesia.

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