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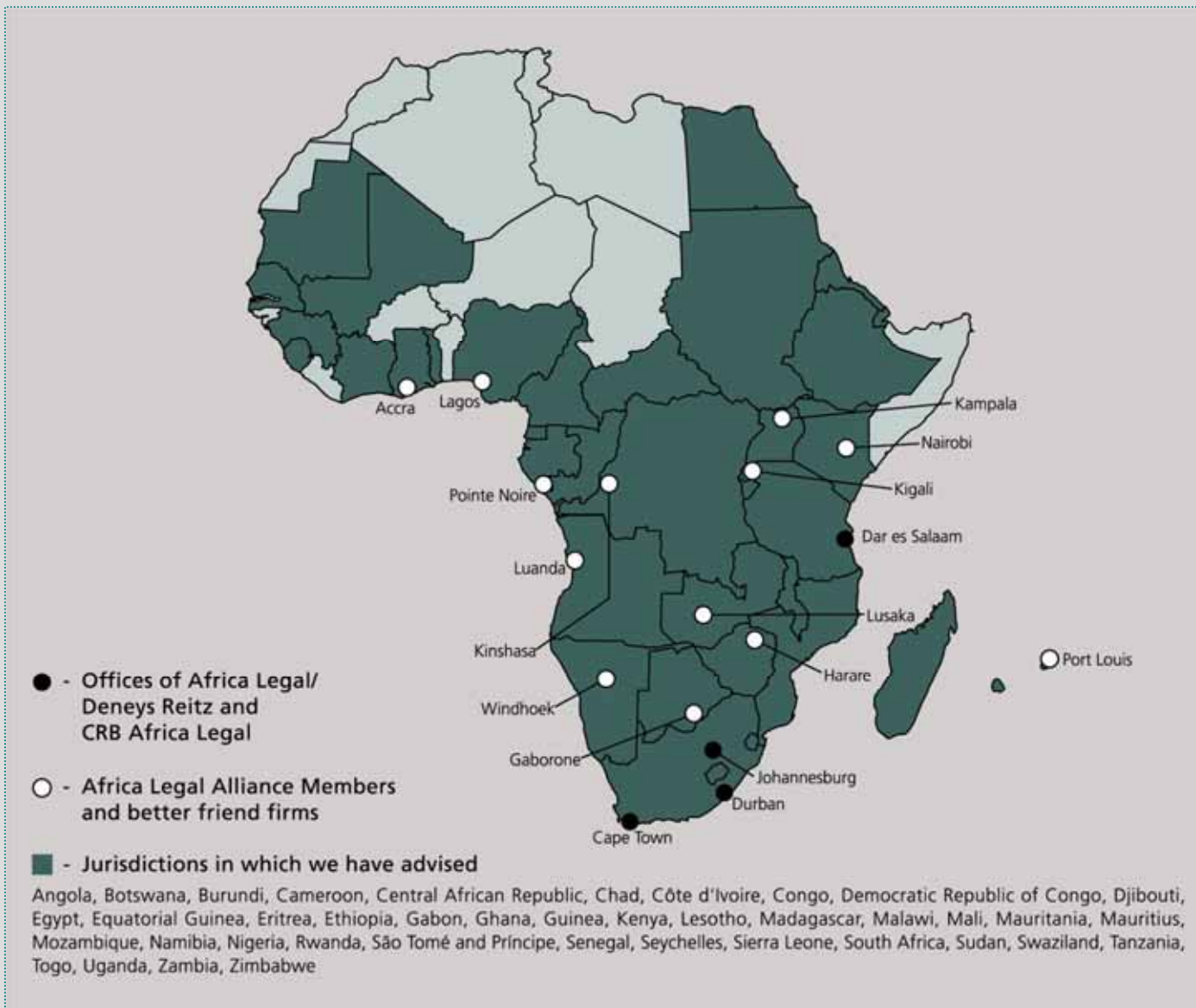
# Introduction to Legal Issues in relation to Cross-Border Transactions

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*Deneys Reitz and its pan-African division Africa Legal join international legal practice Norton Rose Group on 1 June 2011.*

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- One size does not fit all. 54 jurisdictions, different jurisprudence and languages:
  - ▶ English
  - ▶ French and Belgian
  - ▶ Portuguese
  - ▶ Roman-Dutch
  - ▶ Arabic and indigenous

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# EMERGING MARKETS: GENERAL ISSUES

- Rule of law and legal culture
- Lack of transparency
- Resource constraints and inefficiencies:
  - ▲ Registries
  - ▲ Courts
  - ▲ Agencies
- Lack of development of local laws

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# EMERGING MARKETS: GENERAL ISSUES

- Experience (local counsel and courts)
- Regulatory regime – licences
- Registration/notification/consent
- Restrictions on investment or funding by foreign entities (Excon, banking licence)
- Restrictions on repatriating funds (Excon)

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# EMERGING MARKETS: GENERAL ISSUES

- Indigenisation rules: BEE and local ownership (e.g. SA and Zimbabwe)
- Tax exposure
  - ▲ Corporate
  - ▲ Duties
  - ▲ Withholdings
- Governing law: choice/recognition

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# EMERGING MARKETS: GENERAL ISSUES

- Finance and security issues
  - ✦ Restrictions on loans/granting security to foreign lenders (approvals/consents)
  - ✦ Types of security (charges, assignments)
  - ✦ Assets (land, cash, shares, future assets)
  - ✦ Financial assistance/corporate benefit
  - ✦ Documentation (e.g. debenture)
  - ✦ Cost of security (Kenya, Malawi, SA)
  - ✦ Governing law

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# EMERGING MARKETS: GENERAL ISSUES

- Enforcement
  - ▶ Choice of law – English?
  - ▶ Consents (e.g. mining rights)
  - ▶ Process
    - ◆ Court v self help
    - ◆ Liquidator etc.
  - ▶ Timing/cost

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# LEGAL RISK MITIGATION TECHNIQUES

- Due diligence
- Structuring
  - ✦ Offshore
  - ✦ Control/collateral management
  - ✦ Recourse (guarantee or insurance)
  - ✦ Use of insolvency remote vehicles
  - ✦ Ring-fencing assets
  - ✦ Alternative finance structures
    - ◆ Repo
    - ◆ Retention of title

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# LEGAL RISK MITIGATION TECHNIQUES

- Choice of law and jurisdiction
  - ▲ Neutrality
  - ▲ Effectiveness
- Arbitration versus courts
  - ▲ Neutrality, transparency, speed, ease of enforcement ... but cost?
  - ▲ Check recognition of foreign judgments regime
  - ▲ New York Convention
    - ◆ Check accession, ratification and special conditions
    - ◆ Notable absences: Angola, Namibia, DRC

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# LEGAL RISK MITIGATION TECHNIQUES

- Bilateral Investment Treaties
  - ▲ Treaties providing that nationals of state who invest in another state are afforded certain protections, e.g.:
    - ◆ Fair and equitable treatment
    - ◆ Most favoured nation status
    - ◆ Compensation for expropriation
  - ▲ Arbitration (ICSID)

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# CONCLUSION

- Importance of understanding legal and commercial risk in each jurisdiction
- Legal **risk** profile and **cost** of transactions can be significantly influenced by **lawyers**, and so can the commercial outcomes.

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