Lex Mundi
World Ready

Lex Mundi Client Briefing: Investing in Africa

The attraction that Africa presents international businesses has become increasingly obvious in recent years as a greater number of foreign companies tap into the continent's potential. African consumer spending is projected to rise to US $1.4trn by 2020; by 2030 the continent may boast a middle class of over 100m and 18 cities with populations greater than 10m; and by 2040 Africa's working-age population is expected to rise from around 500m to 1.1bn – greater than China and India combined.

On the current trajectory, by 2023 Sub-Saharan African GDP is estimated to surpass current Chinese output. Natural resources may be top of mind when clients think of Africa, but over the past decade most new economic growth has been driven by the services sector.

Lex Mundi and the Association of Corporate Counsel (ACC) joined forces to present a series of symposia in New York, Paris and London focused on investing in Africa. The symposia were specifically designed for in-house counsel advising organizations that operate in Africa or considering entering African markets. The meetings presented a unique opportunity to hear from Lex Mundi member firms whose offices span 17 jurisdictions and to debate issues including Africa's rapidly evolving legal regimes and the harmonization of laws within regional institutions such as COMESA and OHADA. This document is intended to recap the insights and expertise shared at the events.

Competing Frameworks

Despite Africa's obvious macro potential, business and legal disparities inevitably continue to exist across the continent. Africa comprises 54 separate countries evolving at different rates, with different economic needs and a varying appetite (and readiness) for foreign investment. Geography can also be a significant challenge. Africa is huge – the USA, Europe, China and India would all fit into the continent's boundaries.

And Africa can also be divided in many ways beyond its internal borders. Colonial histories notably weigh heavily on national business and administrative systems. Portuguese legal traits dominate in Angola and Mozambique, English common law principles prevail in pockets of West Africa, along the East coast and in South Africa, and the French civil code echoes across the Maghreb, West and Central Africa.

Some countries are, however, moving towards a more harmonized approach to regulation, blending civil, common and customary law influences. The accession in 2012 of Democratic Republic of the Congo to OHADA (L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires) brings the number of East and Central African states to 17 that now utilize it as their default commercial and arbitration framework.

Regional Economic Communities (RECs) play a growing role. Each is an arm of the over-arching African Economic Community (EAC), established in 1991 with the goal of encouraging free trade areas and customs unions, a potentially single market, central bank and a common African currency.

Countries may have multiple memberships but a number of RECs are beginning to emerge as dominant trading blocs. Greater regional co-operation and rising investment flows are providing the impetus for closer regulatory union. The most significant RECs are the Common Market for East and Southern Africa (COMESA, founded in 1994), the East African Community (EACOM, 2001), Economic Community of West African States (ECOWAS, 1975), Economic Community of Central African States (ECCAS / CEEAC, 1985), and Community of Sahel-Saharan States (CEN-SAD, 1998); alongside the 15-member Southern African Development Community (SADC) free trade zone.

Managing Risk

Despite such inter-governmental initiatives, when it comes to doing deals in Africa the ability to mitigate and manage risk is intrinsically linked to access to local know-how. Colonial legacies may mean that certain countries' decision-making structures seem familiar but regulatory processes can be anything but straight-forward.

In 2013 COMESA enacted a common competition authorization procedure, with a mandatory notification requirement for transactions involving two or more member states, but the process has proved controversial for many at the national level. COMESA filing fees are not weighted by deal size (a flat fee of US$500,000 applies) and a number of member states' competition authorities continue to insist on compliance with their own authorization rules. At the time of writing, four of eleven mergers notified have been approved unconditionally, but there is significant uncertainty about the supranational nature of the regime and the relationship to the national authorities.

And even where common practices do exist there may be significant differences in their implementation including between countries' own agencies. The rapid economic evolution of some countries means that in certain sectors – oil, gas and telecoms – foreign investors may even need to help governments build their own regulatory frameworks.

When it comes to doing business in-country, entering into local agency, licensing or joint venture agreements is required in most markets. Time spent educating local partners on the rationale behind key commercial messages or structures can prove a wise investment, helping to clarify expectations and avoid potential misunderstandings. Litigation within most African legal systems can be a long-winded, bureaucratic and expensive undertaking.

Nonetheless foreign investors in so-called "strategic sectors" will inevitably find themselves partnering with governments and while most contract terms may be negotiable those relating to dispute resolution are usually not. Arbitration may be an option but disputes may often revert to the national courts.

Among the benefits to foreign investors of OHADA is that it brings a ready-made arbitration code, enforcement procedure and court (in Abidjan, Ivory Coast). Arbitration may not yet be universally embraced by African companies (or governments) but awards made in Africa may prove in practice easier to enforce than those made in Paris, Geneva or London, for example. A key driver in the development of dedicated new arbitration centers in Rwanda and Mauritius is the greater likelihood of local enforcement in African disputes.

Due Diligence and Market Entry

In Africa, as elsewhere, the notion of prevention being better than cure also applies. Fundamental to this is ensuring that foreign investors undertake the correct due diligence prior to entering into local agreements and partnerships.

In addition to understanding counterparties' backgrounds and potential liabilities, due diligence should include an analysis of the benefits of structuring investments via a third jurisdiction – e.g. Luxembourg, Netherlands or Mauritius – to capitalize on bilateral investment treaties (BITs) and double taxation agreements (DTAs).

Investors may also be able to benefit from bilateral judicial or arbitral enforcement agreements. Angolan courts, for example, may have a limited tolerance for foreign arbitration but awards rendered in Portugal are largely enforceable in the same way as Angolan judicial judgments.

Commercial necessities may mean that foreign companies must adapt their business practices to local norms (for example, adhering to local content or supplier stipulations) but mitigating their risks may, for example, include simply applying stricter credit and stock control to reduce debt issues arising. Fundamentally the best safeguard against misunderstandings is to ensure that the right local partner is in place and again this comes down to ensuring adequate pre-deal analysis and knowing who it is you are doing business with.

Sustainable Success

But once a deal is signed companies may also find ongoing and new obligations arise. The past year has notably seen foreign companies give greater consideration not only to the security of their assets in Africa but also to their people. The continent may be politically more stable than at any time in the past 20 years, but high impact incidents can and do occur – the Westgate Mall attack in Kenya in September 2013 is a sad reminder.

Nonetheless, governments across Africa are well aware of the importance of ensuring the protection of foreign companies and their workers. But companies do need to be keenly aware of emerging threats and to build in risk awareness training and contingency planning for their operations on the ground. Anti-kidnap training is an expanding need and companies may find themselves liable if they do not provide adequate preparation for their employees.

Preparedness also means ensuring that local partners or employees do not engage in corrupt practices. Rising wealth, more accountable governments, and international transparency initiatives are having an impact on local African practices. However, companies also need to understand the extra-territorial reach of legislation such as the US Foreign Corrupt Practices Act and UK Bribery Act. Companies must always maintain their own compliance and behavioral red lines no matter where they operate. For some in Africa, and other emerging markets, this means ensuring that executives cannot negotiate contractual terms unilaterally, contracts must be signed by a separate line manager and meetings with government officials must always be approved in advance.

Fundamentally, foreign investors must enter Africa with their eyes open. Ultimately, this entails balancing the commercial imperatives and opportunities with the requisite legal due diligence and risk mitigation. In Africa, as elsewhere, there are no shortcuts to ensuring long-term sustainable success. For many multinationals however, the major risk is failing to invest and to compete in Africa – the opportunity is too great to miss.

Lex Mundi in Africa

With more than 500 lawyers on the ground in 17 African jurisdictions, Lex Mundi's member firms have experience working together to provide investors coordinated legal advice and service covering all relevant areas of commercial and financial law, including mergers and acquisitions, dispute resolution, antitrust and competition, compliance and tax. Lex Mundi's member firms in Africa are working on transactions across the continent. Together they provide extensive coverage and are committed to working together to provide on-the-ground expertise in Africa.

Read more at www.lexmundi.com/lexmundi/Africa.asp.

About Lex Mundi

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Lex Mundi member firms offer clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth. Each member firm is selected on the basis of its leadership in – and continued commitment to – its local market. The Lex Mundi principle is one independent firm for each jurisdiction. Firms must maintain their level of excellence to retain membership within Lex Mundi.

Through close collaboration, information-sharing, training and inter-firm initiatives, the Lex Mundi network is an assurance of connected, on-the ground expertise in every market in which a client needs to operate. Working together, Lex Mundi members are able to seamlessly handle their clients' most challenging cross-border transactions and disputes.

Member law firms are located throughout Europe, the Middle East, Africa, Asia and the Pacific, Latin America and the Caribbean and North America. Through our non-profit affiliate, the Lex Mundi Pro Bono Foundation, members also provide pro bono legal assistance to social entrepreneurs around the globe. For more information, please visit www.lexmundi.com and www.lexmundiprobono.org.