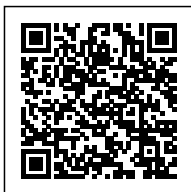


APPROACHING AFRICA: A BEFORE, DURING AND AFTER STRATEGY

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While there are opportunities abound in Africa, preparation and caution are needed, both for investors and law firms, says Jonathan Lang

Africa is blessed with resources: 60 percent of the world's uncultivated arable land, one billion people and abundant natural resources. And the outlook is very promising.

Although sub-Saharan Africa is still at a relatively early developmental stage from an economic point of view, the pace of growth has picked up since the turn of the century. In the ten years to 2010, six of the world's fastest growing economies were in sub-Saharan Africa. But while natural resources and infrastructure remain key drivers of economic growth, the development of market economies is driving the new demand for goods and services including fast moving consumer goods, financial services and telecommunications. The growth of intra-African trade and investment, led by South Africa, Kenya and Nigeria, is also a growing phenomenon, which is starting to reduce the continent's traditional dependence on external trade and investment.

Not without challenges

But for all its promise and opportunities, and there are many, Africa still presents challenges to investors – whether African or not. A wide range of risks from political and policy uncertainty to unreliable and unpredictable judicial systems to ease (or not) the ways of doing business, as well as corruption and poor infrastructure, all serve to counter-balance the potential rewards of doing business in Africa.

Any lawyer from outside Africa advising his or her client on a matter within its borders should adopt a similar approach to that applied to any cross-border transaction. One aspect of this approach is a before, during and after strategy.

At the outset, a key legal risk mitigator is an understanding of the law and regulation in the country in which a client is considering doing business or investing. Legal due diligence up front is usually far more effective than remedial legal advice after the event. Many African countries have entered into bilateral investment treaties (or investment promotion and protection agreements) and double taxation agreements. And access to reliable, consistent and quality legal advice will be predicated to a great extent on knowing which firms in Africa can meet that expectation and developing relationships with those firms.

The developmental state of each African economy is often mirrored in the size and sophistication of its law firms. Don't expect to find an equity derivatives expert in Mali, for example. African law firms also tend to be smaller – outside of South Africa, ten partners would constitute a very large firm. And they are also less resourced both in terms of human capital and technology than those in developed countries.

Prevention

While, at the extreme, a client may take the view that a contract is "not be worth the paper it is written on" in a particular country, a well-drafted one will greatly assist, as long as it is based on reliable local legal advice and contains legal risk mitigation provisions.

If the value or the importance of the transaction warrants it, face-to-face meetings also help a great deal in getting things done. Conference calls, for example, over poor quality telephone connections often make for misunderstanding and frustration. And clients and lawyers alike should not be put off by crime and disease – most African cities are as safe as others in the world, even if the roads are not as well maintained. Consideration must also be given to the possibility of a dispute arising after the contract is signed. Most international investors are understandably cautious about submitting their contracts to the governing law of the country involved. Unless the counterparty is the government or a government-owned enterprise, the contracts for many cross-border transactions in Africa provide for the governing law of another country as well as for arbitration (usually outside the country). However, as many African countries are signatories to the New York Convention, enforcement is not usually an issue.

Possibilities and precautions

While there are opportunities abound in Africa, as the old Ghanaian proverb says: "No one tests the depth of a river with both feet." Investors and law firms would be wise to heed this advice and ensure that they approach Africa with both preparation and caution.

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