

Private Equity and M&A in Africa – A Legal Perspective

By Olivier Chambord, partner in Morgan Lewis' Business and Finance Practice in London and Paris

The IMF's Regional Economic Outlook on Sub-Saharan Africa in October 2013 shows that growth is expected to increase from 5% this year to 6% in 2014. The report highlights that African growth is not simply resource driven as in Uganda for instance, construction and services have contributed more than 60% to the country's overall growth rate, while in some African countries, services have grown on average between 8 to 10% per year. Investors are also excited at the prospect of a burgeoning pan-African middle class, and the much vaunted rise of the African consumer.

Africa's robust and increasingly varied growth provides business and investment opportunities leading to increasing private equity interest and deal making in the continent's M&A field. Private Equity firms invested nearly 12 billion USD in Africa over the past five years, and raised almost 10 billion USD according to an Ernst & Young attractiveness survey in 2013. M&A in Africa is also increasing; the first half of 2013 saw a 10% rise in volume and 18% in value compared to the first half of 2012 as reported in a Mergermarket report in October. In spite of the growing levels of investment and number of deals, investment and deals in Africa remain challenging.

Challenges of frontier markets

Africa is a rich and varied continent, which could easily be approached with a broad brush; however, it is important for investors to remember that the continent is highly diverse. Common civil law systems, customary law, religious law and on occasion, a mix of the foregoing can apply, depending on the locale. There is also a variety of official languages ranging from French, English, Portuguese, Spanish, Arabic and a number of African languages. Investors should be aware of this diversity, and especially those who are not accustomed to the applicable languages and legal systems incumbent in the country where the investment or transaction is carried out.

The differences in legal systems across countries make it vital to carry out thorough due diligence to ensure full understanding of the target company and the local partner where applicable, as well as the jurisdiction's legal and regulatory framework. One common mistake to be avoided is cutting and pasting legal concepts and experience in a given country where it is not pertinent to do so, in particular if an investor originates from a common law jurisdiction and invests in a civil law jurisdiction.

The degree of State oversight and administrative red tape can also be a surprise in certain jurisdictions. Obtaining necessary permits and authorisations can be long and arduous. Investors should, therefore, aim to map out appropriate processes to obtain authorisations and permits with their counsels.

Another challenge is the unpredictability of regulation in some countries, which can be a significant cost factor. It can affect funding models, profit projections and operational matters and can also lead to the unforeseen imposition of more onerous fiscal terms. Investors and their counsels should seek to maximise local investment legislation and include appropriate protections in contractual documentation. Investors should also seek bilateral investment treaties protection whenever possible.

Navigating local court systems can also be challenging in many jurisdictions. Investors should look to insert arbitration clauses in their contracts. When dealing with states, or state owned entities as contractual parties, investors should insist on waivers of sovereign immunity. Enforcement of arbitral awards in Africa can be tricky, as a number of African countries are not parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Parties should also ensure strict compliance with the US Foreign Corrupt Practices Act and other applicable anti-corruption legislation, such as the UK Bribery Act, if and when applicable. Thorough due diligence should be done on middlemen and local partners, whilst imposing compliance mechanisms and train local staff to ensure compliance.

An improving environment

According to the World Bank's Doing Business

2013 Report, the legal and regulatory environment in Africa is improving. This report shows that 45 out of 46 sub-Saharan economies that the World Bank tracks have improved their regulatory environments for doing business since 2005. Out of the 50 economies that have made the biggest improvements over the period, 19 are in Africa. Examples of countries having made substantial progress include Mauritius (the highest ranked country at 19th, notably ahead of Germany, France, Japan, Switzerland and the Netherlands), Rwanda, Ghana, Nigeria, Angola, Senegal, Egypt and Morocco.

Pan African harmonisation treaties and efforts by regional organisations are also playing a pivotal role in making the legal environment in constituent African states more predictable. The Organisation for Harmonisation of Business Law in Africa (OHADA), created in October 1993, has played an important role in harmonising the legal framework in a number of Francophone African countries. Article 1 of the OHADA treaty states that the objective is "the harmonisation of business laws in Contracting States through the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes". 17 African member states have signed up so far. Uniform Acts have been passed under the OHADA treaty's umbrella to cover, amongst others, commercial law, commercial companies and economic interest groupings, securities, insolvency. The provisions of these Acts are directly applicable in each member state, and override local laws. It is thus possible to set up similar types of companies and take the same types of security over assets in all member states. A Common Court of Justice and Arbitration, based in Abidjan, Côte d'Ivoire, has been established to ensure that the provisions of the Uniform Acts are construed and applied consistently throughout all of the member states.

Other harmonisation efforts in Francophone African countries include the Economic and Monetary Community of Central Africa (six member states) and the West African Economic and Monetary Union (eight member states). These organisations seek to

harmonise business and monetary environments between member states, create a common market, and promote the free circulation of goods, services and capital. Specifically, all member states have adopted a common currency, the CFA Franc, which is pegged to the Euro. These organisations have drawn inspiration from the EU, and issue regulations (directly applicable in member states) and directives (that need to be implemented by national legislatures), in a manner akin to the EU. Subject matters addressed as part of these efforts include, inter alia, competition and anti-trust, banking regulations and exchange regulations.

ECOWAS (Economic Community of West African States) is another regional organisation that seeks to promote integration in "all fields of economic activity...", and seeks to create a unified African trading bloc through economic and trading union. Stated objectives are a customs union, economical union and monetary union. Although implementation of these objectives is still work in progress, ECOWAS has played an increasingly active role, and has been a driving force in the development of landmark projects such as the West African Gas Pipeline, the first regional natural gas transmission system in sub-Saharan Africa.

It is without a doubt that the legal and regulatory environment is evolving in the right direction in a number of African jurisdictions. Challenges and risks remain; however, these can be managed with the assistance of counsel with the right skill sets (both legal and linguistic), country experience and local contacts. Such challenges will undoubtedly deter less and less investors attracted by Africa's prospects of growth and returns on investments. In the words of Mo Ibrahim, one of the continent's most successful entrepreneurs and founder of a foundation to promote good governance in Africa: "Economic development of Africa is here to stay". **LM**

Contact Details:

ochambord@morganlewis.com

Morgan Lewis