

MACFARLANES

AFRICAN INSIGHTS

KEY LEGAL CONSIDERATIONS WHEN INVESTING IN AFRICA

Africa, alongside other emerging economies, presents challenges and risks to investors that are fundamentally different to those in more mature economies.

In the first of a series of publications looking at investing in Sub-Saharan Africa we offer our thoughts, based on our own recent experiences, on some of the key legal considerations for investors in the region. In coming months we will delve into some of these areas in more depth as well as looking at other areas of which we hope will be of interest.

A WIDER DEFINITION OF "RISK"

The legal risks facing an investor in Africa (and the business they are looking to invest in) are frequently wider and more critical to the progression of deals than is the case in other continents. As a result the legal tools commonly used to minimise or share these risks, such as deferred payment structures, the use of warranties and indemnities and insurance solutions, are often inadequate. Investors may face political, reputational and regulatory issues which will impact on the robustness of key contracts and constrain an investor's future ability to exit its investment or enforce its rights. There may also be legal and practical requirements to have a local partner which will require further risk appraisal and add further complexity.

It is therefore critical to ensure the correct advisory team with suitable international and local experience is appointed to enable these issues to be identified as early as possible in the process. Communications within the deal team and its advisors then need to be efficient to ensure that the issues that are identified in the diligence process are factored into the early stage negotiations.

PLANNING FOR THE FUTURE

An even greater focus on your exit strategy is critical given the increased number of legal and regulatory hurdles that are likely to be in play. These hurdles may take the form of local ownership rules, on-going indigenisation requirements and the need for tax and exchange control approvals.

A good understanding of these issues will enable you to identify the best way to structure the investment at the outset and mitigate any negative impact they may otherwise have on any eventual exit process. This may be as simple as structuring the investment through an offshore jurisdiction (for example, to avoid the need for local party consents to share transfers). However it may be more complicated, involving advance clearances from exchange control and tax authorities. It will also be important to ensure that the negotiations with any joint venture partner around exit mechanics, including the key transfer clauses dealing with

drag rights and deadlock resolution mechanics, are conducted in the context of a proper understanding of the practical issues and constraints that will apply.

A thorough knowledge of available bi-lateral investment treaties and double tax treaties is also required to ensure that structuring considerations are properly thought through.

PREPARING FOR ALL EVENTUALITIES

Consideration of the issues surrounding enforceability of judgments should form a key part of the early stage diligence exercise. There is little point in having a well drafted contract governed by English law if there are jurisdictional and practical hurdles in enforcing any judgment in the country in question (whether because the countries involved are not parties to the New York arbitration convention, for example Angola or Ethiopia, or otherwise).

In addition, in multi-jurisdictional transactions, differing rules and customs between the relevant countries may affect process, timing and execution risk (for example, customary and legally-required execution formalities in common law systems such as Ghana compared with OHADA jurisdictions such as Benin).

PRIORITISING KEY CONTRACTS

Finally it is critical to understand that the business you are investing in may be dependent on one or more key concessions or licenses granted by governments, government bodies or regulators. The approach that is taken to ensuring these contracts are robust is fundamental. In some cases political risk insurance may be available but in many cases it will not be, or it will not cover the specific risks that are of greatest concern.

For further information or specific advice please contact:



HOWARD CORNEY
PARTNER
CORPORATE AND M&A
DD: +44 (0)20 7849 2373
howard.corney@macfarlanes.com



JAMES DAWSON
PARTNER
CORPORATE AND M&A
DD: +44 (0)20 7849 2430
james.dawson@macfarlanes.com

MAY 2015

See overleaf for examples of our work.

Macfarlanes has extensive experience in Africa, having advised on transactions in more than 30 countries across a range of sectors and a number of disciplines including:

- ♦ public and private M&A;
- ♦ joint ventures;
- ♦ project finance;
- ♦ private equity;
- ♦ litigation and dispute resolution;
- ♦ commercial contracts; and
- ♦ fund formation.

For further information regarding our Africa experience please contact one of the authors or:



SCOTT BRODSKY
PARTNER
PROJECTS
DD: +27 (0)11 326 6261
scott.brodsky@macfarlanes.com



RUPERT CASEY
PARTNER
COMMERCIAL
DD: +44 (0)20 7849 2256
rupert.casey@macfarlanes.com

Recent examples of our work include advising:



Rand Merchant Bank as lender on the 75 MW Building Energy SpA Kathu solar photovoltaic Project, developed under South Africa's Renewable Energy Independent Power Producer Procurement Programme.



Brainworks Capital, a leading Zimbabwean investment and advisory group, on its \$35m fundraising.

DIAZ WIND POWER

The project company on the development and construction of a 44 MW wind farm in Lüderitz, one of the first independent power projects in Namibia.

OIL AND GAS

The minority shareholders on the sale of Sabre's interests in the Jubilee oil field off the coast of Ghana to Petro S.A.

MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

This note is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT. The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes 2015