

AFRICA: NEW TRENDS, OLD WAYS

Investors in countries which are doing their best to modernise must not try to obstruct progress by inserting abusive clauses in contracts

Anyone with experience of working in Africa will tell you that, in the past couple of years, we have been assisting them to gradually abandon old-fashioned, highly protective nationalist policies. Important nations in the continent have started to interact with the global market in a wise and realistic way.

This new approach had not been possible until a stabilisation of political regimes, implementation of democratic processes, the creation of modern legislation, an acceptance of international trade and investment treaties, an establishment of functional court systems, modernisation of public institutions and training of what still is a relatively small elite of highly educated people, with a better understanding of the world and the challenges their countries face to achieve a desirable level of social, economic and political development.

Good examples

Three good examples of this recent trend are Angola, Mozambique and Cape Verde. Far from perfection, each of them, in its own way and at its own pace, is walking the walk and implementing policies to help entrepreneurs generate more value and wealth and attract high-quality foreign investment.

For most of these countries, the chances of piercing the iron wall separating them from the developed countries are very limited without foreign investment. Their politicians are painfully aware of this reality, after years of impoverishment as a result of the world financial crisis and subsequent severe drop in the price of most natural commodities – their main exports and source of income. At state level, diversification has become a top priority and new business ideas are being implemented to bring long-forgotten industries back to life.

New air routes

With this change advertised worldwide, investors are reviving airline routes and small local businesses, carrying ambition and hope in their luggage. But, as the saying goes: all that glitters is not gold.

Attracted by opportunities in new industries, investors with long-term business relationships supported by personal loyalties or who are just trying to navigate uncharted waters, do not seem to acknowledge the social and political changes. We all know how difficult it is to get rid of old habits.

All this leads to abuse clauses, which runs the risk of setting a dangerous precedent.

Obviously dazzled by the new, more energetic

business environment, some investors are asking for provisions in their contracts entitling them to claim compensation in case of actions by future governments (regardless of political colour) they may deem as ‘impacting negatively’ on their businesses. This type of open-end provision contains the seeds of disaster, passing a serious message of distrust in relation to the host countries and the effort states have been making to democratise their societies.

Imagine an investor accepting dealing with Tories, but not with Labour – or vice versa.

Reject these demands

More sophisticated industries, with decades of international experience and highly qualified legal professionals in their ranks, simply reject this type of unwarranted demand and move on.

The problems lie in industries with supervisory bodies still struggling to attract qualified legal people in very niche markets. With a lack of experience, ill-advised, eager to get projects off the ground and in severe need of funding, government agencies may be open to advice from businesspeople with proven international track-records, without checking on them.

That is, until the day they become aware that a simple change of political party in the government may put them in deep trouble.

Killing the golden goose

I will refrain from commenting on the validity and enforceability of such type of provisions at the light of international law – just to say that, as a minimum, they are abusive – but assuming somewhere in the world there may be a court or tribunal willing to support them, the negative impact of a single precedent may be catastrophic, rendering years of progress completely useless and killing the golden goose.

New, progressive and democratic trends on the part of host countries demand new ways of doing business. Investors should know by now that there is no such thing as a clause protecting them from democracy.



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