

The legal challenges for private equity in Africa

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Africa is the world's second largest and second-most populous continent, after Asia in both instances. With over 1.3 billion people, it accounts for about 16 per cent of the world's population, with a median age of around 20 years as compared to a 30 year median for the rest of the world.

Despite a wide range of natural resources, the continent is the least wealthy per capita when compared to the rest of the world. However, recent economic expansion and the large and young population make Africa an important economic market in the broader global context. The continent is at the heart of the "Old World" and controls the shipping routes for a large percentage of global trade.

Given the importance of Africa and its untapped potential, it represents a significant target market for private equity investment.

The private equity industry is an important source of foreign direct investment in developing countries, including African countries. Private equity and fund managers worldwide are always concerned about any legal risks that may impact their overall risk portfolio. In Africa, such risks are numerous and include political stability, legal framework stability, ease of repatriation of funds, ease of exit options, levels of corruption and, last but not least, correct structuring of investment vehicles to achieve a proper corporate structure that is both tax efficient and provides appropriate corporate governance.

The main challenge facing private equity investors in many African jurisdictions is that markets are generally not ready for the sophistication required for a private equity transaction market. The current trend of private equity firms shying away from emerging market investments adds to the overall shortage.

The different legal systems, language, cultural and religious backgrounds of many African countries and the huge impact that colonisation had on Africa, makes investment in Africa more challenging as you cannot have one approach that would fit all countries. Africa has countries with civil law systems, common law systems and mixed law systems. Accordingly, a one size fits all approach will never work for Africa.

Creating a reliable exit environment, from both a legal and economic standpoint, is crucial for the success of private equity investments. Capital gains and dividend tax rates and regular changes to the tax and legal regimes continue to create a prohibitive environment, preventing many private equity firms from investing in African jurisdictions.

Using reliable service providers in such a high-risk investment environment is key to achieving a sound investment decision. Many African countries face the challenge of having relatively scarce resources of legal, financial, tax and accounting advisors with the proper know-how of the private equity industry and a true understanding of the investment cycle, including the importance of a timely exit and, accordingly, different exit options.

As a result, we have seen, over the years, many private equity players seeking to use European or US law firms to quarterback their African transactions, with these firms using local African law firms only in relation to local law issues. Identifying a reliable local law firm with a genuine understanding of the legal risks is crucial for the private equity investor, particularly for the target due diligence process, as well as from a more general legal framework standpoint, including proper anti-trust advisory on the approvals/notices that may be required under the different local laws and different treaties including the COMESA.

While private equity firms are keen to have proper exit alternatives, it is critical for their investment decisions to have sufficient protections on entry, with the usual representations, warranties, indemnities and other customary contractual protections. Also, many private equity firms and their international legal advisors opt to have English law as the applicable law to such contractual arrangements. Therefore, a proper assessment of whether such protections would be fully binding and enforceable from a local law standpoint is a critical element in the legal risk profile of each investment. Having protections which appear to be sound but which prove to be unenforceable or illegal in the relevant jurisdiction(s) would most likely be detrimental to the investment and the envisaged returns.

Al Tamimi & Company, as part of its Africa initiative, has developed relationships with many of the best law firms in various African jurisdictions that have a true understanding of the private equity industry and not just generic M&A experience. Al Tamimi is well-positioned, with its strong presence across the Middle East & North Africa region and its diverse team comprising over 50 nationalities, to offer a high level of service to private equity firms for their investments in Africa and play the quarterbacking role for entry/exit transactions. As well as providing the appropriate structuring advice, we are able to utilise our strong presence in the UAE to offer advantageous structuring options for investment vehicles in the UAE's financial free zones, the DIFC and ADGM.

Additionally, arbitration seated in the Dubai International Financial Centre (DIFC) or Abu Dhabi Global Market (ADGM) may be a more attractive and cost-effective choice for dispute resolution, particularly when compared to other options where the seat of arbitration would be in one of the European capitals.

In conclusion, Al Tamimi & Company can add true value to private equity firms investing in Africa, utilising the strong know-how and expertise of our team, alongside our network of 'best friend' firms. The African continent offers huge opportunity and growth potential for investors and, for this reason, Africa will remain an integral part of Al Tamimi & Company's strategy over the coming years.

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