

## **Briefing Materials for Afribiz Talk Show, October 28, 2009**

*Prepared by Peter C. Hansen*

### **Biographical Notes on Peter C. Hansen**

Mr. Hansen is an American attorney who last year opened a private practice focusing on African investment law. Prior to this, Mr. Hansen served as a lawyer with the World Bank and the U.N., after working as Editor in Chief of a prominent international legal publication at the American Society of International Law. Mr. Hansen has taught for much of the last decade as an Adjunct Professor of International Law at the American University School of International Service. He has taken an active role in U.S. appellate litigation on international questions, and he litigates commercial issues in Washington. Mr. Hansen received his J.D. law degree and Master's in International Economic Policy from American University, and his LL.M. in law from Cambridge University. Mr. Hansen's practice, like Mr. Hansen himself, is fluent in French.

Mr. Hansen continues to do a great deal of work with the World Bank, where he is a Consultant with both the International Centre for Settlement of Investment Disputes (*a.k.a.* ICSID) and the Office of Evaluation and Suspension, which sanctions corrupt companies and individuals, and debars them from future Bank contracts.

### **Why Mr. Hansen opened a practice focusing on Africa**

In 2008, Mr. Hansen was looking to move into the private sector after a number of years at the World Bank and U.N. A fellow Cambridge alumnus, who is a prominent Nigerian businessman, suggested that he attend the AGOA conference about to take place in Washington. Mr. Hansen did so, and found a very large number of African officials who were both interested in attracting investment and serious about legal reform. He also found that he was the only lawyer looking for business in the room. Mr. Hansen immediately saw that Africa was a highly promising growth market, and he decided that this was indeed the way to go. Because Mr. Hansen and his co-counsel combine legal expertise with a deep respect for African interests, the practice has made a very positive splash in Washington, and continues to expand its scope of operations.

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## **Five Legal Matters to Think About Before Investing in Africa**

*Peter C. Hansen*

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One of the biggest challenges to expanding effective investment in Africa is properly managing the legal side of the investment. Too many people think of Africa as the Wild West or some kind of mafia operation, where you have to go in, pay off the right people, make your money quick, keep your fingers crossed, and get out while you can.

Unfortunately, it is still the case that in a number of African countries, particularly resource-rich ones, government officials expect and encourage this sort of rapacious thinking, and that is how they treat even *bona fide* investors. You therefore get a self-fulfilling prophecy for both sides. Meanwhile, the local people on the ground, who just want jobs and a better life, lose out. Either the factory never gets built, or it can't run properly and develop the surrounding area. While the higher-ups might make some quick cash, the end result is continued poverty for the masses.

This being said, in quite a few African countries, governments are making it easier for investors to come in and operate. Among these, Ghana, Namibia, Rwanda, Mauritius and Zambia really stand out. They are giving strong signals that they are willing to do what it takes to welcome global money in a fully modern fashion. Still, the investor can hit snags. Here are some legal tips that will help investors go into these countries, as well as into much more difficult markets.

### 1. Have a Solid Plan Going In

Here I am talking about a serious long-term investor, not the get-rich-quick type. The first thing you need is obvious, and that is to have a serious business plan that is tailored to the market you are trying to enter. You have to have done your research, and not just be hoping or guessing that your product will sell or that your factory is going to make you a ton of money.

Beyond this basic planning is the “developing country” layer of issues. What really distinguishes developed countries from developing ones for investors is that developed countries have good legal systems. If you are a U.S. investor going to Australia, you know that if you run into trouble you can just walk down to the local court and get justice. However, if you go to Congo, or China for that matter, you can't trust the courts. They can be very slow by world standards. The law may have a lot of gaps in it and be hard to figure out and apply. It may be difficult to find a good local lawyer if you don't already know reliable people on the ground. The judges may want payoffs. There may be no way to enforce a judgment even if you get one in your favor.

Even today, a surprising number of developing countries around the world (not just in Africa) ignore these problems. This means that they attract the get-rich-quick type of investor rather than solid and honest businesspeople who are looking to start long-term businesses. As a result, the populations of these countries don't get commercial development and they stay poor. And all for lack of government will to implement a cheap solution, namely an honest, effective legal system.

The key to dealing with “developing country” problems is to have not only a solid business plan, but to also a solid legal plan going in. This means knowing what you can and can’t do, what you should and shouldn’t do, and what the legal limits are for continuing the investment. This will help you navigate both successes and problems on the ground. It will also help you define and manage the course of your investment from startup through windup. Plus, if things go wrong, you should at least have international legal protections if you have done your legal homework.

## 2. Avoid Big-Manism

This is a simple one to start off with. The African investment field is full of people willing (for a price) to hook you up with a top official they claim to know. Sometimes, these folks claim to know just a relative of the official! Don’t go this route. You are already splitting the pie before you have baked it, and it may be you who gets cooked instead.

Let’s look first at the best-case scenario. Your entire investment will depend on the goodwill and favors of an official, and maybe that official’s friends or relatives. What makes for this kind of goodwill, where business is concerned? Money. That means making payoffs, giving shares or jobs to useless but well-connected people, etc., etc. You will get bled dry. You may not even get anywhere anyway, since the official might be useless to you in the end. Most importantly, if you have U.S. investors or workers, you are liable to get hit with federal criminal charges for violating the Foreign Corrupt Practices Act, whether or not your project works out.

You can avoid this route by having a solid business plan, treating the country like any other business jurisdiction, and acting in a transparent, law-abiding manner. If you personally happen to have good contacts with the country’s government, by all means use them to present your business plan and generate enthusiasm. But don’t expect or ask for special treatment. Just ask to be treated according to the law. If you are working with an honest official, it will help the official do their job. If the official is dishonest, it is best to steer clear of them in the first place. The key is, if you are dishonest, expect people to be dishonest with you. If you are not honorable, don’t expect honorable treatment.

## 3. Have an Anti-Corruption Plan From the Start

This point is very similar to avoiding Big-Manism. You have to avoid corruption at all costs. Even in seemingly gray areas like facilitation payments to bottom-level officials, you need to have a program in place to avoid compromising situations and, for U.S. investors, federal criminal charges.

Let’s start off with basic questions. First, do you want to be doing business in a place where the government is trying to rob you at every turn? If you aren’t ready and able to be tough and stick to your guns, and refuse to make payoffs, you really should be doing your business somewhere else. Being tough can of course be costly in the short term. You can get hit with delays by petulant officials, or you may get harassed. In such case, it is very helpful to have access to honest higher-ups who can help you resolve these sorts of problems. In our practice, for example, we are developing ideas for using a country’s one-stop shop as the facilitator and enforcer of fair

legal treatment, backed up by a sovereign guarantee that triggers international legal protections if not honored.

Second, do you want to spend your money on building your business, or on supporting corrupt people? Corruption is always a losing proposition. Once you start paying one person, you end up having to pay off everyone. When one person hears you paid X, they will want X plus ten. This is incidentally why I think the current Chinese wave into Africa will ultimately come back to bite the Chinese. If your work depends on payoffs, you have nothing to fall back on when you can't keep up the payoffs. It's better to be known as a hard-nosed, straight-up player who doesn't pay off anyone. If you can survive the first obstacles, it becomes ever easier to refuse later demands.

Third, do you want to risk federal criminal charges? Under the Foreign Corrupt Practices Act (or "FCPA"), every U.S. person involved in a corrupt act can get charged. That means even the little guy on the ground handing over the suitcase can get years in federal prison. Trust me, defending against FCPA charges is a very expensive proposition, and companies tend to cut loose any employees who have made payoffs for the company. Read this to mean bankruptcy plus prison. It's much better simply to be honest.

What a savvy investor can do is turn the FCPA to his or her advantage. If you are approached for a bribe, which is easier to say: that you just don't want to pay, or that you can't pay because you don't feel like going to prison? The U.S. government is actually doing you a favor by giving you an excuse for not paying. The smart investor will use it.

For any investment that involves a group of people, you should have an FCPA-compliance program before you set foot in a high-corruption country. This means developing appropriate policies, making them very clear to everyone, reinforcing them constantly through training and announcements, and dealing with inappropriate demands or corrupt actions by staff in a firm and proactive manner. Having expert legal counsel on hand to guide this process is very helpful. Counsel can help you avoid most problems and to deal with difficult situations as they occur.

#### 4. Get the Right Investment Vehicle

When you go into Africa, or any other country for that matter, you have to register your business. You can sometimes establish a branch of your existing company, or you can create a subsidiary. The rules on what you can and should do differ from country to country, so you should get legal advice on what to do. Sometimes this can be done by your U.S. attorney at the early planning stages, when you are figuring out what you want to do and where you want to do it. When you actually register your local company, however, it is usually a good idea to have local counsel as well. Your U.S. attorney should be able to help you get reliable counsel on the ground, and can help make this representation as efficient as possible. This is something we can do, for example.

A big issue for foreign investors is choosing the right investment vehicle. This means having the best parent company for the investment. A U.S. investor looking at Angola, for example, may want to establish the parent company in Cape Verde. Why? Because Angola has a bilateral investment treaty (or "BIT") with Cape Verde, but not with the United States. By having the

Cape Verde company own the subsidiary in Angola, certain international legal protections will apply, and these can be enforced by binding arbitration.

In addition to protecting oneself against problems like expropriation, there is the serious and often-overlooked issue of tax. An efficient investment vehicle should have favorable tax status. Most often, this is achieved by siting the investment vehicle in a country with a double-tax treaty with the U.S. This allows the investor to avoid having to pay twice the tax on the same income, that is to say in both the U.S. and in the host country. It is also important to comply strictly with local tax laws and practices to avoid as many entanglements as possible. Having skilled counsel and local accountants is a must-have in such situations. Our practice, for example, has friendly ties with Pricewaterhouse Coopers, which has local tax offices in many African countries.

#### 5. Map Out Your Investment's Lifecycle and Know Local Law Before Actually Investing

When you start a domestic business, you usually have a good idea of what its lifecycle will be. If you set up a family-run store, maybe your kids will take it over and there are expected to be inheritance issues. If you are a venture capitalist, your timeframe is going to be a lot shorter and you will be thinking about how to sell a successful project and get your money in the bank. In all events, you need to know the law of getting out of business. Before leaving, of course, you will have to know and comply with local laws throughout the course of your investment.

When investing in Africa, many investors will want to pick up political-risk insurance to cover a number of local problems which can lead to loss of the investment. Whether to get such coverage depends on a number of factors, including the country's stability, the level of local corruption, and the investment's projected timeline. This is something that your U.S. attorney should be able to assist you with. While it is by no means a panacea, and is in no way a substitute for careful legal planning and compliance, it helps to reduce risks that even the law-abiding can't avoid.

Before going in-country, your U.S. counsel should review the local laws that will apply to the investment. This may go beyond checking out the country's standard investment laws, to reviewing those provisions which cover the specific investment sector, such as mining laws or textile treaties. You need to find out where the local law helps you, where it puts you at risk, and where it is vague or non-existent. In one African country, for example, the law requires a company's workforce to be progressively localized. The problem for the investor is knowing what "progressive" means. Because the law is really only a general principle, it allows a disgruntled official looking for a payoff to show up and cause problems on the basis that the company's workforce isn't sufficiently localized and that there "too many" expats working on site. Figuring out how to legally address such matters in advance can help to make the difference between smooth operations and serious problems on the ground.

If you plan to sell your African investment at some point, then you will need to know the local laws concerning transfers of company interests. Even if you don't plan to sell, you will need to know the local laws on repatriating profits, not to mention more workaday questions such as the rules for buying land, hiring and firing local staff, registering secured loans or leases, accounting, etc. Here it is important to have your U.S. counsel working with local counsel to make sure that local problems and solutions do not harm the investment or the investor.