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The Global Energy Transition: Navigating the D&O risks

Mike Parry • April 16, 2024

As domestic markets become increasingly crowded and competitive, international expansion is rising up the boardroom agenda. Businesses' international expansion plans were evidenced recently, with 1 in 10 UK business leaders saying they planned to expand their operations globally over the next 12 months[1].

However, expansion risks for boardroom executives have grown significantly as the threat landscape has become more complex with new political risks emerging and the rising tide of regulation coming into force. For executives leading businesses looking at international expansion, understanding the risks involved and building resilience is key to navigating in this era of accelerating risk.

One area of development and opportunity in particular that is attracting more firms from overseas, which brings with it a unique set of risks, is the global energy transition in Africa. The prospects around the electrification of the continent are exciting and highly lucrative with successful projects significantly contributing to the world's sustainability goals[2]. The potential of this opportunity is enticing multinational companies (MNCs) into the region to build green energy projects.

Yet, these projects come with significant risk, especially in Africa where several countries have seen regime changes, political coups, and conflict over the last few years. The geopolitical issues are reflected in our Risk & Resilience research, which when first initiated in 2021, has seen the perceived threat of war and terrorism risk among global business leaders increase, rising from 15% in 2021 to 25% in 2024

Investing in African energy projects creates many challenges for MNCs including having to navigate local rules at the same time as regulations in their home market. For companies that do take the leap, understanding the potential risks of expansion into these markets is critical to the long term success of the project.

The JV challenge

The majority of energy transition projects in Africa are run via Joint Venture (JV) structures with domestic firms. By working with a JV partner, international businesses can tap into the knowledge and network of investors and businesses, enabling them to navigate local rules and get spades in the ground. Choosing whom you JV with and your local advisors is vitally important as you are beholden to their practices and operations. This can become even more challenging if you do not hold majority voting rights in the JV structure and don't have the final say on decisions.

From a governance perspective, JVs in Africa can become a headache for directors and officers (D&Os). Without strong due diligence, it can be unclear who you are working with and the potential risks that these relationships bring with them need to be considered. Failure to carry out background checks on local partners can lead to claims of mismanagement. For example, in the Democratic Republic of Congo (DRC) where cobalt is mined to support the development of batteries, the mines have been plagued with scandals in recent years with local mine operators accused of brutal mining techniques, child labour and polluting the environment[3].

For the investors and MNCs linked with these projects, this not only brings reputational damage to their firm but can also lead to legal cases in Western courts if environmental, social and governance (ESG) rules are breached. In 2019, Dell, Tesla, and Microsoft were among several businesses named as defendants in a case brought by human rights firms on behalf of families from the DRC who had children killed or injured from mining Cobalt[4].

Shifting regulatory sands

Against this backdrop, firms expanding internationally need to understand and navigate a complex web of regulations that are evolving quickly. Firms looking to invest in new markets in Africa must contend with significant governance challenges that are becoming more important as ESG regulation grows tougher globally.

Bringing local officials on board with projects can enable developments to get off the ground. Yet, a recent survey revealed that over half of Africans (58%) say that corruption has increased over the past year[5]. This corruption is impacting the transition to renewables with mining and extractive industries particularly exposed to bribery and poor governance[6], often leaving businesses faced with demands for murky transactions to ensure a project's progress. Western companies have strict governance rules around bribery but not all international firms are under the same scrutiny. Companies based in countries like the United Arab Emirates (UAE) and China, for example, have less strict anti-bribery rules when operating in Africa, which can afford them a competitive edge.

For Western-based companies that breach ESG rules, this can be incredibly costly and lead to litigation in their home market. D&O of firms need to be alert to these risks and have robust checks and balances in place to mitigate the ESG risk and the resulting D&O liability claims that are likely to follow.

Partnering for success

For international firms without the requisite track record, local processes and rules are often opaque resulting in the success of a project hinging on teaming up with the right people and organisations. Robust due diligence and vetting of local partners is key to choosing trusted advisers and counsel with shared values and goals.

It is essential to do this work but, even when a process has been put in place to ensure effective partnerships, executives must remember that some risks are only revealed once projects are underway. With so many factors at play, business leaders need to be alert to the potential for the mismanagement or failure of projects and protect their interests.

Only by taking a full view of your risks can you create a robust strategy to counter these threats. Key to this is knowing your counterparties as much as possible, planning for various scenarios, building strong links with local communities, and understanding potential routes for exiting a project. One part of this is having an effective D&O liability policy in place, supported by an expert claims team with experience in defending against claims made by shareholders or third parties for alleged wrongdoing.

In today's rapidly changing geopolitical risk environment, for companies engaged in international operations or aspiring to expand internationally, the absence of robust risk mitigation plans and tailored D&O cover could jeopardise both a company's reputation and its prospects for long-term success. Having comprehensive D&O liability insurance is an essential safeguard against potential liabilities, and for ensuring the sustainability and prosperity of businesses on the international stage.

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[1] https://www.business.hsbc.uk/en-gb/corporate/insights/international/uk-firms-hear-the-call-of-global-growth

[2] https://www.irena.org/-/media/Files/IRENA/Agency/Publication/

[3] https://www.hsph.harvard.edu/news/hsph-in-the-news/the-dangers-of-cobalt-mining-in-the-congo/

[4] https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths

[5] https://www.transparency.org/en/gcb/africa/africa-9th-edition

[6] https://blogs.lse.ac.uk/africaatlse/2023/05/19/fighting-corruption-matters-for-the-energy-transition/