

Capacity building projects in Africa: regulatory reflections

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"Capacity development is the process through which individuals, groups and organisations, and societies deploy, adapt, strengthen, and maintain the capabilities to define, plan, and achieve their own development objectives on an inclusive, participatory, and sustainable basis" (United Nations Economic Commission for Africa).

As a global law firm with projects across the African continent, we see firsthand how institutions embrace these capacity building principles. For many years, we have advised colleges, universities, hospitals, foundations, nongovernmental organizations (NGOs), civil society organizations, and development companies on capacity building in Africa. While perhaps the greatest and most important challenge is achieving a project's sustainable development goals, we must also solve another very practical problem – how to implement a legally sound operation in the host country.

The following lessons are drawn from observation and experience with capacity building projects across sub-Saharan Africa. These projects cross sectors and disciplines, ranging from public health and medical research to chronic hunger and education. The lessons identified here are broad, and multiple business and legal considerations may influence the regulatory strategy across Africa. As such, these reflections are illustrative and hardly exhaust the twists and turns that arise in each country, but perhaps this discussion will serve to illuminate the recurring regulatory issues that can thwart capacity building initiatives.

Respect Africa's country-by-country uniqueness

Each country's distinct political, social, and historical framework informs the modern regulatory climate. To overlook these distinctions and to paint with a broad brush (for example, "this approach worked in Uganda so it will probably work in Nigeria") is hazardous. Several years ago, an organization established a legal entity in Uganda to undertake an innovative education and training initiative, which ultimately was successful. The organization attempted to replicate that successful model for Nigeria, repurposing the same corporate templates used in Uganda. What followed was a multiyear quarrel with Nigerian university regulators about the mission of the entity, which could have been avoided if Nigerian regulatory advice had been taken at the outset.

A regulatory strategy in one country is not necessarily transferable to another country, and legal solutions that make sense from a western law perspective may be completely unworkable in African jurisdictions. Assertions offered by local contacts, such as "This is the way it's usually

done," are no substitute for advice from reputable local counsel. Respect for Africa demands no less.

Obey the "doing business threshold"

To institutions with long experience around the globe, discussion of this topic can sound like a broken record. But, incredibly, some humanitarian organizations still plunge into boots-on-the-ground projects in Africa without consideration of local "legal status" — such as local business registrations, licenses, or other permissions to conduct programs in the host country. Penalties often follow. Increasingly evident is the ability of inflexible and bureaucratic regulators to discover an institution's blind eye to registration and related in-country tax and employment law obligations. Nonprofits and humanitarian institutions generally do not enjoy automatic exemptions or "grace periods" for compliance with local business law. Activities that trigger host country registration obligations or other legal status issues may include

- employing local nationals, or posting employees to positions there;
- executing a lease for office space;
- opening a bank account;
- operating in a highly regulated sector (for example in health care and higher education); or
- procuring equipment, vehicles, or insurance for in-country assets.

Setting up a registered operation does not present a conceptually difficult problem; however, the combination of formality and inefficiency that may characterize government functions in Africa makes the process lengthy and sometimes frustrating. To apply for host country registration and licenses in a capacity building project may involve submission of forms, proposals, resolutions, bylaws, powers of attorney, financial records, and other materials sufficient to put regulators on notice of the institution's intentions and activities there. Some countries permit local operation via a collaboration agreement or affiliation agreement with a local entity, or a memorandum of understanding with the appropriate government ministry. Some countries also permit foreign institutions to "piggyback" on a governmental organization's legal presence, such as operation pursuant to the United States Agency for International Development's (USAID) bilateral agreements with the host country. In still other countries, the institution could be subject to civil or criminal penalties for operation of any program prior to registration of a specific in-country business entity and licensure of that entity.

Because program sponsors often are very eager to begin operations, and because in many African countries it is unlawful to begin operations until certain formalities have been completed, it is important for institutions to find the fastest and surest way possible to operate in the host country. A remarkable array of "interim" solutions may be available, depending on the county. In all these circumstances, capacity building organizations must respect the rule of law wherever they pursue an operation.

It takes only one employee

Recently, authorities in an East African country executed a search warrant on the offices of an organization engaged in public health technical assistance programs in that country. It was alleged that the organization had not obtained proper immigration status for dozens of U.S. nationals posted to that country, and had omitted to remit personal income taxes for local employees.

Hiring just one local national or posting just one employee to the host country may trigger financial and legal obligations. As a general rule, host country employment law applies to local nationals and third country nationals assigned to positions in that country. It may seem convenient to engage staff as "independent contractors" or "consultants" as opposed to employees to avoid entanglement with labor law, payroll, and tax withholding obligations in each country, but this often causes problems. Most countries disregard the "contractor" designation if the substantive arrangement between the parties suggests that an employment relationship exists. Mischaracterizing the relationship can result in fines and legal proceedings. Similarly, human resources documentation such as "staff manuals" and "terms of service" are ripe for dispute when drafted without close inquiry into local labor regulation.

Respecting immigration status also is critical. For example, in Mozambique, a citizen of foreign nationality cannot reside there for work without obtaining a residence card and a work permit, which entails Ministry of Labor approval and a trove of documents (including a certificate of completion of university studies translated into Portuguese and certified by the Mozambican consulate and foreign ministry of the country of origin), regulatory clearance from police, and attention to quotas on the number of foreigners permitted to work in the country. Many organizations find these immigration-related requirements especially difficult to accept when, over the course of many years, they operated with no immigration-related difficulties. Recently, however, organizations were fined and nearly barred from re-entry because local staff did not hold appropriate immigration status.

Engage local stakeholders

Cultivating healthy relationships with local stakeholders in Africa is vital, not just during a project but before a project proceeds and following completion. Local constituents – such as cultural leaders, associations, professional networks, nongovernmental organizations, and municipal authorities – have sharp perspectives on the substance of a project and the regulatory path forward. Gaps and ambiguities persist in written policies or guidelines that pertain to capacity building projects, especially for scientific and public health initiatives, and engagement with local leaders (including local counsel) is a responsible approach to understanding the values that should guide a project. One question from local stakeholders – does the project seek to deliver a "quick win" or to establish a long-term commitment? – often affects a project's legal and regulatory strategy.

For example, after receiving a large USAID award for a five-year training and education project in North Africa, a major U.S. hospital held meetings with local health department officials and professional networks across a dozen provinces. This strategy introduced the project and established personal connections. These relationships made a crucial difference when challenge after challenge arose in the large-scale project. Timely implementation of the project ultimately yielded an additional five years of funding from the sponsor.

Avoid conflicts, bribery, and corruption

Recently, a development organization flagged "procurement irregularities" in purchases in a West African country. An investigation showed an unusual volume of supply contracts with a company based in a particular province. The organization's leadership visited the company's physical location in that province and the address turned out to be an abandoned bakery. The organization was forced into a protracted internal review that distracted substantially from the humanitarian aims of the program.

Issues are often traced to unsubstantiated assumptions about the suitability of local business partners. It's useful to know in advance if your proposed collaborator is financially distressed, has been accused of fraud, or is staffed by family of government officials. Due diligence on African entities is possible through public searches, discreet reference checks, local counsel, and even investigative firms, none of which are necessarily expensive or time-consuming. Often these checks yield precious information on the counterpart's reputation, motivation, business experience, and finances.

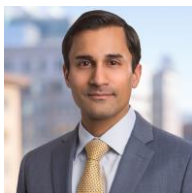
Although many development organizations work hard to change the culture of bribery and corruption, rigorous offensive and defensive measures remain crucial. Senior management at well-prepared development organizations implement a thoughtful, multi-faceted approach to anti-bribery compliance. In addition to anti-corruption policies and standard procedures to diligence vendors and third parties, there are routine risk assessments, periodic compliance trainings, user-friendly guidelines, helplines, and ongoing monitoring of transactions. One organization prepared and negotiated a bilateral agreement with the host country Ministry of Health, titled "Principals of Ethical Practice," to distribute to all employees, partners, vendors, and consultants across their field operations.

Final thoughts

Trial and error can be costly in capacity building initiatives. The regulatory environment in many African countries is opaque, even as reforms are underway. Many more considerations and potential pitfalls, from banking regulation to import and export, must also be considered. The practical challenge in addressing these issues is not the particular difficulty of any one of them, but the difficulty of learning what the rules are for all of them and threading the necessary paths through the local regulatory processes.

Several pieces of the puzzle must fit together before large capacity building projects can properly begin, and orchestrating the necessary actions efficiently, so that they come together in a reasonable and timely manner, is more difficult than one might reasonably expect. However, it is achievable, and making a permanent difference in Africa's future is worth the effort.

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