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THE USE OF ALTERNATIVE DISPUTE RESOLUTION TO REDUCE THE PERCEPTION OF PARTIALITY IN THE COURTS, IN ORDER TO ENCOURAGE INTERNATIONAL ENTREPRENEURSHIP IN COUNTRIES WITH NATIONAL OWNERSHIP REQUIREMENTS

Dr. Daniela Romagnoli*

ABSTRACT

Countries that require international entrepreneurs to have a national partner (national ownership requirements (NOR)) in order to open up a new venture within their borders, run the risk of becoming less desirable to do business in. One reason for this is that some investors and international entrepreneurs may be wary of possible conflict being solved in a court system that shows a positive bias towards its citizens.

This paper looks at the experiences of five international entrepreneurs involved in small and medium-size enterprises (SMEs) in Kenya and explores how their experiences have become a warning to others who see potential gain from doing business in that country and other countries with NOR. It also explains how one such entrepreneur found herself to have a perception of partiality based from her experience with the court system in Kenya and how that perception decreased the likelihood of her opening an international entrepreneurship venture in Saudi Arabia—which also has NOR for business operating in the Kingdom.

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The focus of this paper is to suggest a role for alternative dispute resolution (ADR) as a measure to lower the risk, whether real or perceived, which may keep international entrepreneurs from investing their resources in countries with NOR.

I. INTRODUCTION

Countries such as Kenya and Saudi Arabia have some requirements that international entrepreneurs have a national business partner or do not exceed a certain foreign ownership in order to be allowed to open up a venture within their borders.¹ This means that international entrepreneurs who may have the knowledge, financial ability, and willingness needed to open up a venture in a country with national ownership requirements (NOR) must find a national who is willing to partner with them; whether or not that person has the right qualifications or financial means.² The value of their citizenship can therefore be part of the partnership agreement and calculation of personal return on investment (ROI).³

Kenya, like many other countries in Africa, has captured the imagination of many travelers and businesspeople alike. The nation, which is located in East Africa, has gone through growth and many changes and has become a hub for international businesses with representation in the continent.⁴ Africa in general has experienced a dramatic growth in foreign direct investment (FDI)⁵ over the last decade, especially from China.⁶ Nairobi, the capital of Kenya, is a center for many Non-Government Organizations (NGOs) as well as the UN and has a large population of expatriates, both working and residing as partners and families of international workers.⁷ This along with growth and other economic factors has made Kenya an attractive place for opening up entrepreneurship ventures.

¹ U.N. Conference on Trade and Development [UNCTAD], *An investment guide to Kenya: Opportunities and Conditions* 65 (2012), https://unctad.org/en/Docs/iteiia20052_en.pdf; Frederick W. Taylor, Jr., *Alternative Legal Structures for Doing Business in Saudi Arabia: Distributorship, Agency, Branch, Joint Venture and Professional Office*. CASE W. RES. J. INT'L L. 77, 77, 79–83 (1980).

² The national ownership requirement is also referred to as a foreign direct investment (FDI) restriction. See e.g., *Foreign Direct Investment Restrictions in OECD Countries*, OECD (2002), <http://www.oecd.org/economy/reform/2956455.pdf>; see also Nahom Ghebrihiwet & Evgenia Motchenkova, *Relationship Between FDI, Foreign Ownership Restrictions, and Technology Transfer in the Resources Sector: A Derivation Approach*, 52 RESOURCES POL'Y 320, 320–23 (2017).

³ James Chen, *Return on Investment (ROI)*, INVESTOPEDIA (Apr. 27, 2020), <https://www.investopedia.com/terms/r/returnoninvestment.asp>.

⁴ Kenya Informational Guide, *Nairobi's Economy - A Large Contributor to Kenya's GDP*, NARABI BUSINESS (2015), <http://www.kenya-information-guide.com/nairobi-business.html>.

⁵ James Chen, *Foreign Direct Investment (FDI)*, INVESTOPEDIA (Feb. 24, 2020), <https://www.investopedia.com/terms/f/fdi.asp>.

⁶ Tola Amusan, *China and Saharan Africa Economic Relations: A Neo-Mercantilist Perspective*, AFRICAN RENAISSANCE, Special Issue 2, August 2019, at 145–162.

⁷ Lily Kuo, *Kenya is Pressuring Thousands of Expat NGO Workers and Volunteers to Go Home*, QUARTZ AFRICA, (July, 2016), <https://qz.com/africa/716518/kenya-is-pressuring-thousands-of-expat-ngo-workers-and-volunteers-to-go-home/>.

II. Research on the Foreign Investor's Experience

This paper looks into the journeys of five international entrepreneurs (cases) who chose to open up ventures in Kenya, a country with some NOR.⁸ The participants are or were involved in SMEs in dairy/agriculture, mobile banking, flowers/farming, hospitality, and food. All the participants had experience in international entrepreneurship and used a law firm to draw up partnership contracts with their national partner. Only one of the five SMEs was composed of only two partners, all others had three to five partners, with one national partner for each venture. In four out of five cases, the national partner provided a lower financial contribution to the business venture than that of their partners. The data for this paper was gathered through personal interviews conducted during a two-year period.

A challenge of international entrepreneurship is the fact that the law which governs new ventures is that of the country in which the business is operating, a law often foreign to the international entrepreneur.⁹ This fact, added to the reality of conducting business within the boundaries of a different culture, language, and political system, may be a source of conflict for partnerships. In the research conducted for this paper, it was found that all the international entrepreneurs interviewed mentioned culture and local regulations as sources of tension between themselves and their business partners.

Within a period of five years, four of the cases studied were no longer in business. Three of the international entrepreneurs interviewed cited differences with their national partner as a major contributing factor for the failure of their venture. Out of the four businesses, which ceased to exist, three ended up in the court system—resulting in a settlement that benefited the national partner. As a direct result of court settlements, which seem favorable to the national partner, the three international entrepreneurs involved in legal cases have expressed a perception of partiality towards the national partner within the legal system in Kenya.

III. THE CASE OF THE KINGDOM OF SAUDI ARABIA

As Saudi Arabia is working hard to reduce its financial dependency in oil, the kingdom is encouraging global investment and entrepreneurship as a way to diversify their revenues and attain many of the goals of Vision 2030.¹⁰ This vision, which was

⁸ These interviews took place between December 2015 and February 2016 either in-person or over videoconference. Participants were guaranteed anonymity and therefore will not be named individually or by company. Any uncited references to a SME within this paper is from these interviews. For further questions, please contact the author.

⁹ Jörg Kleis, *Legal Aspects of Doing Business in Kenya—An Outline for German Companies*, 18 RECHT IN AFRIKA 248, 252 (2016).

¹⁰ Jolly Sahni & Ariff Syah Juhari, *Corporate Diversification: A Fundamental Exploration of General Business Environments, Industry Environments and Firm Characteristics*, 18 ACAD. STRATEGIC MGMT. J. (Apr. 2019).

introduced on the 25th of April 2016 by HRH Crown Prince and the Chairman of the Council of Economic and Development Affairs, Mohammad Bin Salam Bin Abdulaziz Al-Saud, is a development program intended to be a blueprint to grow the country by utilizing its resources and strengths to bring the country forward to being recognized in the international arena as a modern, forward-thinking, successful nation.¹¹ Part of Vision 2030 is composed of three pillars: 1) the status of the country “as the heart of the Arab and Islamic worlds”, 2) the “determination to become a global investment powerhouse”, and 3) to “transform the country’s location into a hub connecting three continents (Asia, Europe, and Africa).¹² Pillars number two and three work to directly encourage business development, partnerships, and entrepreneurship.

Like Kenya, Saudi Arabia has NOR, and therefore international entrepreneurs must find a Saudi partner in order to start a venture within Saudi borders.¹³ No data was found throughout this research to quantify the number of business partnerships between Saudi and non-national partners, and their status; however, entering into an international entrepreneurship venture in Saudi Arabia has an added complexity: sharia law.¹⁴ A legal system derived from the Qur’an and the traditions of the prophet Muhammad, sharia law is mainly utilized in Saudi Arabia and other Gulf states.¹⁵ Along with NOR, sharia law, may create hesitation for international entrepreneurs looking to explore business opportunities in Saudi Arabia.

One of the international entrepreneurs in this study is now employed in the kingdom of Saudi Arabia. Though many opportunities exist in the country of Saudi Arabia and many changes are being made in regard to women in terms of employment opportunities, education, and encouragement of women led entrepreneurial ventures, the participant is hesitant to start a business in another country with NOR mainly because of the perceived partiality of the local courts towards national partners in a business venture and the practice of sharia law.¹⁶

The perception of positive partiality towards national partners within the court system of countries with NOR may actually be identified as a gap that can be filled by alternative dispute resolution (ADR) professionals practicing in international firms. This opportunity should be explored by ADR practitioners and students, as it may be financially rewarding for them and contribute to the economy of such

¹¹ Richard H.K. Vietor & Haviland Sheldahl-Thomason, *Saudi Arabia: Vision 2030*, HARV. BUS. SCH. CASE 718-034 (revised Jan. 2018).

¹² His Royal Highness Prince Mohammed bin Salman bin Abdulaziz, *Message from HRH Prince Mohammed Bin Salman Bin Abdulaziz Al-Sud*, Vision2030 (2020), <https://vision2030.gov.sa/en/vision/crown-message>.

¹³ See Taylor, *supra* note 1.

¹⁴ *Foreign Travel Advice: Saudi Arabia*, GOV.UK, <https://www.gov.uk/foreign-travel-advice/saudi-arabia/local-laws-and-customs> (last visited Feb. 29, 2020).

¹⁵ Dean Kern, *Doing Business in the Kingdom of Saudi Arabia: A Tax and Legal Guide*, PWC (2015), <https://www.pwc.com/m1/en/tax/documents/doing-business-guides/doing-business-guide-ksa.pdf>.

¹⁶ *Saudi Arabia: Important Advances for Saudi Women*, HUMAN RIGHTS WATCH (Aug. 2, 2019), <https://www.hrw.org/news/2019/08/02/saudi-arabia-important-advances-saudi-women>.

countries by encouraging international entrepreneurs to explore possibilities in countries with NOR in confidence. The creation and marketing of ADR services, which may be agreed upon by partners of international entrepreneurship ventures in countries with NOR, such as a clause in the partnership agreement stating that conflict within the business or regarding the business or between the partners will be addressed through mediation or arbitration, would likely reduce the probability of going through the court system if something goes wrong with the business venture—lessening the resistance to international entrepreneurship in countries with NOR.

It should also be a consideration for policy makers to encourage the use of ADR in international entrepreneurship ventures in countries with NOR, as the practice would reduce the burden of busy court systems and the cost to taxpayers.¹⁷ Further, policy makers could consider ADR as the first stop to conflict resolution within SMEs by creating policies that make international business ventures in countries with NOR require an ADR clause, therefore shifting the financial burden to the venture itself. This could also be an opportunity for forward thinking/opportunity generating ADR practitioners and students.

Let it be understood, that ADR as a practice is not a western phenomenon, and therefore exists globally and is currently being utilized both in Africa and the Middle East.¹⁸ What is interesting is exploring the many ways in which ADR is not currently being utilized. Both in Africa and the Middle East, we see how NOR may open opportunities for ADR.¹⁹ This finding can also be applied to other countries with NOR and even in partnership contracts for SMEs in countries without NOR.

IV. CONCLUSION

A conclusion from this paper is that ADR focused on international entrepreneurship ventures (SMEs) in NOR countries needs to differentiate itself—especially through the international makeup of the practitioner(s) providing the service. This would reduce the perception of national guided bias. Another observation is that while many ADR practitioners and students are well versed in law, they also need to have an understanding of business principles, finance, and entrepreneurship. The practice of sharia law in Saudi Arabia and other Gulf countries also provides a niche market for ADR practitioners and students who are familiar with this legal system. The last insight from this paper is the importance for ADR practitioners and students to be observant in the many ways in which their

¹⁷ Issena Love, *Settling Out of Court: How Effective is Alternative Dispute Resolution*, WORLD BANK (Oct. 2011), <http://documents.worldbank.org/curated/en/320121468337243521/Settling-out-of-court-how-effective-is-alternative-dispute-resolution>.

¹⁸ See The Law of Arbitration Art. 2, Royal Decree No. M/34 (Apr. 16, 2012) (Saudi Arabia). This article explains the scope to which the arbitration rules apply to disputes in Saudi Arabia. *Id.*

¹⁹ See generally *TCdata360: Foreign Equity Ownership Index*, WORLD BANK (2012), <https://tcdata360.worldbank.org/indicators/feoi.bank?country=SAU&indicator=46&countries=KEN,CMR,MRT,LSO,CIV,GHA,ZMB,SEN,TZA,STP,TCD,ZWE,BEN,SSD,COM,SDN,MLI,UGA,RWA,BFA,SLE,ETH,MOZ,GNB,TGO,ERI&viz=choropleth&years=2012&compareBy=region>.

knowledge and skills are able to fill gaps in current systems and policies; where there is a gap, there is an opportunity.

