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THE RISE OF THE UNIONS IN SUB-SAHARAN AFRICA

and how employers may deal with it

The Trade Union Movement in sub-Saharan Africa

Trade union activity has been on the rise in sub-Saharan Africa in recent years, especially in the natural resources sector, with oil industry strikes in Gabon and Angola, and the miners' strike in South Africa grabbing the spotlight. Often this makes foreign investors question their operations in the countries affected by the turmoil. However, as we will see in this article, these situations can be adequately dealt with in a way as to maintain investment.

Despite what many people may think, the trade union movement in sub-Saharan Africa is not recent. Before the Second World War, groups of employees were already organized and acting as trade unions in South Africa as well as in Sierra Leone and the Gambia, also former British colonies. It was, however, after the Second World War that the trade union movement evidenced growth in some sub-Saharan Africa countries under British and French colonial administrations, which eventually gave rise to the approval of various statutes and guidelines governing the incorporation of unions and the rights and prerogatives of the union entities and their representatives. As one could have expected, the trade union movement began in the public administration and in the transport sector, with teachers, railway and port employees to be the first ones to be able to organize themselves and actively act as trade unions for their respective sectors. Afterwards, some employees from fundamental economic sectors such as the mining industry in Zambia and Rhodesia (currently Zimbabwe) also set up trade union organizations.

The end of the colonial era in sub-Saharan Africa had, quite surprisingly, a negative impact on the trade union movement. Many countries experienced dictatorships and single-party political regimes, where the unions were seen and used as branches of the government and as a means to exercise control over the country's workforce. The end result of this political environment was the general degradation of the trade union movement due to its loss of independence from the State, which in some countries was legally or practically accompanied with restrictions to the freedoms of association and affiliation, with the immediate effect of a low or non-existent collective bargaining agreement negotiation.

The new rise of the trade union movement took place during the late eighties and early nineties with the establishment of democratic regimes in some sub-Saharan African countries or at least an increased openness of the ruling parties to have trade unions actively representing the workforces in certain fundamental economic sectors. The Francophone African countries took the lead in this new movement, notably in Congo-Brazzaville, Niger and Mali. The trade union movement reached lastly the Portuguese speaking countries, particularly Angola and Mozambique, where independent trade unions have been active only since the first decade of this century.

Collective Bargaining Agreements – To Negotiate or Not to Negotiate

One cannot analyze the phenomenon of trade unions without considering the status of collective negotiations and the execution of collective bargaining agreements in each country. Here the evolution of sub-Saharan African countries' legal systems was substantially different depending on the matrix of their constitutional and contractual laws. Countries close to common-law principles tend to demand a given degree or percentage of employee representation for any union to have legal capacity to validly be a party to a collective bargaining agreement. Conversely, certain jurisdictions inspired more in Civil Law principles (e.g. Angola), tend to disregard or be quite liberal as to the representation requirement for a union to enter into collective bargaining agreements with an employer or an association of employers.

In certain countries the employer is not legally required to enter into negotiations with a union upon being faced with a collective bargaining agreement proposal or a set of employees' claims, being thus an option to open or not open a negotiation process and/or an industrial action.

The representation requirement normally entails an immediate legal and practical question for an employer or association of employers: Are we required to actually negotiate? In certain countries the employer is not legally required to enter into negotiations with a union upon being faced with a collective bargaining agreement proposal or a set of employees' claims, being thus an option to open or not open a negotiation process and/or an industrial action. Quite differently, in other jurisdictions employers are subject to a mandatory duty to enter into negotiations aimed at discussing the employees' claims and eventually enter into a formal collective bargaining agreement, with the law also providing for alternative mechanisms for the resolution of collective labor disputes. This may include conciliation and mediation procedures before the Labor authorities and, in some cases (e.g. Angola), mandatory arbitration is provided for in case the negotiation deadlock be total and last for a given period of time.

Some unions in certain sub-Saharan African countries have been known to, at times, adopt strategies that reflect the general unskilled nature and lack qualifications of the employees. Therefore, an immediate approach that employers should take when confronted with a collective bargaining agreement proposal or a list of employees' claims is to divide the claims between voluntary or statutory. Statutory claims are the ones based on a legal provision or on the employer's lack of compliance with a statutory rule or contractual provision in a prior collective bargaining agreement. Voluntary claims include any other employees' request or offers, normally grounded on specific work conditions (e.g. improvement of meals at the company's canteens) or economic sector standards (e.g. payment of an isolation allowance on top of an offshore allowance for offshore personnel).

The responses of the various legal systems are not the same in all Sub-Saharan African countries. In some jurisdictions, a strike is only possible upon the parties exhausting all mechanisms for alternative resolution of the dispute, which normally entails conciliation and mediation procedures before various governmental authorities, typically the labor inspectorate or equivalent body.

A voluntary claim is generally easy to address unless the claim is grounded on standards generally adopted by the relevant industry or economic sector, whether in the country or region. In this last context, unions and employees tend to use arguments of equality and non-discrimination in relation to employees hired by third party companies or working in similar industries. The average percentage of salary increase used in similar companies or the economy as a whole is generally the main voluntary claim, and this is regularly the cause for complex industrial actions and a pretext for strikes. In these cases, employers should focus their reply on the key factual differences between their industry or economic sector and the one being used for comparison, the economic and business justification for such claim and ultimately whether any concession could endanger its sustainability in the medium or long term.

A statutory claim gives rise to a more complex collective negotiation, since the employer needs to rapidly carry out a due diligence exercise of its Human Resources policies and standards, and more importantly as to its payroll rules and procedures, since the general context of employees' claims are typically related to compensation items. If the conclusion is that the company is compliant, then a brief but solid reply should be given to such claim and clearly conclude that it is rejected on the basis of facts and/or as an unreasonable voluntary claim.

An additional point to consider is the scope of the claim and the final collective bargaining agreement eventually entered into. The normal solution followed by most legal systems is that the agreement primarily applies to the employees affiliated in the union that is a party to the agreement, which ultimately flows from the constitutional principle of freedom of association. However, most jurisdictions provide for mechanisms whereby the government may extend the scope of a given agreement to non-affiliated employees, which is typically justified by public policy needs to ensure common work standards and compensation policies in a given trade or economic sector.

And then the Word Strike Jumps in

The risk of any collective negotiation process is the union and the employees deciding to resort to a strike depending on the employer's reply to the claims made and/or if the negotiation process is deemed to have reached a deadlock.

The responses of the various legal systems are not the same in all sub-Saharan African countries. In some jurisdictions, a strike is only possible upon the parties exhausting all mechanisms for alternative resolution of the dispute, which normally entails conciliation and mediation procedures before various governmental authorities, typically the labor inspectorate or equivalent body. Other countries have laws setting out a deadline for the normal and reasonable conclusion of the collective negotiation and leave it up to the parties – the unions obviously – to consider that the process has reached an impasse upon elapsing said period, and entitle the unions to move forward with a strike notice with or without using previously alternative resolution mechanisms.

The strike notice normally depends on the unions' initiative. Nonetheless various jurisdictions consider that a strike notice must also have the employees' confirmation through a general assembly resolution subject to employees' attendance and majority requirements.

Social Peace

The final relevant point to stress is that certain jurisdictions provide for mandatory duties of social peace for both parties to a collective bargaining agreement during the period it is in force. This statutory rule means that the collective bargaining agreement entered into by the union and the employer is a total and comprehensive agreement that covers all employees' claims during its term, which in practice means that the union and the employees covered by the agreement cannot submit new lists of claims or promote a conflict or strike with a view to amending it. In other countries the duty of social peace is subject to a more flexible approach and interpretation, which allows unions to submit new claims or declare strikes for different matters not addressed in the agreement in force.

Conclusion

The trade union movement in every country reflects the status of its constitutional and legal framework, the economy and the labor market. Sub-Saharan African countries are facing a new rise of this movement, which despite the current negative economic environment will likely continue to mature and develop in those countries where the democratic principles and freedom of association are not jeopardized or subject to restrain.

Our experience is that, when faced with union demands or strike notices, the employer's success in adequately dealing with the issue often depends on their first approach to the problem. When employers manage to engage specialized assistance from the very beginning it is often possible to mitigate the potential damage that this type of situation can give rise to.

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