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Navigating Across Borders With Tech
Legal frameworks for Trade And Digital Markets

6 December 2023

In a bid to intensify and promote e-commerce transactions in Kenya, several laws and policies have been passed that provide a framework to foster a conducive regulatory environment in the digital trade space in Kenya.

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Kenya spearheads the digital revolution in Africa, attributing its success to favourable regulatory conditions for data protection, access, consumer rights, and ICT laws. Digital trade, involving electronic cross-border transactions for goods and services, propels online commerce growth within Kenya, impacting global globalization. This article examines Kenya's digital market regulations, dissecting laws and policies shaping the tech sector and influencing innovation and commerce's trajectory amid newfound opportunities in this dynamic environment.

The Africa Continental Free Trade Agreement (the AfCFTA)

Implemented on May 30, 2019, the AfCFTA aims to establish a unified African market, fostering regional and international trade by removing barriers. Despite its current lack of provisions for digital trade, ongoing negotiations are focused on creating a protocol to address this gap. This protocol is anticipated to outline how the African free trade area can facilitate and support the digital trade sector within the AfCFTA framework.

Data Protection Act, 2019 (the DPA)

Digital trade thrives on exchange of data and flow of data from one trader to another or from consumers to traders in online platforms. The DPA guarantees the privacy of individuals, providing for basic principles such as consent and opt-out options for commercial use of data. This is a key legislation for entities trading in the digital space, considering the flow of information usually involved in such trade.

Kenya Information and Communication Act, 2012 (KICA)

KICA regulates the telecommunications sector and is a key legislation for those engaged in telecommunication and broadcasting in Kenya. KICA also establishes the Communications Authority of Kenya that regulates the communication sector. KICA also regulates electronic transactions, which have been on the rise in cross-border trade. This includes regulation of electronic contracts and e-signatures in Kenya.

National Trade Policy, 2017

The National Trade Policy, 2017 provides for key areas such as domestic trade such as micro, small and medium enterprises, international trade and, most importantly, e-commerce. The National Trade Policy, 2017 recognizes that development of e-commerce is hampered by factors such as low access to the internet in certain areas, high internet costs, and network security problems among others. The National Trade Policy 2017 proposes to develop a legal and regulatory framework to support e-commerce while ensuring an upgrade of existing infrastructure. Training is also a key supporting factor in spurring the growth of e-commerce.

National Information, Communications and Technology (ICT) Policy, 2019

ICT is regarded as one of the key drivers of socio-economic transformation worldwide. The ICT Policy seeks to actualize transformation through digital technologies with e-commerce transactions being part and parcel of the digital transformation of the way trade in goods and services is perceived.

Digital Masterplan 2022-2023

Kenya unveiled a ten-year Digital Masterplan in April 2022 to support the development of Kenya's digital economy and keep pace with worldwide technological advancements. The Masterplan is aimed at promoting digital infrastructure, digital services and data management, digital skills, and fostering digital innovation for entrepreneurship. It is designed to promote the growth of digital economy with digital trade being one of the key pillars of digital economy transformation.

Conclusion

Digital trade is no longer an alien concept and is continuously taking shape in Kenya due to globalization and growth of tech infrastructure. More Kenyans continue to take part in e-commerce transactions and as such, it is important to have a well-defined regulatory landscape governing their transactions to enable seamless integrate of digital frameworks in local and international trade.

TECH IN TRADE

International Character of Contracts

Internationalization of Contracts in Cross-Border Transactions

12 January 2024

Globalization and improved tech infrastructure have played a critical role in the rapid growth of e-commerce transactions and today, traders in different jurisdictions within Africa and across the globe can engage in seamless cross-border digital transactions

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A key development in cross border trading has been the internationalization of commercial contracts which generally refers to the process of structuring agreements to accommodate the complexities and considerations that arise when parties from different jurisdictions or legal systems trade with one another.

As people continue access the benefits of international trade, the following key factors should be taken into account when transacting with parties in different jurisdictions:

- Choice of Law

Determining the applicable law in cross-border transactions is vital as it prevents conflict of laws between competing domestic laws of the parties to the transaction. From the onset, parties should specify which laws will govern the contract thus establishing the legal framework governing the transaction. Parties should also consider the effect of international treaties and laws such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and their potential impact on their particular transaction.

- Choice of Currency

Parties to cross-border transactions should be keen on the type of currency to be used in the transaction, taking into consideration the prevailing value and exchange rate of the proposed currency. This minimizes the risk associated with currency fluctuations in international markets.

- Force Majeure Events

Given the international nature of cross-border transactions, force majeure clauses are essential to address unforeseeable events and supervening circumstances that may affect the contract performance.

Some of the most widely known force majeure events in recent times such as Covid-19 and the ongoing conflicts in Eastern Europe and the Middle East have been shown to have direct impact on cross-border trade and are critical considerations in any international commercial transaction.

- Choice of Forum for Dispute Resolution

Clearly defining the forum for dispute resolution in the cross-border transaction is extremely crucial as helps avoid jurisdictional issues and ensures a smoother, timely and cost-effective process of resolving a dispute which might arise between the parties. Bearing in mind the international character of the transaction, it is very important for parties to choose internationally recognized forums and methods of resolving disputes such as arbitration. Some of the renown arbitral tribunals in the world include the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce and the London Court of International Arbitration among others.

- Choice of Language

Language is the key medium of communication between the parties to a transaction. Different jurisdictions have different native languages, and it is imperative for the parties to choose one common language of communication in the transaction. The United Nations has six official languages for its members, namely, English, French, Arabic, Chinese, Russian and Spanish, though ultimately, it may depend on the parties agreeing on a language which is comprehensible to both of them.

- Data Protection Considerations

Digital trade thrives on exchange of information between traders and with the increasing importance of data in business operations, addressing data privacy is of crucial importance considering data is the new oil in this era.

Parties should ensure that adequate safeguards, contractual arrangements and robust data protection laws in each jurisdiction are able to protect any personal data that may be shared across borders.

- Intellectual Property and Trade Secrets

Cross-border intellectual property issues are more than likely to arise if the transaction involves proprietary information or what may be deemed trade secrets . As such, addressing issues like patent recognition, copyright enforcement, trademark protection and secrecy within contracts becomes crucial. Most importantly, parties should consider adopting confidentiality clauses and execute Non-Disclosure Agreements to adequately safeguard such property or information, while taking into consideration international laws and conventions.

Conclusion

Internationalization of contracts requires careful consideration of legal, linguistic, cultural, and business factors since the international character in contracts is a key component in cross-border transactions allowing parties across borders to navigate the complexities and nuances associated with international transactions. Ultimately, this contributes to the success and sustainability of business relations among traders across the globe.

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Decoding Tax and Forex Strategies for International Digital Trade Success

22 January 2024

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In cross-border digital transactions, nothing can be more stressful than tax planning and foreign exchange considerations. The international nature of these transactions calls for a keen eye and an ear for legal developments.

Any person involved in digital trade across various countries always needs to consider the tax regime in the countries they intend to operate in. The fact that these countries may have diverse tax regimes may become quite a headache to start-ups just entering the digital trade space. Here, we summarize key tax and foreign exchange considerations for entities within digital trade sector interested in operating in Kenya.

Tax Considerations

Tax law is known to be quite complex, mainly due to its ever-evolving nature, e.g., in Kenya, tax laws can change every two years.

In Kenya, international entities dealing in digital services such as online advertising, data supply, digital content, cloud computing and e-commerce platforms must really consider the tax implications of their businesses.

Kenyan tax law recognizes various classes of taxes, but the following apply best to digital services:

Corporate Income Tax (**CIT**) – entities that derive income from or accrue income in Kenya must pay CIT on said income. Resident and branch companies CIT rate currently stands at 30%. The Finance Act 2023 has recently introduced tax on repatriated income by non-resident companies with a permanent establishment in Kenya at the rate of 15% from 1st January 2024.

Value Added Tax (**VAT**) – entities that supply taxable goods and services are required to pay VAT on the consideration received for the supply of goods/services including provision of supplies in a digital marketplace. Entities are required to register for VAT where the taxable supplies shall exceed the minimum of K.Shs.5,000,000/= in accordance with the Value Added Tax Act, 2013 (the **VAT Act**). A key provision of the VAT Act included through the Finance Act 2023 requires those importing digital services into Kenya must register for VAT irrespective of whether they expect to meet the minimum turnover threshold.

Withholding Tax (**WHT**) – under the Income Tax Act (**ITA**), entities are entitled to deduct certain amounts of money from income payable and remit the same to the Kenya Revenue Authority (**KRA**). Examples of such income where WHT is deductible includes professional fees, interest, dividends. The Finance Act 2023 has included a new category of income that attracts WHT; any income derived from digital content monetization. Digital content monetization is defined as offering electronic material for entertainment, literature, research etc. including advertising on websites or social media, sponsorship by brand owners for content creation, affiliate marketing with commissions based on audience clicks, subscription services for access to content among others. The current rate for WHT on digital content monetization is 5% for residents and 20% for non-residents.

Digital Service Tax (**DST**) – introduced in 2021, DST is a tax payable by entities providing certain digital services including downloadable digital content (e.g., mobile applications, e-books, films), over-the-top services (e.g., streaming of shows, films, music, podcasts), sale or monetization of data from Kenyan users on a digital marketplace, provision of digital marketplaces, subscription-based media, electronic data management services, electronic booking or ticketing services, search engine and automated help desk services, online distance training (e-learning). DST is payable where a person provides a digital service to a user located in Kenya. Residents and non-residents with a permanent establishment must register with KRA for payment of DST. The current rate is 1.5% of the gross transaction value (excl of VAT).

Digital Asset Tax (**DAT**) – another product of the Finance Act 2023, DAT is a tax chargeable on all persons engaged in the transfer or exchange of digital assets. The ITA defines digital assets to include non-tangible assets of value and non-fungible tokens. The current rate of DAT is 3% of the transfer value of the digital asset.

Foreign Exchange Considerations

Kenya does not have any foreign exchange controls, which works as a way of promoting cross-border money transfers. However, banks in Kenya as practice, require documentary evidence to support any transactions above US$10,000. Banks also monitor any suspicious transactions, particularly transactions above the threshold of US$15,000 set out in Kenya's anti-money laundering laws.

Nonetheless, foreign exchange gain or loss is also a key accounting and tax consideration. The ITA recognizes that foreign gain or loss is allowable and deductible for tax purposes.

Taxes in Kenya are paid in Kenya Shillings, and any payments made in foreign currencies may lead to a gain or a loss being realized in the transaction. Such foreign exchange gains or losses must be realized i.e., it must be converted from a foreign currency to Kenya Shillings. Effectively, any transaction that uses currency held in a foreign currency account e.g., USD account cannot be considered as realized and therefore, allowable.

Conclusion

The Finance Act 2023 has shown Kenya's focus on the digital marketplace, having seen the lucrative nature of the sector. While this may be a good source of revenue for the state, it can be a bottleneck for non-residents who would wish to tap into Kenya's large internet usage base. All this notwithstanding, foreign entities who operate in or would wish to operate in the digital services sector must keep an eye on these key financial considerations as they may affect their ultimate decision to invest in the Kenyan market.

Watts And Woes: Energy And Data Security Are Key Challenges For Trade In Digital Markets

2 February 2024

Stable energy supply by the government and licensed providers, coupled with enhanced data security efforts in the private sector, is crucial for digital markets. A collaborative approach ensures minimal breaches and maximizes value for traders and consumers during power failures.

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In Kenya, there has been a rise in the cost of energy coupled with a spate of power failures across the national grid effectively shutting down the country every 2-3 months. In a similar period, the number of private organizations in the digital space that have suffered data security breaches and regulatory sanctions on account of mishandling of consumer data has increased, this despite the enactment of a data protection law in 2019.

One thing is clear - A weak energy infrastructure is not ideal for a growing economy that has become heavily reliant on virtual data to drive digital markets across a variety of sectors. Digital markets rely on stable energy sources to sustain and enhance digital trade across borders. A local merchant or consumer seeking to trade within local or foreign jurisdictions depends on reliable energy sources and a safe data network to securely process consumer information in online transactions that involve instantaneous online payments and an efficient delivery channel. Unfortunately, it is not uncommon for data driven transactions to fail critical moments due to sudden disruptions in power, leading to loss of confidence from consumers and revenue by online traders.

In Kenya, the Government plays a critical role in ensuring security and reliability of the electric grid, to which it has licensed a majority of the electrical grid to Kenya Power. Through the Energy Act, 2019, the Government has established the Energy and Petroleum Regulatory Authority (EPRA) that is responsible for regulating the energy sector to ensure that it provides sustainable energy to all sectors of the economy.

In addition, the Act contains provisions that penalize licensed electricity suppliers and compensate consumers for power outages that occasion loss and damage to consumers. The Energy Act also provides for alternative sources of energy including renewable sources, however, the costs associated with access to, or installation of, renewable energy infrastructure remains prohibitive for many businesses operating within digital markets. As such, trade within such markets is still largely reliant on stable electric power sources to ensure consistent trading activity across digital channels.

Data security is now a primary concern for traders operating and trading through digital platforms. Despite the enactment of data protection and cybercrime laws in Kenya and increasingly across multiple jurisdictions across Africa and the world, there is still a large amount of personal data shared by traders and consumers within the digital market that remains exposed to payment fraud, malware, ransomware, phishing, and hackers. Such risks are then magnified when the underlying energy infrastructure is mismanaged and cannot guarantee or sustain the safe and secure transmission of data.

When energy security and reliability is low, a typical online or digital transaction on an unsecure website can go wrong in so many ways. The risk that information shared online may be intercepted during power disruption increases and the financial losses may extend beyond that particular transaction. While the Data Protection Act 2019 imposes conditions on organisations to put in place adequate safeguards to protect data loss and the Computer Misuse and Cybercrimes Act contains sanctions against persons who may commit cybercrimes, such legislation is not sufficient to cater for energy failures that may lead to data loss as a result of criminal activity or poor data protection compliance.

Other potential concerns include insufficient digital literacy and the accessibility of essential digital resources like internet connectivity, smartphones, tablets, and computers. Additionally, political considerations play a crucial role, particularly given recent instances of internet disruptions arising from political motivations.

Despite the challenges, businesses and traders operating within digital markets remain innovative and determined to succeed. There are of course practical steps that traders and consumers should take to ensure data security in the midst of power disruptions, including ensuring software used is up to date and contains adequate firewalls and installing sufficient back-up power supply such as generators and power banks to support their operations. For online businesses, implementing robust and legally sound data privacy policies and procedures to mitigate against risk of data loss is vital to ensure continued and sustainable trading within the digital marketplace.

Conclusion

Energy and data security remain a challenge for organizations and consumers operating within digital markets and it is important for the Government and its licensed energy suppliers to provide stable and sustainable energy to consumers and traders, while the private sector should work to enhance data security at both a personal and business level so that risks of breaches are minimized for the benefit of honest traders and consumers. A holistic approach by all honest actors within the digital space can help reduce data loss during downtime caused by power failure and ensure that traders and consumers receive sufficient value for convenience.

NAVIGATING RISKS IN KENYA'S THRIVING DIGITAL TRADE
An Investor's Guide

FMC ADVOCATES
in association with:
Pr1merio

9 February 2024

In an era where the global tech and digital markets present unprecedented opportunities for growth, Kenyan investors are increasingly setting their sights beyond borders. However, venturing into international markets, introduces a myriad of complexities, risks, and challenges that demand strategic foresight and adept risk management.

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From mitigating political and economic uncertainties to embracing adaptability and flexibility, below is a roadmap for investors to not only survive but thrive in the world of cross-border trade and digital markets.

1. Cybersecurity, Data Privacy, and Intellectual Property protection

Data security has been identified as a key challenge in digital markets and should be a primary concern to investors trading digitally. Prioritizing cybersecurity measures to protect digital assets and sensitive data in compliance with international standards such as the General Data Protection Regulations from the EU while ensuring adherence to data protection regulations locally and abroad is critical to mitigate legal and reputational risks. Investors will also need to secure intellectual property rights for their digital products and technologies including patents, trademarks, and copyrights. They also need to conduct due diligence to ensure that intellectual property is protected in the target countries, reducing the risk of infringement.

2. Currency Risks and Hedging

Understanding the impact of various currencies on investment finances is essential, as is adeptly managing the risks tied to currency exchange rates. Sudden shifts in exchange rates can disrupt budgets, escalate costs, and impact competitiveness globally, potentially leading to reduced sales and revenue. Investors must continuously monitor currency exchange rates as they can significantly impact returns on international investments. An understanding of these risks and how they directly affect their businesses will inform investors' hedging strategies to minimize the impact of eventual adverse movements in the market. This involves using financial instruments to increase protection against unforeseen fluctuations, thus making cash flows more stable and predictable.

3. Market Research and Analysis

Investors need to conduct thorough research on the target international markets. This involves an understanding of the regulatory environment, cultural nuances, and competitive landscape to make informed investment decisions. Investors also need to analyze economic indicators, market trends, and geopolitical factors that may impact the tech industry in the target countries. An assessment of the political and economic stability of the target countries is also key because unstable political climates or economic uncertainties can pose risks to investments. This then helps in making informed decisions on the possible need to diversify investments across countries with varying risk profiles to mitigate geopolitical risks.

More importantly, an evaluation of the international supply chain in the target markets is important as it informs decisions on how to navigate and mitigate potential disruptions and implement contingency plans to mitigate supply chain risks.

4. Legal and Regulatory compliance

Strict adherence to both local and international regulations is crucial to safeguard digital investments. This involves understanding international trade laws and regulations, including export-import laws, tax implications, reporting requirements, and limitations on foreign exchange transactions. Seeking advice from legal and financial experts is essential to navigate these complexities, ensuring compliance and preventing inadvertent missteps.

Well-informed observance of such regulations paves the way for sustainable and successful trading endeavors for Kenyan participants in the global markets.

5. Adaptability and Flexibility

Finally, investors need to foster adaptability in investment strategies and be prepared to adjust plans based on changing market conditions, technological advancements, and regulatory shifts. Building agility in responding to unforeseen challenges and capitalizing on emerging opportunities is also key in keeping up with the ever-evolving digital world. This also involves regularly evaluating the effectiveness of risk mitigation strategies and updating them based on evolving market dynamics.

It is also important to establish strategic alliances and partnerships with local businesses in the target markets. Local partners can provide insights, networks, and regulatory knowledge on mitigating operational risks. Investors can then leverage these partnerships to navigate cultural differences and ensure effective market entry strategies.

Conclusion

Kenya has made significant progress in digital trade and various opportunities abound. For new investors, grappling with intricate market terms, trend analysis, and decision-making can be intimidating. Fortunately, Kenyan investors can overcome these challenges by tapping into educational resources, participating in forums, and utilizing demo accounts offered by trading platforms to build confidence. The crucial approach is to begin with small steps, stay well-informed, and exhibit persistence. Much like any skill, the combination of practice and knowledge is the pathway to mastery and, ultimately, success in the realm of digital trading.