



Botswana: legal framework for italian investors

Doing business with Botswana
Business opportunities

Milan, November 5th 2013

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Most common legal issues for Entrepreneurs operating in Botswana

1.1 Geography and government

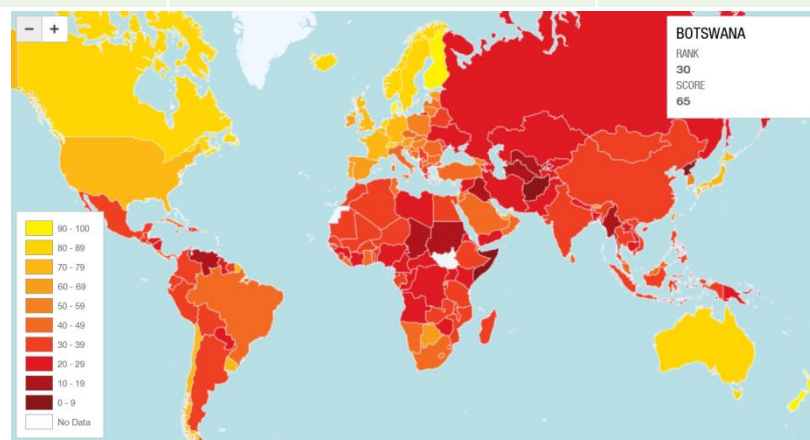
- **Area:** 581,730 sq km.
- **Population:** 2,127,825 (July 2013 est.).
- **Capital:** Gaborone (almost 250 000 people).
- **Main cities:** Francistown, Selibe Phikwe, Lobatse.
- **Independence:** 1966.
- **Government and executive branch:**
 - Botswana is a parliamentary republic;
 - the Chief of State is President Seretse Khama Ian KHAMA (since 1 April 2008): the president is both the chief of state and head of government; he appoints the Cabinet;
 - the President is elected by the National Assembly for a five-year term (eligible for a second term); last election was held in 2009 (next to be held in October 2014).



1.2 Economy

- Botswana has one of the most stable economies in Africa

	2011	2012	2013 (e)	2014(p)
GDP growth rate (%)	8	5.8	5.6	5.5
Inflation (%)	8.5	7.2	6.2	5.9
GDP - composition, by sector of origin				
agriculture	industry		services	
2.1%	45%		52.9%	



- 2012 Corruption Perception Index

1.2 Economy

- Natural resources:
 - diamonds, copper, nickel, salt, soda ash, coal, iron ore, silver;
 - even if Botswana has significant coal reserves, the Government is encouraging other energy sources: in May 2013 the Government has issued a call for Independent Power Producers (IPPs) to submit expressions of interest, as the country plans to add a further 600 MW to its electricity generation capacity.

	2011	2012	
Italy imports from Botswana (annual increase)	NA	+ 35.5%	Precious metals and leather.
Italy exports to Botswana (annual increase)	+ 61.4%	+ 40.8%	Motor vehicles, electrical and mechanical products, medical equipment and hospital supplies, chemicals and pharmaceuticals.

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Contractual best practice:

2.1 Trading: export to/from Botswana

2.2 Free zones and special economic zones

2.3 Payments and collaterals

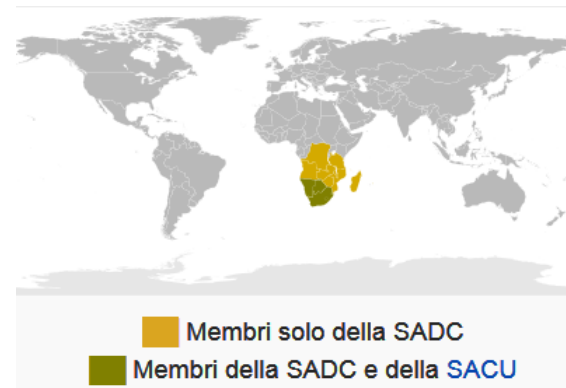
2.4 B2B and B2C

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Most common legal issues for Entrepreneurs operating in Botswana

2.1 Trading

- **Currency:** Botswana Pula BWP
 - 1 Botswana Pula = 0.0860989811 Euros
- Botswana has **bilateral trade agreements** governing the duty free entry of goods with Zimbabwe, Malawi, Korea.
- Botswana is a **member** of:
 - Southern African Customs Union (SACU)
 - Southern African Development Community (SADC): Botswana hosts the headquarters of the SADC group of countries
 - SACU-European Free Trade Association Free Trade Agreement (SACU EFTA FTA)
 - SACU-Mercado Cum del Sur Preferential Trade Agreement (SACU MERCOSUR PTA)
 - SACU-United States of America Trade, Investment and Development Cooperation Agreement (SACU US TIDCA)
 - World Trade Organisation (WTO)
- Botswana is a beneficiary country of African Growth and Opportunity Act (AGOA).



2.1 Trading: export *to* Botswana

- In Botswana exporting and importing has become faster thanks to the introduction of a scanner by the country's customs authority and an upgrade of South Africa's customs declaration system: specifically, in 2009 Botswana sped up customs clearance on its border with South Africa and trained its customs officers in the use of the Electronic Data Interchange (**EDI**) system, resulting in quicker processing of trade documents.
- Investors are encouraged, but not required, to purchase from **local sources**. The Government does not require investors to locate in specific geographical areas, use a specific percentage of local content, permit local equity in projects, manufacture substitutes for imports, meet export requirements or targets, or use national sources of financing, but central government, local authorities and parastatal organizations are encouraged to purchase products and services from locally-based manufacturer or service providers, if they can compare to international standards.
- Botswana Export Development and Investment Authority (**BEDIA**) provides export-oriented manufacturing enterprises with assistance for obtaining clearances, residence permits, factory spaces etc.

2.1 Trading: export *from* Botswana

- Goods originating from Botswana may be **exported to European countries** without payment of customs duties at country of destination, provided that the goods satisfy the origin of goods status criterion as set out in the Cotonou Agreement and the exporter obtains a **certificate of origin** (“Euro 1”) from the Department of Customs and Excise: the goods must be wholly obtained or sufficiently worked or processed in Botswana; e.g.:
 - raw materials, animals or plants extracted from, grown and raised or grown in Botswana respectively. Products of these are also considered as wholly originating. Since the Cotonou Agreement considers African Caribbean Pacific (ACP), European Community (EU) and European Overseas Countries and Territories (OCT) as one territory, goods wholly obtained from these countries and territories are considered as originating from Botswana if the last process of working or processing is done in Botswana;
 - where goods are sourced from outside ACP, EC or OCT and they are used to produce a given product, the latter will be held as originating from Botswana if, after the manufacturing process performed in Botswana, the total value of the non-originating materials does not exceed 15% of ex-works price of the final product.
- When the goods satisfy the above requirements, a Euro 1 certificate can then be purchased from licenced clearing agents or Customs headquarters. Prior to exportation, the certificate must be taken to the nearest Customs office for the relevant processing. Processing of the certificate involves customs officials visiting the exporter's manufacturing factory to ascertain that the manufacturing process taking place is in conformity with origin requirements under the Cotonou Agreement.
- When goods are ready for exportation, other **export forms** (CE 23 and CE 25) must be filled in and counter-signed by Botswana Customs prior to exportation.

2.2 Free zones and special economic zones

- Botswana has no free trade zones, but in recent years the Government has created **special economic zones (“SEZs”)** which are at different stages of development; Botswana’s SEZs will mainly focus on the development of priority export sectors whose goods and services have been identified as having potential growth in demand in world markets. Currently the establishment of SEZs has been handled by:
 - **Agricultural Hub**: the hub operates in conjunction with the Ministry of Agriculture, and is in a position to fully interact with other Ministries, parastatals, the private sector and other organisations. Projects and initiatives currently forming part of the hub are – among others - : National Agricultural Master Plan for Arable Agriculture and Dairy Development, Proposed Zambezi Integrated Agro-Commercial Development Project; Restructuring of Botswana Meat Commission, Restructuring of Banyana Ranch and other state owned ranches (cattle sector).
 - **Botswana Innovation Hub (“BIH”)**: BIH coincides with a business entity; indeed BIH is a company, incorporated to develop and operate Botswana’s first Science and Technology Park in Botswana. The company is mandated to support new ventures and existing companies as well as attract companies, universities, research and advanced training institutes to establish in the Science and Technology Park. BIH is located strategically on a 57 hectares site, near the Sir Seretse Khama International Airport and adjacent to the Diamond Training Centre (DTC) in Gaborone.
 - **Diamond Hub**: this is a state-owned company based in Diamond Technology Park. This centre of excellence, expediently situated a short distance from the airport, city centre of Gaborone and Debswana offers tailor made spaces, security facilities, Botswana Police services, practical solutions to local utility challenges such as generators, UPS systems and water tanks etc.
 - ...**Education Hub, Health Hub, Transport Hub** that are department/units of the respective Ministries.

2.3 Payments and collaterals

- The Bank of Botswana has been reducing exchange controls over the last few years. No foreign exchange controls means freedom of repatriation of profits, investments, and capital gains, free of withholding taxes.
- Both corporate customers and the general public utilize the Society for Worldwide Interbank Financial Telecommunication (**SWIFT**) services through their bankers. SWIFT provides a reliable and quick platform for financial messaging services under internationally recognised standards.
- Payment by cheque can be expensive in consideration of the bank's charges.
- Botswana is a signatory to the World Bank's Multilateral Investment Guarantee Agency (**MIGA**) that provides political risk insurance guarantees to private sector investors and lenders.
- Botswana's commercial and bankruptcy laws are comprehensive. Secured and unsecured creditors enjoy similar rights under bankruptcy proceedings as they would in Europe.
- Forms of securities governed by the laws of Botswana are:
 - **mortgage over real estate**: this form of security implies the registration of a mortgage bond with the Registrar of Deeds in accordance with the provisions of the Deeds Registry Act;
 - **deed of hypothecation over movables**: this form of security is perfected by the registration of a deed with the Registrar of Deeds, in the manner prescribed by the Deeds Registry Act. A deed of Hypothecation is a form of statutory pledge created by statute;
 - **pledge**: this form of security (only over movables) is created and perfected once the pledgor delivers the pledged property to the pledgee.
- A secured creditor is entitled to enforce its security only upon the occurrence of a default on the part of the debtor, according to the terms of the agreement under which the loan/advance/borrowing was made.

2.3 Payments and collaterals

- A creditor will enjoy a preferred claim with reference to claims secured by certain categories of mortgage bonds, notarial bonds, legal hypothecs, pledges or rights of retention.
- According to **Insolvency Act of 2008**, in the event of insolvency, the order in which creditors are paid out is as follows:
 - secured creditors (the priority depends on the dates on which the relevant security was created or registered);
 - costs of the liquidator in administering the estate;
 - claims of employees;
 - tax claims by the Commissioner;
 - claims of preferred creditors, in respect of the free residue;
 - concurrent creditors;
 - holders of preference shares; and
 - holders of ordinary shares.

2.4 Business to business

- **Distribution** and **commercial agency** are well-known kinds of business relationship within Botswana market.
 - They are not specifically ruled by law: Botswana has a legal system based on common law and purpose written legislation which facilitates commercial activities (Roman-Dutch system), e.g. Competition Act (*infra*).
 - Nonetheless, both distribution and commercial agency are covered by the provisions of
 - the first Code of Conduct for the Private Sector approved by Botswana Confederation of Commerce, Industry and Manpower (**BOCCIM**) and Directorate on Corruption and Economic Crime (**DCEC**): according to the Code of Conduct, trade discounts/commission rates or fees paid to dealers, distributors, agents or consultants must be reasonable in relation to the value of the product or the work that has been done and consistent with the law, policy and local practice;
 - the **Competition Act of 2009**: it includes anti-trust legislation and policies to ensure appropriate competition in the business environment. Under this Act, newly-established Competition Authority is monitoring vertical and horizontal market agreements and mergers and acquisitions.
- Botswana has not undersigned the **United Nations Convention on Contracts for the International Sale of Goods** (Vienna, 1980).

2.4 Business to consumer

- Under the laws of Botswana, consumers have the right to:
 - Safety: to be protected against the marketing of goods which are hazardous to health/ life;
 - Information: to be protected against fraudulent, deceitful/ grossly misleading information, advertising, labeling / other practises and to be given the facts she/he needs to make an informed choice:
 - **Consumer Protection Act of 1998** specifies what has to be held as unfair contract terms (and, therefore, void).
- Retailers must provide the customers with remedies for faulty goods; but customers may go directly to the importer/manufacturer where goods are not of acceptable quality or do not comply with the manufacturer's description. Remedies depend on the seriousness of the fault:
 - Minor faults: the retailer can either repair the goods, give you a replacement or give you a refund. If they choose to repair the goods they have to do it in a reasonable time.
 - Major faults: if the problem is major or can't be fixed, you can return the goods and choose between a refund or a replacement.

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Most common legal issues for Entrepreneurs operating in Botswana:

- 3.1 Tendering for public / private procurement - BOT
- 3.2 Dealing with construction permits
- 3.3 Establishing a business entity
- 3.4 Employment of citizens and non-citizens
- 3.5 Paying taxes
- 3.6 Enforcing contracts

3.1 Tendering for public / private procurement - BOT

- The Government is the single largest procurement entity in the country.
- The Public Procurement and Asset Disposal Board (**PPADB**) is responsible for the award of all government tenders.
- Standardized bidding categories regard:
 - **Services:** indicate a contract in which a contracting authority engages a person to provide a service, if the value of the consideration attributable to those services exceeds that of the goods covered by the contract;
 - **Supply:** indicates a contract for:
 - the purchase of goods;
 - hire of goods (both where the contracting authority becomes the owner of the goods after the end of the period of hire and where it does not); and /or where setting or installation of the goods is to be provided and the value of the consideration attributable to the goods and any sitting or installation is equal to or greater than the value attributable to the services.
 - **Works:** indicate a contract that consists of or includes:
 - the grant of a right to exploit the work or works to be carried out under the contract;
 - carrying out of a work or works for a contracting authority; and or
 - engaging a person to procure by any means the carrying out for the contracting authority of a work corresponding to specified requirements.
- Main procurement methods are:
 - **Open International Bidding** where foreign bidders' participation may enhance competition or the procurement requirement's technical complexity demands the participation of non-resident foreign bidders;
 - **Open Domestic Bidding** that is the preferred method of procurement of supplies, works and services, except as provided for in the PPAD Regulations. Foreign bidders may participate in open domestic bidding subject to eligibility requirements.
 - **Restricted International/Domestic Bidding** where (i) Items to be procured are only available from a limited number of suppliers; (ii) there is insufficient time for open bidding due to an emergency situation; (iii) other circumstances occur where departure from opening bidding is justified.
 - **Direct Procurement** relates to a situation where goods, works or services are available from only one source. The request to use this method of procurement must be accompanied by a convincing justification, and where appropriate, the cost benefits.
- In cases where international expertise and technology are needed, the Government has issued concessions as Build-Operate-Transfer, for example for building and maintaining government offices.

3.2 Dealing with construction permits

- **Private ownership** is allowed, but is worth noting that $\frac{1}{4}$ of the land in Botswana is **State-owned land** and more than $\frac{1}{2}$ is **tribal land** that can be leased both for commercial use (up to 50 years) and for residential use (up to 99 years).
- Within this legal framework, the procedure for a building company (BuildCo) to obtain a **construction permit** can be summarized as follows:
 - obtain a site plan from the Department of Surveys and Maps;
 - obtain a certified copy of rates certificate from the Gaborone City Council (the rates certificate verifies BuildCo's tax payment status);
 - obtain a Preliminary Environmental Impact Assessment from the Department of Environmental Affairs (PEIA): new regulations introduced in 2005 require the submission of an environmental management plan before an environmental impact assessment is obtained. The Environmental Impact Assessment is usually performed by an independent company before site construction;
 - submit permit application at Gaborone City Council;
 - obtain planning and building permit from the Gaborone City Council. For any construction over 1,000 sq. m., the City Council forwards the filed documents for the approval of the Department of Town and Regional Planning (DTRP);
 - apply for sewage connection;
 - notify the City Council of the practical completion of the building: BuildCo should give a notice in writing not more than seven days after the completion of building work to the Gaborone City Council;
 - obtain water connection with Water Utilities Corporation;
 - obtain telephone connection.

3.3 Establishing a business entity

- Principal business entities (**Companies Act 2003**):
 - Public and private limited liability companies
 - Partnership
 - Sole proprietorship
 - Branches of foreign companies
- **Business sectors reserved solely for citizens:** butcheries, general trading establishments, gas stations, liquor stores, supermarkets (excluding chain stores), bars (other than those related to hotels).
- Apart from the previously identified business sectors reserved for citizens' ownership, Botswana sets no restrictions on foreigners willing to do business in Botswana.
- Foreign investors are encouraged, but not compelled, to establish joint ventures with citizens or citizen-owned companies. Therefore investments can be 100% foreign-owned. From a commercial point of view it is however advisable to have local participation.
- From 2009 Botswana strengthened investor protections by requiring that **related-party transactions** be approved by the shareholders meeting (shareholders being entitled to sue directors for their relevant liabilities).
- *Incorporation procedure of a private limited liability company (min. 1, max. 25 shareholders; min. 1 director; no paid in minimum capital requirement)*
 - Select and reserve a **company name**.
 - Sign the declaration of compliance of statutory requirements for **incorporation before a commissioner for oaths**.
 - **Register** the company with the Registrar of Companies at the Ministry of Commerce and Industry.
 - Advertise the intention of applying for a license in the official gazette.
 - Obtain an approval of the working condition after an inspection of company premises.
 - Obtain an **industrial license** from the National Industrial Licensing Authority belonging to the Industrial Affairs Department, Ministry of Commerce and Industry under the Industrial Development Act 1998 or a **trading license** from the local authority (under the Trade Act 2008 a license is required to perform different kinds of businesses in Botswana: banking, financial services, transportation, medical services, mining, energy provision and sale of alcohol).
 - Register for Corporate Income Tax number with the Botswana United Revenue Services and obtain the approval from the Commissioner of Taxes for the appointment of a public officer who is in charge of tax return.
 - Register for VAT with Director of Customs & Excise.
 - Register employees for the work injury insurance.

3.4 Employment of citizens and non-citizens

- **Employment Act 1992** sets forth standards of wage, workweek, leaves and termination rights consistently with ILO models.
- **Factories Act 1973** sets forth minimum working conditions on work premises.
- Under the **Workers' Compensation Act**, companies must be insured for workplace injuries.
- As a policy matter, the government encourages foreign firms to hire qualified Botswana nationals rather than foreigners, and the granting of work permits to expatriates may be made contingent upon establishment of demonstrable “localization” efforts. When such a contingency is imposed, after the company's start-up period the government may require evidence that a citizen is being trained to assume some of the duties being filled by a foreigner, particularly at the middle-management level.
- According to **Employment of Non-Citizens Act 11, 1981**, non-citizen shall not engage in any occupation unless he holds
 - a **work permit**: for the purpose of issuing a work permit, the competent Regional Immigrants Selection Board takes into account (i) the effect of issuing a work permit or renewing the existing work permit upon the opportunities for employment open to citizens of Botswana; and (ii) where the application relates to employment, the arrangements made or to be made by the employer to train a citizen of Botswana to replace the person in respect of whom the application is made in the event of a work permit being issued to him or his existing work permit being renewed;
 - or a **certificate of exemption** issued by the Minister of Labour.
- Botswana is a party to only one international agreement on social security: it deals with the Agreement between United Kingdom of Great Britain and Northern Ireland and Botswana concerning Public Officers' Pensions, signed at Gaverone in 1976.

3.5 Paying taxes

- VAT 12%
- Corporate tax 22% + 7,5% withholding tax on dividends → 27,85% effective tax rate.
 - Corporate tax of 15% for manufacturing and financial services sectors;
 - tax holidays, industrial rebate concessions, duty free importation of raw materials, machinery, and equipment:
 - companies are allowed a deduction (in determining their corporate taxable income) equal to 200% of the training expenditure for their employees;
 - companies that have been granted a Development Approval Order can apply for a negotiable tax holidays to 5 or 10 years, depending on the scale of their investment project:
 - Development Approval Orders are issued by the Minister of Finance and Development Planning in respect of a proposed project when such project can be beneficial to the development of the economy of Botswana: both locals and foreigners may apply for a Development Approval Order to the Permanent Secretary for Finance and Development Planning. Main evaluation criteria are: job creation for Botswana citizens; training plans for Botswana citizens; prospective localization of non-citizen positions; Botswana citizen participation in company management; amount of equity held by Botswana citizens in the company; location of the proposed investment; project's effects on stimulation other economic activities and project's effects on reducing local consumer prices.
- Branch of foreign companies 30%: this rate makes the branch the least tax efficient option for setting up a business in Botswana.
- Double taxation treaties have been executed with Barbados, Mozambique, India, Namibia, South Africa, the United Kingdom, Sweden, Mauritius, Zimbabwe, France, Lesotho, Swaziland and the Seychelles, but not with Italy.

3.6 Enforcing contracts

- The Constitution of Botswana provides for an independent judiciary.
- Foreign and domestic people have equal access to the judicial system.
- The **enforcement of foreign judgments** in Botswana is provided for under the Judgments (International Enforcement) Act. Recognition and enforcement starts by the application of the Claimant that must be made within 6 years after date of judgment from a foreign jurisdiction. The registration of the judgment may be denied if the registering court ascertains that, inter alia:
 - the judgment is not a judgment to which the Act applies or the judgment was registered in contravention of the Act;
 - the original court had no jurisdiction in the case;
 - the judgment debtor (the defendant in the proceedings in the original court) did not (notwithstanding that process may have been duly served on him in accordance with the relevant law) receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear;
 - judgment was obtained by fraud;
 - the enforcement of the judgment would be contrary to public policy in Botswana; or
 - the rights under the judgment are not vested in the person applying for registration.
- Botswana undersigned and ratified the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)** that entered into force in 1972 under the following conditions:
 - Botswana will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State;
 - Botswana will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.
- Botswana is a member of the International Center for the Settlement of Investment Disputes (**ICSID**) and therefore accepts binding international arbitration of investment disputes.

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“Each and every person counts“ – to the Castellers and to us.

Human towers symbolise in a unique way the Rödl & Partner corporate culture. They personify our philosophy of solidarity, balance, courage and team spirit. They stand for the growth that is based on own resources, the growth which has made Rödl & Partner the company we are today. “Força, Equilibri, Valor i Seny” (strength, equilibrium, valour and common sense) is the Catalan motto of all Castellers, describing their fundamental values very accurately. It is to our liking and also reflects our mentality. Therefore Rödl & Partner embarked on a collaborative journey with the representatives of this long-standing tradition of human towers – Castellers de Barcelona – in May 2011. The association from Barcelona stands, among many other things, for this intangible cultural heritage.