

The role of consideration in the contractual process of privatisation

Law



Enterprises (PE) from governments to private investors. This shift is necessary to expose economies to the global competition and technological advancement.

Privatisation can be defined as the transfer of ownership, partially or fully, of Public Enterprises to private investors, who may be foreign or local.

With a reduced role of the State in the economy, there has been improved management of the previously public enterprises resulting in increased productivity; reduction of the financial and administrative burden upon Government and increased private investment.

The options involved in privatisation include divestiture and non-divestiture options.

The modes¹ used in divesting companies range from asset sales and liquidations; share sales; management and employee buy-outs; and public flotations.

The modes used in the non-divestiture option include placing PE under management contracts; joint ventures with or without equity participation; and joint ventures with or without equity participation with or without management contracts; and leasing.

Divestiture modes:

* Share sale: This involves sale of shares and may range from sale of all the shares, as noticed in the case of Lake Victoria Bottling Company, to sale of minority or majority shareholding. The sale of Uganda Commercial Bank to

Stanbic (Uganda) Limited is an example of sale of majority shares as it involved the transfer of 80% shareholdings from the seller to the buyer.

* Management and/or employee buy-outs: In this method, the employees form a new company, which buys, out the state owned firm. An example of this method is Central Purchasing Corporation.

* Liquidation: This involves the sale of all the assets of the firm. It is an option for those non-viable public enterprises that continue to be a drain on governments' resources. Examples of public enterprise that were divested using this method include: Uganda Transport Company and Coffee Marketing Board.

* Public offering of shares: Here, shares are offered for sale to the general public through the stock exchange. Uganda Clays Limited was divested with this method.

Non-Divestiture modes:

* Management contracts: In this case, a private investor takes over the management of the public enterprise at a fee, payable by government, which is normally a percentage of the profits made. However the actual ownership of the assets and liabilities remain with government. This method has limitations in that the government sets the terms and conditions of this management contract, thus the private investor has minimum control of the public enterprise.

* Joint venture: Here Government forms a new company with a private investor with the aim of running the public enterprise. A joint venture agreement may involve equity or non-equity participation; with or without a management contract. In Uganda, the privatisation of Nile Hotel and Conference Centre was a joint venture agreement with equity participation and a management contract.

* Leasing: In this case, the private investor uses the assets of the public enterprise at a fee payable to the government. However the actual ownership of the assets and liabilities of the public enterprises remain with government. Disadvantage of this method is that, the leasing company has minimum control over decision making as government sets the terms and conditions.

However, within one privatisation, a variety of modes may be used: for example sale of a core shareholding to a long-term strategic investor , followed by a public offering of the remaining shares.

In order to ensure the success of the privatisation process, there is need for an appropriate institutional framework². Thus governments have to put in place the necessary legislation that will provide a conducive environment for private investors. Such legislation should include, but is not limited to, Privatisation, Investment, Liberalisation, Tax law, Good Governance, Contract law, Company law, Property law and Business Law. Also, the onus is on governments to form bodies and authorities to implement and monitor such legislation.

This paper will be limited to the law of contract.

Public Enterprises Reform and Divestiture in Uganda

During the 1960's and 1970's, there was nationalism of much of the Ugandan economy. This trend was further accelerated with the expulsion of the Asian community in 1970, as ownership of the majority of the departed Asians ' property was transferred to the Government.

In 1992, the government adopted a policy of Private Sector Development together with a program to divest itself of the majority of the 107 Public Enterprises that were in existence at the time.

The objectives of this policy is to:

- * Reduce the direct role of government in the Uganda economy, while promoting a corresponding greater role for the private sector.
- * Improve efficiency and overall performance of those Pubic Enterprises that will remain in government control

The importance of this policy is evidenced by the appointment of a Minister of State for Finance, Planning and Economic Development (Privatisation) who reports directly to the President.

In 1993, the Public Enterprises Reform and Divestiture (PERD) Statute was enacted to provide a legal framework for the divestiture process. It established the Divestiture and Reform Implementation Committee³ (DRIC)

that is responsible to implement government's policy in accordance with the PERD Statute.

In 1998, in response to parliamentary concerns about the transparency of the process, the divestiture procedures were streamlined and documented in a comprehensive Procedures Manual. All divestitures are now carried out in accordance with these procedures, which are recognised under the amended law.

In 2000, the statute was amended to increase private sector participation in DRIC; and to streamline and increase transparency in the divestiture process.

To date, over 90 enterprises have been divested. There are various modes that are used in the divesting of the public enterprises ranging from asset sales and liquidations; share sales (including pre-emptive rights sales); management and employee buy-outs; concession; and public flotations. The particular mode employed is dependent on the public enterprise and the prevailing market situation.

Uganda operates a liberalised economy that allows for the free flow of funds.

In addition to the PERD Statute, there exist other legalisation that provide a framework for private sector investment and regulation of the activities of companies, this include:

* The Investment Code: it was enacted in 1991, resulted in the establishment of the Uganda Investment Authority (UIA). The responsibility of the UIA is to

promote, facilitate and monitor investments in Uganda. This code provides investors with favourable investment conditions and incentives - for example selective tax benefits; protection from compulsory possession by government for investments; and externalisation of funds.

* The Companies Act: it was promulgated in 1948. It provides legal framework for the incorporation, registration and winding-up of both public and private limited liability companies; issuance of share capital and debentures; the modification of share capital provisions; the registration of charges; and the management of companies. Provisions specific to individual companies are set out in the Articles and Memoranda of Association of those companies.

* The Capital Markets Authority Act: was passed in 1995, resulted in the establishment of Capital Markets Authority (CMA). The responsibility of CMA is to promote and facilitate the development of an orderly, fair and efficient capital markets industry; establish a stock exchange; license stockbrokers; and regulate persons dealing in securities.

* In addition, government is reviewing other laws that have a direct impact on the commercial sector.

* In 1992, Uganda became a member of the Multilateral Investment Guarantee Agency, by virtue of this; private investors have additional coverage against non-commercial investment risk.

The case of Nile Hotel and Conference Centre Limited (NHCC)

In 1995, the Government of Uganda entered a Joint Venture agreement with Tahar Fourati International Hotels Limited thus divesting 60% of its shareholding.