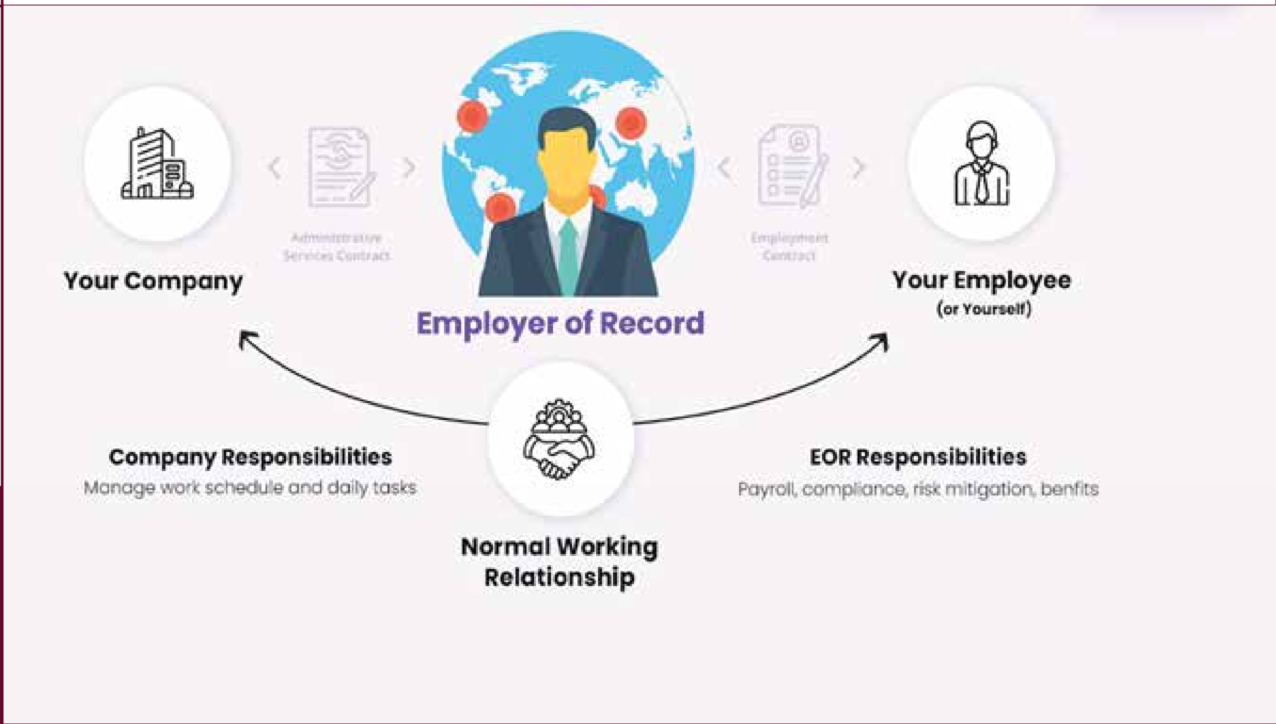
Cristal Advocates

Employer of Record Solutions and PE Risk in Uganda
An Overview



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1. Introduction

While Employer of Record (EOR) solutions can help foreign entities navigate Ugandan employment regulatory obligations for personnel engaged during short term or exploratory ventures without necessarily setting up a formal entity locally, it is crucial to understand the attendant legal and tax implications of this arrangement. A key concern is the Permanent Establishment (PE) risk, which may inadvertently create taxable presence for the foreign entity in Uganda, contrary to the original intent of using an EOR. This discussion highlights the potential PE risk in Uganda for EOR arrangements involving foreign entities.

2. Employer of Record

An EOR is a third-party organization that hires employees on behalf of a client company. In this role, the EOR legally acts as the employer, handling essential human resource (HR) functions such as payroll processing, benefits administration, payroll taxes remittance and social security compliance, as well as ensuring adherence to local employment regulations. This includes managing employment contracts, workplace standards as well as handling work permit applications if required.

While assuming these administrative responsibilities, the EOR allows the client company to maintain control over the day-to-day activities and performance expectations of the employees they engage through this arrangement.

3. What is a PE?

Ordinarily, a PE is a place through which an enterprise wholly or partly carries on business. Unless there is an applicable Double Tax Agreement that varies the application of domestic tax legislation, a PE in Uganda includes but is not limited to locations like offices, branches, factories, construction sites, warehouses and oil or gas wells.

The establishment of a PE in Uganda can also arise through a dependent agent authorized to conclude contracts on behalf of the company. Additionally, activities like construction projects or supervisory roles lasting at least 90 days within a 12-month period can constitute a PE. Similarly, providing services including consultancy services through employees or personnel in Uganda for a total of 90 days or more in any 12-month span can trigger PE status. Furthermore, substantial equipment or machinery operated in Uganda for 90 days or more during a twelve-month period can also create a PE under Ugandan tax laws.

If a foreign company is deemed to have a PE in Uganda, it becomes liable to pay corporate income tax on profits attributable to that PE. This can also lead to additional tax filing and reporting requirements, including potential registration for value-added tax (VAT) and other local taxes.

4. EOR PE risk

One of the primary risks associated with EOR services is the potential creation of a dependent agent PE. This may arise if the employees hired through the EOR have the authority to negotiate and conclude contracts on behalf of the foreign client company.

Another risk is the creation of a service PE. If the employees provided through the EOR are engaged to provide services for the foreign client company including consultancy services and these services are performed in Uganda for an extended period of more than 90 days in any 12-month period, a service PE might be established.

5. Mitigating PE Risk

To mitigate EOR PE risk, it is imperative to clearly define roles and responsibilities in the contract between the EOR and client company. The EOR should be responsible for the administrative and HR functions. If the client company is in any way involved in maintaining control over the day-to-day activities and performance expectations of the employees engaged through the EOR, strategic decision making and business contract signing authority must remain with the client company. Ensuring that employees hired through the EOR do not possess the authority to conclude contracts or make binding decisions on behalf of the foreign company can reduce the PE risk.

Additionally, limiting the duration of activities in Uganda and ensuring that the nature of the work performed does not constitute a substantial part of the foreign company's core business activities in Uganda can further mitigate the PE risk.

6. Tax authority oversight

One might ask how the Uganda Revenue Authority (URA) can determine the existence of a PE in Uganda resulting from an EOR arrangement. When the EOR files monthly Pay As You Earn (PAYE) returns, they would list all employees, including those managed under the EOR agreement. However, in the EOR's financial records, costs related to these employees are excluded when they are reimbursed or front-paid by the client company. The difference between the staff costs reported in tax returns and those in the EOR's books may thus prompt the URA to request a reconciliation.

An explanation for the discrepancy would be the EOR arrangement that could move the URA to inquire into whether a PE has been created by the foreign entity in Uganda.

7. Other issues

In practice, questions often arise whether Value Added Tax (VAT) applies on billings by the EOR solutions services provider. Would it help if the service provider bills a lumpsum sum or that the fees billed should delineate a breakdown of the service fees and employment cost elements? If this is the case, should VAT apply on both or only the service fees billing.

It is also necessary to consider whether, despite an EOR arrangement not creating a PE in Uganda, the obligation to register in Uganda under the requirements of the Companies Act may also not be triggered.

8. Conclusion

In conclusion, while EOR services are practical for short-term or exploratory business ventures in Uganda without establishing a formal entity, over time, it may become increasingly difficult to argue against the creation of a PE in Uganda resulting from long term EOR arrangements.

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Contacts for this Publication

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Denis is the Managing Partner of the Firm. He is qualified both as a Lawyer and Chartered Accountant with UK training and vast experience serving local, regional and international companies in Sub Saharan Africa. He is recognized as a notable corporate and commercial law practitioner in Uganda.

Before joining Cristal Advocates, Denis spent nearly 10 years at Deloitte, an international professional services firm, where he started his career and rose to senior roles. While with Deloitte, he worked and lived in Uganda, Kenya, Tanzania and the United Kingdom.

Education

a) Master of Laws in Petroleum Taxation and Finance with distinction - University of Dundee, UK
b) Certified Public Accountant (Uganda) - ICPAU
c) Certified Chartered Accountant ("ACCA") – ACCA
d) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda

John Teira

John is a Partner with the firm but presently on sabbatical leave. Before joining Cristal, he worked as a Private Secretary to the President of Uganda. Prior to this role, he had worked with Shonubi Musoke & Company Advocates and Post Bank Uganda Limited.

John is presently a Member of Parliament representing Bugabula County North in Kamuli District in Uganda National Assembly.

Education

a) Post Graduate Diploma in Legal Practice - Law Development Centre, Uganda
b) Bachelor of Laws (Honours) - Makerere University, Uganda
c) Diploma in Law (First Class) - Law Development Centre, Uganda
d) Basic Philosophy of Public Service Administrative Communication - Uganda Management Institute, Uganda

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Dickens Asiimwe Katta

Dickens is a Partner at Firm where he also leads the oil and gas practice. Before joining Cristal Advocates, Dicken had served as Company Secretary of the Uganda Refinery Holding Company Limited (URHC) and the Uganda National Oil Company (UNOC) where he played key role in its formation.

Prior to joining the UNOC, Dickens had spent five years as Legal Counsel at the Petroleum Directorate of the Ministry of Energy and Mineral Development, where he evaluated several oil and gas transactions, negotiated contracts, and participated in the preparation of Uganda's oil laws and regulations.

Education

a) Master of Laws in Petroleum Law and Policy with merit - University of Dundee, UK
b) Post Graduate Diploma in Legal Practice - Law Development Center, Uganda
e) Bachelor of Laws degree - Makerere University, Uganda

Bill Page

Bill is a Senior Advisor at the Firm and is a leading global energy and tax practitioner with extensive international experience.

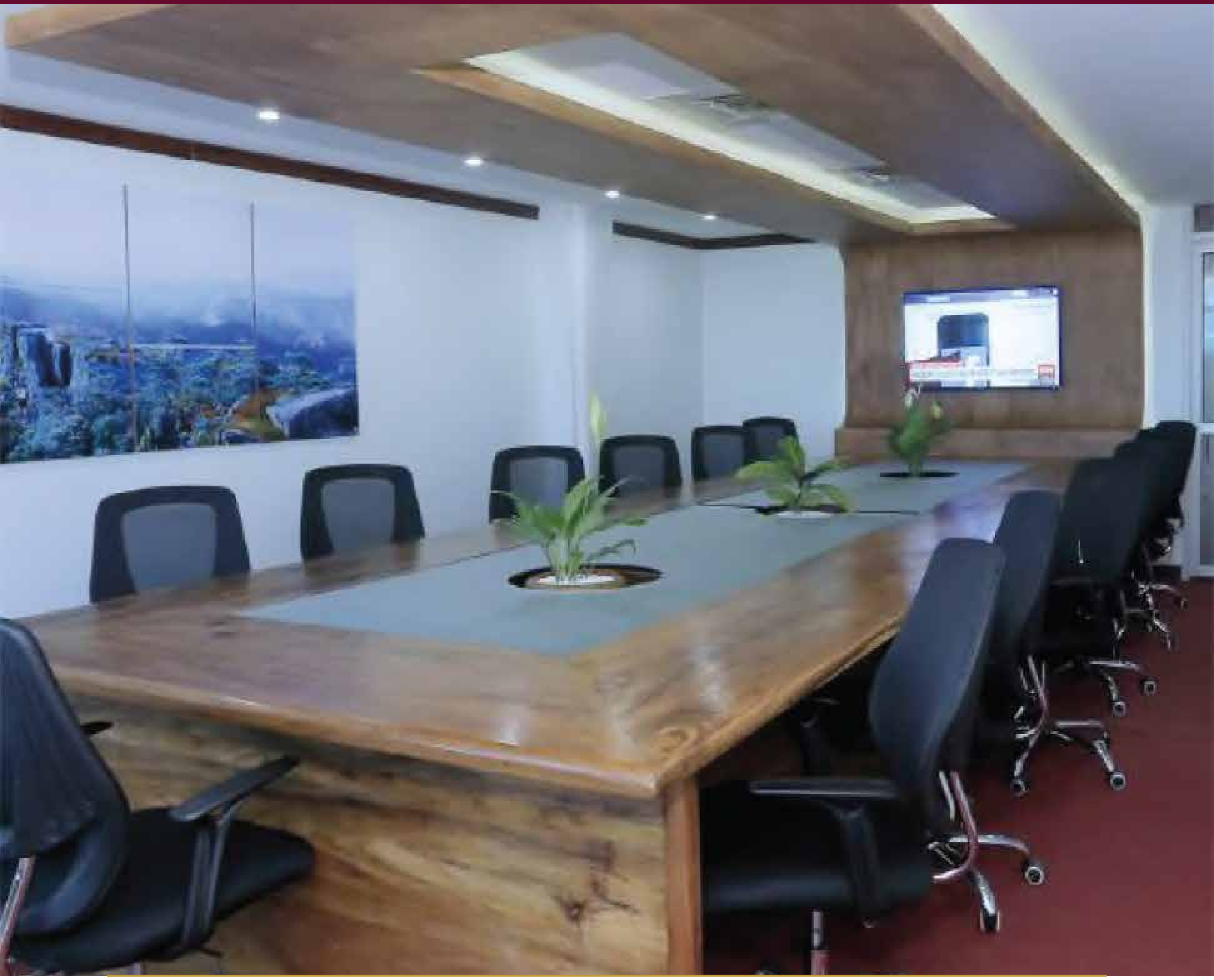
From 1986 to 1998, Bill worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan, working across the Caspian region with Deloitte during a period of major infrastructure development for crude oil production.

From 2004 to 2008, Bill worked in Russia, leading Deloitte's oil and gas industry group and establishing the firm's Sakhalin office. In 2009, he moved to East Africa, where he led Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia, and Mozambique. Initially based in Kampala, Uganda, he later relocated to Dar es Salaam, Tanzania.

In 2014, Bill returned to the UK to support Deloitte UK teams on projects investing in Africa and remained a key member of Deloitte UK's energy and resource practice until his retirement in September 2018.

Education

Bill is a graduate of Oxford University and completed his inspectors' training with the UK Inland Revenue in 1989.



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