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# CONSTRUCTION AND INFRASTRUCTURE IN AFRICA BY THE CONSTRUCTION COMMITTEE

## INTRODUCTION

Construction industry is an extensive area of legal practice which provides interesting challenges to lawyers in different specializations. From conception to completion, each construction project requires careful legal and financial analysis in every step, from procurement, concluded contract between the parties, type of the project, financing the project, and laws governing such construction projects to the methods of settling the disputes arising between the parties from the execution of the contract and the enforcement of the rendered decisions.

Furthermore, construction industry in Africa has a great impact on the African economy by developing and enhancing it in a positive manner which would accordingly affect the other industries; such as health, transportation, tourism, and education sectors.

Moreover, we have recently witnessed several mega construction projects around all of Africa; such as, the Lekki Free Trade Zone in Nigeria, Konza Technology City in Kenya, and Suez Canal Corridor Area Development in Egypt.

Accordingly, construction is currently a key field which requires more efforts in the African countries due to the intensity of investments and activities in such field, hence, we need to be prepared for analyzing and facing every legal or financial issue that may arise in this regard to face and defeat any difficulty that may hinder the construction development.

## SUBJECT MATTER

With respect to the projects finance, the establishment of a construction project requires a huge amount of money that an individual or a private sector company may not simply afford, accordingly, those individuals and companies indeed need a financial support in order to be able to proceed with their project and this would be conducted through the governments of their countries, loans from local or multinational banks .e.g. the regional development banks, international and regional lenders and institutions' such as the World Bank Group and the European Bank for Reconstruction and Development (EBRD). In addition, we have recently witnessed Chinese investment in many construction projects particularly through funding these construction projects.

Moreover, there are many areas of collaboration in construction projects in Africa; including, Public Private Partnerships (PPP), Concession, and Design- Build-Operate (DBO). These types may be used in projects related to services, facilities, utilities, railway stations, industrial and commercial zones, towers, museums, airports, canals, bridges, and oil and gas infrastructures.

In addition, constructions projects mainly go through some phases, as follows:

<u>Pre-investment phase:</u>

It is an initial phase for an investor/contractor or lender to go through. In such phase, they try to find answers to the questions related to the economic, financial, and legal aspects with respect to the host state of investment; since the collected information/data would affect their decision of whether to invest in such state or not.

Moreover, with respect to the large or complex projects, there may be a number of different regulatory issues such as, the planning licenses and the environmental impact assessment which are the legal processes of determining whether proposed project would be permitted or licensed in the host state or not, the approvals required to be obtained according to the state regulations in order to ensure the health and safety of people in and around the project, budget available for the project, the most efficient land plots to establish the projects on, whether the regulations of the host state prohibits expropriation or the transfer of revenues outside the state or not, and whether its regulations allows privatization or not. Nevertheless, having the host state as a signatory to Bilateral Investment Treaties (BITs) is a crucial element.

<u>Incorporation phase:</u>

When the investor/contractor starts a business, he must decide on a legal form/presence to take, usually he will choose either a sole proprietorship, a partnership, a limited liability company (LLC), or a corporation. Moreover, there are different types of construction works, from small maintenance to large construction divided into Small Renovation Contractors, General Contractors, Owner-Builder, Real Estate Developer, Professional

Construction Manager, Program Manager, Package (Turnkey) Builders, and Sponsor-Builder. Each investor/contractor shall choose the adequate legal form of its company depending on each state jurisdiction, size of activities this company would do, type of work whether public or private, its capital, its purpose to construct buildings only for its own ownership, either to sell on completion, or to rent them out, and whether the company would engage in general contracting or sub-contracting works or not.

Reviewing contracts:

Contractors and subcontractors are always excited to be awarded a contract. However, the contract may contain a number of complicated and unfair clauses. Accordingly, for every project, whether large or small, the contractors and subcontractors shall appoint an attorney at law to go through the following steps before signing a contract: Reviewing the bid carefully, method of payment, all plans, specifications, project documents including: architectural, structural, civil, plumbing, mechanical and electrical documents, job schedule, and unfavorable terms and conditions of the contract i.e. termination and rescission. In addition, the contractors and subcontractors shall visit the jobsite before the signature of such contract.

Operation challenges:

There are many challenges and issues arising during the operation of a construction projects such as:

1. The severe economic decisions issued in the state which upset the financial equilibrium of the contracts and caused damages to the contractors and subcontractors i.e. the taxation decisions, the decisions issued regarding the amendment/floating of the exchange rate, and cut of subsidies including petrol and electricity.
2. Delay in the completion of certain stages of the project by the contractor and subcontractor according to the job schedule.
3. Cost increase in the equipment and materials prices during the execution of the construction contract.

Completion and delivery:

Upon completion of the project, the contractor shall evacuate the site from its all equipment, materials, dust, and waste and shall prepare it to be used by the employer; however, in case there are parts that have not been implemented or needed to be repaired by the contractor, the employer may ask the contractor to complete and repair these parts within a reasonable period of time; nevertheless, in case this period has been lapsed

without completing or repairing thereof, the employer may conduct such works at the expense of the contractor and under its responsibility.
Moreover, completion phase raises the issues of releases, delivery, return of guarantees, and final payment.

Dispute resolution:

Due to the fact that these construction projects are extremely complex, as a result, many disputes may arise between the parties, accordingly, the question of how to effectively solve these problems in a very short time is important, hence, the parties always choose the best method among litigation, adjudication, mediation, expert determination, and arbitration through comparing between the advantages and disadvantages of all of these methods. For example, one of the advantages of litigation is that it is not costly; however, it consumes too much time, in addition, with respect to adjudication, a neutral party settles on the dispute; however, the adjudicator's powers are limited, and its decision is not binding and still needs to be enforced by the courts.

Exit phase:

After the final delivery of the project to the employer, the contractor may **voluntarily** decide to bring the business to an end through liquidating its company by inventorying its company's assets, sell them, pay the company's debts, and fulfil all its obligations.

## Foreign Investment Laws:

Some nations promulgate foreign investment laws that aim at promoting investment and providing incentives and tax breaks. For example, Egypt promulgated a new investment law which provides more incentives and tax breaks to investors. Further, the law eased the process of owning lands for industrial purposes and so forth.

Construction lies at the hear of the economy of each nation and is usually affected by foreign investment regulations in a direct and indirect manner.

## TOPICS TO BE DISCUSSED IN FUTURE SESSIONS:

The purpose of the Construction Committee in the AFBA Conference in Nairobi, Kenya is to highlight and indicate, in future sessions, the following topics:

- Resources of funding construction projects.
- Common and legal issues raised in project finance.
- Development of areas of construction across the continent.
- Types of construction projects.
- Construction contracts.
- Dispute resolution in the field of construction.

For more information and details, kindly visit the official website of the African Bar Association: www.afribar.org

To get in touch with the organizing committee of the conference, kindly contact: MRH@id.com.eg