



OVERVIEW OF INTERNATIONAL COMMERCIAL NEGOTIATIONS IN EAST AFRICA

PALU – AFRICAN LEGAL SUPPORT FACILITY
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INTRODUCTION

- ▶ Involves commercial and legal processes.
 - ▶ Governed by laws and regulation of participating countries.
 - ▶ Guided by international instruments.
 - ▶ The focus of this presentation is the Public Private sector commercial negotiations.
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KEY COMMERCIAL AREAS


- ▶ Infrastructure – roads, railways, airports, housing
 - ▶ Telecommunications
 - ▶ Energy
 - ▶ Mining
 - ▶ Land and Agriculture
 - ▶ Capital Markets
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THE PARTIES


- The Procuring Government agencies, ministries or entities.
 - Ministry of Finance or the Treasury.
 - The State Law office or Government Legal Adviser.
 - Office of the President.
 - The Private Sector entity backed up by advisers of various competences e.g., legal, financial, strategic etc.
 - Parent Country where the private entity is located or connected.
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CHOICE OF LAW


Law of the procuring country would be preferred in the first instance but several factors will influence the law applicable to the contract;

- Existence of the enabling law.
 - Adequacy of a regulatory framework.
 - Capacity of negotiators to relate with the law.
 - Source of financing and whether negotiations are demand or supply driven.
 - Confidence of the parties in the legal system.
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Parameters of Negotiations

- ▶ Who sets the basic principles for negotiations for the Governments?
 - ▶ Are there guidelines for Government negotiators to follow?
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Cross Cutting Issues

- ▶ Capacity to negotiate
 - ▶ Accountability of the Negotiators
 - ▶ Transparency
 - ▶ Corruption
 - ▶ Supply driven negotiations
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Capacity to negotiate

- This largely depends on the subject area of negotiation.
 - There is limited technical and legal capacity to undertake due diligence and interpret the complex terms of some of the transactions.
 - Emergence of new areas of contracting and complex vehicles for commercial transactions.
 - Lack of Government investment in capacity building though failure to prioritize or resource constraints.
 - Inability to hire and retain high end expertise in these areas.
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ACCOUNTABILITY

- ▶ To whom are the negotiators accountable?

Transparency and Corruption

- ▶ Use of Confidentiality clauses to prevent public access to information.
 - ▶ Negotiations are done with predetermined outcomes.
 - ▶ Outright corruption through seeking commissions, equity stakes, regulatory exemptions.
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Diplomatic Interference

- ▶ Governments have a stake in the success of multinational corporations based in their countries.
 - ▶ Use of aid, grants, loans, capacity building etc can be used to achieve favorable outcomes in negotiations.
 - ▶ Geopolitics.
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CASE STUDY

RIFT VALLEY RAILWAYS CONCESSION


KENYA-UGANDA RAILWAY

- This is a classical example of contemporary international commercial negotiation.
 - The value of the project was over USD 100 million.
 - As a backbone infrastructure project, it was of great value to Kenya and Uganda.
 - Involved two Government, Kenya and Uganda and local statutory agencies, a number of private sector players and international financial institutions.
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THE NEGOTIATION PROCESS

- Negotiation commenced in 1998 by Kenya by commissioning a consultant to advise on modalities of concessioning KR. Consultants advised on the need to bring on board Uganda.
 - Uganda requests the PPIAF to assist with funding to survey private participation in infrastructure development
 - The PPIAF study recommends a joint rail concessions with the Kenya Government.
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THE NEGOTIATION PROCESS

- Kenya Government hired IFC to work on the transaction structure and tender documents.
 - The President of the Kenya and Uganda agree and announce the preparation of the Railway concession.
 - IFC completed the tender process over a period of two years.
 - Sheltam Rail (Pty) Limited through its local consortium Rift Valley Railways (Kenya) Limited is named the preferred bidder for the 25 year concession.
 - Two separate contracts were executed by the Company with each country.
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FINANCING OF THE CONCESSION

- ▶ The key challenge for the Kenya and Uganda Governments was to structure an arrangement where there would be investment in Rail while ensuring that the concession was an attractive investment for concessionaire.
 - ▶ This meant structuring a complex commercial deal.
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CHALLENGES AND CONCLUSION OF THE CONCESSION

- One of the members of the RVR consortium pulls out threatening the conclusion of the concession.
 - RVR had to be given time to raise equity
 - RVR raise capital from Tran century, ICDC and Babcock & Brown from Australia.
 - Deal successfully closed in 2007.
 - It becomes EuroMoney Project Finance Magazine Africa Deal of the Year.
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POST-CONCLUSION CHALLENGES

- RVR lacked the requisite expertise to run the railway operation
 - RVR did not have money to make initial capital investments and hence not able to meet its part of the deal.
 - Deteriorating relationship between RVR lead-shareholder and the governments with the latter threatening to cancel the Concession.
 - Entry of a new player/shareholder- CITADEL from Egypt
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ISSUES ARISING FROM RVR NEGOTIATIONS

- Who advised the governments of Kenya and Uganda
 - Was appropriate due diligence conducted on the private companies
 - Did the parties have capacity to negotiate the contracts
 - What was the role and interest of the financiers in ensuring that the contracts are above-board
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THANK YOU

