5TH YEAR ANNIVERSARY

Africa Construction Law Conference 2025

5TH EDITION

The future *of* Construction in Africa

Conference Dialogue

22nd to 23rd May, 2025 | Emera Ole-Sereni, Nairobi, Kenya

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Introduction

The 5th edition of the Africa Construction Law Conference 2025, themed "the future of construction in Africa" took place on 22 – 23 May 2025 at the iconic Emara Hotel in Nairobi, Kenya. This milestone event coincided with a major anniversary, as Africa Construction Law ("ACL") celebrated 5 years of excellence in advancing construction law and fostering collaboration across the African continent through its groundbreaking initiatives. Since its inaugural launch in 2021, the ACL has established itself as the foremost and globally acclaimed professional association for the practice of construction law, uniting legal and non-legal construction professionals in a shared mission to shape the legal frameworks and practices supporting Africa's infrastructure goals.

This annual conference serves as a pivotal platform for critical engagement on legal and commercial trends shaping infrastructure delivery and dispute management in Africa, recognizing that across the African continent, construction remains a critical enabler for national development and infrastructure accounts for more than 50% of Africa's investment pipeline from roads, ports, and power plants to data centres, and clean energy installations.

This year's conference attracted a diverse group of stakeholders, including contractors, employers, developers, banks and finance institutions, government institutions, law firms, Chambers, arbitral institutions, expert consultancies, and academia all eager to share best practices, network, and forge valuable business relationships. In attendance were over 200 delegates from 16 jurisdictions, including Egypt, France, Ghana, Kenya, Nigeria, Portugal, Qatar, Senegal, South Africa, Switzerland, Tanzania, Uganda, United Arab Emirates, United Kingdom, Zambia, and Zimbabwe.

During the conference, a range of critical topics confronting the African construction industry were discussed such as the prompt payment crisis, improving project bankability, managing capital mobility and currency risk, dispute boards, strengthening arbitral independence, corruption risk in project delivery, enforcement of arbitral awards against African sovereigns and risk allocation.

Keynote speech delivered by ACL founder and chair, Ngo-Martins Okonmah, traced the ACL's evolution from a bold vision to a thriving pan-African institution, exploring the driving force behind ACL's mission "the ACL was born out of a simple yet compelling realisation that the growing complexity and ambition of infrastructure delivery in Africa demanded a legal and institutional response that is not only homegrown and globally credible, but also capable of addressing the fragmentation within the African construction industry. One of the core drivers of ACL has been the need to promote the Africanization of construction and infrastructure disputes by elevating African legal and technical experts, ensuring that those who understand the unique regional, commercial, and regulatory contexts are meaningfully involved in shaping, advising on, and resolving Africa's infrastructure challenges".

Introduction

Adding further depth to the discussion, Prof. Githu Muigai, a former Attorney-General of Kenya, in his keynote address emphasised the need for integration, innovation and inclusivity in addressing Africa's infrastructural challenges "the African Development Bank estimates that our infrastructure financing gap exceeds $100 billion annually. The traditional question is: Where will we find the money? But perhaps the better question is: How do we create the conditions where that money finds us? When projects are sound, risks are rationally shared, disputes are handled predictably, and corruption is curbed, investment flows not by chance, but by design.

As we embark on these two days of dialogue, I invite you to consider three perspectives that might inform our discussions:

(a) Integration: Africa's infrastructure challenges transcend national borders — and so must our legal solutions. The African Continental Free Trade Area opens historic opportunities, but its promise will remain theoretical without the physical and legal infrastructure to support seamless trade and movement across borders;

(b) Innovation: Africa has shown it can leapfrog traditional development models — particularly in digital and mobile infrastructure. We need the same boldness in how we design contracts, structure risk, and resolve disputes. Our legal solutions should be grounded in global best practice but must also reflect African realities; and

© Inclusion: Infrastructure that fails to serve the majority, rural populations, women, young entrepreneurs, is not just unjust, it is economically inefficient. The legal frameworks we champion must promote broad-based, inclusive development".

This report provides detailed insights into the deliberations during the conference and various panel presentation presented as articles and thought leadership materials, capturing the essence of the discussions and recommendations. It is intended to serve as a useful resource for investors, governments, practitioners and stakeholders' involved in project development and dispute resolution on the African continent.

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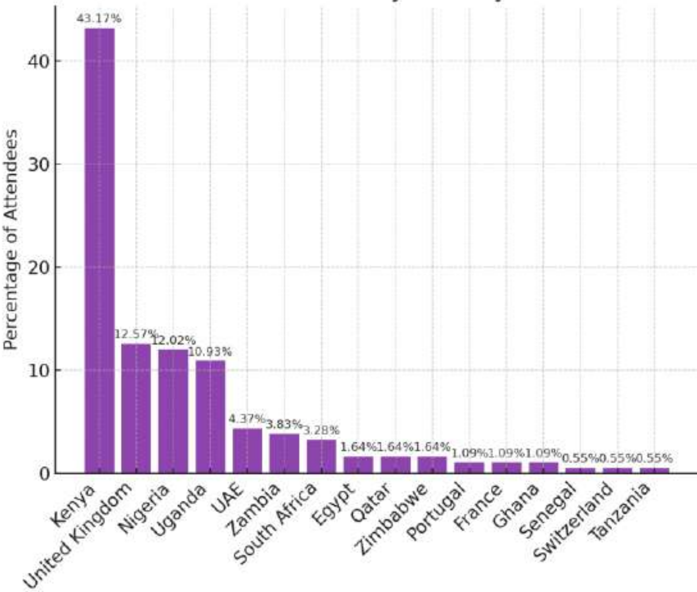
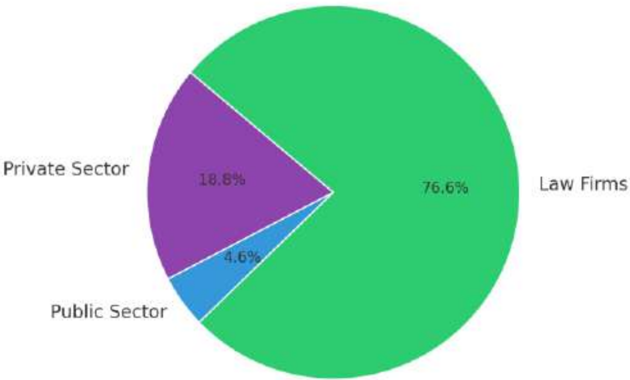
AFRICA CONSTRUCTION LAW CONFERENCE 2025: AT A GLANCE





AFRICA CONSTRUCTION LAW CONFERENCE 2025: AT A GLANCE

AFRICA CONSTRUCTION LAW CONFERENCE 2025: AT A GLANCE

Transforming Africa's Infrastructure Landscape: Key Takeaways from the Africa Construction Law Conference 2025

Africa's infrastructure ambitions are vast, yet their delivery is frequently impeded by entrenched legal, financial, and governance challenges. The Africa Construction Law Conference 2025 convened a cross-section of legal practitioners, policymakers, developers, and financiers to critically examine the root causes of underperformance in Africa's construction and infrastructure sectors, and to chart clear, actionable paths to reform. Across seven thematic focus areas, participants explored the systemic bottlenecks that continue to compromise infrastructure development, while offering concrete solutions that reflect both international best practices and the unique realities of the African context.

One of the central issues addressed was the chronic delay in payments to contractors, a pervasive problem that undermines cash flow, discourages private sector participation, and inflates the cost of delivering public infrastructure. Timely payment is vital to sustaining momentum on projects and ensuring financial viability across the supply chain. The conference identified structural inefficiencies, weak contract enforcement, and insufficient legal remedies as contributing factors, and advanced the need for statutory adjudication mechanisms, enforceable payment certificates, and adjudication bonds. Voluntary fair payment codes were also highlighted as tools to foster accountability and sector-wide behavioural change.

The conference also turned to the persistent challenge of project bankability. Despite the continent's vast infrastructure financing needs, too few projects achieve financial close. Participants examined the disproportionately high failure rates at the feasibility stage, misaligned risk allocation, and inconsistent legal frameworks that undermine investor confidence. To bridge the financing gap, stakeholders emphasized the need for rigorous project preparation, transparent procurement, stronger public-private partnership (PPP) regimes, and legal reforms that create stability and predictability for capital providers.

Currency volatility emerged as another pressing concern, with African projects routinely exposed to exchange rate shocks that destabilize contract values, delay disbursements, and derail project timelines. Drawing on practical examples from across the continent, the conference presented a toolkit of mitigation strategies, including multi-currency contracting, escalation clauses, natural hedging, and local currency financing backed by development institutions. The integration of e-payment systems and regional capital market initiatives was recommended as a longer-term structural solution to enhance currency stability.

As Africa's construction sector increasingly turns to arbitration as the preferred mechanism for resolving complex infrastructure disputes, the role of national courts came under sharp focus. The conference examined how judicial systems can support—not undermine—arbitration by reinforcing finality, procedural fairness, and enforceability of awards. Using comparative insights from Nigeria, Kenya, Mauritius, and Rwanda, participants explored judicial overreach, fragmented jurisdictional procedures, and the risk of inconsistent enforcement.

Progressive reforms such as Nigeria's Arbitration and Mediation Act 2023 were praised for establishing clearer frameworks for review, arbitrator appointment, and third-party funding. Across the board, there was consensus that judicial restraint, harmonized statutory provisions, and judicial training are vital to ensuring arbitration remains efficient and credible for infrastructure disputes.

Participants also explored corruption as a significant hidden cost in infrastructure delivery. From procurement fraud and collusive bidding to quality compromises and extortion by criminal networks, corruption undermines trust, safety, and project value. To combat this, the conference called for the institutionalisation of project transparency standards, adoption of integrity pacts, enhanced due diligence practices, and the prosecution of procurement related corruption. Strengthening public procurement oversight and investing in accountability mechanisms were underscored as essential steps in restoring integrity to the infrastructure value chain.

The enforceability of arbitral awards, particularly against sovereign states, was another area of concern. While arbitration remains a preferred mechanism for dispute resolution, its utility is undermined when awards are delayed or disregarded. The session advocated for judicial training, alignment with the New York Convention, clearer domestic laws on sovereign immunity, and the establishment of regional enforcement mechanisms to ensure that arbitration outcomes are respected and enforceable across jurisdictions.

Finally, the conference addressed the importance of balanced risk allocation in construction contracts. Current practices often shift disproportionate risk to contractors, leading to adversarial relationships, disputes, and eventual project failure. Innovative approaches such as early contractor involvement, target-cost contracts, project bank accounts, and dispute avoidance boards were discussed as tools to promote collaboration and improve delivery outcomes. Reimagining contract structures to incentivize shared success, rather than mutual suspicion, was identified as critical to de-risking infrastructure investments.

The Africa Construction Law Conference 2025 affirmed that the future of Africa's infrastructure depends not just on building projects, but on building the legal and institutional frameworks that sustain them. Payment security, legal enforcement, transparent procurement, and collaborative contracting are not optional, they are prerequisites for sustainable development. The reforms recommended during this conference are not aspirational ideals; they are immediate imperatives. If implemented, they will catalyze a transformation in how infrastructure is financed, delivered, and governed, positioning Africa for a bright and prosperous future.

Ngo-Martins Okonmah

Partner, Aluko & Oyebode/ACL Founder and Chair

Securing Payment In African Construction: A Practical Guide To Reform

INTRODUCTION

The construction industry across Africa faces a crippling crisis of late payment that dramatically inflates infrastructure costs and impedes economic growth. Stemming from legal, institutional, and behavioural inefficiencies, this endemic problem, where contractors and suppliers routinely wait months or even years for payment, represents one of the most significant barriers to infrastructure development on the continent. Despite the critical importance of timely payment in maintaining project momentum and business viability, the continent's construction sector remains mired in patterns of delay that threaten the very foundations of the industry.

As William E. Gladstone aptly observed, "Justice delayed is justice denied"[1] – a principle that finds particular resonance in the construction sector, where delayed or non-existent payments can topple otherwise viable businesses and stall crucial projects. In the case of the construction industry and payments, a more apposite observation was that "cash is the lifeblood of the construction industry" by Lord Denning in the 1973 Court of Appeal case Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] A.C. 689.

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While legislative reforms addressing late payment issues are present in other continents including the utilization of adjudication which has emerged globally as a powerful tool to address payment disputes, such reforms are absent in Africa, and the effectiveness of adjudication across the continent remains severely limited by weak enforcement mechanisms. If African nations are to unlock the full potential of their construction industries and meet the continent's growing infrastructure needs, payment reform must become a strategic priority

This article explores the root causes of payment insecurity in African construction, examines the impact on stakeholders, and proposes actionable reforms for a more resilient and trustworthy payment ecosystem.

THE LATE PAYMENT CRISIS: CAUSES AND ITS CONSEQUENCES

Late payment in construction is not merely an inconvenience but a structural failing that creates a massive premium on every infrastructure project built across the continent. This challenge, which is more prevalent in public sector infrastructure delivery, is caused by varying factors ranging from government fiscal instability & budget gaps, insufficient budgetary allocations before rolling out projects, delayed budget releases and bureaucratic processes, lack of payment security exposing contractors to non-payment risks, unbalanced contract terms and risk allocation, weak contract enforcement especially for public employers, regulatory gaps, political risk and regime instability, under-developed dispute resolution infrastructure, poor record keeping and lack of accountability.[2]

The authors suggest that in countries like Kenya, pending bills for construction projects have reached staggering levels, with national government arrears alone exceeding 650 billion Kenya shillings. This crisis is compounded by the informality that characterizes much of the African construction sector, where the authors estimate that only 10-20% of subcontractor agreements are properly formalized through written contracts. In Nigeria for instance, the Federal Government often releases budget late and this results in delayed payments for completed works under government funded projects, thus compounding the late payment problem

In the construction industry, adjudication has revolutionized dispute resolution in jurisdictions like the UK through statutory mechanisms, but its effectiveness remains limited in Africa due to fundamental issues beyond enforcement.[3] The lack of proper feasibility studies, over-reliance on pre-sales for project funding, and inadequate cash flow planning create a perfect storm for payment delays. The authors note that projects often commence without full funding secured, with developers relying on optimistic projections of pre-sales that frequently fail to materialize.

Standard form contracts like FIDIC and NEC have embraced adjudication as a key dispute resolution component. However, winning parties often find themselves in an unfortunate position – holding favourable decisions but unable to enforce them without entering lengthy legal proceedings. This enforcement gap undermines adjudication's core purpose as a rapid resolution mechanism.[4] The problem is exacerbated when government procurement officers, lacking adequate training, modify these standard forms without understanding the interconnected nature of their provisions, particularly removing dispute resolution mechanisms that are integral to the contract's functionality.

> Standard form contracts like FIDIC and NEC have embraced adjudication as a key dispute resolution component

THE ROLE OF PAYMENT CERTIFICATES IN LATE PAYMENTS AND RELATED ISSUES IN AFRICAN CONSTRUCTION

Payment certificates occupy a central position in construction contracts, serving as instruments designed to balance the contractor's entitlement to remuneration for work performed and the employer's interest in ensuring compliance with contractual obligations. They are intended to facilitate ongoing cash flow, enabling contractors to finance their operations and maintain project momentum. However, delays in the issuance or payment of these certificates are a significant cause of late payments in African construction, exacerbating financial strain and project delays. Additionally, their issuance and enforcement, while seemingly straightforward, engage complex legal principles, including those of contract interpretation, provisional validity, and the interplay between financial security and dispute resolution.

South African jurisprudence has affirmed that payment certificates, under the appropriate contractual framework, constitute liquid documents. In Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd 1973 (4) SA 181 (D), the court characterized interim certificates as akin to acknowledgments of debt, creating a cause of action that can be enforced summarily.

However, the liquid nature of these certificates does not immunise them from challenge. As noted in Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1988 (2) SA 546 (A), the recognition of a certificate as a liquid document does not imply that it is sacrosanct or immune to contractual defences. This tension between the presumed liquidity of payment certificates and the practical challenge of enforcement mirrors the broader challenges faced in construction payment disputes.

The challenges posed by delayed issuance and/or payment of certificates create a cascade of financial and operational problems in African construction projects, further making it expedient for late payment issues to be addressed through a holistic approach.

LEGAL FRAMEWORKS FOR PROMPT PAYMENT IN AFRICA

Alarmingly few African countries have attempted to address payment issues through statutory or regulatory reform, which are fundamental to ensuring prompt payment and protecting contractors. Countries like South Africa, Kenya and Rwanda have taken the lead towards developing legal framework for addressing the payment insecurity crisis compared to other African countries, however their attempts are yet to yield the much-needed result, leaving contractors vulnerable to protracted payment delays.[5]

South Africa

In May 2015, the South African Minister of Public Works issued a notice of intention to amend the Construction Industry Development Regulations through the "Prompt Payment Regulations." These regulations sought to prohibit conditional or 'pay when paid' clauses in contracts; prohibit the withholding of payment; introduce the right to suspend construction activities for non-payment; introduce the right to charge interest on late payments; and introduce a mandatory statutory form of adjudication for resolving payment disputes.[6] It is worthy to note that these regulations align with international best practices seen in the UK, Australia, and New Zealand, where similar enacted laws have stabilized the construction industry of those states by ensuring uninterrupted cash flow.

Despite being regarded by many as a step in the right direction, these regulations faced significant criticism for being overly complex, poorly drafted, and arguably incapable of implementation in the South African context. Ultimately, the draft Prompt Payment Regulations were withdrawn in 2017 on the grounds that they were "ultra vires and if challenged would not pass the Constitutional validity threshold".[7]

Since the confirmation of the withdrawal of the draft Prompt Payment Regulations, it does not appear that any further steps have been taken towards amending such regulations to address the issues raised in the legal opinion. The draft regulations and the groundbreaking ideas which they represent have seemingly been mothballed indefinitely.

With the focus shifting towards infrastructure projects to revive the South African economy, it could be argued that now is an opportune time to revisit the Prompt Payment Regulations. The adoption of these regulations would ensure that smaller contractors, who rely on timely payments to stay afloat, are presented with the best opportunity for survival.

Kenya

Kenya is actively improving its regulatory framework to manage late payments in its construction sector through the "Prompt Payment Bill, 2022" targeted at public entities and public sector procurements. This proposed legislation seeks to ensure prompt payment for commodities, works, and services provided to governmental agencies. The Bill specifies a maximum payment time of 90 days from the receipt of an invoice or completion of work - however, there are suggestions to reduce this to 60 days to comply with the Public Procurement and Asset Disposal Regulations (PPADR), which currently require payment within that timeframe.

The Bill also imposes compulsory interest on delayed payments calculated using the Central Bank of Kenya's base rate; compels procurement entities to settle debts in a first-in, first-out manner, impose criminal penalties for failure to comply with this requirement; and require suppliers must declare any overdue payments owed to small or micro businesses before entering into new contracts with government agencies so as to increase transparency and accountability in public procurement.

> This proposed legislation seeks to ensure prompt payment for commodities, works, and services provided to governmental agencies.

In addition to the Prompt Payment Bill, Kenya currently uses contract-based adjudication to settle construction disputes, including payment concerns. However, there is growing support for implementing a legislative adjudication framework akin to the UK model, which requires prompt, binding dispute resolution to avoid project delays and cash flow disruptions – as evidenced by the Office of the Attorney General's Sessional Paper No. 4 of 2024 on the National Alternative Dispute Resolution Policy, which includes a Draft Construction Adjudication Bill. Statutory adjudication will provide clarity, consistency, and enforceability, improving sector stability and supporting Kenya's infrastructure goals.

Rwanda

Rwanda through its Law No. 62/2018 Governing Public Procurement, established a progressive legal framework to promote prompt payment in public procurement, improve efficiency and accountability by providing stakeholders with data to drive systemic improvements, and enhancing trust in public contracting. Specifically, Article 174 of the Law required procuring entities to pay suppliers and contractors within 45 calendar days after the invoice submission and verification of goods or services, and Article 175 mandated the monthly publication of payment statistics, including the number of invoices paid on time, those delayed, and reasons for delays. This data was to be submitted to the Rwanda Public Procurement Authority (RPPA).[8]

However, the law was repealed and replaced with Law No. 031/2022 Governing Public Procurement,[9] which did not retain the 45 calendar days payment timeline for goods and services. Rather, Law No. 031/2022 reinforces standardized contract terms, which although commonly include clear payment timelines as part of bid documents and contract templates, is subject to negotiations between parties – with the employer having the upper hand most times.

On a positive note, the updated Law retains emphasis on efficient, transparent procurement practices, shifts the operational mechanisms by mandating the use of an e-procurement platform that enhances transparency and tracking of procurement and payment processes, and by retaining the RPPA's authority to monitor procurement processes and enforce compliance with procedures that indirectly ensure prompt payment.

The authors also identified several challenges that are particularly acute in the African context. Political cycles and changes in government frequently result in project abandonment or prolonged payment freezes, with new administrations prioritizing different projects over existing commitments. This lack of continuity creates uncertainty that ripples through the entire construction value chain.

RECOMMENDATIONS FOR REFORM – DRAWING FROM OTHER JURISDICTIONS

To address the chronic late payment crisis in the construction industry, the following are instructive:

Madate Payment Timelines and Interest Payment on Late Payments: Regulations requiring timely payments across the contracting chain, providing clear payment timeframes, introducing statutory interest for delayed payments, providing enforcement methods for penalties such as suspension for delayed payment, should be enacted urgently by African countries. These legislative frameworks have been effectively implemented in a number of jurisdictions around the world like the UK - Housing Grants, Construction and Regeneration Act (1996), Canada - Federal Prompt Payment for Construction Work Act, and Australia - Building and Construction Industry Security of Payment (SOP) Act.

Institutionalize Statutory Adjudication: In the construction industry, adjudication has revolutionized dispute resolution in jurisdictions like the UK through statutory mechanisms, but its effectiveness remains limited in Africa due to one fundamental issue: enforcement.

Standard form contracts like FIDIC and NEC have embraced adjudication as a key dispute resolution component. However, winning parties often find themselves in an unfortunate position – holding favourable decisions but unable to enforce them without entering lengthy legal proceedings. This enforcement gap undermines adjudication's core purpose as a rapid resolution mechanism.

The contrast in enforcement procedures across jurisdictions reveals significant disparities in effectiveness. In the UK, primary legislation and procedural rules enable swift enforcement through summary judgment, providing a model for efficient resolution. South Africa presents an interesting case study: despite lacking statutory backing, it has developed strong judicial support for adjudication as contractually binding. Yet even there, enforcement requires ordinary motion proceedings that typically extend six to eight months for hearing and up to a year for judgment, before considering any potential appeals.

Without specialized legislation, parties must treat non-compliance with adjudicator decisions as contract breaches. This forces them into standard court proceedings or arbitration – the very lengthy processes they aimed to avoid through adjudication. This effectively renders adjudication toothless in many African contexts, despite its potential to transform payment practices.

Adjudication: A Powerful Tool Lacking Enforcement Teeth: Adjudication's value as a dispute resolution mechanism is well-established. The introduction in 1998 of the right to refer disputes in construction contracts to adjudication changed the landscape of litigation in the UK's Technology and Construction Court (TCC). Lengthy trials of contractual disputes became a thing of the past, and the TCC faced the new challenge of devising speedy and appropriate procedures for enforcing adjudicator's decisions when they are challenged.[10]

Following this model, the TCC soon had a regular flow of enforcement cases from the Housing Grants Construction and Regeneration Act 1996 (ACT) and created a swift process for summary enforcement of adjudicators awards.[11] This statutory framework enabled adjudication to fulfil its intended purpose as a speedy mechanism for settling disputes under construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.[12]

Coulson LJ eloquently captured adjudication's vital role in the case of John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd: *"Adjudication is not an alternative to anything; for most construction disputes, it is the only game in town."*[13] This observation highlights the critical importance of effective dispute resolution mechanisms backed by reliable enforcement protocols.

> Adjudication is not an alternative to anything; for most construction disputes, it is the only game in town."

Yet across most of Africa, this critical enforcement element remains weak or entirely absent. Without the ability to quickly enforce favourable adjudication decisions, contractors face the unfortunate reality that adjudication may simply add another layer of cost and delay rather than providing the swift remedy it was designed to deliver.

Adjudication Bonds - Strengthening Enforcement Mechanisms: A promising solution has emerged from the PFI market: the adjudication bond. These bonds have evolved from early on-demand formats to more sophisticated conditional bonds. Their core concept is straightforward – a surety guarantees payment of adjudicated sums. When a party fails to comply with an adjudicator's decision (typically within 7-14 days), the bond becomes callable upon presentation of the decision and notice of non-payment.[14]

These instruments typically range from 10-20% of contract value and remain fixed for the project's duration. Critical to their effectiveness is their drafting as primary obligations rather than secondary guarantees, ensuring immediate payment with limited defences available to the guarantor.[15]

The implementation of adjudication bonds fundamentally transforms market behaviour by creating powerful incentives for compliance with adjudication decisions. Parties are significantly less likely to engage in tactical non-compliance when faced with immediate financial consequences. This behavioural shift enhances the credibility of adjudication as a dispute resolution mechanism while improving project cash flow certainty.[16]

Beyond enforcement efficiency, the practical benefits manifest in reduced legal costs and accelerated project timelines. The elimination of lengthy enforcement proceedings allows projects to maintain momentum, while the certainty of payment encourages more widespread adoption of adjudication as a primary dispute resolution mechanism.[17]

FAIR PAYMENT CODES AND VOLUNTARY STANDARDS

The authors propose adoption of voluntary fair payment codes, drawing from successful international models. The UK's Fair Payment Code, launched in December 2024 to replace the earlier Prompt Payment Code, provides a comprehensive framework that African jurisdictions could adapt. This code establishes three award tiers:

a. **Gold Award:** Paying at least 95% of invoices within 30 days.

b. **Silver Award:** Paying at least 95% of invoices within 60 days, with 95% paid to businesses with under 50 employees within 30 days.

c. **Bronze Award:** Paying at least 95% of invoices withing 60 days

The code requires participating businesses to demonstrate clear, fair, and collaborative practices with their suppliers, with reaccreditation required every two years. This creates a transparent rating system that allows subcontractors to make informed decisions about which contractors to work with, while businesses can use their award status and logo in marketing materials to attract clients who value prompt payment practices.

The authors suggest that such voluntary codes create powerful reputational incentives for prompt payment without requiring immediate legislative intervention. When combined with enhanced reporting requirements for large companies, including disclosure of total payment sums and percentages not paid within agreed terms these mechanisms can drive significant behavioural change in payment practices.

PROJECT BANK ACCOUNTS AND RING-FENCING

For larger projects, particularly those involving public sector clients, the authors recommend mandatory project bank accounts where payments are held in trust and distributed according to agreed milestones. This mechanism protects against fund diversion and provides security for the entire contractual chain. Additionally, ring-fencing funds for public projects through legislative mechanisms would protect against the disruption caused by political changes and competing budgetary priorities.

PRACTICAL RECOMMENDATIONS FOR REFORM

To address the late payment crisis through effective adjudication systems and broader reforms, the following comprehensive measures are essential:

Statutory Framework for Adjudication: African countries should develop tailored statutory frameworks similar to the UK's Housing Grants Construction and Regeneration Act 1996, which mandates adjudication provisions in construction contracts and establishes expedited enforcement mechanisms. As demonstrated in the UK, such legislation can dramatically transform payment practices across the industry.

Implementation of Fair Payment Codes: African jurisdictions should establish voluntary fair payment codes with tiered certification systems (Gold, Silver, Bronze) based on payment performance. These codes should include regular reporting requirements, biennial recertification, and allow businesses to display their certification status. Government and major private sector clients could prioritize contractors with higher-tier certifications, creating market incentives for prompt payment.

Specialized Construction Courts: Establish dedicated construction divisions within the judiciary, staffed by judges with technical expertise in construction matters, to ensure expeditious and knowledgeable handling of construction disputes and enforcement proceedings.

Adjudication Bonds: The construction industry should adopt adjudication bonds as standard practice for projects above a certain value threshold. These bonds ensure that adjudication decisions can be promptly enforced without resorting to lengthy court processes, creating powerful incentives for compliance with adjudicator decisions.

Enhanced Transparency and Accountability: Mandate publication of payment performance data by all major contractors and public sector entities, including total payment sums and percentages paid outside agreed terms. Establish independent commissioners with investigative powers to examine serial late payers and recommend sanctions.

Mandatory Financial Capacity Demonstrations: Require developers to demonstrate financial capacity throughout the project lifecycle, not merely at inception, through mechanisms such as bank undertakings or escrow arrangements.

Capacity Building Programs: Implement comprehensive training for government procurement officers, legal practitioners, and industry professionals on proper contract administration, the importance of maintaining standard form contract integrity, and modern payment security mechanisms.

Industry-Wide Regulation: Develop robust regulatory frameworks for the construction industry, particularly focusing on developer accountability, proper use of pre-sales funds, and mandatory project feasibility studies before commencement.

Right to Suspend Work: Legislation should explicitly recognise contractors' right to suspend performance when faced with non-payment, providing a powerful self-help remedy that encourages prompt payment without requiring court intervention. The proposed South African Prompt Payment Regulations included this critical provision, which should be revived and implemented.

Technology Integration: Promote adoption of e-invoicing and integrated payment systems to streamline payment processes, reduce errors, and accelerate payment cycles across the construction value chain.

Publishing of Payment Statistics: The authors highlight Rwanda as a positive example, where public procurement law mandates transparency through publication of payment statistics, including reasons for any delays. This level of accountability creates pressure for timely payment and provides valuable data for systemic reform.

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CONTINENT-WIDE SOLUTION TO THE CRISIS: ALIGNING PAYMENT REFORM WITH THE AFRICA UNION'S AGENDA 2063

The African Union's Agenda 2063 calls for inclusive economic and sustainable growth, regional integration, and infrastructure development. The reality is that African governments cannot build sustainable infrastructure with unsustainable payment systems. Some practical steps for consideration from a continental standpoint include:

Development of a Pan-African Construction Payment Charter, anchored in AfCFTA protocols on trade in services and investment, to mandate maximum payment periods (e.g., 30 days) for public infrastructure contracts, and mandating the use of PBAs in regional or multi-country infrastructure projects, especially under AU programmes like PIDA (Programme for Infrastructure Development in Africa), and establishing continental standards for dispute resolution and payment enforcement. These PBAs can be monitored by third-party fiduciaries such as regional banks or AfDB.

The EU Late Payment Directive (Directive 2011/7/EU) aimed at combating late payments in commercial transactions within the European Union, primarily to protect small and medium-sized enterprises (SMEs) from negative cash flow impacts, can serve as a guide for this charter.

Under the EU Late Payment Directive (Directive 2011/7/EU), businesses are required to pay invoices within 60 days, with some exceptions for public authorities (30 days, with a 60-day extension in exceptional circumstances); interest on delayed rate payment at least 8% above the European Central Bank's reference rate is mandated, and Member States have the responsibility to incorporate the directive into their national law and enforce its provisions.

Establishment of African Regional Construction Adjudication Panels, composed of certified experts drawn from the construction sector across the continent. The panels would offer fast-track adjudication of payment claims in 28 days, modelled after the UK adjudication system.

Publishing of a Construction Payment Performance Index Rankings measuring average payment timelines, number of unresolved payment claims and compliance with the AU payment charter, to improve transparency and drive accountability across the continent. This rankings can serve as benchmarks and pressure tool for member states that are lagging behind.

CONCLUSION

The late payment crisis in African construction demands urgent, multifaceted solutions that address both the symptoms and root causes of the problem. While adjudication represents one of the most promising tools for addressing payment disputes, its effectiveness depends on comprehensive reform that tackles the unique structural challenges facing African construction markets.

By implementing the reforms outlined above - from statutory frameworks and fair payment codes to innovative financial mechanisms and capacity building - African nations can transform payment practices across the construction sector. The voluntary fair payment code model, in particular, offers an immediately implementable solution that can drive cultural change while more comprehensive legislative reforms are developed.

These measures would not only protect individual businesses from the devastating effects of late payment but would ultimately reduce the substantial cost premium currently attached to infrastructure development across the continent. The potential benefits extend far beyond the construction sector itself. By securing prompt payment through effective adjudication and complementary reforms, African nations can accelerate infrastructure development, reduce project costs, attract international investment, and create a more sustainable, innovative construction industry capable of meeting the continent's immense infrastructure needs. The time for reform is now, as the cost of inaction continues to mount with each delayed project and failed business

Notes

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Making African Projects Bankable: From Concept To Financial Close

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INTRODUCTION

Infrastructure development across Africa faces a critical challenge: bridging the gap between conceptually sound projects and those that achieve financial close. This article examines the systemic obstacles impeding project bankability and proposes actionable solutions for stakeholders seeking to navigate this complex terrain. While the continent's infrastructure requirements are substantial - estimated at $130-170 billion annually[1] - the ability to structure projects that attract financing remains elusive due to fundamental structural, contractual and perception issues that require targeted intervention. For investors seeking safe long-term investments, Africa represents the region with greatest needs and opportunities, yet 80% of projects fail during development phase,[2] with most taking six years on average to reach completion.[3]

The authors note that this failure rate peaks dramatically at the feasibility study stage, where approximately 80% of projects are abandoned before reaching the next phase of development. This early-stage attrition represents not only lost opportunities but also significant wasted investment in preliminary studies and development costs that never yield implementable projects.

DEFINING BANKABILITY IN THE AFRICAN CONTEXT

A bankable project demonstrates clear cash flow projections, well-defined risk allocation, and sustainable project structure that collectively provide sufficient comfort to lenders and investors.[4] In the African context, bankability encompasses not merely financial viability but the credible mitigation of jurisdiction-specific risks that would otherwise render financing prohibitively expensive or entirely unavailable.[5] The key question for investors is when a project becomes bankable - essentially when government or project sponsors have done enough preliminary work to demonstrate reasonable return, with reasonable risk, in a reasonable timeframe.[6]

The authors emphasize that true bankability extends beyond satisfying lender requirements to achieving balanced stakeholder interests. A genuinely bankable project must balance the lenders' need for repayment certainty, sponsors' profitability requirements, and governments' objectives for sustainable infrastructure that serves public needs. Projects that appear bankable on paper but fail to achieve this fundamental balance often encounter implementation difficulties that ultimately lead to failure.

KEY IMPEDIMENTS TO PROJECT BANKABILITY

Inadequate Risk Allocation

Effective risk allocation lies at the heart of any bankable infrastructure project.[7] When construction, demand, currency, or political risks are not clearly assigned to the parties best able to manage them, lenders face uncertainty over cost overruns, revenue shortfalls, and regulatory delays.[8] This ambiguity forces financiers to build higher risk premiums or require expensive guarantees, ultimately inflating the project's cost of capital.[9] To reach bankability and financial close, all stakeholders must allocate project risks to those best able to handle them. The private sector should cover most financial, technical, construction, and operational risks, while governments should handle regulatory, foreign exchange, political, and force majeure risks.

The authors note a critical distinction between risk management and risk avoidance. Many contract negotiations fail because parties attempt to avoid risks entirely rather than developing appropriate management strategies. This approach proves particularly problematic in the African context where certain risks - such as currency volatility or political transitions - cannot be eliminated but must be actively managed through creative contractual mechanisms.

Deficient Feasibility Studies

The authors identify inadequate feasibility studies as the primary cause of project failure, with common deficiencies including:

(i) Copy-paste methodology

Recycling previous studies without adapting to specific project contexts or learning from past failures.

(ii) Optimistic bias

Financial models that are "whitewashed" to present unrealistic projections that satisfy initial review but doom projects to eventual failure.

(iii) Critical omissions

Missing essential technical assessments, such as groundwater table analysis for road projects, leading to massive cost overruns during implementation.

(iv) Poor risk identification

Focusing on risk allocation before properly identifying project-specific risks through comprehensive feasibility analysis.

The authors emphasize that robust feasibility studies serve as the foundation for risk identification - a prerequisite for effective risk allocation. Without data-driven, realistic assessments at this stage, projects carry fundamental flaws that compound throughout development and implementation phases.

Absence of Project Champions & Policy Continuity

Infrastructure projects require steadfast advocacy that outlasts electoral cycles. Without a credible project champion - whether an empowered individual, independent delivery unit, or legally enshrined framework - decision-making stalls, institutional memory erodes, and investor confidence wanes. Successive administrations may reprioritise national agendas, disrupting critical enabling actions such as land acquisition and permits. Support from government leaders, sometimes directly from the head of state, is key for expedient implementation of infrastructure projects.[10]

Corruption Risk

Corruption represents a pervasive threat to project bankability, driving up costs while degrading quality and undermining stakeholder trust. From inflated bids and kickbacks to opaque procurement and change-order abuses, corrupt practices erode financial viability by siphoning investment value and introducing unpredictable delays. According to reports by the African Union and the United Nations Economic Commission for Africa, Africa loses up to USD 148 billion each year to corruption, representing approximately 25% of the continent's GDP, money that would be otherwise supporting critical infrastructure. If during negotiations there is an imbalance of power caused by various factors including incompetent negotiation teams, inadequate advisory, corruption, or undue influence, long-term sustainability becomes impossible and project collapse inevitable.[11]

Risk Perception Premium

There exists a persistent risk perception premium applied to African infrastructure projects, often exceeding actual risk profiles. This perception - sometimes divorced from jurisdiction-specific realities - leads lenders and investors to demand higher returns to compensate for perceived increased risk. The cost of risk has deterred investment in many African regions despite phenomenal growth in green lending.[12] Inadequate infrastructure and lack of financing remains a major obstacle towards these regions achieving full economic growth potential.[13]

Contractual Framework Deficiencies

Contractual documents fundamentally influence bankability. Well-structured, concise, and rigorous documents better facilitate financing than complex arrangements that create interpretation ambiguities. We need a better mitigating structure to put facilities in place and improve the quality of contracts. Quality contracts will protect lenders and attract investment.[14]

The authors highlight that lenders often review contracts only at the final stages, after substantial investment in project development. This late-stage review frequently identifies fundamental issues that should have been addressed during initial structuring, creating costly delays or requiring complete restructuring of agreements.

Sovereign and Payment Risks

Government counterparty risk presents a significant bankability hurdle. Sovereign risk materialises when a government fails to meet obligations—whether paying availability fees, issuing permits, or enforcing concession terms. Most African governments have restricted or significantly reduced the issuance of guarantees for public-owned projects due to historical breaches of obligations that required government bailouts.[15] Some countries, including Tanzania, have taken the initiative of outright rejecting the issuance of government guarantees for projects under public-private partnerships.[16] This contributes to challenges of securing funds despite promising returns.[17]

The authors note particular challenges in countries undergoing debt restructuring, where IMF requirements may prohibit government guarantees entirely. This creates a deadlock where projects cannot achieve bankability without payment security that governments are legally unable to provide, resulting in signed agreements that never reach financial close despite urgent infrastructure needs.

Regulatory and Policy Environment

The most important ingredient of successful PPPs is having an investment-friendly legal and regulatory framework.[18] This starts with effective PPP regulations and setting up specialized and fully empowered PPP Units.[19] Uncertain legal frameworks and policies directly affect project bankability and reduces the interest of investors and stakeholders.[20] Unforeseeable and constant changes in the policies, regulatory framework, and fiscal laws bring instability and threaten the continued sustainability of projects. Governments should also consider embedding project de-risking tools in legislation, such as project facilitation funds to support early stage development, gap financing and contingent liability windows. Legally backed facilitation mechanisms send a powerful signal to lenders and developers about the state's commitment to the projects.[21]

Local Currency Financing for Long-Term Stability

Financing infrastructure projects in local currency can mitigate foreign exchange risk, stabilise tariffs and avoid the need for frequent regulatory adjustments. It allows domestic institutional investors such as pension funds and insurance companies to participate in infrastructure financing, fostering local capital market development and reducing dependence on foreign debt.

Capacity Constraints

The authors identify systemic capacity issues across the project lifecycle, from government officials who lack understanding of contract implications to negotiation teams unable to achieve balanced agreements.

This manifests in several ways:

(a) Procurement officers modifying standard form contracts without understanding the integrated nature of provisions;

(b) Parties entering agreements without mutual understanding of obligations and payment structures;

(c) Failure to appreciate the long-term impact of specific clauses, particularly regarding interest calculations and risk allocation.

STRATEGIC SOLUTIONS TO ENHANCE PROJECT BANKABILITY

Structured Risk Allocation

Projects should adopt standardised PPP risk-allocation matrices that assign construction, demand, currency, and political risks to the parties best able to manage them. Government-backed guarantees such as availability payments or political-risk insurance can cap lender exposure, while hedging requirements and contingency reserves embedded in financing agreements provide further protection.

The authors recommend collaborative risk management approaches, particularly post-COVID, where traditional adversarial models proved inadequate. This includes establishing contingency funds tied to event occurrence rather than fault allocation, enabling projects to address unforeseen circumstances without protracted disputes over responsibility.

Enhanced Project Preparation

The authors emphasize investing in robust project preparation through dedicated facilities like the Africa 50 initiative.

Key improvements include:

(a) Data-driven feasibility studies

Moving beyond optimistic projections to realistic, independently-verified assessments with comprehensive sensitivity analyses.

(b) Feedback loops

Systematically incorporating lessons from ongoing and completed projects into new feasibility studies.

(c) Early lender engagement

Conducting market sounding exercises during feasibility stages to understand lender appetite and structure projects accordingly.

(d) Phased development approaches

Recognizing that failing fast and early is preferable to investing substantial resources in fundamentally flawed projects.

Institutionalised Project Advocacy

Projects must institutionalise advocacy by establishing independent Delivery Units or non-partisan PMOs with statutory mandates to steward initiatives across election cycles. Key infrastructure schemes should be enshrined in project-specific Acts of Parliament and include contractual "champion clauses" that vest named

Transparent Procurement and Anti-Corruption Measures

To combat corruption, tenders should be governed by binding integrity pacts with liquidated-damages clauses for breaches and executed through secure e-procurement platforms that log every action with timestamped audit trails. Public data portals should disclose feasibility reports, bid evaluations, change orders, and beneficial-ownership records in real time.

Optimised Contractual Frameworks

Streamlining contractual documentation through internationally recognised models (e.g., FIDIC) can enhance bankability by facilitating faster drafting, clearer risk allocation, and greater market familiarity. Termination payment provisions are particularly critical for lenders, with government guarantees often required to ensure compensation in early termination scenarios.

The authors note that while EPC contracts remain the preferred model for lenders due to single-point responsibility and price certainty, they may not suit all projects. Alternative approaches include:

(i) Early Contractor Involvement (ECI) for innovative projects requiring construction input during design;
(ii) Collaborative contracting models that better distribute risks and rewards;
(iii) Hybrid structures that maintain lender comfort while allowing flexibility for project-specific requirements.

Innovative Financial Structuring

Beyond traditional approaches, the authors recommend several financial innovations:

(a) Debt Service Reserve Accounts
Providing additional security for lenders while managing liquidity constraints.

(b) Viability Gap Funding
Bridging the divide between economically viable but financially challenged projects.

(c) Local Currency Instruments
Utilizing facilities from institutions like the African Development Bank that offer lending in 11 African currencies.

(d) Credit Enhancement Mechanisms
Leveraging institutions like Nigeria's InfraCredit or Kenya's Kanindia Guarantee Company for local currency guarantees.

Adaptive Compliance Frameworks

The authors advocate moving away from one-size-fits-all approaches, particularly regarding ESG compliance and dispute resolution. This includes:
(a) Tailoring ESG requirements to local contexts while maintaining core principles;
(b) Selecting dispute resolution mechanisms based on project size and complexity rather than template provisions;
(c) Recognizing that DABs may not be cost-effective for all projects;
(d) Developing jurisdiction-specific solutions that respect international standards while acknowledging local realities.

Capacity Building Programs

Comprehensive capacity building should target all stakeholders:
(a) Government officials on contract administration and long-term project implications;
(b) Legal advisors on avoiding contract "whitewashing" that creates false bankability;
© Financial modelers on realistic projections and stress testing;
(d) All parties on the integrated nature of

Green Building Certification

Green building certification can unlock financing opportunities.[22] Lenders look for projects that have international, credible certifications. Financial institutions are interested in green buildings but they are not experts in sustainable infrastructure.[23] Providing a bank with a certification that shows the developer's sustainability credentials improves investor confidence in the project.[24]

Effective Negotiations and Balance of Power

Before any investment in the public or private sectors, negotiations should precede the signature of project documents and deployment of funds for investment purposes.[25] If history has taught us anything after seeing several African countries passing laws that try to regain lost power in various investments, there should be a balance of power from the onset i.e. during negotiations, entry into project documents in good faith, continued trust between parties, transparency and ensuring that both sides gain the expected returns.[26]

CONCLUSION

Enhancing the bankability of African infrastructure projects requires a fundamental recalibration of how projects are conceived, structured, and delivered. The solutions proposed are not merely theoretical constructs, but practical interventions drawn from successful project implementations across the continent. The authors emphasize that achieving the remaining 10% success rate requires addressing failures at their source - primarily the feasibility study stage where 80% of projects fail.

Critical to this transformation is recognizing that bankability extends beyond satisfying lender requirements to creating genuinely balanced projects that serve all stakeholder interests. This requires moving from adversarial risk avoidance to collaborative risk management, from template solutions to context-specific approaches, and from optimistic projections to data-driven reality.

Whilst the current infrastructure gap remains an issue throughout Africa, there is a way to overcome the challenges faced. Many projects across the continent have successfully accessed international finance. What we must do is take the lessons learned and use a collaborative approach to break down the barriers identified and accelerate the development of sustainable infrastructure projects. The path forward requires not only technical solutions but fundamental shifts in how projects are conceived, studied, and structured from their earliest stages.

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LESSONS FROM THE FIELD: A PRACTICAL TOOLKIT FOR MANAGING CURRENCY RISK IN AFRICAN CONSTRUCTION PROJECTS

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INTRODUCTION

Currency risk is one of the most persistent and complex threats to African construction projects. From capital flight to budget overruns and delayed payments, the implications for contractors, developers, and financiers are significant. At the 2025 Africa Construction Law conference, our panel explored these issues through the lens of regional case studies and contract best practices. This article consolidates those insights into a practical toolkit, aligned with the structure of our panel. The sections that follow will explore capital mobility restrictions, contract adaptations, hedging strategies, and dispute mechanisms. Together, they present tested, experience-based recommendations for legal and commercial teams navigating FX risk.

LEGAL & REGULATORY BARRIERS

East African Perspectives

In East Africa, investors in infrastructure projects must navigate several legal and regulatory hurdles related to capital mobility. Contractors face cash flow challenges due to delayed payments. In 2025, the Government of Uganda faces significant arrears to contractors amounting to US$208 million. The increased cost of obtaining and maintaining bank guarantees, and the requirement to finance projects (EPC) before receiving payment. A case in point is the US$92,000,000 EPC contract between the Government of Uganda and China Communications Construction Company Limited (CCCC) for the construction of the Kisubi-Nakawuka road. If a project generates income in a different currency, it can create a currency mismatch and require conversions that might be restricted. The Exim Bank of China funded the construction of the Kampala-Entebbe Expressway project in Uganda, costing US$ 476 million. The Government of Uganda is servicing the debt through its revenue collection and road toll, where money is collected in Uganda shillings. To mitigate the risks, contractors should carefully allocate risks, including currency fluctuations.

The authors identify several specific regulatory barriers that compound these challenges:

(i) Foreign Exchange Controls

Central banks across East Africa maintain varying degrees of control over capital movements, with Tanzania's Central Bank noted as particularly strict. These controls limit the amount of capital that can move in and out of jurisdictions, directly affecting project liquidity and contractor payments.

(ii) Bureaucratic Investment Approval

While Rwanda has streamlined its investment approval systems, countries like Uganda and Kenya still face bureaucratic complexities. Without certain approvals, capital mobility remains restricted, creating additional project delays and costs.

(iii) Anti-Money Laundering Restrictions

Commercial banks increasingly block accounts when transactions lack proper documentation or explanation. The authors note that these AML requirements, while necessary, create an additional layer of complexity for legitimate infrastructure financing, particularly when funds originate from multiple jurisdictions or involve countries flagged as high-risk.

(iv) Taxation Complexities

Transfer pricing regulations, double taxation issues, and varying withholding tax rates on dividends and interest create significant barriers for investors with holding companies in other jurisdictions. The lack of harmonized tax regimes across East Africa exacerbates these challenges.

Harmonisation and Enforcement Challenges

The authors emphasize that the lack of regulatory harmonization across capital markets authorities creates a patchwork of rules that complicate cross-border project financing. Different jurisdictions maintain varying requirements for financial intermediaries, creating uncertainty for investors and contractors operating across multiple countries.

Particularly problematic is the unpredictability of tax regimes. The authors note that revenue authorities often play "catch up" with rapidly evolving project structures, creating retrospective tax liabilities that undermine project economics. This uncertainty extends to enforcement mechanisms, where despite the New York Convention's adoption, court cooperation varies significantly across the region, affecting the enforceability of contracts and arbitral awards.

CONTRACTUAL RESPONSE TO FX VOLATILITY

Ghana's Currency Crisis and Contractual Adaptations

Ghana's recent currency volatility can be attributed to a combination of internal and external factors. In 2022, rising inflation, exchange rate depreciation, a loss of external buffers, and external shocks exacerbated pre-existing fiscal and debt vulnerabilities, leading to increased economic and financial pressures. The high levels of public debt put additional strain on the Ghanaian cedi.

“Ghana's recent currency volatility can be attributed to a combination of internal and external factors

The Ghanaian cedi has depreciated significantly against major trading currencies, losing over 100% of its value between January 2022 and April 2025 against the US Dollar, creating uncertainty and financial risk for parties involved in construction contracts, especially those priced in cedis. Long-term projects that require materials and equipment from foreign suppliers paid for in local currency and utilize third-party financing in foreign currencies that must be repaid in local currency, are at risk due to currency fluctuations. Currency volatility can significantly impact project costs, budgets, revenues, debt servicing, and profitability.

The authors detail Ghana's response to this crisis, which included:

(i) Debt Restructuring and Project Suspension

Ghana's IMF-mandated suspension of external debt obligations affected Eurobonds, commercial term loans, and bilateral debt. This forced many public sector projects funded through these mechanisms to be suspended or terminated, with contractors facing the difficult choice between accepting suspension (hoping for eventual resumption) or pursuing termination for prolonged non-payment exceeding one year.

(ii) Contractual Modifications

In response to these price fluctuations, contractors are seeking to include clauses in construction contracts that address exchange rate variations. This includes:

(a) exchange rate escalation clauses;

(b) multi-currency payment provisions, which allows payments to be made in multiple currencies depending on the source of the cost. For example foreign inputs are priced in USD while local inputs remain in Ghana cedis;

(c) split currency risk sharing clause, where the exchange rate risk is split between the parties; and

(d)force majeure and hardship clauses specifically addressing currency fluctuation.

Multi-Tiered Dispute Resolution

The authors recommend incorporating sophisticated dispute resolution mechanisms to handle currency-related issues:
(a) Standing Dispute Boards established at project outset to provide real-time recommendations;
(b) Early warning notification requirements for material currency risks;
(c) Time-bound multi-tiered resolution processes starting with amicable settlement;
(d) Expert determination for technical currency adjustment calculations;
(e) Arbitration as a final resort with clear timelines to prevent delay tactics

CURRENCY CONTROLS IN FRAGILE ECONOMIES

In Zimbabwe, construction projects face significant currency risk due to local currency constraints, including rampant exchange rate depreciation and inflation. These factors escalate costs for imported materials and labour, prompting contractors to adopt dual pricing strategies. By charging clients differently based on currency, firms can manage expenses amidst volatile market conditions.

The authors note that Zimbabwe's economy is approximately 80% dollarised, allowing private projects to be executed entirely in US dollars. However, challenges arise in public projects funded in foreign currency but payable by government in local currency, particularly for toll projects where users pay in both currencies at managed exchange rates that don't reflect real market values.

To navigate liquidity challenges, the private sector increasingly seeks foreign funding, strengthening cash flow and reducing reliance on local currency. Export Credit Guarantees (ECGs) have proven effective in mitigating risks associated with non-payment and exchange rate fluctuations in cases where procurement of goods is external.

A prime example is the Beitbridge Border Post construction, which successfully attracted foreign investment backed by ECGs, enhancing trade efficiency between Zimbabwe and South Africa. Such strategies enable Zimbabwean construction firms to effectively manage currency risks, ensuring project viability and stimulating economic growth in the sector despite prevailing challenges.

FINANCIAL INSTRUMENTS & HEDGING

Hedging currency risk in African construction projects is crucial due to volatile exchange rates and limited currency convertibility. The authors present comprehensive data on currency movements, noting that between May 2023 and May 2025:
(a) Nigerian naira depreciated 248% following currency floating;
(b) Ethiopian birr depreciated 146%;
(c) Egyptian pound depreciated 64%;
(d) Malawi kwacha depreciated 69%.

Conversely, some currencies showed resilience:
(a) South African rand appreciated 10%;
(b) Zambian kwacha appreciated 13%;
(c) Ugandan shilling appreciated 4%;
(d) Botswana pula appreciated 2.2%.

Several financial tools are available for protection, each with distinct advantages and limitations:

Low-Cost Hedging Strategies

(a) Multi-Currency Contracting
Structuring projects so local content (labour) is financed in local currency while equipment and foreign inputs are priced in hard currency. The authors note this requires careful structuring and access to multiple currency sources.

(b) Price Escalation Clauses
Tying contract price adjustments to inflation or forex indices, with contractors bearing risk up to predetermined thresholds (typically 5-10%) and developers/financiers bearing risk beyond. The authors caution this merely allocates rather than mitigates losses.

(c) Natural Hedging
Matching expenses and revenues in the same currency across multiple projects or countries. The authors suggest that multinational contractors operating across several African countries can create natural hedges by strategically sourcing materials and allocating resources across their portfolio.

High-Cost Financial Instruments

Forward contracts and currency swaps provide predictability by locking in rates, but they lack flexibility if market conditions improve. Options offer more flexibility, allowing firms to benefit from favourable rate movements, although they come at a higher cost.

The authors note that forward contracts can be expensive but potentially worthwhile - citing the example that paying a 40% premium would be justified to avoid the Nigerian naira's 248% devaluation. However, exchange controls in countries like Nigeria necessitate using non-deliverable forwards, adding complexity.

Multilateral and Regional Solutions

Instruments from multilateral development banks, such as MIGA or the African Development Bank, can mitigate political and currency transfer risks, although access may be limited to large-scale or government-backed projects. The African Development Bank's local currency lending in 11 African currencies represents a significant development, though the authors note capacity constraints remain.

Local currency financing eliminates foreign exchange risk, but funding is limited to certain parts of Africa, particularly in countries with more developed financial systems like South Africa, Kenya, and Nigeria. This financing is often facilitated by development finance institutions and is practical for government-backed or infrastructure projects. However, challenges such as limited capital markets, high interest rates, and economic instability render it less viable in many other regions.

The authors highlight promising developments including:
(i) Kenya Mortgage Refinance Company's green bond initiatives in local currency;
(ii) IFC's partnership with Citibank to expand local currency use;
(iii) Credit enhancement mechanisms like Nigeria's InfraCredit and Kenya's Kanindia Guarantee Company.

However, they caution that local banks typically offer only 7-10 year tenures, misaligned with infrastructure projects requiring 20+ year financing.

Future Currency Considerations

The authors note growing interest in alternative currency arrangements, including potential BRICS currency development and regional initiatives like the West African Eco. They suggest that a common African currency backed by the continent's resource base could provide effective natural hedging for commodity-based transactions, though acknowledge the significant political and economic challenges to implementation.

CONTRACT CLAUSES & DISPUTE RESOLUTION

A typical fluctuation clause in a construction contract to allow for adjustments to the contract price may include the following:
(a) a base date from which fluctuations in costs will be measured;
(b) a price index or economic indicator that will be used to measure change in costs;
(c) an adjustment formula to determine how the contract price will be adjusted based on changes in the price index;
(d) the frequency at which adjustments will be made;
(e) caps or limitations on the extent of adjustments;
(f) notification requirements to trigger and process adjustments; and
(g) the dispute resolution mechanism if disputes arise regarding the adjustments.

FIDIC Golden Principles and Risk Allocation

The authors emphasize that FIDIC's golden principle - allocating risk to the party best suited to manage it - typically means contractors seek to pass currency risk to employers through various mechanisms:

a. Currency Adjustment Clauses: Specific provisions allowing contract price adjustments based on predetermined exchange rate movements, with clear triggers and calculation methodologies.

b. Multi-Currency Financing Structure: Separating imported inputs (steel, equipment) for payment in stable currencies while maintaining local inputs (labour) in local currency.

c. Fixed or Variable Payment Mechanisms: Building in renegotiation triggers when exchange rates reach predetermined thresholds.

d. **Early Warning and Collaboration:** Contractual requirements for prompt notification of material currency risks, enabling proactive management rather than reactive disputes.

Expert Determination and Tribunal Discretion

The dispute resolution mechanism for a currency-related dispute will depend on the specific needs and preferences of the parties involved in the construction contract, but may include a combination of resolution mechanisms. A multi-tiered dispute resolution clause makes provision for parties to undertake one or more rounds of a non-binding resolution process such as utilising a DAAB, negotiation, mediation, or reference to an independent expert, before moving on to arbitration or litigation.

The authors stress the importance of:
(i) clear contractual language avoiding ambiguity in payment modalities and currency expectations
(ii) granting tribunals specific discretion to address currency fluctuations as economic loss;
(iii) careful seat selection considering both procedural and enforcement implications.

CRITICAL ROLE OF GOVERNMENT AND SYSTEMIC SOLUTIONS

The authors emphasize that sustainable solutions require government participation and accountability. They note that African governments, as the largest employers in infrastructure projects, control the framework within which currency risk solutions must operate. Key recommendations include:

Public Financial Management Reform

Proper project planning with realistic budgetary allocations, disciplined debt sustainability measures, and accountability mechanisms for ministry departments managing infrastructure budgets.

Balanced Negotiation Power

Addressing the structural imbalance where capital-exporting countries often dictate contractual terms. The authors suggest that improved government negotiation capacity and regional cooperation could help achieve more balanced risk allocation.

Capacity Building

Investment in training for state law offices and attorney general departments who make critical decisions on infrastructure contracts. The authors note that weaknesses in government contract negotiation and administration create downstream currency risk exposure.

Anti-Corruption Measures

Recognizing that corruption compounds currency risk by inflating project costs and creating additional uncertainty. Transparent procurement and project management reduce the premium associated with governance risks.

PRACTICAL TAKEAWAYS

Based on extensive field experience, the authors offer these key recommendations:
(a) Anticipate Volatility: Currency fluctuation is not a matter of if but when. Draft contracts for volatility as the norm rather than stability as the exception.

(b) Multi-Pronged Approach: Combine multiple tools - multi-currency pricing, escalation clauses, and selective use of financial instruments based on cost-benefit analysis.

(c) Market Understanding: Deep knowledge of local market trends and regulatory environments is indispensable for building appropriate contractual protections.

(d) Government Engagement: Sustainable solutions require government participation in improving local capital markets and reducing dependence on foreign financing.

(e) Project Team Investment: Consider investing in project team capabilities and proper contract administration rather than expensive external hedging mechanisms.

(f) Early Engagement: Structure currency protections from contract inception rather than attempting retrofit solutions after currency shocks occur.

(g) Regional Cooperation: Support initiatives for payment system integration and common currency discussions that could provide natural hedging opportunities.

The authors conclude that managing currency risk in African construction requires embracing economic resilience rather than merely seeking market opportunities. Success depends on realistic assessment of currency dynamics, creative contractual solutions, and recognition that traditional stability-based approaches no longer suffice in an environment of persistent volatility.

JUDICIAL INTERVENTION IN AFRICAN CONSTRUCTION ARBITRATION: FINDING THE BALANCE

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A Delicate Equilibrium: Judicial Support Within Defined Boundaries

Construction arbitration across Africa stands at a critical junction in its development. The relationship between national courts and arbitral tribunals requires careful calibration to preserve the efficacy of arbitration as a preferred dispute resolution mechanism in a sector vital to African economic development. This paper examines how to achieve an optimal balance between necessary judicial support and appropriate restraint.

The Paradox of Judicial Intervention

The paradoxical nature of judicial intervention in arbitration requires careful navigation: courts must simultaneously support arbitration through enforcement mechanisms while exercising restraint to respect the autonomy of the arbitral process. As demonstrated by the Cruz City 1 Mauritius Holdings v Unitech Limited case, where the Mauritius Supreme Court emphasized that its role was *"not to review the award on the merits, but instead only to evaluate if refusal is warranted under the narrow circumstances set out in the Arbitration Act."*[1] The ideal approach respects the finality of arbitral decisions while providing a safety net for fundamental procedural fairness.

The authors highlight practical examples such as the New York Convention and the UNCITRAL Model Law, both of which explicitly provide for limited court involvement in arbitration. These instances include the enforcement of arbitral awards, the appointment of arbitrators, and the safeguarding of procedural fairness. However, the authors caution that when courts exceed these narrowly defined boundaries, they risk undermining confidence in the arbitration process. In some jurisdictions, this overreach stems from a lack of familiarity with arbitration. Although review applications for arbitral orders are intended to be narrowly confined, parties often misuse them to relitigate disputes.

This practice compromises the fundamental advantages of arbitration—namely, its speed, cost-efficiency, and finality.

Regional Disparities and Emerging Convergence

The African arbitration landscape reveals significant variations in judicial attitudes toward arbitration. While some jurisdictions like South Africa and Mauritius have adopted a robust pro-enforcement stance, others have demonstrated inconsistency. Kenya's experience is illustrative: in Tanzania National Roads Agency v Kundan Singh Construction Limited, the High Court refused enforcement on public policy grounds, determining that the tribunal had not applied the contract's governing law.[2] Subsequent attempts to afford Kenya's Supreme Court an opportunity to intervene and define public policy in the enforcement of arbitral awards as a question of general public importance with a view to adopting international best practice in international arbitration in the case were unsuccessful.[3] This position was later counterbalanced in Mohamed Salim v Trishcon Construction, where the court rejected similar public policy objections and emphasized that public policy actually compelled enforcement rather than vacation of the award.[4] Since then the practice of the country's High Court has been to take into consideration previous cases on public policy with the result that the jurisprudence emerging from such decisions is to the effect that a party seeking to set aside an arbitral award for being inconsistent with public policy, will only succeed if he shows that the award violates the tenets of the constitution or laws of Kenya; national interest or offends justice and morality of Kenya, is outright illegal or it unjustly enriches a person in a manner that is inconsistent with Kenya's socio-economic ethos factually through evidence.[5]

Rwanda's courts have similarly supported enforcement, notably rejecting an objection based on the expiration of time limits where a party had continued participating in arbitration without complaint.[6] Zimbabwe's courts have shown willingness to interpret awards flexibly to ensure enforceability, holding that public policy would render an award unenforceable only if it constituted *'a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.'*[7]

This evolving jurisprudence suggests a gradual continental shift toward limited intervention, albeit at varying paces and with occasional setbacks.

The Model Law Impact: Creating Harmonization

The adoption of the UNCITRAL Model Law has been transformative for many African jurisdictions, providing a template that bestows upon national courts only narrow grounds for setting aside awards – grounds that mirror the New York Convention's provisions for refusing enforcement. Countries with arbitration laws based on the Model Law in East Africa include Comoros, Kenya, Madagascar, Mauritius, Rwanda, Uganda, whilst in Southern Africa Zambia, South Africa and Zimbabwe all have Arbitration Acts which are tied to the Model Law. Although Mozambique has not fully adopted the Model Law, its legislation bears significant similarities.[8] This trend toward harmonization creates predictability and enhances the attractiveness of African seats for international arbitration.

The Kenyan arbitration framework exemplifies this commitment to international standards. Section 10 of the Kenyan Arbitration Act states that "…except as provided in the Act, no court shall intervene in matters governed by the Act".[9] The Supreme Court of Kenya in Nyutu Agrovet Limited v Airtel Networks Kenya Limited emphasized that the Act *"was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process"* and that finality provisions were designed to ensure that neither party frustrates the arbitration process, thereby [thus] giving arbitration advantage over the usual judicial process.[10]

The authors emphasized that legislative clarity is crucial to promoting the use of arbitration as a preferred dispute resolution mechanism. In this regard, they commended Nigeria's Arbitration and Mediation Act 2023 for introducing several key innovations. These include the establishment of the Arbitration Review Tribunal (ART), which provides a faster, expert-led alternative to traditional court reviews; a procedural fast-track for appeals emanating from arbitration related mattersthe introduction of finality at the Court of Appeal level, which helps to curtail protracted litigation; and the inclusion of provisions for third-party funding, thereby improving access to arbitration for parties with limited financial resources.

Additionally, the authors highlighted reforms in the English Arbitration Act that could serve as a model for African jurisdictions. These reforms limit jurisdictional challenges and promote the remittal of matters back to arbitral tribunals rather than setting aside awards. The authors suggested that similar measures, including judicial practice directions that empower courts to dismiss meritless claims at an early stage, could significantly enhance the efficiency and credibility of arbitration across the continent.

Civil vs. Common Law: Bridging Divergent Approaches

One of the most distinctive features of construction arbitration in Africa is the introduction of civil law concepts in jurisdictions with common law legal system. In a few African countries, there operate a hybrid legal system of civil and common law that prevails in practice and, sometimes that combines civil and common law, prevailing in practice and, occasionally, in legal texts.[11] This duality creates practical challenges where common law-trained lawyers represent a large majority of practitioners of construction arbitration working alongside experts and construction managers trained on the UK Society of Construction Law Protocol. These practitioners must reconcile these approaches with concepts rooted in civil law concepts of breach of contract, abuse of right, causation, and construction-specific duties of information and co-operation, including breach of contract, abuse of right, causation, and construction-specific duties of informationgood faith and cooperation between the Parties.[12] Courts must navigate these intersecting legal traditions when reviewing arbitral awards.

Addressing Jurisdictional Complexities

The jurisdictional aspect of court intervention presents particular challenges. In Nigeria, for example, jurisdictional issues are complex due to the multilayered court structure. Nigeria has a Federal High Court with various divisions across the Federation, plus as well as 36 state High Courts and the Federal Capital Territory High Court. The State High Courts have unlimited jurisdiction subject to the exclusive jurisdictions jurisdiction of the Federal High Court and the National Industrial Court.[13]

These complexities affect arbitrator appointments. The Nigerian Arbitration and Conciliation Act (ACA) defines a court to mean either the Federal or State High Courts or the High Court of the Federal Capital Territory. This creates uncertainty about which High Court should appoint arbitrators when parties fail to do so - should it be the court that would have jurisdiction over the underlying dispute or can any of the designated courts intervene regardless of subject matter?[14] This uncertainty creates practical difficulties for parties seeking judicial assistance.

The authors note the need for harmonized judicial practices and institutional reforms to reduce fragmentation and enhance predictability in arbitrator appointments. For instance, the authors noted that in Kenya, delays in judicial confirmation of arbitral appointments have discouraged parties from selecting local seats. Meanwhile, in Ghana, inconsistent interpretations of arbitration statutes by different High Court divisions have created uncertainty around the enforceability of interim measures. The authors emphasise that such inconsistencies could be mitigated through centralized arbitration benches, judicial training, and clearer statutory mandates.

The Path Forward: Recalibrating the Balance

To establish the optimal equilibrium between judicial support and respect for arbitral autonomy across Africa, we propose:

Legislative Reform: Countries should introduce uniform statutes aligned with the Model Law and implement proper statutory standards for expert evidence in arbitrations. Nigeria's recent Arbitration and Mediation Act 2023 offers a template, creating a structured framework for enforcement while addressing previous challenges.[15]

Judicial Training: Judges should receive formal training in arbitration principles to ensure consistent application of limited intervention standards. Tanzanian courts have demonstrated exemplary restraint, with the High Court declaring in Dowans Holdings SA v Tanzania Electric Supply Company Limited that "it would not be proper for this court to interfere with the findings of the ICC's Arbitral Tribunal, for, in doing so, it would amount to re-opening and re-arguing of the issues."[16]

Professional Ethics Development: Law societies and bar associations should promote ethical practice that discourages abuse of the courts to frustrate the arbitral process. With increased knowledge and sophistication on construction law issues across the continent, the adoption of international best practices will further reduce unnecessary judicial intervention.[17]

Institutional Strengthening: The growing prominence of African arbitration institutions like the Arbitration Foundation of Southern Africa, the Cairo Regional Centre for International Commercial Arbitration, the Kigali International Arbitration Centre, and the Lagos Court of Arbitration should be supported through governance standards that enhance their autonomy from court systems while maintaining procedural integrity.[18]

Conclusion

The future of construction arbitration in Africa depends on striking the right balance between judicial oversight and arbitral independence. Courts must embrace their role as facilitators rather than supervisors ofadopt a facilitative approach, rather than acting as supervisors, in the arbitral process. As East African courts have increasingly demonstrated, the optimal approach is one where the national courts of various countries in Africa have demonstrated their support of international arbitration through limiting their interference in the sanctity of awards and promoting enforcement exceptnational courts in different African countries have demonstrated their support for international arbitration by limiting their interference in the sanctity of awards and promoting enforcement only on limited grounds. That approach provides foreign investors with a degree of comfort that there will be certainty and finality to their chosen mechanism for dispute resolution.[19]

This balanced approach will not only strengthen arbitration as a dispute resolution mechanism but also enhance confidence in Africa's construction sector, promoting investment and development across the continent.

Notes

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Corruption In Infrastructure Development:
Systemic Challenges And Pathways To Reform

INTRODUCTION

Infrastructure development serves as the backbone of economic growth and social progress, yet corruption continues to plague construction projects globally, with particularly severe manifestations in developing regions. The construction sector consistently ranks among the most corruption-prone industries worldwide, with conservative estimates suggesting that 20-30% of project value is lost through corrupt practices.[1] This pervasive challenge undermines public trust, compromises safety standards, and significantly hampers socio-economic progress, creating a vicious cycle where the poorest communities bear the greatest burden of inadequate infrastructure delivery.

The author's extensive global experience confirms that corruption, dishonesty and fraud are endemic across all continents - this is not simply an African problem. The scale of this challenge is staggering, with Africa's construction industry expected to reach $369 billion by 2028, representing enormous potential for both legitimate development and corrupt exploitation. However, the pervasive nature of corruption means that substantial portions of these investments fail to deliver intended benefits, as every dollar stolen or diverted means that the poorest people don't receive the essential infrastructure they need.

UNDERSTANDING CONSTRUCTION SECTOR CORRUPTION

Corruption in the construction sector encompasses far more than the stereotypical bribery. From a legal perspective, the author observes that corruption constitutes the abuse of entrusted power for private gain, encompassing bribery, embezzlement, nepotism, favouritism, and various forms of illicit enrichment. The construction industry's inherent characteristics make it particularly vulnerable to corrupt practices: projects are typically large, unique, complex, and structured through multiple phases with numerous contractual links that disperse accountability among separate agents.[2]

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The author's professional experience reveals that corruption manifests in sophisticated forms throughout project lifecycles. During procurement processes, fraud includes manipulating tender documents and prequalification processes to ensure favoured parties receive contracts, whilst eliminating preferred bidders through corrupt payments. Quality compromises represent one of corruption's most dangerous manifestations, where specifications call for high-quality materials with specific technical requirements, but actual delivery involves inferior substitutes that fail to meet standards whilst being accepted at full cost.

The author notes that construction fraud can be categorised into five main types: tender fraud, procurement fraud, substandard works and overcharging, inflated project costs, and simple bribery and corruption. These categories illustrate the comprehensive nature of corrupt practices that can affect virtually every aspect of project delivery.

Extreme Manifestations: Construction Mafias and Organised Crime

Construction mafias represent an extreme manifestation of systematic corruption, particularly prevalent in South Africa where these networks employ violence, intimidation, and extortion to control access to procurement opportunities.[3] These criminal organisations exploit legislative frameworks intended to promote economic transformation, particularly the Preferential Procurement Policy Framework Act's 30% procurement requirements for historically disadvantaged individuals, deliberately misinterpreting these provisions to demand illegal percentages of contract values.[4]

By 2019, at least 183 infrastructure projects worth more than R63 billion had been affected by construction mafia activities.[5] The author observes that these organisations employ tactics including threatening projects with violence and heavy weaponry, demanding shares without genuine interest in actual work, and terrorising, intimidating, assaulting, and in some cases killing employees or managers on construction sites.

The construction mafia has progressively established political connections, aligning with specific factions within governing parties to gain protection and facilitate access to state procurement opportunities. This political backing enables systematic targeting of construction projects across all provinces, creating environments where legitimate contractors cannot operate safely.

The author's analysis of international cases demonstrates corruption's evolution into organised crime networks. The Medupi and Kusile power station projects in South Africa illustrate extreme consequences: projects completed over 10 years late and R161 billion over budget, with criminal proceedings ongoing against numerous participants. These cases reveal corruption extending beyond financial losses to include organised crime, contract killings, and systematic state capture, with hit men operating on construction sites and assassination attempts against officials attempting to combat corruption.

Root Causes: Structural and Systemic Factors

The author's analysis identifies that the persistence of construction sector corruption stems from deeply embedded structural factors operating across cultural, political, and economic dimensions. Cultural factors include moral norms around nepotism, which undermines merit-based systems by prioritising family or ethnic connections over qualifications. Informal social networks based on patronage create parallel governance systems where personal connections influence decision-making at the expense of public interest.

Political economic factors include weak governance and accountability structures that create environments where corruption flourishes. The author observes that poverty, inequality, and limited economic opportunities act as incentives for individuals to engage in corrupt practices as survival strategies. Political patronage systems reward supporters through preferential contract access whilst protecting corrupt actors from enforcement actions.

Ground-breaking research into the British building industry in 1966 found that formal control systems conflict with practical management requirements, leading to informal procedures that produce more realistic decision-making processes.[6] These informal systems, whilst not necessarily corrupt, create environments where departure from formal procedures becomes normalised, potentially facilitating corrupt arrangements.

Research in Kenya echoed these findings, revealing problems of inadequate capacity and formal systems for delivering projects that were simply not working and in many instances not workable.[7] Recent findings from the Construction Sector Transparency (CoST) initiative reveal that little has changed in many countries, with 26% of problems in project delivery occurring at the pre-tender stage, including poor quality and incomplete design.[8]

Corruption Across the Project Lifecycle

The author's observations reveal that corruption infiltrates every stage of infrastructure project delivery, from initial conception through final operation and maintenance. During project identification phases, there is perception that some projects are initiated specifically to create opportunities for public officials to extract money, with unnecessarily large designs and embedded sophistications to inflate associated costs.[9]

At tender management stages, governments often lack capacity to undertake needs assessments and develop bills of quantities internally, hiring consultants where corruption risks emerge due to lack of disclosure and public scrutiny. The author notes that government officials register companies that bid and win contracts in different entities, avoiding conflict of interest issues whilst subcontracting work to other firms and retaining percentages, explaining poor quality outcomes.

During contract management, the author identifies risks including delays in bid processing as officials buy time to offer preferential treatment, subjecting other bidders to accumulated bank interest on guarantees that erode profit margins. Private companies provide facilitation payments to officers in technical evaluation committees, with businesses losing up to 10% and sometimes above of contract sums through such payments.

The system of competitive tender, preferred by multilateral development banks and most developing countries with reformed procurement procedures, is based on several key assumptions that are rarely met in practice.[10] Most importantly, designs are rarely complete before tender, and it has been argued that the need for feedback from contractors means designs can never be complete before construction starts.

Regional Variations and International Dimensions

The author's global experience reveals that different regions demonstrate varying patterns of construction sector corruption, though common themes emerge globally. In the Middle East, corrupt practices are often viewed as accepted business practices that have operated for years, requiring cultural shifts to address underlying acceptance of such behaviours.

Concerning Chinese companies' operations in Africa, the author's analysis suggests different approaches to anti-corruption compliance compared to European firms. Respondents indicate that Chinese companies have connections in top political leadership echelons, with local companies often withdrawing from bids when Chinese companies participate, believing they cannot compete fairly.[11] These companies reportedly quote lowest prices making them difficult to beat financially, whilst having backing from their home government and learning to domesticate businesses to benefit from local content reservations.

The author's examination of the P&ID case exemplifies how corruption can evolve from initial contract awards through international arbitration processes. This investment treaty arbitration initially awarded $6.8 billion, eventually threatening Nigeria with $11 billion in liability. UK High Court investigations revealed systematic bribery and corruption spanning initial contract award, cancellation, and subsequent arbitral proceedings, involving perjury and sustained corrupt practices.

QUALITY, SAFETY, AND DEVELOPMENT IMPLICATIONS

The author's experience demonstrates that corruption's most dangerous consequence involves systematic quality degradation that creates serious safety risks. When contractors pay bribes of 10-15% to win contracts, they typically receive "conducive environments" for recovering costs through substandard delivery.[12] Agreements between contractors and supervising engineers enable acceptance of inferior materials and overlooking substandard work, with contractors and engineers agreeing to use fewer materials and split savings.

The author observes that these compromises create ongoing threats to public safety, as infrastructure built with substandard materials poses risks of catastrophic failure. Recent earthquake damage in Turkey revealed building collapses linked to substandard steel from compromised suppliers, illustrating corruption's life-threatening consequences.

Beyond immediate safety concerns, the author notes that corruption undermines the broader development impact of infrastructure investments. Major challenges in developing countries include inappropriate projects, high prices, poor quality, excessive time and cost overruns, inadequate maintenance and low returns.[13] These problems impact negatively on development and poverty alleviation, as resources that should contribute to economic growth are diverted for private enrichment.

LEGAL FRAMEWORKS AND ENFORCEMENT CHALLENGES

The author's analysis reveals that multiple legal frameworks address construction sector corruption, including the US Foreign Corrupt Practices Act, UK Bribery Act 2010, OECD Anti-Bribery Convention, and UN Convention Against Corruption. However, enforcement challenges stem from limited investigative capacity, compromised judicial systems, and sophisticated methods employed by corrupt networks to conceal activities.

In international arbitration contexts, the author observes that corruption significantly impacts dispute resolution processes. Corruption can serve as defence arguments that underlying contracts are invalid due to fraud or bribery, with tribunals required to investigate when sufficient red flags emerge. The World Duty Free versus Kenya case established precedent that contracts procured through bribery are void and unenforceable, even when claimants argue that bribes represent customary business practices.

The author notes that under illegality doctrines, contracts tainted by corruption can be declared void ab initio, meaning claimants lose all contractual rights. This creates high-stakes situations where corruption allegations can invalidate entire contractual relationships, making arbitral awards unenforceable under public policy exceptions in the New York Convention.

DUE DILIGENCE AND RISK ASSESSMENT

The author's experience in integrity due diligence reveals that many infrastructure projects involve opaque ownership structures where formal corporate records don't reflect actual control arrangements. Common red flags include companies with no verifiable track records bidding for major projects, opaque ownership involving multiple shell companies, and contractors whose financial profiles don't support claimed capabilities.

In conflict-affected and fragile states, the author observes that registry systems are often unreliable, making beneficial ownership verification extremely difficult. Cases in South Sudan exemplify these challenges, where formal company records contradict ground-truth intelligence about actual project ownership and control.

The author emphasises that enhanced due diligence requires going beyond registry searches to include source verification, litigation record checks, and ground intelligence gathering. Companies must investigate not only immediate contractors but entire supply chains, including subcontractors and suppliers who may introduce corruption risks through compromised practices.

SOLUTIONS AND MITIGATION STRATEGIES

The author's recommendations emphasise that addressing construction sector corruption requires comprehensive strategies operating across multiple levels, from individual project management to systemic institutional reform. Enhanced procurement processes help but remain insufficient without corresponding institutional reforms and cultural changes that make honest business practices both possible and profitable.

Contract design innovations can reduce corruption opportunities through design-build approaches that create single points of responsibility, eliminating coordination challenges that corrupt networks exploit.[14] Cost-plus contracts with open-book accounting and pain/gain sharing formulas align incentives for honest performance whilst reducing opportunities for hidden corrupt arrangements.

The New Engineering Contract (NEC) developed by the UK Institution of Civil Engineers provides examples of such arrangements, now routinely adopted on major UK public construction projects and increasingly used in Gulf States, South Africa, Botswana, Australia, New Zealand and Hong Kong.[15]

The author stresses that anti-corruption measures must be proactive rather than reactive, embedded in organisational culture rather than treated as compliance exercises. Companies should implement robust third-party management systems including regular auditing and monitoring of subcontractors and suppliers throughout project implementation.

PROFESSIONAL AND INSTITUTIONAL RESPONSES

The author's observations reveal that professional bodies often fail to adequately address corruption within their membership, sometimes appearing protective of corrupt practitioners rather than maintaining professional standards. This institutional weakness undermines broader anti-corruption efforts by failing to create professional consequences for corrupt behaviour.

Individual professionals face difficult choices when confronting systemic corruption, as those who refuse to participate in corrupt practices may find themselves excluded from future work opportunities. However, the author argues that contractors should recognise that combating corruption benefits their bottom line, as corruption typically costs 5-20% of project values whilst legitimate profit margins often run only 2-3%.

From purely economic perspectives, the author notes that eliminating corruption provides direct financial benefits that exceed most other operational improvements. Companies adhering to strict anti-corruption standards may face short-term competitive disadvantages in corrupt environments, but ultimately benefit from enhanced reputation, reduced legal risks, and improved operational efficiency.

CULTURAL AND EDUCATIONAL DIMENSIONS

The author's view emphasises that effective anti-corruption strategies must recognise that legislation alone cannot solve corruption problems—cultural change remains essential. Professional ethics education appears inadequate across many jurisdictions, with practitioners often unfamiliar with fundamental ethical principles that should guide professional conduct.

The author observes that cultural sensitivity must be balanced against universal integrity standards. Whilst different regions may approach business relationships differently with some emphasising transactional efficiency and others prioritising relationship-building, certain behaviours constitute corruption regardless of cultural context and must be addressed accordingly.

The distinction between relationship-building and corruption requires careful consideration, as legitimate business practices in some cultures may be misinterpreted whilst genuine corruption may be excused as cultural differences. The author argues for clear standards that help distinguish between acceptable relationship-building and unacceptable corrupt practices.

SYSTEMIC REFORM REQUIREMENTS

The author's analysis stresses that effective anti-corruption strategies must address systemic rather than individual instances of corruption, recognising that corrupt networks operate as interconnected systems rather than isolated incidents. Institutional reforms must create environments where honest business practices become rational choices for individual actors.

This includes strengthening regulatory oversight, improving transparency mechanisms, and ensuring that enforcement actions create credible deterrents against corrupt behaviour. The author emphasises that asset recovery represents one of the most effective deterrents, as corrupt actors lose incentives when they cannot retain ill-gotten gains.

International cooperation remains essential for cross-border asset recovery and enforcement actions, particularly given the global nature of major infrastructure projects and the tendency for corrupt proceeds to be hidden in multiple jurisdictions.

TECHNOLOGY AND TRANSPARENCY SOLUTIONS

The author's recommendations include digital solutions that offer promising approaches to reducing corruption opportunities through enhanced transparency and automated processes. Digitisation of procurement processes, electronic payments to government ministries, and blockchain-based contract management can reduce opportunities for corrupt manipulation.[16]

Beneficial ownership transparency requirements and disclosures in company registries across jurisdictions help address opacity that facilitates corrupt arrangements. However, the author notes that technology solutions must be accompanied by institutional capacity to utilise these tools effectively and political will to enforce transparency requirements.

The Construction Sector Transparency (CoST) initiative provides frameworks for increasing transparency in infrastructure project delivery, though implementation requires sustained commitment from governments and civil society organisations.[17]

ECONOMIC ARGUMENTS AGAINST CORRUPTION

The author's economic analysis reveals compelling financial arguments against corruption that should resonate with contractors and project participants. Corruption typically imposes costs of 5-20% of project values, whilst legitimate construction profit margins often run only 2-3%. From purely business perspectives, eliminating corruption provides direct bottom-line benefits that exceed most other operational improvements.

The author observes that this economic logic should make anti-corruption efforts attractive to legitimate businesses, as reduced corruption costs translate directly into improved profitability. However, this requires creating competitive environments where honest companies are not systematically disadvantaged by corrupt competitors.

INTERNATIONAL ENFORCEMENT AND ASSET RECOVERY

The author's experience highlights the importance of international cooperation in combating construction sector corruption. Cross-border asset recovery and extradition proceedings represent crucial deterrents, as demonstrated by cases where corrupt actors attempted to flee to safe jurisdictions but were ultimately brought to justice.

The African Union has produced agreements between countries to facilitate actions implementing legislation to prevent laundering of corruption proceeds. The author emphasises that if people cannot keep ill-gotten gains, there is no incentive for them to take money in the first place, making asset recovery one of the most important initiatives any country can implement.

Effective anti-corruption efforts must address underlying political, economic, and social conditions that make corruption rational for individual actors whilst imposing enormous collective costs

CONCLUSION

The author's comprehensive analysis reveals that construction sector corruption represents more than a technical problem requiring procedural solutions - it constitutes a fundamental challenge to development effectiveness and social justice. Whilst legal frameworks, transparency initiatives, and technical reforms are necessary components of anti-corruption strategies, they remain insufficient without broader recognition that corruption often serves functional roles within dysfunctional governance systems.

The author's view is that effective anti-corruption efforts must address underlying political, economic, and social conditions that make corruption rational for individual actors whilst imposing enormous collective costs. Success requires sustained commitment from political leadership, international development partners, and civil society organisations working together to create environments where honest business practices become both possible and profitable.

The stakes extend far beyond immediate project outcomes to encompass the fundamental question of whether developing countries can achieve sustainable, inclusive development. As infrastructure needs continue growing across Africa and other developing regions, the author argues that the choice between perpetuating corrupt systems or building institutions capable of honest, effective public service delivery will largely determine whether infrastructure investments contribute to broadly shared prosperity or merely enrich narrow elites whilst leaving the majority in continued poverty.

The author's final observation emphasises that success in this endeavour requires recognition that corruption is not an inevitable feature of developing country contexts but rather a solvable problem demanding appropriate tools, sustained effort, and unwavering commitment to the principle that public resources should serve public purposes. The alternative, accepting corruption as inevitable, condemns entire societies to continued underdevelopment and perpetual inequality.

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ENFORCING ARBITRAL AWARDS AGAINST STATES IN AFRICA: A STRATEGIC ANALYSIS

INTRODUCTION

Enforcing arbitral awards against sovereign African states requires sophisticated legal strategy amid diverse legal traditions, evolving institutional frameworks, and established sovereign immunity principles.[1] As economic engagement with Africa continues to grow, effective enforcement strategies become increasingly vital for investor confidence.[2] This growth will likely lead to increased commercial disputes, making enforcement capabilities a critical consideration for investors.

The authors note that African states are increasingly developing defensive mechanisms against enforcement, including constitutional amendments, specialized review committees, and creative interpretations of public policy exceptions. These developments reflect a continental trend toward greater state resistance to arbitral enforcement, necessitating more nuanced creditor strategies.

THE AFRICAN ARBITRATION FRAMEWORK

The African arbitration landscape continues to develop unevenly but with notable progress toward harmonization. As of 2023, 30 of 48 sub-Saharan African countries have acceded to the New York Convention, while 41 Sub-Saharan African countries are ICSID Convention Member States.[3] Despite this coverage, judicial experience with enforcement remains limited in many jurisdictions.

Africa's annual need for infrastructure is huge (estimated US$130-170 billion per year) but current funding (~$80bn/yr) is far below that.[4] This chronic shortfall drives the proliferation of large-scale projects (roads, railways, power plants), but also heightens political and financial risk. For example, delayed or unpaid projects can attract arbitration claims. In East Africa a mix of domestic budgets, bilateral donors, Multi-Lateral Development Banks (MDBs) and large foreign investors—especially China—is meeting this gap.

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China's Belt & Road projects are prominent (Kenya's SGR, Uganda's roads, Ethiopia's rail), but Beijing is now shifting from pure loans to public–private partnerships (PPPs) to reduce debt strain.[5] For instance, Kenya's proposed SGR extension would be 40% financed by Chinese banks under a long-term build–operate deal. Chinese and other international contractors are increasingly sharing construction risk, meaning more complex contracts (with longer concession periods). This PPP trend may ease debt loads, but also creates multi-faceted dispute scenarios where investors must navigate host-country law and creditor agreements.

States have implemented the New York Convention through three primary methods: adopting the UNCITRAL Model Law (nine countries), implementing the OHADA Uniform Act (17 member states, 11 of which are New York Convention signatories), or relying on domestic legislation (often outdated colonial-era laws).[6] This fragmentation creates significant enforcement variation across the continent, necessitating jurisdiction-specific strategies.

Emerging State Defensive Mechanisms

The authors identify several recent developments demonstrating increased state sophistication in resisting enforcement:

Egypt's Institutional Innovations

The establishment of a Superior Committee for Arbitration in 2019 requires all administrative entities and state-owned enterprises to obtain committee review before entering arbitration agreements. This creates an additional layer of state control over dispute resolution commitments. More significantly, amendments to the Supreme Constitutional Court law now permit constitutional review of foreign arbitral awards, with the Prime Minister empowered to request such reviews. While untested, these mechanisms signal Egypt's intent to strengthen its defensive position against enforcement.

Nigeria's Procedural Barriers

Beyond traditional immunity defenses, Nigeria maintains requirements for Attorney General consent before executing monetary judgments against government especially where such enforcement is carried out via garnishee proceedings- a common method of enforcement in Nigeria. . The authors suggest this creates significant delays and additional litigation layers, as creditors must either await consent that rarely materializes or pursue mandamus proceedings to compel it.

Political Risks and Regime Change

Frequent regime changes destabilize contractual continuity; awards risk becoming politically inconvenient to successors. For example, Tanzania's Natural Wealth and Resources (Review and Re-Negotiation of Unconscionable Terms) Act 2017 allows voiding contracts deemed 'unconscionable'.[7] Across Africa, coup d'états or election changes have led to amnesty laws or nullification of past liabilities. In practical terms, this means even a legitimately won arbitration award can become moot if a successor government refuses to comply. Investors increasingly mitigate this by political-risk insurance or bilateral dispute treaties, but it remains a stark reality of the region.

SOVEREIGN IMMUNITY: COMMERCIAL IMPLICATIONS

Sovereign immunity remains the primary obstacle to effective award enforcement in Africa. While most African jurisdictions formally adopt the restrictive immunity approach - distinguishing between sovereign acts and commercial activities - practical implementation often favours broader immunity protections than legally required.[8]

Most jurisdictions now follow restrictive immunity, a state cannot invoke immunity for acts performed as a private market actor, but can still claim immunity for sovereign acts. The case Trendtex v. Central Bank of Nigeria (England 1977)[9] introduced this test. In enforcement practice, though, states often still assert "state acts" to block execution. For example, banks holding state funds may refuse to allow attachment. Therefore, the safest course is to contractually waive immunity in advance.

The critical distinction between "express" and "specific" immunity waivers has direct commercial implications for enforcement. An "express" waiver merely conveys a general intention to waive immunity, whereas a "specific" waiver identifies particular categories of assets against which execution may proceed. Recent jurisprudence confirms that general waivers often prove insufficient for attachment of diplomatic, central bank, or other specialized assets.[10]

The ICSID Convention provides a model waiver clause under clause 15, "The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award..."[11] Parties should incorporate similar language into any investment or concession agreement. Many lenders and multilaterals insist on it. A clear waiver in the contract or treaty means that, once a tribunal issues an award, the respondent state cannot turn around and invoke immunity in the enforcing court. By contrast, mere treaty ratification or appearance is often insufficient without an explicit waiver.

Strategic Asset Categories and Immunity Challenges

From a commercial perspective, effective asset identification strategies focus on purely commercial state activities, including infrastructure projects, commodity export revenue streams, joint venture interests, and cross-border financial flows. In [LETCO v. Liberia],[12] despite obtaining ICSID award recognition, execution was denied because the identified assets (registration fees from Liberian ships) were deemed sovereign rather than commercial activities. The claimant was likewise denied execution against bank accounts used by the Liberian Embassy in the US on sovereign immunity grounds.

The authors note that central bank assets and sovereign wealth funds present particular challenges, as they are typically structured to maximize immunity protections. These entities often have mandates intertwined with fiscal management policy, creating multiple layers of potential immunity claims. Even clearly commercial assets like airline royalties or oil revenues face immunity arguments when states claim they serve public functions.

DISTINCT ENFORCEMENT PATHWAYS: ICSID VS. NEW YORK CONVENTION

The ICSID Convention establishes a distinctive enforcement regime that differs fundamentally from the New York Convention system. Article 54(1) requires Contracting States to recognize ICSID awards *"as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."*[13] While still requiring procedural steps for formal recognition in most jurisdictions, this pathway offers significant advantages:

(a) domestic courts cannot review ICSID awards on substantive grounds;

(b) no public policy exception exists for refusing enforcement; and

© the enforcement obligation derives from a treaty commitment rather than domestic legislation.

In jurisdictions like Kenya, Tanzania, Uganda and Ethiopia (all ICSID members), an ICSID award is automatically registrable as a court decree.[14] Under ICSID Art. 54, courts "shall" register awards on submission of a certified copy. In practice, this means domestic judges have little discretion to refuse an ICSID award on merits (no review on law or fact). Any challenges are limited to the narrow post-award remedies in the ICSID Convention. Once registered, the award has the same force as a final judgment of that court. However, courts still apply national laws on execution. Thus after registration, one may still face questions about which state assets are immune.

Despite these advantages, Article 55 of the ICSID Convention explicitly preserves state immunity from execution laws, creating a critical distinction between recognition (where ICSID offers clear advantages) and execution (where both ICSID and non-ICSID awards face similar immunity challenges).[15]

New York Convention Enforcement Challenges

The New York Convention allows refusal under Art V; Kenya's Arbitration Act section 37 adds public policy grounds. Parties must apply to a local court (typically the High Court) to recognize and enforce the foreign award. The court treats the award as if it were a judgment, but may refuse enforcement under the Convention's Article V grounds. East African laws largely mirror these grounds, but often add local twists. For example, Kenya's Arbitration Act §37 allows refusal if enforcement would violate Kenyan public policy—a broadly worded clause beyond the Convention. Tanzania's Arbitration Act similarly bars enforcement if "contrary to the public policy of Tanzania," which courts have interpreted to include violations of mandatory procurement law. Uganda and Ethiopia also have public policy reservations, though Ethiopian practice is still evolving under its new law.[16]

Commercial vs. Investment Arbitration:

Enforcement Disparities4.5The authors highlight an important distinction between purely commercial arbitration awards and investment treaty awards against African states. Commercial arbitration awards may face additional hurdles, particularly in jurisdictions that distinguish between administrative and private contracts.

In Egypt, for example, contracts deemed "administrative" - those with public entities serving public utilities with onerous state-imposed conditions - require ministerial approval for arbitration agreements. The absence of such approval has generated extensive litigation over whether this constitutes a public policy ground for annulment. The authors note various scenarios creating uncertainty: ministers signing contracts without separate arbitration approval, ministers attending signing ceremonies without signing, and situations where the state entity itself proposed the arbitration clause.

These complexities suggest that commercial arbitration awards may face more unpredictable enforcement challenges than investment treaty awards, as they remain vulnerable to domestic law peculiarities and administrative requirements that ICSID awards largely bypass.

COMMERCIAL REALITIES BEYOND LEGAL FRAMEWORKS

Beyond legal considerations, commercial realities significantly impact enforcement strategies against African states:

Liquidity Constraints and Budgetary Implications

Many African states face significant liquidity constraints that complicate immediate award payment regardless of compliance willingness.[17] Effective enforcement strategies must consider sovereign debt profiles, commodity price dependencies, and budgetary allocation processes. These realities often necessitate structured settlement arrangements balancing fiscal constraints with creditor recovery needs.

The authors note that awards against African states can represent substantial portions of national budgets - in extreme cases equalling entire sectoral allocations for health or education. This fiscal reality creates both practical payment challenges and public sympathy factors that courts may consider when evaluating enforcement actions.

Capital Market Access and Reputational Leverage

For African states seeking international capital market access, compliance with arbitral awards carries significant reputational implications.[18] Award creditors can leverage these concerns by coordinating enforcement actions with planned sovereign bond issuances, engaging with international financial institutions, and pursuing parallel strategies involving both direct enforcement and reputational pressure.

The authors highlight successful examples where attachment of escrow accounts used for bondholder payments created immediate settlement incentives due to sovereign default risks. Similarly, threats of winding-up petitions against state-owned enterprises, particularly national airlines or oil companies, can focus government attention on settlement negotiations.

Strategic Default and Bureaucratic Delay

A recurring pattern involves states engaging in strategic silence or default throughout arbitral proceedings, only to raise procedural objections during enforcement. The authors cite cases where states ignored dozens of arbitration notices, allowed default awards, then raised belated challenges to service, procurement law compliance, or entity identification during enforcement proceedings.

This strategy exploits bureaucratic inefficiencies while preserving technical defences. The authors suggest that creditors should anticipate such tactics by maintaining meticulous records of all communications and ensuring strict compliance with notice requirements, even when facing apparent state disengagement.

REGIONAL FRAMEWORKS AND ENFORCEMENT PATHWAYS

OHADA: A Distinctive Regional Enforcement Avenue

The Organization for the Harmonization of Business Law in Africa (OHADA) provides a potentially important enforcement pathway across its 17 West and Central African member states. The OHADA Uniform Act on Arbitration establishes a standardized enforcement regime distinct from both ICSID and the New York Convention.[19]

This system offers several strategic advantages:
(a) a uniform recognition procedure applicable across all member states;
(b) the Common Court of Justice and Arbitration (CCJA) serving as both an arbitral institution and supreme court for arbitration matters;
(c) cross-border enforcement with recognition in one member state theoretically enabling enforcement across all OHADA jurisdictions; and
(d) treaty-based obligations to recognize and enforce arbitral awards.

However, OHADA's effectiveness for enforcing awards against states remains constrained by sovereign immunity considerations. While the Uniform Act expressly provides that state parties to arbitration cannot claim immunity from jurisdiction, OHADA member states still enjoy immunity from execution under the Uniform Act's enforcement provisions, creating a familiar gap between recognition and execution.[20]

African Regional Options

There is currently no dedicated "African" arbitral court or judgment enforcement scheme analogous to the EU, nor does the East African Community have a general enforcement mechanism for arbitration awards. The closest regional forum is the East African Court of Justice (EACJ), but its mandate covers interpretation of EAC treaty law (not enforcing awards) unless the contract in question gives the court jurisdiction.[21] However, the African Union does have the 2008 AU Model Law on Arbitration and the 1999 Maputo Convention on arbitration, though few East African states have ratified these. In practice, enforcement is handled at the national level under each country's Arbitration Act or equivalent.

Public Policy as a Continental Defence Strategy

The authors identify public policy as the predominant ground for resisting enforcement across African jurisdictions. This defence takes various forms such as :

Corruption Several high-profile cases demonstrate states successfully invoking corruption in contract procurement to defeat enforcement on public policy grounds. Even where international tribunals have validated contracts, domestic courts may reach different conclusions when evaluating public policy during enforcement proceedings.

In enforcement cases, states frequently invoke public-policy to derail awards from "corrupt" contracts. Notable examples: World Duty Free Co. v. Kenya (ICSID ARB/ 00/7) involved a duty-free shop contract in Nairobi. The ICSID tribunal found the contract was procured through bribery and therefore incompatible with both international and Kenyan public policy. When the High Court later faced enforcement of the award, it set the award aside on those grounds. Likewise in Tanzania, CATIC Int'l Eng. (T) Ltd. v. UDSM saw the High Court annul an award because the contract variation violated Tanzania's public procurement law, thus breaching public policy. These cases show that when an award (investment or commercial) taints public interest, domestic courts may refuse enforcement regardless of the tribunal's merits decision.

Several high-profile cases demonstrate states successfully invoking corruption in contract procurement to defeat enforcement on public policy grounds. Even where international tribunals have validated contracts, domestic courts may reach different conclusions when evaluating public policy during enforcement proceedings.

Unfortunately, "contractors routinely build a 'corruption premium' (20–30%) into African bids." Bidders should recognize this reality and manage it. Practically, insisting on due diligence, anti-corruption warranties, and transparency helps. Corruption allegations can convert a straightforward delay or cost claim into an enforcement quagmire (as in World Duty Free). Lawyers should advise clients that bribery not only risks criminal liability, but also provides a public-policy shield for states. Robust compliance measures (FCPA/UKBA policies, independent audits) are as important as any legal clause.

Creative Public Policy Arguments

The authors note increasingly creative public policy arguments, including claims that arbitrators' legal errors constitute public policy violations, attempts by enforcement courts to assume jurisdiction to set aside foreign-seated awards, and arguments that any state expenditure without proper budgetary allocation violates public policy.

PRACTICAL ENFORCEMENT STRATEGIES

Effective enforcement against African states requires multi-jurisdictional, commercially-focused approaches. The authors recommend several key strategies:

Pre-Dispute Contractual Protections

Given enforcement challenges, the authors emphasize front-end contract structuring:

(a) always include a clear dispute resolution clause;
(b) emphasize choosing the seat of arbitration and jurisdiction carefully;
(c) explicit waivers of immunity from both jurisdiction and execution;
(d) specific identification of commercial assets subject to execution;
(e) clear choice of arbitration rules avoiding domestic administrative requirements; and
(f)consideration of third-party guarantees or security interests in commercial revenues.

Large East African projects often use international forms (e.g. FIDIC Red/ Yellow/Golden Book) adapted to local law. These allocate risks for time, price changes, and quality.[22] It is critical to ensure the contract's governing law and arbitration clause are consistent. For instance, a FIDIC contract governed by Kenyan law could end up in Kenyan court to register an award (under NY Convention). Parties should review any mandatory construction law (Ethiopia's old civil code, Kenya's PPA) that might override contract terms.

Ensure compliance with local procurement laws to avoid enforcement nullification.[23] Governments in Kenya, Tanzania, Uganda and Ethiopia have strict procurement statutes. Violating these (bypassing tender, not obtaining parliamentary approval, ignoring quotas) can render a contract void or unenforceable. FIDIC and other contracts allow variations, but authorities may challenge changes that sidestep procurement rules. As seen in CATIC v UDSM, a breach of procurement rules was held to breach public policy, voiding the award.[24] Contractors must document every step: board approvals, no-objection certificates, and compliance with local-content requirements.

Settlement and Negotiation Dynamics

The authors suggest that willingness to negotiate award amounts can accelerate recovery, as states often require time to build political consensus for payment. New administrations may prove more receptive to settling predecessor obligations, particularly when framed as responsible governance. However, creditors should recognize that settlement negotiations with states involve complex bureaucratic processes, and political considerations absent from commercial settlements.

Leveraging Publicity and Political Pressure

Strategic use of publicity can create settlement incentives. The authors note that even unsuccessful attachment attempts against high-profile assets like presidential aircraft can generate media attention and political pressure conducive to negotiation. However, this strategy requires careful calibration to avoid generating nationalist backlash that could complicate enforcement.

Non-payment can be raised diplomatically, especially where the investor's home state has leverage (development aid, trade). In some cases, invoking state-to-state arbitration clauses in investment treaties (if available) can add weight. While this goes beyond pure "law," sober governments usually prefer compliance to prolonged bilateral tension.

Alternative Monetization Strategies

The growing third-party funding market for sovereign awards has transformed enforcement dynamics, offering award creditors immediate partial liquidity while specialized investors pursue longer-term enforcement strategies. The authors note various structures emerging beyond outright award sales, including portfolio arrangements where funders take positions across multiple awards to diversify sovereign risk.

Freezing Orders

In common-law jurisdictions of East Africa (Kenya, Uganda), courts can grant freezing orders (analogous to Mareva injunctions) to prevent asset dissipation before enforcement. A freezing injunction must meet a high threshold (showing good arguable case and risk of asset removal), but it is an invaluable tool once an award is imminent.[25] Without it, a state party might move assets offshore. Note that ICSID tribunals cannot issue pre-award injunctions, so these tactics rely on concurrent local litigation.

INSTITUTIONAL DEVELOPMENT AND FUTURE DIRECTIONS

The authors identify critical needs for African arbitration development:

Judicial Capacity and Consistency

The effectiveness of arbitration seats depends fundamentally on consistent, predictable judicial support. The authors note that while apex courts in several African jurisdictions demonstrate strong pro-arbitration positions, High Court decisions remain inconsistent. This unpredictability at the enforcement level undermines seat competitiveness and creates strategic forum shopping incentives.

On the whole, East African courts resist deeply re-examining an award's merits. Courts have held that their role at enforcement is limited to checking formal compliance, not re-weighing evidence. Once a valid award is in hand, they will typically enforce it unless one of the narrow defenses applies (fraud, public policy, etc.). Still, procedural hurdles remain—delays due to backlogs and multiple layers of appeal can prolong enforcement. In Kenya, for instance, recognition and enforcement of an award (with no objection via setting aside grounds on Section 35 filed) should take only a few weeks, but in practice can stretch into many months if the losing party challenges every step or seeks judicial review.

Regional Consolidation

Rather than proliferating new arbitration centres, the authors advocate consolidating institutional capacity into fewer, stronger regional hubs. They suggest that Africa needs robust institutions in each major region - Southern, Eastern, Western, and Northern Africa - with the resources and expertise to match international standards.

African Participation in African Disputes

The authors emphasize the incongruity of African disputes being resolved primarily by non-African arbitrators in non-African seats. They advocate for increased African participation in tribunals hearing Africa-related disputes, noting that sustainable arbitration development requires building local expertise and credibility.

CONSTRUCTION-SPECIFIC ENFORCEMENT CONSIDERATIONS

FIDIC Contracts and Local Law Compliance

Include clauses on post-award interest, currency conversion, and tax implications. In practice, government clients may delay payments or currency remittance. Strong construction contracts build in clear milestone payments, interest on late payments (subject to any statutory limits), and compensation for devaluation. Security instruments (performance bonds, advance-payment guarantees) are common, but enforcing them against a sovereign guarantor may itself require arbitration. Parties should verify that their payment-security instruments are governed by independent law (e.g. ICC bank guarantees) to facilitate claim.

Force majeure and change-in-law

East African projects face political events (droughts, floods, social unrest, election delays). Many local laws and FIDIC forms include force majeure clauses. Ensure these clauses are well-defined and that relief (extensions, cost sharing) is expressly provided. Similarly, governments sometimes change building regulations or tax laws mid-project; consider including specific change-in-law clauses to avoid disputes (or at least design robust relief procedures).

Dispute boards and ADR

FIDIC contracts encourage dispute adjudication boards (DABs) that can resolve issues in real time.[26] Although not mandatory under Ugandan/Tanzanian law, these can prevent disputes from escalating. Emphasize that parties should use all ADR layers (negotiation, DAB, expert determination) before arbitration. If arbitration is needed, East African countries allow both institutional (e.g. KCIA/NCIA in Nairobi) and ad hoc arbitration.

CONCLUSION: STRATEGIC IMPERATIVES

The African enforcement landscape presents distinctive challenges requiring tailored approaches with realistic expectations. Award creditors should prioritise:

(a) Sophisticated Pre-Award Planning
Jurisdiction-specific immunity waivers, administrative compliance verification, and security arrangements tailored to African legal peculiarities.

(b)Multi-Dimensional Enforcement Strategies
Combining legal proceedings with credit rating pressure, publicity campaigns, and political engagement while maintaining flexibility for settlement negotiations.

(c) Realistic Commercial Assessments
Understanding state fiscal constraints, political cycles, and bureaucratic processes that affect payment capacity and timing.

(d) Creative Monetization Options
Exploring third-party funding, award trading, and portfolio approaches to manage sovereign risk and accelerate recovery.

(e)Long-Term Institutional Engagement
Supporting African judicial and arbitral institutional development while navigating current limitations.

The future of Africa's construction lies not just in concrete and steel, but in the strength of our legal institutions/systems. Building Africa's physical infrastructure must go hand-in-hand with building robust legal foundations. Only then, will our achievements stand the test of time and truly benefit the continent's development.

Despite aspirational regional harmonisation efforts, successful enforcement typically relies on established pathways: ICSID enforcement in member states outside the respondent's territory, New York Convention enforcement where applicable, strategic commercial asset identification in favourable jurisdictions, and pragmatic settlement negotiations recognizing political and fiscal realities. By balancing legal strategy with commercial pragmatism and political sensitivity, award creditors can navigate Africa's complex enforcement landscape more effectively while contributing to its institutional development.

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BALANCING RISK IN AFRICAN CONSTRUCTION:
INNOVATIVE APPROACHES FOR PROJECT SUCCESS

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INTRODUCTION

Africa's infrastructure ambitions face a critical impediment: dysfunctional risk allocation frameworks that undermine project viability and investor confidence. The continent's estimated $130-170 billion annual infrastructure demand requires not merely additional capital,[1] but fundamentally reimagined approaches to contracting, risk distribution, and project delivery. Conventional risk transfer practices to contractors have proven increasingly problematic, as evidenced by the business rescue of construction giants including South African firms like Murray & Roberts, which filed for voluntary business rescue in November 2024.[2] This analysis examines innovative risk balancing mechanisms emerging across Africa's diverse construction markets, highlighting approaches that enable successful project delivery whilst appropriately distributing risks to parties best positioned to manage them.

THE RISK ALLOCATION DYSFUNCTION

Current construction risk allocation frameworks across Africa suffer from systemic deficiencies that manifest throughout the project lifecycle. Power imbalances during contractual negotiations frequently result in imbalanced risk distribution, as project sponsors typically "hold the pen" during contract drafting. The authors' analysis reveals a critical temporal dynamic: employer power peaks immediately before contract signing but diminishes progressively during execution, whilst contractor leverage increases dramatically as projects approach completion. This creates a perverse dynamic where contractors, recognising unreasonable risk exposure, inflate bids to reflect exaggerated risk premiums, only to subsequently litigate when those risks materialise - effectively forcing public sector clients to pay twice for the same risks.

There exists a profound disconnect between sophisticated international contract structures and local implementation capacity. Public authorities often focus on securing expert advice during negotiation but invest less in contract implementation support.

The authors observe that contractors frequently possess superior technical capacity, having delivered similar projects across multiple jurisdictions, whilst public employers often tackle such projects for the first time. Standard forms like FIDIC Yellow Book and Silver Book provide valuable frameworks when appropriately contextualised but can become problematic when applied without market-specific modifications. This mismatch leads to a total divergence between client and contractor expectations, resulting in stressful contract execution and increased costs.

Political cycles compound these challenges. The authors' research indicates that four-year electoral cycles create systematic disruption, with projects frequently stalling in pre-election periods. Even continuity within the same political party fails to guarantee policy consistency, as new administrations often seek to reshape inherited projects, triggering costly variations and delays.

CRITICAL RISK CATEGORIES REQUIRING TARGETED APPROACHES

Security and Community Risks

The "construction mafia" phenomenon in South Africa represents perhaps the most acute manifestation of security and community risks in contemporary African construction. Over 180 projects worth approximately R63 billion have been disrupted by these groups since 2019,[3] forcing the industry to develop innovative responses. South African courts have demonstrated notable pragmatism, allowing interdicts to be served through unconventional means including WhatsApp and loudspeakers at construction sites when traditional methods prove ineffective.[4]

The authors emphasise that failure to engage local communities ranks amongst the primary causes of project failure across Africa. Standard force majeure clauses must typically be adapted in African construction contracts to explicitly address "community unrest" as a separate risk category. This customisation reflects the recognition that contractors cannot reasonably bear macroeconomic criminal risks, and that a more balanced allocation requires project owners to share in these increasingly prevalent disruptions. Properly crafted community unrest clauses provide relief mechanisms for contractors while establishing collaborative approaches to managing social engagement and security protocols across the project lifecycle.

Supply Chain and Materials Risks

Africa's construction sector faces pronounced supply chain vulnerabilities that conventional contracting approaches inadequately address. In South Africa, between 40-50% of construction materials, particularly high-tech components like MEP systems, originate from foreign vendors,[5] creating exposure to currency fluctuations, import delays, and global supply chain disruptions. The East African Resort Project case demonstrates how relatively inflexible construction contracts became problematic when local currency depreciation impacted material costs, ultimately forcing developers to renegotiate several contracts mid-project.[6]

Currency and Financial Risks

Currency volatility presents acute challenges for construction projects throughout Africa, particularly in markets with limited hedging instruments and frequent exchange rate fluctuations. The authors contend that exchange risk allocation requires nuanced approaches - whilst contractors should not bear full currency exposure for imported materials, complete transfer to employers may discourage efficient procurement. Industry experts advocate for shared currency risk mechanisms where employers bear macro-economic currency movements beyond predetermined thresholds, whilst contractors manage normal fluctuation bands through procurement timing and hedging strategies.

EMERGING MODELS FOR BALANCED RISK ALLOCATION

Collaborative Contracting Models

Forward-thinking industry leaders are developing context-appropriate risk allocation approaches that move beyond simplistic risk transfer to create more sustainable project outcomes. The authors identify momentum as the critical success factor - projects require dedicated teams absolutely determined to solve multiple simultaneous challenges rapidly. Collaborative approaches address the adversarial dynamics that plague conventional contracts by creating aligned incentives and shared problem-solving frameworks. These include early contractor involvement during the design stage to flag risks upfront and price them realistically, alliance contracting which establishes shared risk/reward mechanisms among project participants, and project-specific partnering arrangements with integrated risk management provisions.

However, the authors caution against conflating collaboration with compromise on commercial terms. Successful collaborative contracting maintains professional rigour whilst building interpersonal trust. The Lagos Luxury Hotel Development exemplifies this approach, where a phased development approach maintained flexibility in construction scheduling and cash flow management when supply chain disruptions threatened the timeline.[7]

Phased Risk Allocation

Innovative projects increasingly adopt staged risk allocation frameworks that recognise the evolving nature of project risks throughout the development lifecycle. The authors advocate for dynamic risk allocation that adapts as projects progress through conceptualisation, design, construction and operational phases. These approaches typically feature government assumption of early-stage risks including land acquisition, regulatory compliance, and initial approvals; private sector management of construction and operational risks once parameters are better defined; and adaptive mechanisms for transitioning risks as the project progresses. This dynamic approach provides greater flexibility than conventional static risk allocation models whilst maintaining appropriate incentives for efficient risk management.

Technology-Enabled Risk Management

Digital tools are transforming risk management across Africa's construction landscape. Over 58% of industry survey respondents highlighted construction digital transformation as a strategic priority for mitigating risks and enhancing efficiency.[8] Building Information Modelling (BIM) increasingly serves as the foundation for comprehensive project management, whilst AI and machine learning enable real-time analysis to manage resources effectively.[9] The authors stress that risk allocation, once contractually "set", requires active management throughout project execution by appropriately skilled risk managers equipped with sophisticated monitoring tools.

Innovative Financial Structures

The authors highlight emerging financial innovations that address Africa's unique risk challenges. Credit guarantee providers like InfraCredit enable pension fund participation in infrastructure projects by reducing risk profiles to acceptable levels. Nigeria's substantial pension assets, previously inaccessible for infrastructure investment due to regulatory restrictions, become available through such guarantee structures. Blended finance approaches combining patient capital from development finance institutions, commercial bank lending, and contractor equity create more resilient project structures. The Gates Foundation and similar institutions provide patient capital with 5–10-year horizons, contrasting sharply with commercial banks' shorter-term perspectives.

PRACTICAL RECOMMENDATIONS FOR STAKEHOLDERS

For Project Sponsors and Government Entities

Entities commissioning projects must fundamentally reconsider risk allocation practices. The authors' research confirms that employers attempting to transfer all risks inevitably pay premium prices for risks that never materialise whilst still bearing costs when transferred risks manifest through claims. Project owners should typically retain risks related to regulatory changes, land acquisition, site access, geological and archaeological conditions, and partial exchange risk. Investment in thorough project preparation, including comprehensive feasibility studies before tendering, proves critical to project success.

The authors emphasise avoiding defensive decision-making driven by corruption perception rather than actual corruption risk. Public officials' reluctance to make decisions for fear of corruption allegations creates project paralysis. Implementing clear governance frameworks and decision-making protocols protects officials whilst enabling project progress.

For Contractors and Developers

Construction firms operating in African markets should conduct comprehensive due diligence and realistic risk pricing. The authors note that sophisticated contractors increasingly adopt strategic negotiation approaches, understanding that employer time pressure intensifies as financial close approaches. However, contractors must balance negotiation leverage with long-term relationship building. Those demonstrating genuine commitment through equity participation or innovative risk-sharing proposals often secure preferential positions in future projects.[10]

Contractors are better positioned to manage risks related to quality control, subcontractor management, technical performance, construction methodology, and environmental compliance during construction. Development of local partnerships proves invaluable, facilitating navigation of community relations and labour regulations.

For Lenders and Investors

Financial institutions can significantly enhance project success by abandoning rigid "bankability" requirements that ignore African market realities. The authors advocate for lenders to recognise that overly rigid risk transfer often undermines rather than enhances project viability. Leading practitioners highlight that innovative financing options including blended finance approaches and increased local funding can help distribute risks more effectively[11] Strategic contractor selection should prioritise demonstrated capability in managing complexity over lowest price.

ADDRESSING IMPLEMENTATION CHALLENGES

The authors identify critical implementation challenges requiring targeted responses:

Continuity Between Negotiation and Execution Teams

Projects frequently suffer when execution teams lack understanding of negotiation rationales. Maintaining key personnel across project phases or conducting comprehensive handover sessions proves essential.

Proactive Risk Management

Post-contract risk management requires equal attention to pre-contract risk allocation. The authors advocate for regular risk review sessions, updating risk registers as projects evolve rather than treating risk allocation as static.

Managing Political and Regulatory Instability

Given four-year political cycles, projects must build flexibility to accommodate potential policy shifts. Engaging across political spectrums, whilst challenging, provides insurance against electoral disruption

CONCLUSION

Africa's construction sector stands at a pivotal moment requiring fundamental reconsideration of traditional risk allocation paradigms. According to HKA's CRUX report, Africa experiences a higher volume of claims and disputes - both in time and financial impact - than any other region globally, underscoring the urgency of addressing risk allocation practices.[12] The authors' analysis reveals that conventional approaches centred on maximum risk transfer to contractors have demonstrably failed, creating adversarial relationships that increase costs and delays whilst discouraging international contractor participation.

Innovative approaches emerging across the continent promise more balanced, sustainable outcomes through context-sensitive frameworks that recognise both local market capacities and unique operational challenges. Success requires moving beyond contractual risk transfer to embrace genuine risk management throughout project lifecycles. For Africa to close its infrastructure gap and realise its construction ambitions, stakeholders must abandon simplistic risk transfer in favour of sophisticated, collaborative approaches that appropriately allocate risks to parties genuinely capable of managing them. Project flexibility remains critical, allowing adjustments to contract terms affected by macro triggers whilst maintaining commercial discipline. The future lies not in perfecting risk transfer but in mastering collaborative risk management.

Notes

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