

POLITICAL RISKS IN CONSTRUCTION INDUSTRY IN ETHIOPIA: WHO SHALL BEAR SUCH RISKS?

Abstract

Construction is a complex and challenging process and area where risk is inevitable. Risk is any uncertainty in an industry including the construction sector. Based on different circumstances, scholars classified and categorized risks into different classification or categories. Political risks in construction industry in Ethiopia with particular emphasis on Ethiopia's massive protests since 2016 which have caused serious impact on the ongoing construction projects were elucidated. A methodology articulated to answer "puzzles" of the Paper was both doctrinal and empirical approaches; it was concerned with legal prepositions and doctrines, and observations and experiences respectively. Due to its suitability for addressing high level of flexible issues, qualitative research designed was preferred to deal with political risks in constructions industry depending on the subjective interpretation of different actors who involve directly or indirectly. The instrument used was analytical- document analyzing and semi structured interview. The finding show that an employer shall bear political risks if the employer is government authority irrespective of its attribution being at default, because, the government is duty bound to prevent actions and/or omissions that cause to such political risks in general and political risks occurred in construction industry in particular; and it shall bear such risks if any third party, for instance, a non-state armed/ unarmed group like what happened in Ethiopia since 2016 has been pummeled by massive protests that greatly affected on the ongoing construction projects, is at default or cause to the occurrence of such political risks when an employer is a private employer.

Key Words: Risks, Political-risks, Construction, Industry, Non-state actors, Ethiopia

1. Introduction

Risk is part of every human endeavor. From the moment we get up in the morning, drive or take public transportation to get to school or to work until we get back into our beds (and perhaps even afterwards), we are exposed to risks of different degrees. What makes the study of risk fascinating is that while some of this risk bearing may not be completely voluntary, we seek out some risks on our own (speeding on the highways or gambling, for instance) and enjoy them. While some of these risks may seem trivial, others make a significant difference in the way we live our lives.

Given the ubiquity of risk in almost every human activity, it is surprising how little consensus there is about how to define risk.

The Oxford Dictionary of Law defines risk as “the possibility of something bad happening at some time in the future; a situation that could be dangerous or have a bad result”¹ likewise Black’s Law Dictionary defines it as “the uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; especially, the existence and extent of the possibility of harm”².

Risk can be defined from different perspectives and practically refers to “an event or set of circumstances that, should it occur, will have an effect on the achievement of the project's objectives”³.

A construction risk can be defined as any exposure to possible loss though because every construction project is different, each offers a multitude of varying risks.

Therefore, a risk can be defined as the potential for complications and problems with respect to the completion of a project and the achievement of a project goal and as an uncertain future event or condition with the occurrence rate of greater than 0% but less than 100% that has an effect on at least one of project objectives such as scope, schedule, cost or quality. In addition, the impact or consequences of this future event must be unexpected or unplanned. It is well accepted nature that risk can be effectively managed to mitigate its adverse impacts on project objectives, even if it is inevitable in all project undertakings.

¹Oxford Dictionary of Law, 5th ed., 2002, s.v. “Risk”

²Black’s Law Dictionary, 9th ed., 2009, s.v. “Risk”

³Simon, P.(et al) , ‘Project Risk Analysis and Management Guide’, The Association for Project Management, 1997, Norwich Norfolk, p.16

Risk classification is a significant step in the risk allocation process, as it attempts to structure the “diverse risks affecting a construction project”. There are many approaches in “literatures for construction risk classification”. Owing to the various nature of risks which may be encountered in a major project and the differing weights which may attach to their consequences⁴, it is not uncommon for parties to seek to identify these risks under major headings or categories though “classifying risks is risky by itself”⁵.

Since mentioning and discussing different types of classification of construction risks in different approaches is not the scope of this “Term Paper”, I shall be obliged to deal with only about political risks in construction industry in Ethiopia.

This term paper has three parts; the first part is the introduction, the one being discussed here and now, which tries to depict the definition and natures of risks in general roughly, the second part is the main part of the term paper that deals with definition and nature of political risks; what risks are considered as political risks; who shall bear such risks-a contractor, an employer or any third party and is the assumption to bear such risk is same when the employer is a public authority and private one in construction industry in Ethiopia. And finally, I will sum up my reflections and stands in the conclusion part.

2. Political Risks in Construction Industry in Ethiopia

As mentioned above, construction industry is highly risk prone, with complex and dynamic project environments which create an atmosphere of high uncertainty and risk. The industry is vulnerable to various technical, socio-political and business risks⁶. The practical track record to cope with these risks in general and political risks in particular has not been very good in construction industry in Ethiopia since 2016 when “Ethiopia has been pummeled by massive protests” that resulted downbeat brunt “on the ongoing construction projects”⁷ almost in all part of a country.

⁴Getachew Yilma Debela, The Practice of Construction Risks Management through Insurance in the Ethiopian Federal Road Projects, MSc Thesis, Addis Ababa University, Addis Ababa Institute of Technology, School of Civil and Environmental Engineering, 2014, [unpublished, available Addis Ababa University Library], PP.27-28

⁵Yohannes Enyew, Risks in Construction Industry, supra note 2.

⁶Krantikumar Mhetre, (et al), Risk Management in Construction Industry, International Journal of Engineering Research, 2016, Volume No.5, Special Issue No’ 1, PP . 153-155.

⁷Yohannes Enyew, Risks in Construction Industry.

As a result, the people working, contractors, in the industry bear various failures, such as failure of abiding by quality and operational requirements, cost overruns and uncertain delays in project completion.

But, which uncertainty in the construction industry considered as political risks and what is their nature? The next sub-section deals with.

2.1 Definition and Nature of Political Risks

The risk of direct or indirect political expropriation is a concern for multinationals considering potential investments in many countries⁸. In its broadest sense, political risk is the probability that the state will use its monopoly on legal coercion to renege on prior agreements with private firms in order to affect a redistribution of rents among private and public sector actors. Political risks are associated with government actions which deny or restrict the right of an investor or owner may be a contractor in our case i) to use or benefit from his/her assets; or ii) which reduce the value of the firm. Political risks include war, revolutions, government seizure of property and actions to restrict the movement of profits or other revenues from within a country.

To narrow down my concentration to political risks in construction industry in Ethiopia that “jeopardizes the effective performance of” construction projects, I preferred to take a look at International Federation of Consulting Engineers (here after abbreviated as FIDIC) under Sub-Clause 17.3⁹ that list political risks illustratively than defining what political risks are. War, civil commotions, disorders and strikes are treated as political risks under such Conditions of Construction Contract. Yohannes Enyew has also listed political risks-“ጦርነት፣ ብጥብጥ፣ የሰራዊታዊ ጦርነቶች፣ ስራ ማቆም አድማ፣ ዘረፋ እና ወንበድና”¹⁰ illustratively than providing a comprehensive definition of political risks.

To sum up, scholars who have studied and written about political risks and international conditions for construction contract have preferred to list down activities illustratively that can be considered as political risks than providing a comprehensive definition in a statement to

⁸Isaac Muchenga, Political Risk Management on International Construction Projects, MSc. Thesis, University of Cape Town, Department of Construction Economics and Management, 2016, [published by the University of Cape Town], PP.10-11[Here in after, Isaac Muchenga, Political Risk Management on International Construction Projects]

⁹International Federation of Consulting Engineers, FIDIC, Condition of Contract for Construction, 1st ed., 1999, Clause 17.3[Here in after, FIDIC 1999]

¹⁰Yohannes Enyew, በኮንስትራክሽን ውሎች አፈፃፀም ወቅት ለሚስተዋሉ ጉዳዮች (Risks) ተጠያቂው ማን ነው?, at <<https://www.abyssinialaw.com>>, [last accessed January 14, 2019]

political risks. This practice is not outrageous, as far as my thought concerned, because demarking a clear boundary between risks and categorizing in to political risks or other types of risks may be differentiated in different legal jurisdictions.

Although Zhang has articulated, when he has explained about nature of political risks, “political risks are very much less to occur”¹¹, they have affected “the ongoing construction projects in Ethiopia since 2016” unanimously when “Ethiopia has been pummeled by mass Protests”.

Depending on where your construction project is, there is a/an (in) frequent occurrence of political risks. It is most probably true that in a place where a matured, stable and democratized political atmosphere exists, the occurrence and affection of political risks to construction industry is least while it is frequent to happen in the place where an unstable political atmosphere exists.

Therefore, the nature of political risks to happen depend on government’s politics environment where the construction projects undertake, for instance, “Ethiopia’s massive protests since 2016” have caused serious impact on the “ongoing construction projects” which are not reviving well today.

2.2 The Responsibility to Bear Political Risks

“Reasoned” risk allocation strategy in construction industry is a “win-win” proposition for all project participants. Such a strategy tries to allocate specific risks based on an analysis of which party is best able to evaluate, control, manage, and assume the risk. Proper risk allocation provides many benefits to the project participants and to the project. It frames positive project relationships, thereby reducing the adversarial outlook characteristic of an “all-or-nothing” or “take-it-or-leave-it” approach and the chance for misunderstanding and claims. With fewer uncertainties caused by unfairly allocated risks, contractors can avoid the addition of cost contingencies in the pricing of project bids and estimates and schedule contingencies.

Zhang (et al) has put eloquently a theoretical presupposed construction risk allocation should be achieved only when a contracting parties clear mutual appreciation is come to their mind.

Theoretically, sound risk allocation should achieve management efficiency and reduce the transaction costs in the construction contracting business. While this is clearly (not) contentious, such a principle presupposes an atmosphere of trust between contracting parties and a clear mutual appreciation of project risks which, under the current competitive market environment, the more complex project financing structure and the attitudes of the parties towards risks, seldom exists. The

¹¹Zhang Shuibo (et al), ‘Risk allocation in construction contracts: A Comparison of China's Standard Form of Construction Contract and FIDIC Conditions of Contract for Construction’, *surveyors Times*, School of Management, Tianjin University, p. 40

*existing theoretical principles might be complemented with more realistic considerations, clarity in allocating the risks so that such risks can be reasonably priced, and the traditions of that particular construction sector*¹².

“The parties to a construction contract owe a responsibility towards each other to do certain things at certain times or, in some aspects, all the time”¹³. “These responsibilities are set out in the agreement, conditions of construction contract or in codes of ethics which control the behavior of professional people”¹⁴.

In case of occurrence of political risk events that impact the Contractor's project execution, the Employer shall, under FIDIC sub-cause 17.4¹⁵, both bear and pay cost compensation (but no profit) to the Contractor. Construction Laws in Ethiopia has recognized three types of risks, namely, employer risks, contractor risks and sub-contractor risks¹⁶.

Contractor and sub-contractor risks result from actions, forbearances or negligence of contractors and their staff during the construction process and the contractors bear responsibility while employer risks cover situations such as social and political risks including strike, lock-out, war, civil commotions and disorders, and legal risks¹⁷. Hence, any risk associated with changes or amendment in legislations after the project contract enters into force and “force majeure”, will be the responsibility of the employer¹⁸.

In addition to risks related with actions, forbearances or negligence by the employer, his or her representatives or other persons (bodies) ultimately attributable to the employer, it is logical and reasonable to regulate to oblige the employer to bear political risks if the employer is governmental authority irrespective of its attribution being at default or not. Because, the government is duty bound to prevent actions and/or omissions that cause to such political risks in general and political risks occurred in construction industry in particular.

But, who shall bear political risks when neither of project participants, but any third party, for instance, a non-state armed or unarmed group like what happened in Ethiopia since 2016 when it

¹²Ibid. See also Isaac Muchenga, Political Risk Management on International Construction Projects, supra note 10

¹³Nael G. Bunni, Risk and Insurance in Construction, supra note 1, p.141

¹⁴Ibid

¹⁵FIDIC, 1999, supra note 11, Clause 17.4

¹⁶Yohannes Enyew, ‘Risk Allocation Norms of Civil Construction Contracts in Ethiopia’, *Mizan Law Review*, 2017, Volume 11, No’ 2, PP.440-456, at PP.443-446[Here in after, Yohannes Enyew, Risk Allocation Norms of Civil Construction Contracts in Ethiopia]

¹⁷Ibid

¹⁸Ibid

“has been pummeled by massive protests that greatly affected on the ongoing construction projects”, are at default or cause to the occurrence of such political risks when an employer is not a governmental authority?

Under FIDIC Sub-Clause 17.4¹⁹, a distinction has not made to bear political risks when an employer is governmental authority and private employer. But, is it logical, reasonable and legal to oblige a private employer to bear such political risks while these risks are caused by actions of non attribution of such employers who are not duty bound to prevent actions and/or omissions that cause political risks?

Classifications of construction risks are plenty and include political risks. These risks may not be handled in terms of explicit allocation to the parties through contract planning than annexing standard forms of construction contract. Nevertheless, the standard forms of construction contract including FIDIC have not stipulated conditions and circumstances or otherwise options to justify when and why the employer shall bear political risks sustained in construction industry.

Although none state actors (International organizations, belligerent and insurgent armed groups, public and private international corporations) are not parties to different human right instruments, said Tefera Degu²⁰, their international obligation is now becoming a custom under international law. He mentioned his authoritative source; Andrew Clapham in this regard argued that non-state actors including Private Corporation and armed groups do bear human rights obligations due to the expanding scope of International law.²¹ The traditional approach of making states as the only subjects and duty bears under international law is hardly important these days²². It is true that states are the main duty bearers and subjects of international law, but there is growing consensus that non state actors are within the ambit of international law (at least in secondary status). The correlative decline of state power coupled with contemporary

¹⁹ FIDIC, 1999, supra note 11, Clause 17.4

²⁰ Interview with Tefera Degu, Lecturer at Bahir Dar University, School of Law, on *the Responsibility to Bear Political Risks Caused by Armed or Non-armed Groups in Construction Industry in Ethiopia*, January 28, 2019[Here in after, Tefera Degu, Lecturer at School of Law]

²¹ Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford university Press, New York, 2006, as quoted by Tefera Degu, Lecturer at School of Law

²² Tefera Degu, Lecturer at School of Law

phenomena such as globalization and the proliferation of armed conflicts have increased the influence of non-state actors in many spheres²³.

Tefera finally puts his remark as far as armed or unarmed groups concerned:

I think little or no jurisprudence has been developed with regard to the obligation to compensate the injured construction projects with political risks caused by non state actors. Investment risks are usually associated with states under International Economic Law. However, once we have established obligation under International Law I don't see any reason why we should say non state actor don't have the obligation to compensate for damages associated with them²⁴.

Various practitioners and researchers who have spent time in studying about risks in general and construction risks in particular alike have written extensively on the allocation principles of risk sharing. Some researchers suggested guidelines as the criteria for sharing the project risks as follows:

1. "All risks are rightfully the owners unless transferred to or assumed by another party for a fair compensation, when the risk is so transferred, consider whether the receiving party has both the competence to fairly assess the risk and the expertise necessary to control or minimize it"²⁵,
2. "If a risk is imposed upon a party, an opportunity for reward to the party should exist for properly or claims dealing with the risk"²⁶,
3. "A risk should be allocated to the party which is in the best position to control it and to undertake it financially"²⁷, and
4. "Steps should be taken to assure that risks are actually allocated as intended"²⁸.

Although the above suggested guidelines as a criterion for sharing construction project risks are applicable to any types of risks against any construction project, we can "*mutatis mutandis*" apply to political risks on construction industries in particular that result negative effects such as delay, non-performance, defective performance, on the "ongoing" or potential construction projects.

²³ Ibid

²⁴ Ibid

²⁵ Casey J.J., 'Identification and Nature of Risks in Construction Project: A Contractor's Perspective, Construction Risks and Liability Sharing', *Conference Proceedings by American Society of Civil Engineers*, 1979, Vol. 1, P.83

²⁶ Nadel, N.A. 'Allocation of Risks: A Contractor's View, Construction Risks and Liability Sharing', *Conference Proceedings by American Society of Civil Engineers*. 1979, Vol. 1, P.86

²⁷ Ibid

²⁸ Id, 89

3. Conclusion

Defining “political risks” in a short and precise statement is unanimously understood and listing illustratively actions that can be considered as political risks is practicable in international standard forms for construction contracts including FIDIC and in many literatures. Political risks are frequent to happen in politically unstable areas than politically stable ones.

The growing literatures emphasize on how firms design strategies specifically to manage and mitigate political risks so that giving serious attention and examining the institutional, political and economic atmosphere of a place where a construction is implemented is essential though can't prevent or avoid such risks from happening.

The government shall bear political risks if the employer is government authority irrespective of its attribution being at default or not, because the government is duty bound to prevent actions and/or omissions that cause to such political risks in general and political risks occurred in construction industry in particular.

A third party shall bear political risks if they are associated with encumbrances created by persons other than the contracting parties particularly when a construction contract is a civil work i.e. the employer is private not a government authority. This includes unauthorized entry in the project sites by third parties; “interference by governmental authorities in the performance of the contract”²⁹ or obstructions by any armed/ unarmed groups any riot or uprising that prevent the contractor to perform the contract meanwhile.

Although Tefera has argued otherwise as far as my thought concerns a government authority shall bear such political risks because it is still duty bound to protect the citizen of state and their properties from those armed/ unarmed groups irrespective of the legitimacy of the cause that lead them to riot or uprising. And it is in the best position to control it and to undertake it financially.

Unless a government shall bear political risks or regulate a mechanism how could such political risks can be transferred to and insured in insurance companies³⁰, a private owned construction

²⁹Yohannes Enyew, Risk Allocation Norms of Civil Construction Contracts in Ethiopia, supra note 16, p.446

³⁰All insurance companies in Ethiopia incorporate a clause or a general exception (Tsehay Insurance S.C recently has started to accept such risks in special contract) to their liability to assume risks if such risks result from Political instability, act of terrorism, riots, strikes, civil commotions, popular uprisings insurrections, rebellion, revolution, military or usurped power martial law or state of siege, armed or unarmed robbery. Thus, in today's

projects which have constructed in the area where such massive protests likely to happen may be challenged greatly.

practice the employer can't even transfer such risks to insurance companies that greatly threatens particularly private employers when they construct any construction in the area where a political instability likely to happen.