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Consortia Agreements in the International Construction Industry

With Special Reference to Egypt

by

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What is a Consortium Agreement?

INTRODUCTION

As will be discussed, "consortium" is not a term of legal art and has not been recognised as a separate legal concept. Lack of statutory or case law recognition has resulted in "terminological anarchy" in practice and confusion as to what is really meant by a "consortium" and other terms such as "joint venture", "joint bidding agreement", "joint contracts", and "joint collaboration".[1] The use of the term "consortium" in itself seems, in many ways, not to be helpful for legal purposes. The definition and identification of contractual characteristics of consortia and other arrangements, made in this chapter are designed for the better understanding and interpretation of the "general practice" in this field.[2] This understanding of the practice is necessary to articulate a coherent legal analysis for international construction consortium agreements.

1. DEFINITION AND GENERAL CHARACTERISTICS

A. Terminology

(i) *Origin of the Term*

The term "consortium" is derived from the Latin word "*consortium*", or "*consortio*", meaning association, participation, sharing of property, or community of life.[3] The expression "consortium" is found also in the language of some Anglo-American case law in the context of tort law rather than business law. In this respect, the courts use "consortium" to denote "a fellowship of husband and wife and the right of each to the company, society, co-operation, affection, and aid of

[1] Herzfeld, E. & Hadley, R., *Contracting and Sub-contracting for Overseas Projects* (1988) p. 11.
[2] "General practice" is a conduct which is carried out consistently and to a certain extent uniformly. See, Rosener, W., "Joint Ventures" in International Bar Association, *Seeking to Codify Practices in International Construction Contracts: New York Conference* (1986) p. 3.
[3] *Oxford Latin Dictionary* (1982) p. 418. In the ancient time of Roman law, *consortium* was used to describe a common ownership of family property by undivided heritage for undetermined period. See Zimmermann, B., *The Law of Obligations: Roman Foundations for the Civilian Tradition* (1990) p. 425.

the other in every conjugal relation".[4] However, this expression has become very fashionable in international business relations since the 1950s, and has been and continues to be extensively used in the construction industry to describe a range of different forms of co-operation between international contractors.[5]

(ii) *Construction Consortium Defined*

"Construction consortium" is defined for the purpose of this study as a contract by which two or more enterprises agree to join their skills and resources, without creating a formal economic or legal entity, to offer a joint bid and perform a works contract, with each party within the consortium solely responsible for its portion of the works.[6] Therefore, there are certain fundamental elements required to constitute a "consortium agreement" as defined in this study. The term "consortium" denotes a purely contractual arrangement. Parties to the agreement do not set up a partnership or a designated business association. In addition, the purpose of this agreement is limited to carrying out a particular construction project for the employer. It is not concluded to carry on a general business related to the construction industry. Finally and most importantly, members of the consortium do not share profits or losses arising out of the contract.[7]

[4] For American cases see, *Roseberry* v. *Starkovich*, 387 P. 2d 321 (N.M. 1963). For English cases, *Lawrence* v. *Biddle* [1966] 2 Q.B. 504 and *Best* v. *Samuel Fox & Co.* [1952] A.C. 716. The same definition is adopted in the legal dictionaries. For American law see, *Black's Law Dictionary*, 6th edition (1990) p. 309. For English law see, *Jowet's Dictionary of English Law* (1977) p. 428; *Words and Phrases: Legally Defined* (1989) p. 319. Furthermore, the term "consortium" has a special legal meaning under the English Income and Corporation Tax Act (ICTA 1988). In this context, "consortium" refers to a particular company where 75 per cent or more of its share capital is owned by UK companies, each owning at least 5 per cent of the total share capital. The members of this "consortium" are entitled to particular forms of tax relief. See, CCH Editions Limited, *British Tax Reporter* (1994) paragraphs 134-025.

[5] Boulton, A., "Construction Consortia: Their Formation and Management" *J. Bus. L.* (1959) p. 234; *Business Consortia* (1961). However, Boulton used the expression "consortium" to refer to any form of business alliance irrespective of the legal structure it takes. Furthermore, "consortium" in Boulton's view can be created to carry on a general business for an indefinite period. *Cf.* Schimitthoff, C., *Schimitthoff's Export Trade: The Law and Practice of International Trade* (1990) p. 334.

[6] In the same line with the above definition, see Glavinis, P., *Le contrat international de construction* (1993) p. 340; Fong, C., *Construction Joint Ventures in Singapore* (1985) p. 19; Mercadal, M. & Janin, P., *Les contrats de coopération inter entreprises* (1974) p. 310; Blanc, G., *Le contrat international d'equipment industriel: l'example algerien* (1983) p. 73; Baptista, L. & Durand-Barthez, P., *Les associations d'entreprises (joint ventures) dans le commerce international*, 2nd edition (1991) p. 25; ORGALIME, *Guide for Drawing up an International Consortium Contract* (1992) p. 3; Memento Pratique-Francis Lefebvre, *Droit des Affaires* (1991) p. 600.

[7] It is worth mentioning that the following terms are used interchangeably with the term "consortium": "non-integrated joint venture", "segregated joint ventures", and "les groupements momentané d'entreprises" (temporary groupings of enterprises).

This definition includes cases where the members of the consortium act as joint consultants, joint main contractors, or as joint sub-contractors. In addition, it includes situations where the members are nationals of or domiciled in the same country, or nationals of and domiciled in different countries and performing the works contract in a foreign country. Equally, it includes agreements that are concluded between international contractors and contractors from the country where the project is performed.

This definition does not introduce any formal legal authority. However, it represents the prevailing view and customary practice within the international construction industry with respect to what is understood by the term "consortium".[8] This understanding is affirmed by a considerable number of standard forms which have been launched in the last two decades.[9]

It is common for consortia agreements to include provisions concerning the following:

- the purpose of the agreement (Chapter Three);
- the nature of the collaboration between the members (Chapter Two);
- the duration of the agreement and its termination (Chapter Three);
- responsibilities of the members for the preparation and submission of the joint bid (Chapter Three);
- the negotiation and signing of the works contract with the employer (Chapters Three and Six);
- the supervision by the members (the co-operation committee) and their powers and procedures (Chapter Four);
- the leading party's rights and duties (Chapter Four);
- the division of works under the works contract (Chapter Five);
- the allocation and apportionment of the internal liability during the performance of the contract (Chapter Six);
- the credit and payment terms with the employer (Chapters Five and Six);
- the insurance, guarantees, and common costs;
- sub-contracting and personnel (Chapters Four and Five);
- the external liability to the employer and other third parties (Chapter Six);
- confidentiality obligations, exchange of information, and exclusivity of obligations (Chapter 5);
- the assignment, adjustment, and amendment of the agreement (Chapter Five); and
- the settlement of disputes and applicable law (Chapter Seven).

Finally, the agreement is usually accompanied by schedules that include in detail all matters concerning the description of the entire works under the contract, the

[8] Rosener, W., *supra* note 2, p. 5; Garb, R., "Practical Considerations in International Construction Joint Venturing for the Practitioner" 6 *I.C.L.R.* (1989) pp. 257-260.
[9] *Supra*, note 18, p. 6.

scope of the works of each party (supply of services and material), the time schedule and format for the tender. A similar structure is adopted in the integrated joint venture agreements.

B. The Main Features of the International Construction Consortium

The internal terms of the consortium agreement may vary in details from case to case according to different factors (e.g., the nature and complexity of the project; the employer's requirements; the terms of the works contract; the technical and financial capacity of the parties and their previous experience in working together; and the legal and administrative regulations imposed by the host country and the home country). There are universal characteristics, however, which are associated with all types of consortia.

(i) *A Consortium is a Purely Business Concept*

As already indicated consortia agreements do not fall under a particular set of legal rules in modern legal systems.[10] The consortium is a creature of the international construction practice and has not been recognized as a separate legal concept. However, the past two decades have witnessed statutory attempts, particularly in the civil law countries, to identify the consortium as a separate type of contract.

In Italy, Law No. 584 of August 8, 1977, regulated the formation of "temporary association of enterprises". This law made possible for two or more enterprises to enter into a temporary contractual association in order to bid for and to undertake large public sector construction projects. According to this law, each party is liable jointly and severally to the employer for the performance of the contract.[11] The temporary association of enterprises is a purely contractual relationship, and is not a company in any respect.[12]

In France, a draft of law was submitted to the Parliament in 1976 to regulate consortia agreements or "*groupement momentané d'entreprises*".[13] According to the Law Project No. 2994, a consortium is a separate type of contract (*contrat*

[10] Lacasse, N., "La réalisation d'une co-entreprise à l'étranger: le choix de la forme juridique" 19 *R.G.D.* (1988) p. 775.

[11] Studio Legale Bisconti, "Italian Joint Ventures" in Ellison, J. & Kling, E., (Ed) *Joint Ventures in Europe* (1991) p. 130.

[12] Simonart, V., *L'association momentanée* (1990) p. 183. The temporary association of enterprises must not be confused with the "external syndicate" (Arts 2612-2621 of the Italian Civil Code). Unlike the temporary association, the liability of the members of the "external syndicate" is limited to their shares in its fund, and personal creditors of the members cannot enforce their rights against such fund. In addition, the external syndicate is a separate taxable entity for the purpose of corporate income tax and local income tax.

[13] This proposal is reproduced in Dubisson, M., *Les groupements d'entreprises pour les marchés internationaux*, 2nd edition (1985).

nommé), and is not a partnership by any means.[14] This proposal aimed at avoiding conflicting decisions in relation to the legal classification of the construction consortium.[15] Unfortunately this proposal has never been put into force, and a consortium remains an unrecognised separate legal concept under French law.[16] This issue is dealt with in further detail in Chapter Two.

Within the European Community, a proposal was submitted by the permanent commission of the International European Construction Federation (F.I.E.C.) represented in the European Economic Community.[17] The proposed construction consortium is designed to operate as a purely contractual relationship, and no legal personality is created.[18] It is created for the purpose of carrying out a *particular* industrial or commercial project, and is not operated *vis-à-vis* third parties under a particular name (*raison sociale*).[19] According to the European proposal, each party of the consortium is solely responsible for its works, and individually liable for its defaults to other third parties including the employer, unless agreed otherwise.[20] This proposal as well has never been put into force.[21] Instead, the EEC adopted another co-operation formula, known as the "European Economic Interest Grouping" (EEIG)[22] which operates as a separate legal entity in most of

[14] Krsjak, P., "Appreciation critique du projet de loi relatif au contrat de groupement momentané d'entreprises" *La Vie Judiciaire* (27 Juin 1977) p. 1.

[15] Ducasse, E., *Les groupements momentanés d'entreprises dans le secteur du bâtiment et des travaux publics*, Thesis, Paris II (1984) p. 473.

[16] Boussard, J. & Ravel, J., *Les groupements momentanés d'entreprises*, Thesis, Paris II (1991) pp. 394 *ff.*

[17] The actual text of the proposal is reproduced in French by Matbei, P., "Les groupements momentané européen d'entreprises", in FEDUCI, *La co-traitance internationale* (1979) pp. 209-210.

[18] Art. 2 of the European proposal.

[19] Art. 1 of the European proposal.

[20] Art. 2 of the European proposal. Furthermore, Art. 3 of this proposal requires the consortium agreement to be in writing. The agreement would be void unless it includes the following: name, address, legal status, and place of registration of each party of the consortium; the object of the agreement; the location of the works carried out by the parties; the duration of the agreement; and the liability of the parties of the consortium to third parties.

[21] Sec. 19 of the Public Works Contracts Regulations of 1991 used the term "consortium" to refer to the situation where "two or more persons (at least one of them is a national of and established in a member state) acting jointly for the purpose of being awarded a public works contract". However, this section is not intended to articulate a precise legal organisation of the construction consortium. Indeed, the term "consortium" under sec. 19 was used to cover any joint bid submitted by two or more contractors whether they establish a company or not. Geddes, A., *Public Procurement: A Practical Guide to the UK Regulations and Associated Community Rules* (1993) p. 27.

[22] Council Regulation 2137/ 85 of July 25th 1985. 28 *Official Journal of the E.C.* of 31 July 1985, n. L 199/1. Also, see De Peuter, S., "European Economic Interests Grouping: Comparative Study of the Legislation in Most Members States" 16 *D.P.C.I.* (1990) pp. 465-479.

the EC countries;[23] however, it is not a taxable unit,[24] and parties of the group have unlimited joint and several liability to third parties.[25] Theoretically, an EEIG can be utilised to bid for and to perform a particular works contract.[26] However, the EEIG is not commonly used in the construction industry.[27] Consortia agreements and integrated joint ventures still remain the major collaborative forms in the international construction industry even in the EC countries.

In Egypt, although consortia agreements are extensively used to carry out infrastructure projects,[28] there is no set of rules that recognises consortium as a separate legal concept. However, a reference to the consortium in Egyptian law was made for the first time in 1990 in relation to public works contracts financed by the EC. These contracts are subject to specific rules.[29] Article 43 of these conditions spells out the general principles that govern the relationship between the members of the consortium and the employer.[30] It is presumed under Article 43

[23] E.g., Belgium, France, the Republic of Ireland, Italy, and the United Kingdom. However, the EEIG in Germany has no legal personality. See Gerven, D. & Aalders, C., (Eds) *European Economic Interests Groupings: The EEC Regulation and its Application in the Member States of the European Community* (1990).

[24] Art. 40 of the Regulation. For further details, see Bedias, C., "A Split Personality" 291 *Tax J.* (1995) pp. 16-17.

[25] Art. 24 of the Regulation.

[26] Kelly, P. et al, *European Economic Interest Groupings: Commercial, Legal and Tax Considerations* (1990) p. 20.

[27] Generally, see Commission of the European Communities, *EEIG: The Emergence of A New Form of European Co-operation* (1993).

[28] For example, the following projects were performed in the last ten years throughout consortia: El-Kasr-El-ainy Hospital (French contractors); Demietta Port (French-Japanese); Waste Water Project "contracts 16.1 & 16.2" (Italian-Egyptian) (however, those agreements were described as joint ventures in the contractual documents); Cairo Airport "Terminal two" (Egyptian-French); New *Essna* Barrage and Power Project performed for the ministry of irrigation in Egypt (Italian-Romanian); Ameriyah Portland Cement Project (French-Swiss-Egyptian) (however, an internal dispute led to the termination of this agreement, and a new consortium was constituted to carry out the project); the third Cement Production Line at Tabbin for National Cement Company (Egyptian-Italian).

[29] "General Conditions of Works Contracts in Egypt Financed by EEC." Presidential Decision of 1990, published in 38 *Official Journal of the E.C.*, 20/9/1990.

[30] An English translation of this Article may be read as follows:

"Where the tender is submitted by a group without legal personality, made up of several natural persons, companies, or institutions, it shall be signed by each of those persons – unless agreed otherwise in the specific conditions – who shall accept joint and several liability and appoint one of their number to represent the consortium *vis-à-vis* the administration.

The representative may sign the tender on behalf of the consortium provided he has a written power of attorney issued by the other members of the consortium; this power of attorney or authorisation must be enclosed with the tender. This authorisation must be in compliance with the municipal laws of the members of the consortium.

Each member of the consortium, as far as each is concerned, must provide the proof required under article 27, as if they were themselves the tenderers."

that the consortium agreement is not a legal entity. The significance of Article 43 under Egyptian law, however, is restricted for two reasons. First, the application of these rules in Egypt is limited to works contracts financed by the EC. Second, this article is limited to the relationship between the parties of the consortium agreement and the employer. Legal classification of the consortium and the organisation of the internal relationship between its members are out of the scope of the relationships considered.

(ii) ***Contractual Characteristics***

Although consortia agreements are not legally defined, in the international practice they enjoy specific contractual peculiarities that distinguish them from other forms of co-operation. The major contractual characteristics of the consortium are as follows:

(a) it is a purely contractual relationship;
(b) it is a collaborative relationship;
(c) it is of a personal nature;
(d) the internal relationship of the consortium's members is dependent on the works contract in many respects;
(e) the members of the consortium are jointly and severally liable to the employer;
(f) each member within the consortium is solely responsible for its own works; and
(g) the general framework of decision-making is standardised.

The above characteristics, except (a) and (f), are equally applicable to the integrated joint venture.

(a) ***Contractual Basis of Relationship***

A typical consortium, as defined above, is not intended to operate as a separate entity even in the business sense. Members of the consortium do not intend to carry on a continuing or permanent enterprise. The object of the consortium is always limited to a particular works contract. In addition, members of the consortium retain their identity as individual contractors and potential competitors in the future. Usually, there is no commercial name and no particular domicile given to the consortium as such. Furthermore, the members do not contribute any capital, and no company assets exist. Generally, each member is responsible for costs arising in relation to its own works. However, the members share in the common costs that may occur during the preparation for the tender and the performance of the contract. Finally, each member is solely responsible for its works.[31]

[31] Linklaters & Paines with Nightingale, *Joint Ventures*, 2nd edition (1990) p. 30.

Members of the consortium usually, but not always, express explicitly their intention not to create a separate entity or a partnership. A typical provision is as follows:

> "By entering into the present Agreement of Consortium, the companies are by no means setting up any particular partnership, or a company distinct from its members. The companies therefore shall merely be technically associated with joint and several responsibilities without forming a separate legal entity."[32]

This negation does not necessarily exclude the creation of a *de facto* company in the civil law jurisdictions (e.g., France),[33] or of a partnership in the common law systems (e.g., England).[34] Of course, in case of doubt, the judge or the arbitrator is expected to give evidentiary weight to a declaration of the intention not to form a partnership.[35] However, this denial is a useless protest unless it is accompanied by sustainable facts extracted from the internal structure of the agreement and the external relationship of the members to third parties.

In Egyptian law, the court would not be prevented from classifying a particular agreement as a *de facto company*, if it found the legal elements of a general partnership (i.e., *affectio societatis*; shares contribution; and sharing of profits and losses).[36] This is the case whether such agreement is labelled "consortium" or not, and whether it contains a negation clause or not. Similarly, it is uncontestable under English law that the parties' description of themselves, whether as partners or as non-partners, is not conclusive. A declaration against partnership, when all the *indica* of partnership are present, will be ineffective.[37]

(b) *Collaborative Relationship*

The relationship between the members of the consortium, like that of the integrated joint venture, is not an "adversarial" relationship but rather is an interdependent one.[38] The execution of each member's share of the works would be affected in time, quality, and liability by the performance of the others.[39] As such,

[32] Further examples are provided in Appendix 2.

[33] Dalloz, *Code des sociétés* (1995) pp. 86 *ff.*

[34] "It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that in which in law it is." *Winer* v. *Hariss* [1910] 1 K.B. 285.

[35] *Lindley & Banks on Partnership*, 17th edition (1995) pp. 73 *ff.*

[36] The decisions of the Egyptian Supreme Court of 18/12/1952, Cassation no. 329, 20 Judicial Year, Court of Cassation (Technical Bureau), vol. I. *Collection of the Judicial Rules (CJR) decided by the Court of Cassation:1931-1955* (1957) p. 690; 23/11/1987, Cassation no. 367, 52 Judicial Year, *El-Fakahany*, p. 518.

[37] *Moore* v. *Davis* (1879) 11 Ch.D. 261; *Stekel* v. *Ellice* [1973] 1 W.L.R. 191.

[38] *Cf.* Monghan, I., "Joint Ventures in International Construction", a paper submitted to a seminar on *International Joint Ventures*, held by the "Study Group for International Commercial Contracts" (20 April 1994) p. 8.

[39] Sizes, D., *La coopération internationale entre entreprises*, Thesis, Paris I (1987) pp. 63 *ff.*

the consortia agreement is viewed by civil law jurists as a separate category of co-operation agreement.[40] A co-operation agreement may include, *inter alia*, construction consortia, construction integrated joint ventures, joint operating agreements, and research and development contracts.[41]

The members of the consortium owe to each other a duty to co-operate in order to accomplish the joint objective of their agreement (i.e., joint bidding and joint performance).[42] This duty to co-operate persists during the negotiation of the agreement and its performance.[43]

The success of the consortium's undertakings would be defeated if there were not continuing co-operation among the members during the pre-award and post-award phases. It would be damaging for all members if continuing co-operation and full participation of other members were not forthcoming.

A similar view was expressed under the common law in relation to a "Joint Operating Agreement" – the equivalent formula of the consortium in oil and gas exploration activities.[44] The collaborative nature of the participants' relationship requires them to act in true fairness, good faith, and honesty to each other.[45]

(c) ***Personal Nature of the Agreement (Intuitus Personae)***

The consortium agreement, as well as the integrated joint venture, is of a personal nature (*intuitus personae*).[46] The technical and financial capacity, and the business reputation of the other members are important considerations for each member.[47] The acceptance of X to co-operate with Y for the purpose of obtaining

[40] Ducasse, E., *supra* note 15, pp. 445-488.

[41] On the theory of co-operation agreements, their legal characteristics, and types see, Mercadal, *supra* note 6; Mercadal, B., "Les caractéristiques juridiques des contrats internationaux de coopération dans le commerce internationale", 9 *D.P.C.I.* (1983) pp. 319-336; Dubisson, M., *Les accords de coopération dans le commerce internationale* (1989); Memento Pratique Francis Lefebvre, *supra* note 6, pp. 594-622.

[42] Boussard, *supra* note 16, p. 19.

[43] Del-Poso, T., *Les groupements non institutionnels d'entreprises: Etudes de droit communautaire*, Thesis, Paris I (1993) p. 328.

[44] *Supra*, note 14, p. 5.

[45] Bean, G., *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (1995) p. 141.

[46] Jennings, P., "Joint Ventures in Construction: Major Considerations in Drafting Joint Venture Agreements" in International Bar Association, *Joint Ventures in the Construction Industry* (1985) p. 49.

[47] A particular agreement is of a "personal" nature under Egyptian law if its formation and its performance depend upon the qualifications of the contracting parties. The technical capacity, business reputation and financial ability of one or more of the contracting parties are the main *cause* of the engagement of the others. The same concept is adopted under French law. See generally, Malaurie, P & Ayné, L., vol. 5 *Coure de droit civil* (1993-1994) p. 179; Contamine-Raynaud, M., *L'intuitus personae dans les contrats*, Thesis, Paris II (1974). The concept of *intuitus personae* is recognised in English law in relation to certain relationships (e.g. the relation between the partners of a partnership).

and performing jointly the contract depends upon the trust of each party in the ability of the other to co-operate, to perform its portion of works, and to satisfy its joint and several liability under the works contract. This is the *intuitus personae* which means that the choice and the trust of the members in each other is fundamentally important.

This *intuitus personae* may result in a number of legal consequences under Egyptian law. For example, unless agreed otherwise, the admission of a new party to the agreement requires the consensus of the other remaining parties. In addition, unless agreed otherwise, the prior consent of all members of the consortium is required for full or partial assignment of any rights or obligations provided in the agreement. Moreover, all decisions concerning policy matters must be taken unanimously (e.g., extension of the terms of tender subsequent to the expiration of its validity; amendment of the terms of the tender upon the request of the employer; appointment of the project manager, if any; issuance and terms of joint insurance policies; and/or variation of terms of payments under the works contract). Finally, unless agreed otherwise, the agreement is terminable *ipso facto* upon the insolvency or bankruptcy of one of the parties, notwithstanding that the remaining parties would be liable to the employer for the entire works including the insolvent or bankrupt party's portion. This is because each party is, in general, jointly and severally responsible to the employer. As will be discussed in Chapter Five, the insolvent or bankrupt party would be considered at default under the agreement and would be expelled from the consortium, subject to the applicable law to the agreement. In this case, the agreement would continue between the remaining parties who may take over the portion of the expelled party, or add a new party to carry out such works.[48]

(d) ***Interplay Relationship with the Works Contract***

The consortium agreement is formed by its parties to organise their relationship to: (i) pre-qualify (if required), prepare, and submit a joint bid; (ii) enter into a works contract with the employer; and (iii) execute the project in accordance with the terms of the works contract.

As such, the purpose of the consortium is "teleologically" dependent on the works contract. The core of the agreement is to ensure that all members of the consortium will execute and complete their responsibilities in accordance with the terms and conditions of the works contract. The consortium agreement, like the sub-contract, can be viewed as an accessory agreement to the works contract.[49] The economic objective of the agreement is "transparent". In other words the objectives of the final agreement necessarily reflect the objectives of the tender documents issued by the employer and the conditions of the works

[48] The approval of the employer would, usually, be required. See for example, ENNA (Engineering Advancement Association of Japan) Form: International Contract for Process Plant Construction, vol. 3 Guide Notes (1992) p. 38.

[49] Glavinis, *supra* note 6, p. 345.

contract.[50] The following examples illustrate, under Egyptian law, the legal implications of this interplay relationship. Some of these implications are indirect (i.e., formation of the agreement); some others are direct (i.e., nature of the members' obligations *inter se* and duration of the agreement).

Formation of the Consortium

Members of the consortium need to consider carefully the nature of the works and the particular requirements of the employer, if such information is available, before beginning to draft their agreement. The context of the majority headings of the agreement would depend on the nature of the project, and the specifications and terms of the works contract itself.[51] The final precise terms of the agreement cannot be determined in *detail* in advance until the works contract in its final form is concluded with the employer.[52] This may explain why the members of the consortium in some instances enter into a preliminary agreement before the conclusion of the works contract, then conclude a final agreement after signing the contract.[53]

Nature of the Internal Obligations

As will be discussed in Chapter Five, the nature of the obligations of the members to each other is determined in accordance with the nature of their obligations to the employer. Each member must undertake its obligations under the agreement with due care in accordance with its obligations under the works contract. Under Egyptian law and in other civil law systems, many of the obligations of the members of the consortium under the works contract are obligations of achieving a result (e.g., the design, supplying the required materials, and the erection of the construction works).[54] The mere failure to perform the design and construction works provided under the contract determines the members' liabilities in the presence of actual damage suffered by the employer.[55] In the language of English courts, such obligations are described as "absolute obligations".[56] No investigation as to whether the breach of the contract is attributable to the fault of the members is necessary to establish entitlement to damages.

[50] *Cf. Derains*, Y., "*Observation: L'affaire no. 3043,* 1978" 106 *J.D.I.* (1979) pp. 1001-1003.

[51] ORGALIME, *supra* note 6, p. 6.

[52] Dubisson, *supra* note 13, p. 87.

[53] United Nations, Economic Commission for Europe, *Guide for Drawing up International Contracts between Parties Associated for the Purpose of Executing a Specific Project*, UN. Publications, Sales No. E. 79. II. 22 (1979) p. 6.

[54] However, the obligations of the consultants to supervise the works are obligations of exercising best efforts. El-Sanhouri, A., vol. 7 *El-Waseet* (1983) p. 83 (in Arabic).

[55] *Ibid.*

[56] E.g., the obligation of the contractor under the English law to complete works that will be suitable for its purpose is an absolute one. See the decision of the House of Lords (*per* Lord Scarman) in *IBA* v. *EMI* (1980) 14 BLR 47.

As a result of the dependency relationship between the consortium and the works contract, the obligations of the members to each other are obligations of achieving a result (*obligation de résultat*), to the extent that these obligations are instrumental in the discharge of the obligations to the employer.[57] It follows that the mere failure of one of the members to carry out its scope of the works under the consortium agreement constitutes a breach of such agreement, irrespective of the degree of diligence applied by such a member.[58]

Duration of the Agreement

As will be discussed in Chapter Three, some of the provisions of the consortium agreement would be enforceable only at the date of the enforceability of the works contract itself (e.g., sub-contracting, invoices and payments made by the employer, performance securities, and/or liquidated damages clauses).[59] This is because these clauses are designed to govern the relationship between the members *inter se* during the execution of the works contract, and therefore they cannot be put into force unless such contract becomes enforceable.

Prior to the conclusion of the works contract, the consortium agreement would be terminated, unless agreed otherwise, if the joint bid was rejected by the employer or the negotiation failed. The agreement also terminates if the employer abandoned the project for its own reasons, or if the joint bid has not been accepted by the employer within the period of the validity of the tender or any agreed extension. Obviously, the above reasons are directly connected with the works contract.[60] Further, if the employer for whatever reason terminates the works contract, the consortium would be terminated.[61] However, this termination should not affect the contractual rights of the members to each other by reason of any previous breach of the terms of their agreement.[62] In this respect, the agreement must provide expressly that the agreement would continue in force until all the obligations of the members to one another have been fully performed.

Finally, the agreement would terminate when the works contract is fully accomplished. The consortium terminates only after all liabilities of the members have been settled and paid under the works contract. Thus, the agreement continues until all the warranty periods have expired.[63]

[57] Baptista, L. & Durand-Barthez, P., *Les associations d'entreprises (joint ventures) dans le commerce international*, 1fr edition (1989) p. 43; Draetta, U., Lake, R. & Nada, V., *Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria* (1992) p. 46.

[58] However, duties of the leading party as a co-ordinator are obligations to exercise best efforts. The general duty of co-operation among the members of the consortium is also an obligation to exercise best efforts.

[59] Lake, R. & Draetta, U., *Letters of Intent and Other Pre-contractual Documents*, 2nd edition (1995) p. 216.

[60] Durand-Barthez, P., "La durée des accords de groupement" in FEDUCI, *supra* note 17, p. 254.

[61] *Cf.* ICC case no. 5346 of 1988, with a note by Derains, Y., 118 *J.D.C.* (1991) pp. 1059-1065.

[62] *Ibid*, p. 1064.

[63] Vennat, M., "Joint Venture Dissolution" 19 *R.G.D.* (1988) p. 843.

(e) *Each Member of the Consortium is Jointly and Severally Liable to the Employer*

The employer's contract is the source of joint and several liability, not the consortium agreement. It appears to be a "standard practice" that the members of consortia, and of integrated joint ventures, are jointly and severally liable to the employer under the works contract. For example, clause 73 of part II of F.I.D.I.C. Conditions of Contract for Works of Civil Engineering Construction (4th edition), provides:

> "If the contractor is a joint venture of two or more persons, all such persons shall be *jointly and severally* bound to the employer for the fulfilment of the terms of the contract and shall designate one of such persons to act as a leader with authority to bind the joint venture. The composition or the constitution of the joint venture shall not be altered without the prior consent of the employer."[64]

According to the World Bank regulations, the above clause is mandatory, and should be incorporated into all works contracts financed by the Bank.[65] Similar provisions are incorporated in the majority of works contracts concluded with the parties of the consortium agreement.

The scope of the members' joint and several liability is determined under the law applicable to the works contract. In general, such joint and several liability means that no member can limit its liability to its share of works. Thus, the employer has the right to take proceedings against the member not in default without need to take proceedings against the other members.[66] Further, no member of the consortium can refute the employer's claim by proving that it is not in default.[67]

As will be discussed in Chapter Six, this joint and several liability is extended to cover "decennial liability" under civil law countries. In effect, each member would be liable jointly and severally to the employer for a period of ten years for the total or partial demolition of constructions or other permanent works erected by them. This warranty extends to defects in constructions and erections which endanger the solidarity and security of the works.[68]

[64] The term "joint venture" under the F.I.D.I.C. includes all forms of joint bids submitted by groups of contractors which do not have a legal personality.

[65] The World Bank, *Standard Bidding Documents: Procurement of Works* (January, 1995) p. 130.

[66] E.g., sec. 285 of the Egyptian Civil Code; sec. 1206 of the French Civil Code. Generally, see Huet, J., "Obligation in solidum et solidarité des constructeurs" *Rev. dr. immob.* (1983) pp. 11 *ff;* Mazeaud, H., Mazeaud, J. & Chabas, F., *Leÿons de droit civil: obligations-théorie générale*, 8th edition (1991) pp. 1118 *ff.*

[67] *Ibid.*

[68] E.g. Sec. 651.2 of the Egyptian Civil Code. The decennial liability is also provided under Saudi law regarding public works contracts. See sec. 121 of decree no. M/6 of 24/2/138bA.H regarding Tender and Auctions law.

(f) *Each Member Within the Consortium is Solely Responsible for its Own Works*

Generally, each member is solely responsible for its own portion of the works. As such, each has autonomy over its share, equipment, material, and its employees. Profit is taken severally by each member. Although the members receive the "gross payments" (i.e., the total price of the contract) made by the employer, they do not share the net profits. Each member is responsible directly for all expenditures necessary to carry out its scope of the works, and individually assumes risks relating to payments made by the employer.[69] Thus, unlike IJV or general partnership it is possible for one member to show a profit, and another a loss on their respective parts of the work.[70] Although the parties undertake a common object, the outcome of the project is not shared. The profitability of a particular member in the consortium is not the concern of the others. In this connection one may underline that such lack of joint profit is against the philosophy of partnership, and thus the consortium is unlikely to be viewed as a partnership under most of the legal systems examined in this book.[71]

The liability of the members *inter se* arising out of claims made by the employer would be the responsibility of the defaulting member under the works contract. Therefore, the members "work together" with the corresponding rights and obligations under the contract with the employer "shifted through" to the respective members.

Furthermore, the consortium agreement usually provides that each member is liable solely to other third parties, except the employer, whether such liability is established in tort or contract. However, under Egyptian law, members of the consortium could be held jointly and severally liable to third parties, irrespective of any internal agreement, if the third party (e.g., a sub-contractor) proves that the defaulting member was acting as an agent of the others, or if the third party proves that all the members or some of them are responsible for his injury in tort.[72]

(g) *General Framework of Decision-making in Standardised Management*

As already indicated, there is no joint organisation *per se* performing the works contract, but rather each member acts to execute its share of works. In fact, the members act as independent contractors within the organisational framework established under the agreement.[73] However, the relationship and activities of the

[69] However, there are certain expenditures to be carried out jointly in accordance with each member's proportional share as determined under the agreement, such as the leading party fees.

[70] Linklaters, *supra* note 31, p. 30.

[71] E.g., Egyptian law, *infra* p. 79.

[72] For example, according to sec. 169 of the Egyptian Civil Code when several persons are responsible for an injury, they are jointly and severally responsible to make reparation for the injury. They share the liability equally between them, unless the judge fixes their individual share in the damages due.

[73] Rosner, *supra* note 3, p. 6.

members are interconnected. Hence, the undertakings carried out by these members should be co-ordinated. In addition, a consortium agreement combines separate and distinct interests for the purpose of accomplishing a particular project. This limited purpose represents only one of the many objectives of the individual members who are likely to be competitors in future contracts. The interests of these members may therefore be divergent and should be so considered.

As will be discussed in Chapter Four, the co-ordination between the members *inter se* and *vis-à-vis* third parties usually is vested in one of them which is called in practice the "leading party", "sponsor company", "pilot", or "project manager". Policy matters, however, usually are undertaken by a "supervisory committee" that contains the representatives of the members of the consortium. The decisions of this committee, or at least those relating to substantial matters, are usually taken unanimously. However, in some exceptional circumstances, one of the parties can be passive, and therefore have no effective involvement in the committee.[74] Each member is responsible for supplying the required personnel at its own costs, and it is individually responsible for its own employees.

2. MOTIVATIONS

The popularity of the consortium in the international construction industry is motivated by several legal and business advantages from the view of employers and contractors. Likewise, most of these advantages are applicable equally to the IJV.

A. The Employers' View

Contracting with joint bidders has the following advantages from the view of the employer: (i) joint and several liabilities on the part of the members of the consortium; (ii) no co-ordination liability on the part of the employer; and (iii) use of local sources and improvement of indigenous skills.

(i) *Joint and Several Liability (Solidarité)*

The works contract looks at the members of the consortium as a single contractor. Unlike a joint stock company or any other form of corporation, the liability of the consortium's members is unlimited liability. As a result, it is unnecessary for the employer to prove which particular member's work, supply, or design was in fault since they are jointly and severally liable. The personal credit and assets of the individual members will be available to meet claims of the employer in the case of delay or unsatisfactory performance. Thus, a consortium from the view of

[74] Rubino-Sammartano, M., "Silent and Active Partners in Joint Ventures" in International Bar Association, *Arab Comparative & Commercial Law: The International Approach* (1987) p. 405.

the employer can be described, under Egyptian law, as a form of "guarantee".[75] Furthermore, it is suggested that the conflicts of interests among the members of the consortium would often weaken the members defence when in dispute with the employer.[76] As will be indicated in Chapter Six, the employer is advised to ensure that each member of the consortium is able to comply with the joint and several liability obligations.

(ii) ***No Co-ordination Liability on the Employer May Arise***

In large projects that involve different fields such as civil engineering, mechanical works and electrical works, the employer may adopt a separate contracts approach, or a single comprehensive contract approach.

In the separate contracts mechanism, the employer contracts with several contractors. Each one of them will be responsible to the employer solely for its own works. This is not a favourable solution from the view of the employer for several reasons. First, in a separate contracts approach, the employer will become his own principal contractor and can be legally liable to the separate contractors for delay of equipment, materials, or any disturbance caused by other contractors or suppliers.[77] Second, all information to and from each contractor, under a separate contract form, must pass through the employer or the engineer and inevitably slows down the process of communication. Third, the employer, if it is a public authority, will have to comply with public tenders procedures separately each time.[78]

For the above reasons the single comprehensive contract approach through contracting with a consortium is more convenient from the employer's perspective. The employer signs a single contract with the members of the consortium. They are viewed under the works contract as a single contractor, and they are responsible for the performance of the entire project. The responsibility for the co-ordination and its consequences is transferred to the members, who are then liable for the execution of a single contract. As a general rule, this method results in an earlier completion of the project and in greater certainty that the budget will not be exceeded due to claims against the employer from different contractors.

[75] El-Sharkawi, S., "International Construction Contracts" in The Engineering Society, *First Arbitration Conference of the Engineering Society*, Cairo (1992) pp. 357-371 (in Arabic).

[76] Wallace, I., *Construction Contracts: Principles and Policies in Tort and Contract* (1986) p. 415.

[77] However, a separate contracts technique is employed in developed countries where the employer has the knowledge and the technical capacity through its staff to take the burden of co-ordination. The Federal Triangle project in Washington D.C. of US$ 88 million is an example of the use of such technique where the State contracted with five groups of independent contractors separately to carry out the project. *E.N.R.* (February 22, 1993) p. 29.

[78] United Nations (UNIDO), *Contract Planning and Organisation*, Sales No. E. 74. II. B. 4. (1974) p. 26.

(iii) ***Use of Local Resources and Improvement of the Indigenous Skills***

Consortia agreements concluded among local contractors and foreign contractors are supported by public employers. Such participation of local contractors in the view of the public employer results in foreign exchange savings and transfer of technical and managerial skills to local enterprises in the employer's country.[79] As indicated above, this method would enable the employer not to divide the project into small separate contracts to assign works for local contractors. Consequently, consortia agreements between local contractors and foreign contractors give the employer the opportunity to avoid the disadvantages of the separate contracts approach. The consortium may also be a financial advantage from the employer's view. Infrastructure projects in developing countries involve considerable amounts of money, and often the public employer cannot finance the undertaking by its own resources. Such projects have to be financed by public international institutions or through foreign aid agencies.[80] In these circumstances invitation to bid usually is restricted to local contractors and contractors of the nationality of the members of the international institutions or of the nationality of the foreign aid agency.[81] In effect, consortia and integrated joint ventures among local contractors and foreign enterprises are supported by the employer's country and the concerned financial institutions.

B. The Contractors' Perspective

Consortia agreements are commonly used to achieve one or more of the following: (i) strengthening the technical and financial capacity of contractors; (ii) satisfying local participation requirements; (iii) flexibility and confidentiality; and/or (iv) antitrust considerations.

(i) ***Strengthening the Technical and Financial Capacity***

For technical reasons, a consortium agreement is necessary to carry out projects that involve different technical disciplines (e.g., civil engineering, mechanical works, and electrical works). The consortium would allow the interested enterprises to expand their activities to offer "a complete range" of services, including architecture, interior design, urban planning, and construction. The consortium is an ideal contractual arrangement for carrying out "turnkey" contracts and "product in hands" contracts, which assume the liability of the contractor for design, construction works, machinery and equipment supply, and technical

[79] The goal of optimising transfer of technology to local contractors is achieved only by exposing such parties to all facets of the project, including project management and co-ordination.

[80] Schmitthoff, *supra* note 5, p. 731.

[81] For example, invitations to pre-qualify and tender for projects financed by the EC in Egypt are limited to contractors from EC members and Egypt (Sec. 5 of the "General Conditions for Works Contracts" in Egypt financed by EC), published in *Official Journal of the E.C.*, No. 38, 20/9/1990. The same principle is applied by the "Agency for International Development" (US AID), *AID Handbook* (11) Trans. Memo No. 11: 42, pp. 2-8.

assistance.[82] Consortia can also be utilised, to a lesser extent, in Build-Operate-Transfer (BOT) contracts.[83]

The consortium is almost essential when the erection of a particular project would be beyond the technical and management capacity of a single enterprise even if it were a multinational enterprise (e.g., design and construction of an international airport). The design and erection of the Damiatta port in Egypt is an example of such a project; therein, ten companies (two Japanese and the rest French) entered into a consortium agreement in order to submit a joint tender and to perform the contract concluded with the employer. The Channel Tunnel is another evident example; therein, five English contractors and five French contractors entered into a consortium to carry out the project. In addition, consortium enables companies of medium scales to pre-qualify for large projects that otherwise they would be unable to qualify for. Usually, the members of the consortium are required to satisfy the minimum technical and financial qualifying criteria collectively, even if each member does not satisfy such criteria individually.

For financial considerations, a consortium agreement can be more favourable from the view of the contractor even if the project does not exceed its technical capacity. For example, if there is a US$ 500 million contract, the interested contractor would have to provide as a performance bond 5 to 10 per cent of the total values of perspective contract (i.e., US$ 25 to US$ 50 million in some cases). This situation would create critical problems for medium-scale international contractors scales since the contract costs, particularly in the developing countries, have been rising faster than any increase in the fixed assets of these companies necessary to back a bank's guarantees. In fact, it was reported that several sizeable American companies were unable to accept any more works from Arab authorities, even though the works were in their physical and technical capacity.[84]

The consortium and the IJV enable contractors to overcome cash flow problems and losses due to inflation. This is because these collaborative arrangements open the opportunity for small and medium-scale companies in the market, without risking capital beyond their means. Also, these forms of contractual

[82] Schneider, M., "Turnkey Contracts: Concept, Liabilities, Claims" 3 *I.C.L.R.* (1986) pp. 338 *ff;* Westring, G., "Turnkey Heavy Plant Contracts from the Owner's Point of View" 7 *I.C.L.R.* (1990) pp. 234 *ff.*

[83] In a typical BOT project, the members of the consortium obtain the required authority from the appropriate government agency to arrange the project finance, build the facility, and own and operate such facility for a stated period of time or until all indebtedness incurred financing the project has been repaid, and the parties have recovered a stipulated return on their investment. The members then transfer the facility to the government authority which owns and operates the facility thereafter. However, establishing a separate legal entity would be more appropriate for carrying out BOT. See, Stein, S., "Build-Operate-Transfer (BOT): A Re-valuation" 11 *I.C.L.R.* (1994) pp. 101 *ff.*

[84] Ui-Sup, S., (Ed) *Korean Construction Industry in the Middle-East* (1984) pp. 89-90.

co-operation are used by Western companies to overcome the tough competition of the Far Eastern companies.[85]

The members of the consortium spread the risks connected with the performance of the project. Unlike sub-contracting, where the main contractor is responsible for the entire works of sub-contractors, each member of the consortium accepts only its determined share of risks associated with the project. Of course, the joint and several liability of the members to the employer limits the mentioned advantages since the parties not in liquidation or default will be liable in all their substantial assets and activities, even those that are not related to the project.[86]

Finally, the consortium agreement as a project-by-project collaboration may be taken as a preliminary step for further integration on a more permanent basis in a particular market based upon the previous successful experience.[87] Unlike corporate ventures, each member can experiment with large projects without making a permanent commitment or losing its identity.

(ii) ***Necessity for Local Participation***

Constituting a consortium agreement with local contractors can be the only way to bid and to get into the local market. For example, the law or the employer may require the foreign contractor to form a consortium agreement or an IJV with a local contractor in order to be eligible for the tender.

Irrespective of any legal requirements, indigenous contractors in developing countries may play an important role in providing constant and topical marketing information, introducing the foreign contractor to the prospective employer and, in the case of negotiated contracts, leading government officials. In addition, the local contractor is capable of advising the foreign company on the following matters: (i) local legislation and various regulations regarding taxation, duties, and restrictions on import of particular plant or material required for the completion of the

[85] The Great Cairo Waste Water Project is an illustrative example of the increased competition in the region, with bids for this project coming in 50 per cent lower than expected despite the high inflation rates for import goods and products produced in Egypt. Comment, "Project Bids Drop 50% in Egypt" *E.N.R.* (March 20, 1986) p. 91. Furthermore, it was reported that Korean and Turkish contractors are encouraged by their governments not to exceed the costs price in their offers, and in fact pay these contractors the difference between cost price and prospective profits. In addition such contractors enjoy the benefit of low costs of workmen. For these reasons, the consortium agreement is seen as a necessary vehicle to defeat this competition. See Industrial Commercial Chamber of Gadah, *The Current and Future of Construction Sector in the Kingdom*, (1987) pp. 34 *ff* (in Arabic).

[86] Furthermore, the provision that gives the right of the remaining members to retain plant, equipment, and material provided by the insolvent member may be invalid *vis-à-vis* the personal creditor of the defaulting party. Such risks may be minimised through insurance of liability and contracting within subsidiaries with limited assets.

[87] Joint Ventures win Big Contracts, *E.N.R.* (April 1981) pp. 25-28.

project; (ii) local financial arrangements; and (iii) foreign exchange.[88] Furthermore, indigenous contractors take the responsibility of supplying local manpower to the project. Unfortunately, however, an indigenous party may take a disproportionate share of the profits when its resources are not sufficient to bear a substantial portion of losses. In these cases, the local contractor is usually a dormant participant, and would not have any substantial role in the co-operation committee.

The local contractor may also supply its technical assistance for the physical conditions of the potential project, such as sub-soil condition. Physical works which local firms from a developing country may undertake are usually limited to building and civil engineering works not requiring the use of special techniques or large quantities of heavy construction equipment. As will be indicated in Chapter Six, the foreign contractors who submit a joint bid with the participation of a local party are usually entitled to a 7.5 per cent or even a 15 per cent margin of preference in their bids.[89] As such, the submission of a joint bid with a local contractor would enable a foreign contractor to be awarded the bid even when its bid's prices are higher than those offered by other foreign competitors by a margin of 7.5 or 15 per cent, as the case may be.

(iii) *Flexibility and Confidentiality Considerations*

Unlike corporations, consortia agreements provide great flexibility of formation, amendment, and ease of operation. As a general rule the members do not have to contemplate any formalities for the formation of the agreement.

Further, a consortium agreement as an internal agreement between its parties can be kept confidential from the outside world, particularly where a transfer of technology is involved. However, antitrust regulations and the obligation to notify any anti-competitive agencies should be taken into consideration.

(iv) *Antitrust Considerations*

As a general rule, a construction consortium agreement is viewed as less anti-competitive than other business combinations such as equity joint ventures. This is because a consortium, like an integrated joint venture, is a creature of necessity, and no party would enter to a such agreement if it were able to perform the works contract individually. As a "temporary alliance" its creation seems to be unobjectionable.

In the United States, where antitrust law has an extraterritorial application upon overseas joint tenders, the consortium agreement and integrated joint venture seem typical and legitimate for antitrust law purposes. In general, the antitrust inquiry into the legality of a particular joint bid for an overseas project involves a question as to whether the creation of the joint bid itself unreasonably

[88] Gould, R., "Joint ventures *vis-à-vis* Local Sponsor, Agent, Consultant: Pros and Cons of Each Formula", in *Arab Comparative and Commercial Law*, *supra* note 74, pp. 413 *ff.*

[89] E.g., sec. 18 of law no. 9 governing public tenders in Egypt; sec. 43 of law no. 37 governing public tenders in Kuwait.

restrains competition. The joint bid may also be in violation of antitrust restrictions if it has any unreasonable collateral restraints, or if it is a "bottleneck monopoly".[90] Indeed, consortia or integrated joint ventures as "one short venture" created to undertake a particular works contract have had the general support of U.S. government officials since the 1970s.[91] This view was sustained by the Antitrust Division of the U.S. Department of Justice in relation to a consortium agreement concluded between six of the largest ten equipment manufacturers and engineering firms in the United States to bid for a hydroelectric project in Latin America. The Antitrust Division stated:

> "Such short-term consortia are useful where large risks... are involved... or where complementary skills are required. There is no reason to suspect that the [consortium] either would eliminate competition in the domestic U.S. market or foreclose export opportunities for U.S. [interests]. Its creation appears unobjectionable, and no impermissible collateral restraint are shown."[92]

One must emphasise, however, that a consortium agreement for overseas projects is examined for U.S. antitrust purposes under section 1 of the Sherman Antitrust Act. Therefore, a consortium may become unlawful if either one or more of the members use it as a platform to restrain or to eliminate competition *vis-à-vis* other parties or outsiders in the near or long term.[93]

A similar, flexible attitude, is found under the European Community (EC) regulations.[94] The consortium, as a temporary co-operation arrangement is not subject to Article 85(1) of the Treaty of Rome, provided that the members of the consortium do not compete with each other in the same industry, or if they are competitive in the same field, each party in itself is unable to execute the prospective works individually.[95] In either case, the agreement must not impose or imply any restriction on the freedom of its members as regards their other activities. Accordingly, the EC Commission has declared that the consortium agreement between French and English contractors for the purpose of bids for works related to the construction of the Channel Tunnel fall out of the scope of

[90] US Department of Justice: Antitrust Division, *Antitrust Guide for International Operations* (1977) p. 20. See generally, Pitofsky, R., "A Framework for Antitrust Analysis of Joint Ventures" 54 *Antitrust L.J.* (1985) pp. 893-914.

[91] Antitrust Division, *supra* note 90, p. 121.

[92] To the best knowledge of the author, a comprehensive search through "LEXIS" and "NEXIS" databases found no application of the "essential facility" or "bottleneck monopoly" to construction consortia.

[93] Griffin, J. & Calabrese, M., "US Antitrust Policies on Transnational Joint Ventures" 17 *I.B.L.* (1989) pp. 310-311; Ginsburg, G., Keup, W. & Villet, J., "Joint Ventures: Basic Principles and Guidelines" *Construction Briefings* (July, 1984) p. 5.

[94] Lesgullons, H., "Les groupements d'entreprises" in vol. 5 Lamy, *Contrat internationaux* (1988) Articles 21 *ff.*

[95] William, S., "Construction Joint Ventures: EEC Competition Aspects" 9 *I.C.L.R.* (1992) p. 7.

Article 85(1). This is because the members "have as their sole object the setting up of consortia for the joint execution of orders where each of them by itself is unable to execute the orders".[96]

In Egypt and other Arab Middle-Eastern countries, the consortium, as well as the IJV, is not subject to any specified restrictions similar to those that may apply in the United States or in EC countries.

3. TYPES OF CONSORTIA

Structural distinctions can be made between "horizontal" consortia agreements and "vertical" consortia agreements, and between consortia agreements with joint and several liability and consortia agreements without several liability.

A. Horizontal Agreements v. Vertical Agreements

(i) *Horizontal Agreement*

A consortium agreement is described as horizontal when its parties enter into a direct relationship with the employer. In this case, the works contract can be signed by all members of the consortium, or by the leading party on their behalf.[97] (Figure 1)

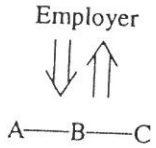

Figure 1

As a general rule, the parties to the horizontal agreement are viewed under the works contract as a single contractor. The members of the consortium are jointly and severally liable to the employer.[98] The majority of consortia agreements and integrated joint ventures found in practice, as defined in this study, fall within this category.

The horizontal agreement can be formed between two groups of contractors, and each group is subject to a separate consortium agreement. All the parties of the agreements conclude a third agreement (main agreement) to enter into the works contract with the employer. The parties to the main agreement are represented under the works contract, and have a direct relationship with the employer. The New *Essna* Barrage and Power Project performed for the ministry of irrigation in Egypt is an illustrative example of this form. In this project, the members of the consortium entered into three separate consortia: (i) a consortium

[96] *Ibid*, p. 8.
[97] Dubisson, *supra* note 13, p. 84.
[98] Glavinis, *supra* note 6, p. 343.

agreement among civil engineering contractors for carrying out civil engineering-works; (ii) a consortium agreement among electromechanical contractors to carry out electromechanical works; and (iii) the main consortium agreement between all the civil engineering contractors and all the electromechanical contractors formed in order to submit a joint tender and to perform the turnkey contract with joint and several unlimited liability to the employer. The main agreement in these cases is a horizontal one since all the members are involved in a direct relationship with the employer. (Figure 2)

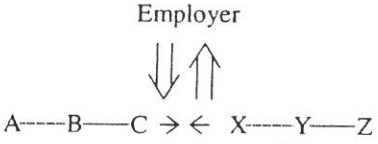

Figure 2

Two arrangements can be made regarding the internal liability of the members of the main agreement. The agreement may provide that the members of each group are jointly and severally liable to the members of the other group. However, each member is solely responsible within the group for its works. Alternatively, the members may agree that the members of each group will be liable severally to the other group.

(ii) ***Vertical Agreement***

The "vertical agreement", or "closed consortium agreement",[99] is an agreement by which the leading party or only some of the members contract with the employer. The other members of the consortium are not represented in the works contract, and have no direct relation with the employer.[100] (Figure 3)

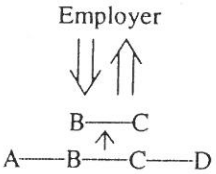

Figure 3

[99] Institution of Civil Engineering, *Overseas Contracts: Conception to Completion* (1980) p. 53.

[100] Generally, vertical agreements are not commonly utilised in international practice. However, the *Dutco* case is an evident example of such a consortium in the international practice. In this case, BKMI a German company signed a turnkey contract with an Omani company (the employer). Subsequently, BKMI entered into a consortium agreement with Siemens AG (a German company) and Dutco (established under the laws of Dubai). Each member was responsible for a particular part of the construction works. While BKMI was responsible to the Omani employer, the other two parties were not parties to the turnkey contract. Schwartz, E., "Multi-Party Arbitration and the ICC in the Wake of Dutco" 10 *Int. Arb.* 3 (1993) p. 9. The facts of this case will be examined in detail in Chapter Seven.

The members who enter into the contract with the employer sub-contract part of the works to the others through the consortium agreement itself or through a separate sub-contracting agreement. The members who are not represented in the works contract are not jointly and severally liable to the employer. Non-contracting parties under the works contract are viewed as sub-contractors *vis-à-vis* the employer and other third parties.

Although vertical agreements are not commonly utilised in the international practice, they can be used in situations where some of the parties to the agreement do not accept joint and several liability to the employer, but still desire to participate actively in the operation of the entire project. The internal structure of the relationship between the members of the vertical agreement is subject to the same structure applicable to the horizontal agreement.

The vertical agreement must not be confused with the situation where the sub-contractors form a consortium agreement between themselves to carry out sub-contracting works for the main contractor. The sub-contractors would be then jointly and severally liable to the main contractor. The main contractor in turn is responsible to the employer for the works of the joint sub-contractors.[101] (Figure 4)

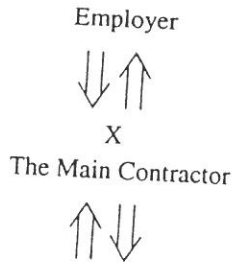

Figure 4

B. Consortium with Joint and Several Liability v. Consortium with Several Liability

As already mentioned, the members of the consortium are almost always jointly and severally liable to the employer. However, a particular form has been developed in connection with public contracts in France, known as a "joint agent grouping" or "consortium agreement without joint and several liability" – *le groupement momentané d'entreprises conjointes*.[102]

According to this formula, each party of the *groupement momentané d' entreprises conjointes* is solely responsible for its works. However, the leading party,

[101]. The relationship between the joint sub-contractors and the main contractor, under Egyptian law, is subject to the general rules applicable to the sub-contract under the Civil Code. However, the main contractor does not benefit from decennial liability provisions *vis-à-vis* the members of the consortium (i.e., the joint sub-contractors). Sec. 651.3 of the Civil Code.

[102] Art 2.3 of The General Conditions of the Public Works Contracts: *Cahier des clauses administratives generales applicables aux marches publics* (Juin, 1991).

known as a "*mandataire commun*", is liable to the employer for the works performed by itself and other parties.[103] This form is peculiar to the French practice and is not commonly used in the international practice.[104]

4. CONSORTIUM DISTINGUISHED FROM OTHER FORMS OF COLLABORATION

The draftsmen of the UNCITRAL guide on drawing up international construction contracts have observed correctly that "consortia agreements" are sometimes confused in practice with other forms of collaborations.[105] A conceptual distinction, therefore, is necessary to underline different legal consequences attached to each formula. For legal purposes, a distinction is made between three forms of international construction co-operation: (i) consortium; (ii) companies having a legal entity (i.e., equity joint ventures); and (iii) integrated joint ventures which are contractual ventures.[106]

A. Consortium v. "Equity Joint Venture"

(i) *Notion of the "Equity Joint Venture"*

The term "equity joint venture" or "incorporated joint venture" is usually used to describe the situation when two or more enterprises establish a corporate body with an independent legal personality, owned and controlled by its constituents. For legal purposes, an equity joint venture may take different forms in accordance with the applicable law under which the company is established. For example, under the law of other Arab Middle Eastern countries, the following forms of companies with legal personality are permitted.

[103] Federation Nationale du Bâtiment, *Les groupements d'entreprises* (1989) p. 15.

[104] Goudsmit, J., "Joint Venture Forms of the International European Construction Federation" in *Joint Ventures in the International Construction Industry*, *supra* note 46, p. 131.

[105] UNCITRAL, *Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*, United Nations Publications, Sales No. E. 87. V. 10 (1987) p. 18.

[106] Generally, as indicated in the text, there are two fundamental forms of joint ventures: equity joint ventures and contractual joint ventures. In an "equity joint venture" or "incorporated joint venture" the parties establish a corporate body. On the other hand, the contractual joint venture is a special combination of two or more parties where profits and losses are shared in some specific venture without creating any corporate designation. Equity joint venture and contractual joint venture or integrated joint venture, as described in this study, imply a small number of venturers who are unrelated (i.e., not unaffiliated to each other). In both forms, however, common control must persist. There is an ownership and control sharing of the promoted business between the venturers according to fixed percentages. The venturers share the profits and losses of the venture according to their proportionate share. In this connection, consortium agreement as defined in this study must not be confused with either of the other forms of joint venture.

(1) Personal companies ("*sociétés des personnes*") including: general partnership ("*société en nom collective*" or *Sharikat Al-Tadamonn*); limited partnership ("*société en commandite*" or *Sharikat Al-Tawsiah Al-Basitah*);
(2) Capital companies ("*sociétés des capitaux*" or *Sharikat Al-Amoual*) including: companies limited by shares ("*société en commandit par actions*" or *Sharikat Al-Tawsia Belas-homm*); limited liability companies ("*société à responsabilité limitée* or *Sharikat Al-Masaoliah Al-Mahdoudah*); and joint stock companies ("*société anonyme*" or *Sharikat Al-Mousahmah*).[107]

The idea of constituting a company with a separate legal personality brings with it two fundamental elements. The first element is the creation of an independent economic and legal entity distinguished from its constituents.[108] The second factor is the continuity and long-lasting duration of the undertakings carried out by the new company in the host country.[109] International contractors usually constitute capital companies with a local partner when the contracting opportunities in the host country are likely to expand the existing business in order to optimise the profit base world-wide.[110] They are established for an indefinite period, or a long period (e.g., 25 years), under capital investment laws in the host country.[111] This usually involves prolonged and complicated procedures.[112] As such,

[107] In general, see Shaheen, M., *Equity Joint Ventures*, Thesis, Cairo (1987); Radwan, A., *Commercial Companies* (undated); El-Sharkawi, M., *Commercial Companies* (1992); Easa, H., *Transfer of Technology* (1987) pp. 225-310 (in Arabic).

[108] Langefeld-Wirth, K., *Les joint ventures internationales: pratiques et techniques contractuelles des co-entreprises internationales* (1992) para. 22.

[109] Boussard, J., *supra* note 16, p. 492.

[110] Walmsley, J., *Joint Ventures in the Kingdom of Saudi Arabia* (1985) p. 3.

[111] For the purpose of investment laws, "joint venture" is used to describe any collaboration or new investments involving shared ownership between local and foreign partners. See, United Nations, *Manual on the Establishment of Industrial Joint Venture Agreements in Developing Countries*, UN Publications. Sales No. E. 71. II. B 23 (1971) p. 3; Cherin, R. & Combs, J., "Foreign Joint Ventures: Basic Issues, Drafting, and Negotiation" 38 *J.Bus.L.* (1982-1983) pp. 1033 *ff;* Sornarajah, M., *The International Law on Foreign Investment* (1994). According to this approach, the UNCITRAL uses the term "joint venture" to describe any form of association between the contractor and the employer to carry on common business. The objectives of the partners throughout this joint venture may include: "the transfer of technology, the pooling of financial resources or other assets, the sharing of costs, control and management of the operation of works, the marketing of the products of the works, and sharing of the profits and losses resulting from the operation of the works." UNCITRAL, *supra* note 105, p. 23.

[112] In Egypt, foreign investment companies are subject to law No. 230 of 1989 and the executive regulations issued thereunder by the Prime Minister's decision No. 1531 of 1989. "Bechtel Egypt" is an example of an equity joint venture formed between American Bechtel, International Finance Corporation (IFC) and other Egyptian partners. This joint venture took the form of a joint stock company under the investment law. The purpose of the company is to establish a consulting service in the engineering and financial fields for a period of 25 years, subject to extension.

incorporated joint ventures are not suitable for the purpose of bidding and executing a single overseas project for a limited period of time, but they are designed for carrying out continuous activities for a long period of time.

(ii) *The Consortium Distinguished from Equity Joint Ventures*

The major difference between a consortium agreement and an equity joint venture resides in the fact that the former is a purely contractual relationship, whereas the latter is established through a corporate form, and a separate legal personality is created. Moreover, while the corporate joint venture is normally established for indefinite duration,[113] the consortium agreement is formed by the parties to carry out a single works contract. One may also note that while in the equity joint venture the work is carried out by the new entity itself under the common control of the venturers, the consortium agreement is viewed as a mere means of management wherein the parties undertake their respective portions of the work separately. Finally, in an equity joint venture that takes the form of a capital company, the liability of the shareholders to the employer is limited to their shares in the capital, whereas the parties of the consortium are jointly and severally liable to the employer irrespective of their share of works under the contract.

B. Consortium v. Integrated Joint Ventures (Contractual Joint Venture)

(i) *Notion of the Integrated Joint Venture*

The integrated joint venture in the construction industry can be described as an association between two or more enterprises who agree for the purpose of furnishing engineering, consulting and construction procurement of an *ad hoc* project by combining their resources and sharing the losses and profits of their joint undertaking. Overall, it is a "risk-sharing venture". It does not have a legal personality, but it can be viewed as a separate economic entity.[114] There is an ownership and control sharing of the promoted business between the venturers according to a fixed percentage. The venturers share the profits and losses of the venture according to their proportionate share participation in the venture capital.[115] Generally, the integrated joint venture is classified for legal purposes as a partnership.[116]

[113] Herzfeld, E., *Joint Ventures*, 2nd edition (1989) p. 4

[114] Linklaters, *supra* note 31, p. 29; Garb, *supra* note 8, p. 257.

[115] *Ibid.*

[116] This may include: (i) the "temporary association" (association momentanée) of the Belgium law, see Simonart, V., *L'association momentanée* (1990); (ii) the "Civil law partnership" (*BGB Gesellschaft*) of the German law, see Carsten, E. & Bringezu, V., "Partnerships" in Rüster, B., (Ed) vol. 2 *Business Transactions in Germany* (1992) pp. 22.7 *ff.*; Stroble, Killius & Vorbrugg, *Business Law Guide to Germany* (1988) p. 108; and (iii) the partnership of the English law, see Brown, J., "International Joint Ventures Contracts in English Law" 5 *D.P.C.I.* (1979) pp. 193-243. For the application of these forms of companies in the construction industry, see Perolini, K., "The Joint Venture in Civil Law: A Comparative Survey" *Joint Venture in the Construction Industry*, *supra* note 74, pp. 70-95.

When practitioners use the term "joint venture" abstractly, usually they mean an integrated joint venture as described above. Common law practitioners generally use the expression "integrated joint venture", as opposed to "non-integrated joint venture" or "segregated joint venture" (described for the purpose of this study as a consortium agreement).[117] It is interesting to note that consortia are often used by contractors from civil law countries, particularly from France and Italy, whereas integrated joint ventures are more used by contractors from the common law jurisdictions.[118]

(ii) *IJV Distinguished from Consortium*

Generally, the IJV resembles a consortium agreement in the particular characteristics. The partners of the venture, as with the members of the consortium, carry out a joint undertaking under their common control without the purpose of creating a corporate entity. Moreover, the purpose of the joint venture agreement, like in the consortium, is limited to carrying out a single project.[119] Further, as in the consortium, the partners of the joint venture are jointly and severally liable to the employer. Finally, both models share a common form of management structure. These similarities in functions and structures explain why both formulas are generally subject to similar rules.

There are fundamental differences, however, between the two forms. The IJV is an aggregation of partners where each partner contributes both capital and performance. On the other hand, in the consortium agreement, there is no capital contribution as each member undertakes its respective portion of works separately, and bears its own costs in the preparation of the tender and during the performance of the works contract. As will be discussed in Chapter Five, the common costs are shared in accordance with the proportionate share of each member of the venture.

As pointed out above, the legal status of the two types is very different. The IJV, in general, satisfies the criteria of the partnership or *de facto company* under most of the modern legal systems. On the other hand, the consortium agreement generally is likely to be treated as a non-designated contract. It does not satisfy the legal elements required for the creation of a partnership since the parties

[117] However, the distinction between the integrated joint venture and the consortium agreement (non-integrated joint venture in the language of the common law practitioners) is not always observed in practice.

[118] For example, while the English contractors who carried out contract no. (15) of the "Greater Cairo Wastewater Project" entered into an integrated joint venture, the Italian contractors who performed contract no. (16) of the same project constituted a consortium agreement.

[119] However, according to Friedmann, "contractual joint ventures" can be designed to be a continuing co-operative venture. Friedmann, W., "The Contractual Joint Venture", *Colum. J. World Bus.* (1972) p. 58.

share no more than the gross payments received from the employer.[120] However, in some countries, such as Germany, a consortium agreement as defined here is classified as a civil law partnership.[121]

Also, the IJV is viewed as a profit centre. The profits in this context mean the net profits (i.e., the net amount remaining after paying out of the receipts of the contract all the expenses incurred in obtaining those receipts). Payments received from the employer will go into the joint venture's bank account, and the partners share profits and losses in proportion to their contribution on a fixed *pro rata* (e.g., 50/50). On the contrary, in the consortium agreement all payments received from the employer are to be disbursed either directly or by the leading party to each member individually in accordance with its share of works performed and invoices submited. Unlike the joint venturers, the members of the consortium do not share the profits and losses resulting from the execution of the works contract.

The table overleaf specifies in more detail similarities and differences between the two contractual formulas as developed in the international construction industry.

CONCLUSION

As pointed out, many of the legal problems associated with the operation of the construction consortium agreement are due to the lack of clear cut distinctions between different forms and structures of co-operation that have evolved in the construction industry. This chapter attempts to define and to articulate forms of contractual co-operation into distinct groups.

It appears that there are two fundamental contractual formulas of co-operation utilised by international construction companies to undertake a particular constructional or industrial project: first, contractual arrangements under which two or more enterprises agree to undertake a constructional or industrial project without sharing in the profits or losses resulting from the works contract (consortium); and second, arrangements by which the parties share profits and losses resulting form the works contract (integrated joint ventures).

Some common contractual features of consortia and integrated joint ventures are: (i) both forms are products of the general practice, and are not subject to a specific set of rules; (ii) they are related to a single project; (iii) they are collaborative relationships and of a personal nature; (iv) their structure and execution depend on the works contract; (v) their management structure is similar; and (vi) the legal and economic motivations to enter into consortia and integrated joint

[120] The above distinction is clearly reflected in two standard models issued by JMEA: (i) Consortium Agreement for Tender and Execution of Turnkey Project (June, 1984); and (ii) Joint Venture Agreement for Tender and Execution of Turnkey Project (September, 1985).

[121] Lionnet, K., "Supply and Service Consortia: Legal Position and Risks", in Nicklisch, F., (Ed) *Contracts for Construction and Large Industrial Projects* (1983) p. 132.

TABLE 1 ***A Comparison Between Integrated Joint Ventures and Consortia***

Integrated joint venture	*Consortium (non-integrated joint venture)*
1. The purpose of the agreement is limited to undertaking a particular works contract.	1. Same.
2. The joint venturers must agree unanimously on the terms of the joint bid or any variation to it.	2. Same.
3. The joint venturers share profits and losses resulting from the execution of the works contract in accordance with their share participation.	3. Each member of the consortium is solely responsible for its own works. Any liability arising out of claims made by the employer will be the full responsibility of the defaulting party.
4. The joint venturers are jointly and severally liable to the employer.	4. Same.
5. By operation of law, the joint venturers are jointly and severally liable to other third parties for acts carried out in connection with the joint venture activities.	5. Each member of the consortium is individually responsible for its own acts *vis-à-vis* third parties.
6. Each venture must indemnify the others for damages caused due to its fault.	6. Same.
7. The joint venturers must contribute the working capital required to perform the works.	7. In principle, each member is responsible for its own costs. Thus, there is no capital contribution. However, common costs are shared between the members in accordance with their proportional share in the works.

TABLE 1 ***Continued***

Integrated joint venture	*Consortium (non-integrated joint venture)*
8. The joint venture may hire its own employees.	8. Each member is responsible for supplying its own employees.
9. The bank account is usually opened in the name of the joint venture.	9. The bank account must be opened in the name of the members.
10. The leading party or the project manager is the legal representative of the venture *vis-à-vis* third parties including the employer.	10. The leading party is not a legal representative of an entity, however, it may be authorised to act as an agent *vis-à-vis* the employer for the purpose of the works contract. This agency, generally is not extended to other third parties.
11. The co-operation committee is responsible for decisions related to policy matters.	11. Same.

ventures are generally identical. These structures, however, differ in the following manners: (a) while the integrated joint venture acts as an economic entity *vis-à-vis* third parties, the consortium is a mere internal contractual relationship; and (b) the co-venturers of the integrated joint venture share the profits and losses resulting from the works contract, whereas each member of the consortium is solely responsible for the outcome of the project.

The separation of these distinct business *structures* in a clear cut manner gives a better comprehension of their legal nature, irrespective of the label given to the particular agreement. It is argued in the following chapter that these business forms should be treated differently for legal purposes as well.