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**Casablanca, le 4 août 2016**

**Atlantic Beach Paradise Resort**  
**Boite Postale No. 2226**  
**Agence Msallah**  
**9003 Tanger**  
**A l'attention de M. Larbi Tadlaoui**

Par email et remise en main propre

**Objet : Atlantic Beach Paradise Resort / Consultation**

Cher Monsieur,

Vous trouverez ci-joint notre consultation, en français avec sa traduction anglaise, concernant la responsabilité de l'Etat dans le cadre de l'exécution de la Convention intervenue entre votre société et le gouvernement du Maroc, en date du 10 mai 2007, s'agissant du projet à Boukhalef - Préfecture de Tanger Asilah.

Je vous prie de croire, Cher Monsieur, à l'expression de mes salutations dévouées et les meilleures.

**Mathieu Dahan**  
Of Counsel  
**Norton Rose Fulbright Morocco SARL**



**Salma Bedraoui Idrissi**  
Associate  
**Norton Rose Fulbright Morocco SARL**



PAR-#21555173-v1

RC Casablanca N° : 252447 - taxe professionnelle N° : 35695908 - CNSS N° : 9007148 - identifiant fiscal N° : 40462335.

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## Memorandum

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<b>From</b>	Mathieu Dahan Janice Feigher Salma Bedraoui Idrissi	<b>Date</b>	19 July 2016
<b>Direct line</b>	+212 (0) 529 09 00 60		
<b>Email:</b>	Mathieu.Dahan@nortonrosefulbright.com Janice.Feigher@nortonrosefulbright.com Salma.Bedraouidrissi@nortonrosefulbright.com	<b>Our refs.</b>	

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<b>To</b>	Mr Larbi Tadlaoui  Atlantic Beach Paradise Resort	<b>Your refs.</b>	
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Dear Sir,

You have sought our advice with regard to the development of tourism and residential project (the **Project**) undertaken pursuant to an investment agreement (the **Agreement**) between Atlantic Beach Paradise Resort (ABPR) and the Moroccan Government, dated 10 May 2007, on a underlying plot of land (the **Underlying Land**) of 111 hectares, located in the rural township of Boukhalef, Prefecture of Tanger Asilah, the object of Land Title 1095/G, as modified by amendments.

We have analysed the legal situation of ABPR in the light of the documents which were communicated to us, the list of which is set out in a schedule hereto (the **Documents**).

In accordance with your request, we have restricted the scope of our examination to that of the liability of the State in respect of the performance of the Agreement.

### 1. Factual background

#### *a) Conclusion of the Convention and provision of the Financing Agreement project*

On 4 may 2007, the Moroccan law company, ABPR, signed the Agreement with the government of Morocco (the **Government**), represented by various ministries.

According the recitals of the Agreement:

*"As part of its policy of developing the tourism industry, the Kingdom of Morocco pays particular attention to boosting investment, in particular investments by national and foreign groups with specific know-how in the management of hotel chains.*

*For this purpose, Morocco decided to grant specific benefits to these investors, whose projects will contribute to the qualitative and quantitative development of the tourism infrastructure of the country, and to improved marketing of national tourism."*

The Agreement provides for the realisation by ABPR of an investment programme consisting of a holiday resort, a golf course, sports equipment and shops, as well as 212 apartments on a plot to be extracted from the Underlying Land. The Project must be realised within 36 months from the signature of the Agreement.

Under the terms of the Agreement, the Government undertakes to mobilise the plot to be extracted from the Underlying Land in the form of a renewable 50-year lease for the golf course and a sale of land for the hotel and residential programme.

Article 15 of the Agreement provides that the Government shall follow up the Project through a central committee composed of representatives of certain ministries and by a local committee chaired by the Wali of the Tangiers-Tétouan region.

Various amendments to the Agreement were entered into between 2007 and 2015, the main purpose of which was to extend the deadline for the completion of the project by periods of 24 months.

In September 2007, the project received a favourable opinion from the Town Planning Department of Tangiers, subject to compliance with aerial easement.

The building permit authorizing the Project, which mentions in particular Amendis among the consulted entities, has been granted on 30 May 2007.

Amendis has received a public service delegation pursuant to an "agreement for the delegated management of liquid waste disposal and the distribution of drinking water and electricity", dated 12 December 2001, a copy of which has not been provided to us. We understand that according to this agreement, Amendis is the delegatee and the Township of Tangiers is the delegator authority.

The State sold to ABPR the plot on which the project was to be executed in March 2009.

On 24 September 2009, in view of the problems encountered, with regard to the lack of off-site infrastructure ABPR contacted the director of the CRI of Tangiers Tétouan regarding the problems which had arisen with the off-site infrastructure (the **Off Site Infrastructure**) and the issue of their financing.

In November 2009, Amendis sent ABPR and 9 other companies affected by a project in the area, a draft "Agreement for the financing of the Off Site Investments of the Boukhalef-Houara Zone" (the **Financing Agreement**). Amendis asked ABPR to sign and return the agreement to it by 15 December 2009.

In its accompanying letter dated 12 November 2009, Amendis emphasised that "as provided in Clause 5 of this Agreement, and in accordance with the heads of terms between the Delegator Authority and the Delegatee, the payment should be made on the signature of the Agreement".

The Draft Financing Agreement provides that Amendis shall execute off-site works consisting in fitting out the "Boukhalef-Houara" zone with drinking water, electricity, liquid waste disposal and waste water recycling networks (Irrigation Water), and that these works shall be paid for by ABPR.

The draft Financing Agreement received up to this date, states more specifically that :

- "The volumes of *Réutilisation des Eaux Usées* [Recycling of Wastewater (REU)] cannot be guaranteed to cover the requirements for watering" (article 3.4 of the Draft) ;
- "Tranche I of the works will only be completed if the "Works Fund" has sufficient resources coming from promoters' contributions. Thus, all promoters related to tranche I shall pay the contribution in accordance to timelines adopted to ensure that the Delegatee can perform the work" (article 6 of the Draft) ;
- Payment of the contribution shall be made by ABPR through two instalments, as the Project aims to a "flat-rate contribution" corresponding to the tranche I in the amount of 43.327.000.00 DH and due "in accordance to the draft Financing Agreement adopted between the Delegating Authority and the Delegatee" (article 4 of the Draft) ;
- The draft Financing Agreement provides that "the cost of the tranche II will be recovered either with the Promoter [ABPR] if he decides so or, at the latest, with the Final Acquirer of each unit within connection fees applicable to the floor area in sqm for each unit".

ABPR did not initially sign the draft Financing Agreement.

### **b) The Head of terms and new proposals of Financing Agreement**

The "heads of terms" referred to in the Draft Financing Agreement had been entered into following a "Follow up Committee" meeting of 29 May 2009, to which ABPR had not been invited (according to the minutes).

In addition to the representatives of Amendis, the following attended this meeting: the President of the Urban Township of Tangiers (who is also the Chairman of the Follow-up Committee), representatives of the Ministry of Home Affairs and the Wilaya of Tangiers, the President of the Rural Township of Boukhalef, the Representative of the Urban Township of Asilah, the Representative of the Council of the Town of Tangiers and representatives of the permanent supervisory department.

According to the minutes of the meeting, the projects in the Boukhalef-Houara zone "were initiated through agreements with the State. The Agreement does not provide for the development of this zone over the short term or even with projects of this size. [...] This requirements of this zone are very substantial. [...] The overall cost of these investments has been valued at 1.2 billion DH for a construction period of 3 to 10 years. [...] It has been recalled that this financing was not provided in the Delegated Management Agreement [...] Consequently, it is suggested that the developers should be asked to be liable for the first tranche, and then at the time of marketing, the developer will have the choice of bearing the cost of its participation in tranche II or passing it on to the end client in the agreement between itself and its clients. [...] The Wali concluded that tranche I shall be considered to be a "flat rate contribution from the developers to the Off Site facilities of the Houara zone" the amounts of which shall be determined in the agreement. Lastly, the minutes state that "it has been decided to invoice a flat rate contribution to the developers concerned by the financing of tranche I of the off site area of the zone. For tranche II, leave developers the choice of payment or transfer of the participations to purchasers [...]".

Heads of Terms dated 1st June 2009 (the **Heads of Terms**) were entered into following this meeting between:

- on the one hand,
  - ✓ the Delegator Authority of the Delegated Management of the Liquid Waste Disposal, Drinking Water and Electricity services of the Wilaya of Tangiers, represented by the Chairman of the Follow-up Committee, the President of the Urban Commune of Tangiers;
  - ✓ the Management of the Utility Companies and Services Awarded;
  - ✓ the Rural Township of Boukhalef;
  - ✓ the Ministry of the Interior in his capacity as Supervisory Ministry and the Wilaya of Tangiers-Asilah; and
- on the other hand, Amendis, in its capacity as the Delegatee.

The purpose of the Heads of Terms is to "determine the terms and conditions of financing by future developers, of the off-site works in the Houara zone".

The Heads of Terms provide that "a flat contribution has been set for each developer" for the financing of the first tranche of works and, *inter alia*, indicate the contribution due from ABPR.

Clause 6 of the Heads of Terms provide that "all the developers must pay their contributions corresponding to tranche I at the agreed due dates to enable the Delegatee to execute the works".

Moreover, under the Heads of Terms, "the Delegatee is authorised to use all contractual and legal means for the effective recovery of receivables due from the developers and designers subject to the contribution. "

Thereafter, an amendment to the Heads of Terms was signed on 24 October 2011, which provides that "no acceptance may be declared in relation to real estate developments for as long as the contributions have not been paid in full." Such amendment provides (in page 4) that over the total amount of promoters' contribution which is 676,847 kDH, the amount of 591.007 kDH is left to be paid by the promoters.

The off-site works were not executed by Amendis in 2010, as Amendis had made the start of these works subject to the payment of the flat rate contribution referred to in the draft Financing Agreement by all the relevant developers.

On this basis, on October 13, 2010, Amendis wrote to ABPR that the project "Prestige" (which we are assuming being the Project) "will be able to be supplied in Drinking Water, Sanitation and Electricity by May 1<sup>st</sup>, 2011 at the latest, provided your signature on the specific agreement and the payment of the first third of your contribution".

On 2 November 2011, Amendis wrote again to ABPR that the supply of electricity, drinking water and waste disposal services for the project, which had become feasible as of 1st May 2011, would only become effective from the payment by ABPR of the flat rate contribution which ABPR has still not paid.

Moreover, Amendis announced in this letter that it was sending out a new version of the draft Financing Agreement, following "new provisions concerning the contributions of the developers [...] decided by the Delegated Management Follow-up Committee".

This new project was sent on February 2<sup>nd</sup>, 2012 ; but ABPR continued to refuse to sign the draft Financing Agreement.

In this regard, it must be noted that the draft of Financing Agreement provided on such date mentions a construction period of **18 months** for the completion of the Off-site Infrastructures concerning, Sanitation, Drinking Water supply and Electricity subject inter alia to payment of the contribution but remained silent concerning Off-Site Infrastructures and Irrigation Water supply, and the *Réutilisation des Eaux Usées* [Recycling of Wastewater (REU)].

ABPR finally signed the Financing Agreement in 2015. This has been entered into between the Delegator Authority, the Wilaya, Amendis and ABPR.

It provides for the payment by ABPR in respect of the flat rate contribution of MAD 75,910,000.00 including tax. It provides that "this amount does not include medium voltage connections from source stations or the existing network. [...] Moreover, the volumes of *Réutilisation des Eaux Usées* [Recycling of Wastewater (REU)] cannot be guaranteed to cover the requirements for watering." It also provides that Amendis may impose an additional contribution in the event of "possible extra costs of works or significant modifications of income connected with modifications to the built areas with regard to all the projects of the zone and in order to protect the overall balance of the transaction [...]"

The Financing Agreement provides that Amendis shall carry out the works, provided *inter alia* that ABPR pays the flat rate contribution. It is specified, in addition, that most of the Off Site Infrastructures is already completed and that the connexion to the networks may be implemented within 3 months. Currently, however, you are refusing to pay the amounts asked for, which correspond to the financing of the Off Site Infrastructures of the first tranche, amounting to 32,921,419 DH including tax.

**In conclusion, these various exchanges thus highlight that :**

- **On October 2011, none of the promoters had paid their contribution in full, while the Draft Financing Agreement of 2009 expressly submit the completion of the Off-site Infrastructure works to the payment of the financial contributions requested to all the promoters of the Boukhalef-Houara zone ;**
- **Over the total contribution due by these promoters' which amounts 676,847 kDH, the sum of 591.007 kDH is left to be paid.**

- The timeframe for the completion of the Off-site Infrastructure concerning Drinking Water, Sanitation and Electricity, initially scheduled for May 1<sup>st</sup>, 2011 (Amendis letter on October 2010 and article 7 of the Protocol), i.e., slightly more than six month when notified to ABPR, was postponed to eighteen months in the agreement of 2012, subject to payment of the contribution;
- The Financing Agreement project communicated in 2012 does not provide neither an implementation deadline for Off-site Infrastructure concerning the *Réutilisation des Eaux Usées* [Recycling of Wastewater (REU)] and Irrigation Water needed to cover watering needs that can be supplied by Amendis, nor a guarantee concerning the volume that can be supplied by Amendis in this regard; and
- The Financing Agreement that has been signed in 2015 does not provide neither an implementation deadline for the Off-site Infrastructures (for any services), nor a guarantee concerning the volumes of *Réutilisation des Eaux Usées* [Recycling of Wastewater (REU)] to cover watering needs that can be supplied by Amendis.

## 2. Obligations of the State under the Agreement and the Deed of Sale concerning the realisation of the Off Site Infrastructures

### a) Summary of the problem

Under Article 8 of the Agreement, the State undertook to sell or make available a portion of the Underlying Land to ABPR, according to an agreed timetable and financial terms, and subject to the execution of a certain number of obligations by ABPR.

By way of the Deed of Sale dated 19 March 2009, the Private Domain of the State was sold to ABPR, which we understand to be the plot "to be sold" (the **Plot**) by virtue of Clause 2 of the Agreement, corresponding to the first tranche of the Project.

This Plot was not connected to the public sewer, water and electricity networks, and the State refused to bear the cost of connection works for these Off Site Infrastructures.

You have agreed to bear the cost of part of the funding of these Off Site Infrastructure works, in accordance with the Financing Agreement, but have refused to pay the amounts requested for the first tranche.

### b) Legal nature of the Agreement

The Agreements contains the following provisions:

- the recitals set out the general background to the investment agreement by specifying that it is being entered into in accordance with the strategy of the Kingdom of Morocco implemented to develop the tourism sector in Morocco;
- the obligations of ABPR under the Agreement also cover (a) the employment of a predetermined number of persons and (b) recourse to local suppliers for the requirements of the Project;
- the Agreement provides the terms of the sale of the Underlying Land (price and conditions of valuation);

- in consideration for the sale of the Underlying Land, ABPR undertakes to commit a certain amount of investment for the realisation of the Project;
- the Agreement records the grant of a certain number of exemptions and benefits to ABPR with a view to the realisation of the Project; and
- the Agreement provides an arbitration clause.

Although *prima facie* the Agreement appears to contain provisions that are outside the scope of general law, we consider that the Agreement is an agreement subject to private law for the following reasons:

- the reference in the recitals to the desire of the Kingdom of developing the tourism sector in Morocco only indicates the reason for which the Government decided to enter into this agreement. Under Moroccan law, each party is a contracting party which has furnished specific consideration;
- we consider that the obligations of ABPR under the Agreement, including the obligations to employ a certain number of Moroccan nationals or to use Moroccan suppliers, despite clearly indicating the concern of the Government to act in public interest, constitute contractual obligations of a purely private nature which ABPR has agreed to perform and which are not within the scope of the prerogatives of public authority;
- the exemptions and benefits granted to ABPR under the Agreement are granted by law. The Agreement simply recognises the existence of these rights which originate from the law and not the Agreement itself, which implies that with regard to this point, the Agreement is of a *declaratory* nature and not does *create* rights;
- The main purpose of the Agreement remains the sale and valuation of a real estate asset in the Private Domain of the State (i.e. the Underlying Land).
  - *The Agreement does not therefore seem to contain clauses "exorbitantes" [Translator's note: vesting powers in one party which would be considered unfair in a private contract but acceptable in an administrative contract] of an unusual nature - which would instigate significant inequality between the parties - or of an impossible nature - as indicated by the exercise of power which would not be available to a private person -<sup>1</sup> and, consequently, we feel that the Agreement may be classified as a private law agreement subject, in particular, to the Dahir forming the Code of Obligations and Contracts.*
  - *The Deed of Sale entered into in application of the Agreement is a private law agreement by nature for the sale of real estate.*

**c) Breach of the rules of town planning and remediation resulting from land registration**

Clause 4 of the Deed of Sale provides that ABPR is responsible for applying for the registration of the Deed of Sale on the Parent Land Title 1095/G and the preparation of the technical file for the division of this title.

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<sup>1</sup>*Droit du contrat administratif* [The law of administrative contracts], Laurent Richer, No.°116

The sale of a registered building requires this land title to be in existence on the date of sale. Consequently, the aforementioned provision in the Deed of Sale does not seem lawful in view of the Dahir of 12 August 1913 on the registration of real estate.

Moreover, the lawfulness of the transaction is also doubtful in view of the terms of Law No. 25-90 relating to town planning and estates, groups of dwellings and units.

- *However, we understand that the Transferred Plot is the object of an individual Land Title and that the Deed of Sale has been registered in the name of ABPR, which would remedy such possible irregularity, since the creation of a land title by the Land Registry causes such title to become definitive and incapable of challenge, in accordance with Articles 2 and 62 of the Dahir of 12 August 1913 on the registration of buildings.*

#### **d) Breach of the obligations of the vendor**

Pursuant to Article 498 of the Dahir forming the Code of Obligations and Contracts, the vendor must deliver a compliant object.

In the case of the sale of real estate, this obligation does not *per se* imply that the asset should be connected to public services. Nonetheless, in the event of a change of purpose of the asset, the vendor must ensure that the asset is compliant with applicable standards even in the absence of a specific provision<sup>2</sup>.

In this case, the Plot was to be used for the realisation of the Project, which implies that the State, in its capacity as the vendor and in view of the Agreement, could not have been unaware of its purpose and, consequently, should have ensured its compliance with the contemplated use. Now, the absence of Off Site Infrastructure causes the Plot to be improper for such use.

The fact that you have been kept in the dark about the absence of such Off Site Infrastructure (as you have informed us in your memorandum) and that this matter was only raised at a very late time, in September or November 2009, shortly after the signature of the Deed of Sale in March 2009, only strengthens your position in this point. Had you been aware of this point prior the signature of the Deed of Sale, the signature would have been completely different since the Deed of Sale includes a clause of acceptance of the Plot as the purchaser finds it (which is assessed in view of your level of information). Similarly, the grant of authorisation to divide into plots and of the building permit for the Project prior to the sale reinforce your legitimate and erroneous belief of the situation regarding the Plot.

- *In view of the foregoing, we feel that the realisation of Off Site Infrastructure, by definition executed outside the perimeter of the Plot, was the responsibility of the State, in the absence of any express provision causing ABPR to be liable for the cost of such infrastructure<sup>3</sup>. According to our analysis, the State therefore is in breach of its obligation of compliant delivery, resulting from its capacity as the vendor under the Deed of Sale.*

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<sup>2</sup> With respect to electricity meters, required by applicable legislation, in the event of the transformation of a motel into individual units for residential use (Cour de cassation, 3<sup>rd</sup> Civil Chamber, 6-10-2004 No.°968: RJDA 1/05 No.°20 2nd case).

<sup>3</sup> The specifications of the Project include an obligation to provide highways and other network, but we consider that this relates only to on site infrastructure, since the same clause subsequently refers to the building manager and the owners' association specific to the Project.

*Financing Agreement proposals' thereafter sent by Amendis acting on the behalf of the State does not seem to demonstrate that an equitable and acceptable solution has been proposed to ABPR to rectify that breach.*

**e) Impact of the exemption clauses of the Deed of Sale**

Clause 1 of the Deed of Sale provides that the Plot is sold "with the ordinary *de jure* and *de facto* warranties."

Clause 6 of the Deed of Sale then provides that the "Purchaser is deemed to have good knowledge of the plot being sold, its content and borders. The purchaser takes it as he finds it, without reliance on any warranty, or any reduction in price for hidden defects or other reason whatsoever."

The ordinary warranties to which the aforementioned Clause 1 refers relate to the warranty of peaceful enjoyment due by the vendor to the purchaser pursuant to Article 532 of the Dahir forming the Code of Obligations and Contracts, which are mandatory public policy and from which the vendor cannot obtain exemption by virtue of Article 544 of the Dahir.

Clause 6 refers to the warranty of area and the warranty against hidden defects resulting from Articles 459 *et seq.* of the Dahir forming the Code of Obligations and Contracts, which are not mandatory public policy and which may be adapted by contract, as was done in this case.

- *However, none of the provisions seems to affect the issue of the Off Site Infrastructure which, as stated in paragraph c) above, is a matter of the compliance of the Plot with the provisions of the Deed of Sale and the Agreement, and not a matter of warranty.*

**f) The time frame problem: absence of reservation, implied acceptance and time bar**

In principle, non-conformity must be notified immediately, as soon as the purchaser becomes aware thereof.

In the sale of real estate, the absence of reservations is therefore traditionally deemed to imply acceptance, extinguishing the cause of action by the purchaser on the grounds of non-conformity<sup>4</sup>. The reason for this is that in the interests of legal certainty, the vendor must be able to determine whether or not his obligation has been executed correctly.

In the present case, it can be seen from the Documents that ABPR did not expressly notify the State that it was considered in breach of the Deed of Sale. Nevertheless, as soon as the first problems were encountered with the Off Site Infrastructure and the issue of their financing, ABPR contacted the director of the CRI of Tangiers Tétouan by way of a letter dated 24 September 2009. Discussions were then undertaken with Amendis, and ABPR refused to sign the draft Financing Agreement until December 2015, and has refused to pay the contribution requested to fund the completion of the Off Site Infrastructure up to this day.

Moreover, it is possible that due to the complexity of the Project and the financial interests at stake, the attitude of ABPR may be justified and explained by legitimate causes (the need to pursue the Project, the relationship with the State etc.).

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<sup>4</sup>Supreme Court, 3<sup>rd</sup> chamber, 10-01-1982, *bull civ.* III No.°20

- *Consequently, although at this stage it is difficult to determine definitively in view of the Documents, whether or not such acceptance without reservation could validly be relied upon against ABPR to defeat its action against the State, we feel that ABPR would have cogent arguments against the State if the State were to rely on the lack of reservation or implied acceptance in an attempt to avoid its liability concerning the delivery of the Plot.*

Lastly, it should be noted that depending on the civil or commercial nature of the Agreement, the limitation period would be fifteen years in the former case (Article 388 of the Dahir of Obligations and Contracts) and five years in the latter case (Article 5 of the Moroccan Commercial Code).

Doubt subsists and there is a low risk that the Agreement would be considered to be a commercial instrument, in which case the limitation period would be reduced to 5 years. This doubt arises from the fact that on the one hand, the Agreement is a preparatory agreement for the sale of real estate, which is civil in nature, but on the other hand, it is entered into by ABPR, a commercial party, as part of its commercial activity.

According to academic writings and civil legal tradition, it is generally considered that instruments relating to real estate must be deemed to be civil by nature<sup>5</sup>.

The procedural rules confirm this presumption by referring before the civil courts the disputes concerning the sale of real estate and, more generally, rights *in rem* to real estate<sup>6</sup>. Nonetheless, there remains slight doubt regarding real estate acquisitions by developers in the course of their business, since it is the realisation of their corporate purpose, which is commercial in nature.

- *On this question as well, ABPR has serious arguments to defeat any defence based on the commercial nature of the Agreement and the Deed of Sale concerning the expiry of the limitation period of the action.*

#### **g) Impact of the Heads of Terms**

The Heads of Terms is entered into between public persons. The nature of this instrument is uncertain, but bears similarities with a unilateral administrative action.

As the law cannot have retroactive effect, and by nature, administrative acts have lower value than the law<sup>7</sup>, we feel that it is difficult to assert that these Heads of Terms could have validly amended the terms of the Agreement by adding a financial obligation of ABPR for the purpose of funding the Off Site Infrastructure.

The minutes of the Follow-Up Committee meeting of 29 May 2009 confirms this point, as the Wali mentioned on several occasions the need to agree on "agreements" with developers (e.g. see page 3).

Incidentally, it should be noted that the minutes are particularly interesting as they confirm that the State had not in any way appreciated the needs, in terms of infrastructure, of the projects of the zone where the Project was to be developed, and had not fully appreciated the scope of these undertakings, most certainly due to negligence, at the time of the signature of the Agreement.

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<sup>5</sup> Ripert and Roblot, *Traité de Droit Commercial* [Treatise of Commercial Law], Tome 1, Volume 1, 1st edition, Nos.°136 and 354.

<sup>6</sup> See for instance law n°18-00 on joint-ownership of erected buildings

<sup>7</sup> Article 6 of the Constitution of the Kingdom of Morocco.

- *In any event, if we assume that the Heads of Terms could validly impose the funding of the Off Site Infrastructure on the developers, the obligation of the State to execute - or to ensure the execution - of the Off Site Infrastructure results in this case from the Agreement and the Deed of Sale, and not from an administrative obligation. The changes resulting from the Heads of Terms, which is solely a matter of administrative law, should not therefore affect the pre-existing liability of the State under the Agreement or the Deed of Sale, which results from an obligation of private law.*

**h) The question of acceptance and the signature of the Heads of Terms**

You agreed to sign the Financing Agreement in December 2015, which provided for the payment of a total amount of 75,910000 DH including tax.

You are currently refusing to pay the amounts requested, which amount to 32,921,419 DH including tax for the first tranche.

The analysis of the Financing Agreement is outside the scope of this Memorandum. Nonetheless, it must be taken into account in terms of the facts of the matter, in so far as it could constitute a possible waiver by ABPR to rely on the non-conformity of the plot sold by the State.

Pursuant to Article 467 of the Dahir forming the Code of Obligations and Contracts: *"Waivers of a right must be strictly interpreted and shall only ever have the scope which clearly results from the terms used by the waiving party, and may not be given a broader meaning by way of interpretation. Actions and instruments the meaning of which is unclear may not form the basis of a waiver."*

Waiver must therefore be express, and we consider that the signature alone of the Financing Agreement could not constitute a waiver.


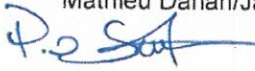
In this case, in addition to the urgency of the circumstances in which ABPR found itself and which could justify the signature of the Financing Agreement, the fact that ABPR has complied with a possible administrative obligation (the lawfulness of which should, moreover, be examined and confirmed) by signing the Financing Agreement, should not be interpreted as the waiver off the right to seek indemnity based on the civil liability of the State under the Agreement or the Deed of Sale, which are subject to private law and constitute a legal relationship which is entirely separate from the relationship binding Amendis and ABPR by virtue of the Financing Agreement.

- *We therefore consider that a waiver, which by nature must be express, cannot be deduced from the signature alone of the Financing Agreement.*

Please do not hesitate to contact us with any questions you may have on this memorandum.

Yours faithfully,

Mathieu Dahan/Janice Feigher/Salma Bedraoui Idrissi



## Schedule

### Documents reviewed

- Memorandum from client on the chronology of events communicated on 27 May 2016
- Investment agreement between the Government of Morocco and Atlantic Beach Paradise Resort of 10 May 2007
- 4 successive amendments to the Agreement
- Specifications for the construction of a holiday resort with project manager, Atlantic Beach Paradise Resort, dated 24 May 2007
- Correspondence between Amendis, Town Planning Department of Tangiers and Atlantic Beach Paradise Resort, May to November 2007
- Deed of Sale of the plot between the private domain of the State and Atlantic Beach Paradise Resort dated 19 March 2009
- Reviewed Articles of Association of Atlantic Beach Paradise Resort dated 30 May 2008
- Minutes of the meetings of Atlantic Beach Paradise Resort of 7 May 2009 and 13 July 2015
- Share Purchase Agreements of shares in Atlantic Beach Paradise Resort
- Draft agreements for the financing of off-site investments: electricity, drinking water, liquid waste disposal and wastewater recycling for the "Atlantic Beach Paradise Resort" project in the Boukhalef-Houara zone
- Signed version of the Financing Agreement, date illegible
- Correspondence between Amendis and Atlantic Beach Paradise Resort (September 2010 to April 2013)
- Heads of Terms for the funding of off-site investments in Boukhalef-Houara zone between the Delegator Authority, the Utility Companies, the Township and the Wilaya on the one hand, and Amendis on the other hand, dated 1st June 2009
- Minutes of the Follow-up Committee meeting of 29 May 2009
- Amendment to the Heads of Terms of 24 October 2011

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- Extracts from the management supervision report of Amendis, carried out by the *Cour des Comptes* [**Translator's note: the supreme audit institution**] in November 2009.
- Building permit dated 30 May 2007 (in Arabic and English translation)