Thought Leadership | Frank Okeke

CONSTRUCTIONS: LEGAL ISSUES IN 'MINDING HOW YOU BUILD'

Introduction

Construction law involves any legal issue related to the construction of a building or other structure; it is the combination of all of the areas of law that apply to construction work. Often, the state of a country's construction industry reflect its economic health. The economic strength of a country can be hinged on the development of its construction industry as it affects several spheres of living: healthcare, retail, education, transportation etc. while also contributing immensely to the Gross Domestic Product (GDP).

f.okeke@lelawlegal.com

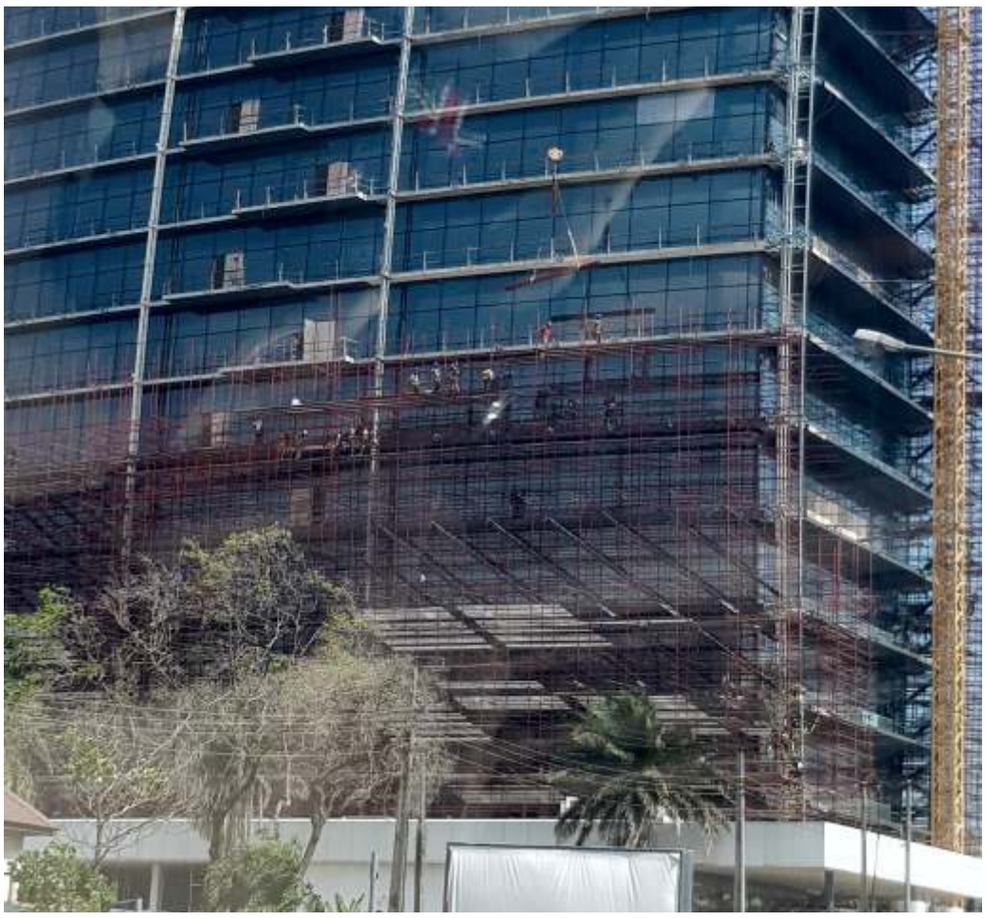
Infrastructure development has been used as a tool to bring economies out of recession, a famous example is the Great Depression in the United States of America in the 1930s (1929 – 1939), and the Marshall Plan for European countries after the 2nd World War. More recently, President Obama exemplified the same approach to lead America out of the recession he inherited when he assumed office.[1] Nigeria's massive reconstruction efforts after the Civil War, and current Federal administration's significant capital budget allocations also comes to mind. Nigeria's current significant public infrastructure gaps in transport, health, education and including over 18 million housing deficit represents major opportunities and potential for the construction industry value chain. This article discusses salient issues that participants should be mindful of because such implicate various shades of liability and results, depending on the circumstances.

A construction contract (the Contract) spells out the terms upon which parties bind themselves before, during and after a project for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology, and function for their ultimate purpose or use.

It is often a common trend for parties to commence work on a construction project without a valid Contract. Most times, the employer and the contractor had entered into a Memorandum of Understanding (MOU) and on the strength of that, have begun to build. The problem with this is that an MOU is not binding on the parties. This was the decision of the Supreme Court (SC) in ***BPS Construction & Engineering Company Limited v. FCDA***[2] where it held that an MOU or a Letter of Intent (LOI) does not bind the parties as does a contract, since both documents are usually precursor to parties entering definitive agreements. While entering into MOUs or LOIs are encouraged, it should not preclude the parties (or either party) from insisting on definitive Contracts. The failure to do this would leave an aggrieved party at the mercy of the courts in the event of a dispute.

To ensure project efficiency, certain provisions must be accommodated in the Contract to define the positions of the parties. This will not only enable the work to be completed within the stipulated period, it will also prevent and manage disputes. Some of the provisions are discussed below.

[1] *Ed Henry 'Obama Pushes $50 Billion in Infrastructure Spending', CNN Wire* September 7, 2010: -http://edition.cnn.com/2010/POLITICS/09/06/obama.economy/index.html <Last visited on 25/7/2018>
[2] ***(2017) LPELR-42516 (SC)***



Contract Terms

Scope of Construction Work

It is surprising the number of Contracts which fail to exhaustively establish the scope of work for which the contractor is hired. The rule of thumb is that nothing must be left to chance or the discretion of the contractor. For instance, a Contract could contain a clause that *"the employer hereby appoints the contractor to construct a 13 storey building"* without identifying the appurtenances that would be included such as size and number of bedrooms, other spaces/rooms etc. More often than not, these information should be included in the Design Plan and same would be attached as an appendix to the Contract. It is therefore important for the Design Plan (showing details of the work), the Letter of Award and Bill of Quantities from the contractor to be incorporated into the Contract.

Defects Liability Period and Payment of Retention Sum

It is common industry practice for the employer and contractor to agree that the employer retains 5% (or such percentage as may be agreed by parties) of the contract sum (the Retention Fee) until after the Defect Liability Period (DLP). The DLP is a period (typically between 6 and 12 months) after completion and handover of the project to the employer. The purpose of the Retention Fee is to ensure that the employer is pleased with the work and give room for remedies by the contractor if necessary. It further incentivises the contractor too as he would not want to leave the Retention Fee (being part of the contract sum), on the table.

Provisions would have to be made for both latent and patent defects. Latent defects are faults and defects caused by failures in design, workmanship or materials that may not become apparent or readily detectable (even with the exercise of reasonable care) until many years after completion of a building project, long after the end of the DLP. This is as opposed to patent defects which are apparent and capable of being promptly assessed, inspected and if necessary; rectified.

Authority of the Contractor

The contractor often plays a significant role in the execution of a construction project. Thus, proper recognition and allocation of the rights and responsibilities of the contractor *vis-à-vis* the employer is essential to an understanding of the legal relationships that govern a project. Contractual privity is said to exist between parties to a contract. Contractual privity allows the employer to sue the contractor directly for damages attributable to a breach of contract. More often than not, contractual privity is absent between the contractor and a design professional. Therefore, a contractor lacks the *'locus standi'* to bring a suit for breach of contract against a design professional engaged directly by the employer: ***B. B. Apugo & Sons Limited v. Orthopaedic Hospital Management Board.***[3] A contractor seeking to recover directly against a design professional must resort to actions in tort such as negligence.

During the design development phase, the contractor generally acts as an independent contractor to the employer. Thus, the contractor may not be deemed to be an agent of the employer, and, in such cases, he may not have the power to bind the employer with regard to third parties. Moreover, parties may, by their conduct during the course of a project, depart from the written terms of their contract, with the result being a modification of the parties' respective authority or responsibilities. The authority of the contractor can be divided into:

Actual Authority: Actual Authority refers to that authority which the employer expressly confers upon its agent and which the agent accepts. The contractor's actual authority is usually outlined in the Contract and is limited to specific functions. For example, on a typical construction project (and in the absence of contract terms to the contrary) the design professional does not have the authority to make or modify contracts on behalf of the principal/employer, or to materially change the scope of the work, the contract price or time: ***Crown Construction Company v. Opelika Manufacturing Corporation.***[4]

Also, Contracts involving the FG, more often than not, contain *"termination for convenience"* clause. This clause grants the employer the unilateral right to terminate a Contract before completion without regard to the contractor's performance. For

[3] *(2016) LPELR-40598(SC)*
[4] *80 F.2d 149, 151*

instance, in January 2018, the FG revealed its intention to terminate the contract for the remodelling of the domestic wing of the Port Harcourt International Airport in Rivers State. Even though this was in part due to perceived incompetence of the contractor,[5] the presence of the *"termination for convenience"* clause would grant the FG the right to perform same as they have done on several other occasions.

Implied Authority-Implied authority gives the contractor the means to act in ways that are incidental to his exercise of authority. In other words, implied authority allows the contractor to do those things that are considered reasonable and necessary for the exercise of his actual authority irrespective of whether they were set forth in the contract. In ***Incar Nigeria Plc v. Bolex Enterprises Nigeria Limited***,[6] the Court held that: *"Every agent who is authorised to do any act in the course of his trade or profession or business as an agent had implied authority to do whatever is usually incidental in the ordinary course of such trade or profession or business to the execution of his express authority."*

Flow-Down Obligations

The purpose of the flow-down clause is to bind the subcontractor (if any) to the terms and conditions of the Contract (between the contractor and the employer). An example of a flow-down clause is: *"Contractor shall include in its Subcontracts provisions which impose obligations on Subcontractors that are consistent with the obligations imposed on Contractor in the provisions of this Agreement listed in Appendix __ as those terms are applicable to the Work being performed by the Subcontractor."*

They also ensure that subcontracts do not relieve the contractor from liability. This incentivises the contractor to ensure that subcontracted works are qualitative. The absence of a flow-down clause can leave the contractor exposed to liability but unable to seek appropriate relief or indemnity from the subcontractor. The rights and duties flow both ways-upward to the prime contractor, as well as downward to the subcontractors at each level. This tends to keep the parties on an even basis/ensures alignment, even though there is no privity of contract between the employer and the subcontractor.

Delays

Disputes involving delayed progress are widespread in the construction industry. The reason for this is not far-fetched: some construction projects are embarked upon in view of a certain event. For instance, construction or refurbishment of a stadium in view of FIFA's World Cup or another major sporting competition like the All Africa Games. Delays in such instance can prove costly. In ***Adecentro Nigeria Limited v. Council of Obafemi Awolowo University***,[7] the SC held that inordinate delay occasioned by late mobilization, indolence, lack of seriousness, persistent shoddy work can be tantamount to abandonment of work of which the employer is able to terminate the contract.

Some delays are the result of occurrences beyond the control of either the contractor or the employer. This is the necessity of the *force majeure* clause: to govern the relationship when a delay is caused by external factors occur such as war/insurrection, strikes, natural disasters etc. For instance, in the United Kingdom, Chelsea Football Club recently announced the suspension of works for the construction of its new stadium in London citing unfavourable economic environment.

Most Contracts provide that *'time is of the essence'*. This clause makes time a material requirement of the contractor's performance obligation and ensures that the employer can recover delay damages for missed milestone or completion dates. The first factors to be analysed in assessing a delay claim are the contract commencement and completion dates. Contracts usually specify performance periods either by setting forth commencement and completion dates or by establishing that the work shall be completed within a specified number of days after the notice to proceed or commencement of work. For instance, the construction of the Dubai Metro in the United Arab Emirates commenced in May 2005. Its planned completion date was in September 2009; however, due to several delays, it was only completed in March 2014 (five years later) with 85% cost overrun.

Contracts can also include *interim milestone dates*, specifying the dates upon which certain portions of the work are to be completed. It is important that the contractor is incentivised to meet interim dates, to ensure meeting the overall completion date. Where a Contract specifies the date for the commencement of work, the employer may be deemed to have warranted the readiness of the work site as of the specified date. If the work site is not in a sufficient state of readiness to permit the contractor to begin work on that date, the employer may be liable for delay damages. In an attempt to avoid liability for such delays, employers often include a clause in the contract that the specified commencement date is only a projection or an estimate.

Substantial Completion

Most contract documents have a *substantial completion clause* which identifies a scenario in which the works would be deemed

[5] Wole Oyebade, 'Nigeria: Government Set to Cancel Remodelling Contract of Port Harcourt Domestic Airport' The Guardian, 26 January, 2018 https://allafrica.com/stories/201801260676.html <Last visited on 24/7/2018>

[6] [1996] 6 NWLR (Pt. 454) 318 at 357

[7] S.C. 33/2000

sufficiently complete for its intended use. Generally, an employer may not assess, and a contractor is not liable for, delay or liquidated damages after substantial completion.

Dispute Resolution

Conflicts and disputes are almost inevitable in a construction project. In order to complete the work within the stipulated period, the parties must determine how their disputes will be resolved. The parties may resolve their disputes by meetings between their representatives or by negotiations between them within a stated period. If the parties include a valid arbitration clause in the Contract, they will avoid the hassles associated with litigation when negotiation fails. Arbitration affords the parties the opportunity to quickly resolve their disputes and concentrate on executing their obligations under the Contract. Furthermore, arbitration is not subject to the technicalities of litigation and is also less adversarial.

Arbitration is not new to the construction industry. In 2016, Afriland Properties Plc and the Lagos State Government were referred to the Lagos State Multi-Door Court House for possible settlement regarding the construction of the Falomo Shopping Complex. Also, in ***Imani & Sons Limited v. BIL Construction Company Limited***[8] the Court held that in addition to the motion on notice filed by the party seeking enforcement of the arbitral award, the party also needs to provide: the Arbitration Agreement; the Original Award; the name and last place of business of the person against whom it is intended to be enforced; Statement that the award has not been complied with, or complied with only in part.

Kano State Urban Development Board v. Fanz Construction Coy Limited,[9] the SC established that a party to a contract with arbitration clause who approaches the court instead of submitting the dispute to arbitration is likely to be successfully challenged and the court to grant an order staying proceedings pending arbitration provided the other party has not taken any steps (e.g. filing a defence) before challenging the suit. It further held that the High Court also has the discretionary power under ***Section 5 Arbitration and Conciliation Act***[10] to stay such proceedings brought in breach of an arbitration agreement provided the other party after entry of appearance but before delivery of any pleadings or taking any other steps in the proceedings applies to the court to stay the proceedings. Thus, the power to stay proceedings is merely discretionary and not mandatory.

Although arbitration is generally perceived as a way to avoid the delays and problems associated with litigation, time has demonstrated the draw-backs as well as advantages of relying on arbitration as a means of resolving construction claims.

While arbitration is typically faster than litigation, it could in certain instances be just as long. A dispute over the existence, scope, or validity of an arbitration clause agreement itself can engender a protracted court proceeding and appeal before there is a determination of whether and to what extent the parties should proceed with arbitration. To curb this, parties could have a clause in the Contract recognising the arbitral award as final. This is to ensure that the losing party is unable to bring frivolous applications challenging the decision. The SC in ***Ras Palgazi Construction Company Ltd vs. Federal Capital Development Authority***[11] held that an arbitral award operates as a final and conclusive judgment upon all matters referred.

Furthermore, the selection of arbitrators could also be a significant issue. Appointing arbitrators with ample experience in the construction industry would add to a just resolution of the dispute. This is a positive over litigation as judges, despite their wealth of knowledge, may not be specialists in construction.

Arbitration could also be more expensive as the experience or skill of the arbitrator appointed is directly proportional to the fees to be paid. Also, an increase in the number of arbitrators would lead to an increase in the fees-exemplified by a three person panel as opposed to a sole arbitrator.

Conclusion

The parties must ensure that the above provisions are not only included in their Contract, the provisions must be drafted in such a way that their respective interests are adequately protected. If it is envisaged that the scope of work would be varied in future, provisions should be included on how to manage the variations rather than leaving it at the discretion of a party, which is a certain recipe for disputes.

The initial choice of project participants can dictate the outcome of the project and is one of the first steps in avoiding claims. Many disputes can be avoided by investigating the record of the other parties. Construction claims often require the assistance of experts to help solve problems and to assemble and analyse the facts. Part of a program of prompt and cost-effective claim preparation requires involving lawyers experienced with construction claims and other technical experts at an early stage.

Construction is an inalienable part of human development and its impact on the overall economy cannot be overstated. However, it is not helpful where easily avoidable disputes hinder the progress of a project. A hospital projected to be completed in one year could be extended to three years due to various disputes, court applications, injunctions etc. hindering the completion thereby delaying its utilisation to provide healthcare to the populace. The capital that could be deployed in another project is then used to fight fires that could be addressed on the strength of a strong contract.

The negative impact of not properly minding how one builds can be illustrated in several other ways: delayed road projects, malls, etc. All these highlight the need for parties to be alert during the contracting process, take appropriate advice and do their level best towards achieving desirable and efficient outcomes.

[8] *[1999] 12 NWLR (Pt. 630) 253*
[9] *[1986] 5 NWLR (Pt. 39)74*
[10] *Cap.A19, Laws of the Federation of Nigeria 2004*
[11] *[2001] 10 NWLR (Pt. 722) 559*