



Construction

in 31 jurisdictions worldwide

2015

Contributing editor: Robert S Peckar



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Getting the Deal Through is delighted to publish the fully revised and updated eighth edition of *Construction*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 31 jurisdictions featured. New jurisdictions this year include Indonesia, Italy, Norway and South Africa.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. **Getting the Deal Through** publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.

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Nigeria

George Etomi, Efeomo Olotu and Adunola Akindele

George Etomi & Partners

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before taking such a step?

Before a foreign contractor sets up an operation to pursue the local market, the law requires that such foreign company intending to do business in Nigeria must take the steps necessary to obtain incorporation as a separate legal entity in Nigeria for its intended purpose (section 54, Companies and Allied Matters Act, LFN, 2004).

The foreign contractor will also need to give due consideration to the necessary licences, leases, permits and approvals that have to be obtained (section 19(2) Nigeria Investment Promotion Commission Act, LFN, 2004). Such licences, permits and approvals include, but are not limited to:

- business permit;
- expatriate quota;
- residence permit;
- registration of security;
- fiscal approval; and
- technology transfer.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

Foreign designers and contractors must be registered locally and the consequence of non-registration is that they will be considered to be operating illegally in the country.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

No. In fact, depending on the sophistication of the contract, the local contractor tends to be disadvantaged.

4 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

A contract is not necessarily vitiated because of bribery allegations. However, where bribery is proven to have materially distorted a contract, the remedy of rescission of the contract is open to the offended party. An example of such material distortion is if the price of the contract becomes unreasonably high as a result of the inclusion of bribery in the cost. In that circumstance, such a contract is not enforceable.

Bribe-givers and bribe-takers will be prosecuted under the law and the penalties they are likely to face include imprisonment or a fine, or both. Facilitation payments are not allowable under local law (Corrupt Practices and Other Related Offences Act 2004).

5 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

The making of political contributions is not viewed as part of doing business. Organisations prohibit such contributions or donations. No such laws exist.

6 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

There are no other issues apart from those provided in question 1.

7 Construction contracts

What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

The language of the contract need not be the local language, insofar as it is agreed by the parties.

Generally, there are no restrictions on choice of law and venue for dispute resolution. The courts usually respect the choice of law and venue agreed to by the parties in their contract, except in instances where the chosen state has no substantial relationship to the parties or to the transaction or where the application of the law of the chosen state would be contrary to the fundamental policy of the state.

The choice of law jurisdiction need not be the same as the venue or choice of forum. The parties can even choose different jurisdictions depending on the type of dispute. In general, courts will respect the parties' selection.

In Nigeria, the most common standard-contract forms used for construction and design are:

- Joint Contract Tribunal (JCT);
- FIDIC contract rules (International Federation of Consulting Engineers); and
- Federal Ministry of Works Contract (variant of the JCT).

8 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

There is no standard method for payment of contractors, subcontractors, vendors and workers. However, in line with the Central Bank of Nigeria's cashless policy, which imposes a cash handling charge on daily cash withdrawals or cash deposits that exceed 500,000 naira for individuals and 3 three million naira for corporate bodies, most payments are now made by electronic transfer or cheque deposit.

Section 9(4) of the Labour Act 2004 provides that 'no contract shall provide for the payment of wages at intervals exceeding one month unless the written consent of the State Authority has been previously obtained'. Under this law, the standard frequency for payment of wages in Nigeria is one month.

9 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Again, this provision is governed by the contract itself. There are instances where the employer chooses to deal with only one contractor, and subcontractor issues are dealt with by the chosen contractor. In this instance, there is no privity of contract between the employer and the subcontractor.

There are also instances where the employer deals directly with contractors and nominated subcontractors, in which case privity of contract exists between all parties.

The contractual incidents that attend to the parties in the various scenarios also differ.

10 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Yes. Recently, the federal government enacted a law in the area of private sector participation in the development and maintenance of public infrastructure. The current law comprises the Infrastructure Concession Regulatory Commission (ICRC) Act 2005, the Public Procurement Act 2007 and regulations issued by the ICRC governing the PPP process. Please note that there are equivalent state laws as described in each state's PPP policy.

11 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Under a typical contractual joint venture structure, all members of the consortia are jointly and severally liable in the ratio of their participating interests. Each member is therefore liable for all acts within the ostensible authority of the other members. However, members of the consortia may agree among themselves to share liability in specified proportions. This, however, does not bind third parties.

12 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

Again, there are no specific laws dealing with this, though it could be done under the general law of contract and tort.

Negligence will always defeat any contractual protection against acts, errors and omissions.

13 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

As long as a contractor is not a party to the lease or sale, the contractor will be protected by the principles of privity of contract.

However, in Nigeria there are instances where the contractor is also the developer of the property and could therefore become liable to third-party claims in that capacity.

14 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

Common business standards require contractors to take out construction liability insurance before the project's commencement. Liability insurance protects contractors against injuries, accidents or property damage suffered on the job.

Liability insurance is designed to offer specific protection against third-party insurance claims under the ambit of public liability.

In general, damages caused intentionally and contractual liability are not covered under liability insurance policies.

Contractor all-risk insurance is a property insurance, and includes third-party liability cover against legal liability for damages as a consequence of the performance of the contract, including death, bodily injury to persons and damages to third-party property.

A company owning an industrial facility may buy pollution insurance to cover lawsuits resulting from environmental accidents.

The local law makes no provision for limits on contractors' liability for damages.

15 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

Generally speaking, there are local content laws in various legislation and policy manuals that affect the construction industry in the area of employment of local labour.

Consequently, the proportion of local labour required is commensurate to the skill level involved.

In manual or various other unskilled-type labour, that percentage is almost 100 per cent, but as the skill level increases, and the requisite labour is not available locally, the employment of foreign labour may be allowed.

16 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

If a contractor decides to hire local labour directly, it becomes subject to the local labour law on issues dealing with termination and redundancy.

However, the terms can be negotiated from the outset and the relevant labour union so informed.

17 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

The law does not discriminate against a foreign or local contractor at the close of a contract. The usual practice is for the closing obligations to be negotiated before a contract is signed and any termination payments made before closing up.

18 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

A contractor's ability to secure its payment is largely dependent on the nature of the contract.

If the contractor secures funding for the contract at the owner's risk, then the contractor can be in a position to secure the payment.

In other instances, the contractor could place a lien on the property, but may require a court order to do so if not expressly provided for in the contract.

19 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

No. Once a government agency engages a contractor, that government agency becomes bound by the particular contract it has signed or by the general law of contract.

20 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Again, there are no specific laws and the contractor's right to compensation for unpaid work is dependent on the provisions of the particular contract; the contractor can also pursue the usual debt claim under our general rules of contract.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Yes. Force majeure laws are generally enforceable in Nigeria.

Frequently, in the volatile Niger Delta region, many contractors have declared force majeure as a result of militant activities affecting their ability to perform their contractual obligations.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

There are no such specialised tribunals peculiar to the industry in resolving construction disputes that arise.

23 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

No.

24 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Yes, increasingly, even if only because of the frustration of lengthy trials in our legal system, the practice of voluntary participation in professionally organised mediation is gaining acceptance. In recognition of the need to have a set of guidelines to govern mediation, the Lagos Court of Arbitration (LCA) published mediation guidelines (LCA Mediation Guidelines 2011) to assist in the effective resolution of disputes by mediation.

25 Confidentiality in mediation

Are statements made in mediation confidential?

Yes, statements made in mediation are confidential. The entire process is done without prejudice.

26 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Arbitration of construction disputes is preferred over litigation in our local courts. Increasingly, arbitration has become the preferred method for resolving construction disputes in Nigeria.

27 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Generally in Nigeria, on the question of the applicable law, where the contract is to be performed in Nigeria, the preference is that Nigerian law should be applicable. The place of the hearing, however, could be in a foreign jurisdiction.

Both the ICC and UNCITRAL rules tend to be popular in Nigeria because of their widespread international applicability.

28 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Government agencies may participate in private arbitration depending on the agreement of the parties as stated in the terms of the contract. These agencies are bound by the arbitrators' award.

29 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The local courts can reject an arbitral award issued by a foreign or international tribunal if there is proof that no service was effected on the Nigerian party (ie, where a Nigerian party was not aware that such an action was going on, often as a result of non-service of processes) and that, as a result, such party did not have the opportunity to defend itself. Under our inherent rules on fair hearing, an award so given may be rejected by our courts.

Another instance where an arbitral award could be rejected is where the award is deemed repugnant to good conscience and public policy; for example, where the subject matter arises from gambling transactions.

Otherwise, the general rule is that once a party submits to jurisdiction, be it the ICC or UNCITRAL or any other tribunal, that party is bound by the award given.

Update and trends

The construction industry is a non-regulated industry. The National Building Code (NBC), a document that has existed since 2006 and which is expected to provide a legal framework and regulate the conduct and operations of professionals and stakeholders in the industry, is yet to be passed into law. At the time of writing, this issue is still developing.

However, despite the hiccups in enacting the enabling law, the Nigerian construction industry has been rated as the fastest-growing industry by Global Construction Perspectives and Oxford Economics in the latest 10-year forecast. Currently, the construction industry accounts for 3.2 per cent of Nigeria's GDP. There are a number of emerging trends and hot topics in the Nigerian construction market. Some of these include:

- the conclusion of a financial agreement between Dangote Group and 12 banks for a US\$3.3 billion loan to build a greenfield refinery and petrochemicals complex in Olokola, in the south of Nigeria;
- the federal government of Nigeria recently launched the Nigeria Mortgage Refinance Company (NMRC), aimed at revamping the Nigerian housing market by raising capital through the bond markets;
- the substantial upgrade of the country's airports. Renovations have commenced in some of Nigeria's airports;
- in the transportation sector, a new port facility is seeking financing and development in Lagos. The new facility is set to be located in Badagry, Lagos State; and

- the Lagos-Ibadan Expressway is one of the major road projects under development in the country. The project, which is now expected to be completed in 24 months, rather than the planned 48 months, is set to raise 117 billion naira from the Infrastructure Bank Plc for the reconstruction of the 127km road. The government has made provisions to provide the remaining 50 billion naira to cover the project's total cost for 2014 and 2015.

The federal government of Nigeria has approved a new cement standard for building in the country. Now, all cement manufactured locally or imported must meet the approved standards. The new standard for cement will be strictly enforced following a short grace period to enable all manufacturers in the country to come to terms with the development. The new standard states that the highest grade, CEM I 52.5R and 52.5N, which can be simply referred to as the 52.5 cement grade, will now be used for the construction of bridges. The second-highest grade, CEM II 42.5R, 42.5N or simply the 42.5 grade, will be used for the casting of columns, beams and slabs and for block moulding. The last cement grade, referred to as CEM I and II 32.5R, 32.5N or the 32.5 cement grade, will henceforth only be used for plastering buildings.

30 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

Because construction falls under the law of contract, the statutory limitation that applies for the commencement of a lawsuit is six years. Where a government parastatal or statutory body is being sued, a pre-action notice will be served as required by some government parastatals. Other preconditions will be dependent on the parties involved in the suit.

31 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Yes, Nigeria is a signatory to the Stockholm Declaration. It has not been transposed into domestic law, but the following local laws provide for preservation of the environment and wildlife:

- the Establishment Act 2007 (which empowers Nigeria to enforce any foreign conventions to which it is a party);
- the Environmental Impact Assessment (EIA) Act 2004;
- the Harmful Waste (Special Criminal Provisions, etc) Act 2004; and
- the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act.

Any person advancing infrastructure and building projects will be required to comply with these laws.



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32 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Local laws impose various duties on contractors regarding environmental hazards or violation of environmental laws and, when breached, sanctions are imposed on the contractors. Some of the provisions of the local laws include:

- the Environmental Impact Assessment Act 2004 imposes a duty on the public or private sector (including contractors and developers) not to undertake, embark on or authorise projects or activities without prior consideration of their environmental effects at an early stage. Where the project is likely to significantly affect the environment, an environmental impact assessment must be undertaken in accordance with the Act. Failure to comply with the provisions of the Act can incur a fine or imprisonment for an individual, firm or corporation;
- the Harmful Waste (Special Criminal Provisions, etc) Act 2004 prohibits and declares unlawful all activities relating to the purchase, sale, importation, transit, transportation, deposit and storage of harmful waste. Any person found liable for these will be given a penalty of life imprisonment, and any carrier or object used in the transportation or importation of harmful waste or any land on which harmful waste was deposited or dumped shall be forfeited to and vested in the federal government without any further assurance other than the Act; and
- the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 imposes a duty on the agency to issue regulations setting specifications and standards to protect and enhance the quality of Nigeria's air resources, so as to promote public health and welfare and the natural development and productive capacity of the nation's human, animal, marine and plant life. The Act provides that any person who violates the regulations shall be liable to a fine or imprisonment or both.

33 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

There is no specific international agreement we know of to which Nigeria is a signatory. However, it is the Nigerian government's policy to protect foreign investments that come into the country, and this is accomplished through legislation such as the Nigeria Investment Promotion Commission (NIPC) Act 2004, which is geared towards the protection of foreign investors.

34 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Nigeria has a reciprocal treatment of tax issues with various jurisdictions and bilateral agreements on taxation to prevent double taxation.

35 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

Nigeria operates a liberalised foreign exchange regime so that investors can easily repatriate funds.

36 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

No.

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