



Construction

in 35 jurisdictions worldwide

Contributing editor: Robert S Peckar

2012



Published by
Getting the Deal Through
in association with:

- AB & David Law
- Achour & Hájek sro
- Akinci Law Office
- Alem & Associates
- ALTIUS
- Arzinger
- Beiten Burkhardt Moscow
- Bin Shabib & Associates (BSA) LLP
- Borden Ladner Gervais LLP
- Buse Heberer Fromm Rechtsanwälte Steuerberater PartG
- Comad, SC
- Conway & Partners NV
- Drakopoulos Law Firm
- Fenwick Elliott LLP
- Foyen Advokatfirma KB
- George Etomi & Partners
- Iason Skouzos and Partners Law Firm
- Kleyr Grasso Associes
- Kvale Advokatfirma DA
- Lalive
- Lalive in Qatar LLC
- Larraín, Rencoret, Lackington & Urzúa Abogados
- Maddocks
- Magnusson
- Mäkitalo Rantanen & Co Ltd
- Motieka & Audzevicius
- Nemetschke Huber Koloseus Attorneys at Law
- Oh-Ebashi LPC & Partners
- Peckar & Abramson, PC
- Pinheiro Neto Advogados
- Seth Dua & Associates
- Smith Violet
- V&T Law Firm
- Webb Henderson
- WongPartnership LLP



Construction 2012

Contributing editor:
Robert S Peckar
Peckar & Abramson PC

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants
William Bentley
Sarah Savage

Subscriptions manager
Nadine Radcliffe
Subscriptions@
gettingthedealthrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Production editor
Anne Borthwick

Chief subeditor
Jonathan Allen

Subeditor
Davet Hyland

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Construction 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd
2011

No photocopying: copyright
licences do not apply.

ISSN 1755-6953

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2011, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

Introduction Robert S Peckar <i>Peckar & Abramson, PC</i>	3
Albania Alban Ruli and Ekflodia Leskaj <i>Drakopoulos Law Firm</i>	5
Australia Greg Campbell and Paul Woods <i>Maddocks</i>	10
Austria Konrad Koloseus <i>Nemetschke Huber Koloseus Attorneys at Law</i>	18
Belgium Lieven Peeters and William Timmermans <i>ALTIUS</i>	23
Brazil Júlio César Bueno <i>Pinheiro Neto Advogados</i>	30
Canada Bruce Reynolds, Sharon Vogel and Yvan Houle <i>Borden Ladner Gervais LLP</i>	43
Chile José Manuel Larraín <i>Larraín, Rencoret, Lackington & Urzúa Abogados</i>	51
China Wang Jihong, Gao Lichun, Qiu Jian, Zhang Xiaofeng, Shi Jie and Xie Yi <i>V&T Law Firm</i>	58
Czech Republic Gabriel Achour <i>Achour & Hájek sro</i>	64
Finland Aimo Halonen <i>Mäkitalo Rantanen & Co Ltd</i>	70
France Isabelle Smith Monnerville and Julien Maire du Poset <i>Smith Violet</i>	75
Germany Alexander Herbert and Markus Eckardt <i>Buse Heberer Fromm Rechtsanwälte Steuerberater PartG</i>	83
Ghana David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi <i>AB & David Law</i>	88
Greece Theodoros Skouzos <i>Iason Skouzos and Partners Law Firm</i>	92
India Sunil Seth and Vasanth Rajasekaran <i>Seth Dua & Associates</i>	98
Japan Teppei Mogi <i>Oh-Ebashi LPC & Partners</i>	105
Lebanon Karim Khalaf and Rana Kahwagi <i>Alem & Associates</i>	112
Lithuania Jovitas Elzbergas, Donatas Lapinskas and Valentas Mitrauskas <i>Motieka & Audzevicius</i>	118
Luxembourg François Collot and Anne Mertens <i>Kleyr Grasso Associes</i>	124
Mexico Roberto Hernández Garcia <i>Comad, SC</i>	131
Netherlands Thabiso van den Bosch <i>Conway & Partners NV</i>	136
New Zealand Garth Sinclair and Craig Wheatley <i>Webb Henderson</i>	141
Nigeria George Etomi, Efeomo Olotu and Ivie Omorhirhi <i>George Etomi & Partners</i>	148
Norway Amund Bjøranger Tørum and Richard Alme <i>Kvale Advokatfirma DA</i>	152
Poland Andrzej Tokaj and Przemysław Kastyak <i>Magnusson</i>	157
Qatar Marcus Boeglin, Michael E Schneider, Fadi Sabsabi and Ramy Saleh <i>Lalive in Qatar LLC</i>	163
Russia Kamil Karibov and Olga Chaykovskaya <i>Beiten Burkhardt Moscow</i>	168
Singapore Christopher Chuah and Tay Peng Cheng <i>WongPartnership LLP</i>	175
Sweden Eva Westberg Persson and Andreas Magnusson <i>Foyen Advokatfirma KB</i>	181
Switzerland Michael E Schneider, Matthias Scherer, Sam Moss and Nathalie Subilia-Bigler <i>Lalive</i>	187
Turkey Ziya Akinci and Cemile Demir Gokyayla <i>Akinci Law Office</i>	193
Ukraine Timur Bondaryev and Svitlana Teush <i>Arzinger</i>	199
United Arab Emirates Antonios Dimitracopoulos <i>Bin Shabib & Associates (BSA) LLP</i>	206
United Kingdom Stacy Sinclair <i>Fenwick Elliott LLP</i>	214
United States Robert S Peckar and Michael S Zicherman <i>Peckar & Abramson, PC</i>	222

Nigeria

George Etomi, Efeomo Olotu and Ivie Omorhirhi

George Etomi & Partners

1 Joint ventures

Must foreign designers or contractors enter into a joint venture with a local contractor to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

Foreign investors are not obliged to enter into a joint venture with a local contractor to design, build and be paid for their work, but in practice they do.

The law does not require control by the local contractor. A foreign contractor can also control the joint venture but it is always advisable for foreign and local partners to collaborate.

2 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 they took 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 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, etc.

3 Licensing procedures

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

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

4 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.

5 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.

6 Health and safety regulation

Are there any specific health and safety rules regulating the construction industry?

There are no specific health and safety rules regulating the construction industry in Nigeria. However, depending on where a particular contractor is working, the contractor may be subject to the health and safety rules of that particular industry.

It is commonplace to find that a contractor working in the oil and gas industry will be subject to the health and safety rules of the company in question.

If the contractor works for the government, the contractor will be subject to the health and safety provisions of our various labour laws, etc.

7 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?

Our laws do 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 prior to closing up.

8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

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).

Update and trends

In recent times, in most states in Nigeria, infrastructural projects like road reconstruction, housing projects, bridge building, construction of drainage, dams, rural electrification, land reclamation projects, city expansion and beautification projects (among others) have been on the increase, especially in the Lagos, Rivers and Akwa Ibom states where massive amounts of money have been voted for capital projects. The increasing number of infrastructure projects has resulted in more partnerships between the public and the private sector.

State governments are coming to terms with the importance of sticking to master plans and town planning laws. More importantly, federal and state governments are looking for alternative sources of revenue (ie, non-oil based sources) such as taxation, which depends largely on available infrastructure. The Nigerian economy can be viewed as a green field project, as Nigeria possesses large expanses of undeveloped land requiring road construction to link many parts of

the country with other parts. What will therefore be witnessed in the coming years is that many large-scale construction projects will be embarked upon.

Most state governments have realised that foreign investment is only possible when an enabling environment, such as one with sufficient infrastructure, exists.

Based on the above phenomenon, most of the transactions will be done via PPP; therefore, we see an opportunity in the future for specialised dispute resolution mechanisms beyond the normal dispute resolution mechanisms; for example, adjudication (whereby the parties can appoint an adjudicator to resolve a dispute of an interim nature while there is no downtime in construction work), which, as a dispute resolution mechanism, is a concept that is alien at this point to Nigerian construction law.

9 Price escalations

In typical construction contracts, who assumes the risk of material price escalation and shortages?

In typical construction contracts, it is usually the employer that assumes the risk of material price escalation and shortages, and this is especially so if the escalation and shortage is a direct act of the government.

10 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.

11 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 is the Infrastructure Concession Regulatory Commission (Establishment, etc) Act 2005.

Other statutory and regulatory frameworks for PPP and PFI contracts are being worked on at the time of writing.

12 Payment of fees

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.

13 Tort claims and indemnity

Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even when the general contractor 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.

14 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.

15 Insurance

To what extent may a contractor obtain insurance to cover its contractual risks?

The concept of contractors' all risks insurance is very prevalent in Nigeria and this will always remain enforceable except in force majeure circumstances.

16 Insolvency and bankruptcy

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.

17 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.

18 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

A contract is not necessarily vitiated for reasons of a bribery allegation. 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.

19 Political contributions

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?

No such laws exist.

20 Arbitration

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.

21 Foreign corruption

Does local legislation prohibit corrupt practices carried out abroad by persons domiciled in your jurisdiction?

There is no specific legislation similar to, for example, the United States Foreign Corrupt Practices Act in Nigeria prohibiting corrupt practices carried out abroad by persons domiciled in Nigeria. However, there are provisions in the Economic and Financial Crimes Commission Act and the Money Laundering Act in Nigeria, which could have serious consequences for persons domiciled in Nigeria but conducting business abroad. Nigeria belongs to the Financial Task Force under which the worldwide financial units share financial intelligence with regards to money movement. Any information so obtained from Nigeria about persons domiciled in Nigeria doing business abroad could be used against them.

22 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.

23 Dispute resolution mechanisms

What dispute resolution procedures are successfully used to solve construction disputes?

The following are the various dispute resolution procedures that are successfully used to resolve construction disputes in Nigeria: mediation and conciliation; arbitration; and litigation.

24 Courts and tribunals

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

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

25 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.

26 Dispute review boards

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

No.

27 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?

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, and even though there is no specific data to verify this notion, we can confirm that this practice is gaining widespread recognition.

28 Confidentiality in mediation

Are statements made in mediation confidential?

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

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.

30 Governing law and arbitration provider

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.

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 us to enforce any foreign conventions to which Nigeria is a party);
- the Environmental Impact Assessment (EIA) Act, LFN 2004;
- the Harmful Waste (Special Criminal Provisions, etc) Act, LFN 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.

32 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 2.

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 that Nigeria is signatory to. 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, LFN 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 on 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 currently 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.

37 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.

George

Etomi &

Partners

George Etomi
Efeomo Olotu
Ivie Omorhirhi

george@geplaw.com
efeomo@geplaw.com
ivie@geplaw.com

1B Professor Tiamiyu Belo-Osagie Road
Parkview Estate, Ikoyi
Lagos
Nigeria

Tel: +234 1 461 9877/+234 1 461 9878
Fax: +234 1 262 1218
www.geplaw.com

GETTING THE DEAL THROUGH[®]

Annual volumes published on:

Air Transport	Life Sciences
Anti-Corruption Regulation	Merger Control
Arbitration	Mergers & Acquisitions
Banking Regulation	Mining
Cartel Regulation	Oil Regulation
Climate Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Product Recall
e-Commerce	Project Finance
Electricity Regulation	Public Procurement
Enforcement of Foreign Judgments	Real Estate
Environment	Restructuring & Insolvency
Foreign Direct Investment	Right of Publicity
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



The Official Research Partner of
the International Bar Association



Strategic research partners of
the ABA International section