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## TEMPLARS ThoughtLab

# Transnational Conflict Mitigation in Construction Contracts: Navigating Disputes Across Borders

### Introduction

The construction industry in Nigeria continues to experience spurts of growth fueled by the vast infrastructure needs and investment in the country<sup>1</sup>. Whilst this is a positive development; it presents unique challenges like navigating the complexities of transnational construction contracts in relation to foreign companies or investors who are key players in the construction industry in Nigeria.

Transnational Construction projects have the potential to unlock expertise, investment, and promote faster project completion in Nigeria. However, they also present the potential for transnational disputes which could arise from the convergence of different legal systems, communication gaps, unforeseen circumstances like global pandemics, currency fluctuations, and political instability. Worthy of note, as well, is the wide range of legal and regulatory framework on construction contracts in Nigeria which includes statutes such as the Public Procurement Act, 2007, the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act 2005 (as amended), National Building Code along with other subnational laws such as the Urban and Regional Planning and Development (Amendment) Laws 2019, Lagos State Physical Permit Regulations 2019, Lagos State Building Control Agency Regulations 2019. In addition to the above stated statutes, the construction industry is heavily regulated by the environmental protection laws in Nigeria, such as the National Environmental Standards and Regulations Enforcement Agency Act 2018 (as amended), and the Environmental Impact Assessment Act 1992.

<sup>1</sup> A recent study by the world bank shows that Nigeria requires a sustained expenditure of almost \$14.2 billion per year over the next decade to address its infrastructure challenges

Evidently, there would usually be a significant difference between the legal framework for construction contracts in Nigeria, and that of a foreign company's home country. These differences could ultimately lead to misunderstandings regarding contractual obligations and dispute resolution processes, unless these differences are carefully and effectively considered by the parties during the negotiation of the contract. Otherwise, the ensuing disputes would lead to lengthy and expensive legal conflicts that derail progress and discourage foreign investment.

It is thus important to navigate transnational contracts by delving into the key challenges as well as exploring proactive strategies to minimize conflicts such as pre-agreeing on the applicable governing laws for the interpretation of the terms of the contracts and the resolution of any disputes that arise therein as well as endorsing clear contracts that leverage on the provisions of the new Arbitration and Mediation Act (AMA) regarding the conduct of arbitration. This also applies to the potential use of Dispute Resolution Boards (DBRs) for early and expeditious intervention as well as other options of Alternative Dispute Resolution (ADR) for the resolution of disputes.

### The Enduring Challenge of Nigeria's Infrastructure Deficit

With a large population and booming economy, there is an even greater demand for infrastructure development. However, Nigeria faces an infrastructure deficit resulting from decades of underinvestment and neglect of the sector. The decline in public spending on infrastructure has left the country with a shortage of essential infrastructure including power, transportation, and water. Undoubtedly, development and construction are inextricably linked to each other, because as a country progresses economically, the demand for infrastructure increases. The recent surge in construction activities across the country reflects this reality.

Addressing the infrastructure deficit in Nigeria requires a collaborative effort from diverse stakeholders which should be guided through the implementation of effective policies and regulations by the government.<sup>2</sup>Firstly, the government plays a crucial role in setting the national infrastructure agenda, formulating long-term development plans like the Nigerian National Integrated Infrastructure Master Plan launched in 2014 and reviewed in 2020,<sup>3</sup> and creating an enabling environment for private sector investment.

Secondly, the private sector contributes capital and expertise to infrastructure development. Tools like public-private partnerships can accelerate private investments in infrastructure development. Financial institutions also play a role in providing financing for infrastructure projects and collaborating with the government to develop innovative financing mechanisms such as infrastructure bonds and long-term loans with attractive interest rates.

In addition, Civil Society Organizations play a vital role in advocating transparency and accountability in infrastructure projects. They also monitor projects to ensure adherence to regulations and environmental standards. The public remains a vital stakeholder in ensuring that other stakeholders are held accountable. Active citizenship participation enhances transparency and project sustainability

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<sup>2</sup> This can be achieved through Public-Private Partnerships (PPPs) for example, the government can collaborate with private companies to fund, build and maintain a high-speed rail network. In this instance, the private sector provides investment and expertise, while the government offers regulatory support and ensures public interests are met. This nature of collaboration makes the entire process more expedited, ensures efficient management by leveraging private sector innovation and public sector oversight.

<sup>3</sup> Please see: <https://nationalplanning.gov.ng/wp-content/uploads/2022/10/REVIEWED-NIIMP.pdf>

## Potential Liabilities and Contract Drafting

As mentioned earlier, the infrastructure deficit in Nigeria heralds a boom in transnational construction projects, and this necessitates a nuanced understanding of potential liabilities. Some key areas of concern include Joint Ventures (JVs), Currency Fluctuation, Building Material Costs, Force Majeure, and Permit Delays.

### **Joint Ventures**

Joint Ventures are a popular model for transnational construction partnerships in Nigeria and in this case, between a Nigerian construction company and a foreign firm. JVs in transnational construction provide benefits such as shared expertise and resources involving advanced technologies, innovative construction methods, and access to international financing, risk sharing, and market access. Joint Venture Agreements (JVAs) generally provide a comprehensive and legally binding structure for transnational construction partnerships in Nigeria and acts as a formal contract outlining the rights, responsibilities, and profit-sharing arrangements between the parties involved. It also includes capital contributions, project management duties, risk allocation, and dispute resolution mechanisms which minimize ambiguity and potential conflict.

In relation to dispute resolution, JVAs may incorporate dispute resolution mechanisms such as an arbitration clauses based on internationally recognized arbitration laws and rules to provide a streamlined path for resolving disagreements and minimizing downtimes. Notwithstanding, there are other challenges that may be faced in the resolution of the disputes like cultural differences and differences in the legal and regulatory landscape. While JVAs offer a structured approach, it is important to acknowledge other transnational construction partnership models like the consortium which is particularly suitable for complex infrastructure projects that require a diverse range of skills.

### **Currency Fluctuations**

There is an ever-changing tide of the currency market in Nigeria and these fluctuations pose a substantial risk to project viability by derailing project timelines and eroding profitability. A weakening Nigerian Naira, relative to foreign currencies, significantly increases the cost of imported building materials and foreign expertise. When foreign companies enter partnerships with Nigerian firms, there is an expectation of return on investment, but currency fluctuations diminish profit margins and make construction projects less attractive for foreign investors. Currency fluctuations also disrupt cashflow projections thus making it difficult for partnership entities to manage daily operations and meet financial obligations to suppliers and workers. Despite the challenges, some strategies help in navigating currency fluctuations, and they include employing financial hedging instruments like currency forwards and options contracts, incorporating currency escalation clauses in contracts to allow for adjustments to prices based on pre-defined exchange rate fluctuations, and exploring alternative sourcing for building materials.

## **Building Material Costs**

There is a relentless rise in building material costs, which threatens to stall projects, erode profits, and hinder progress in bridging the infrastructure gap in the country. Various reasons contribute to the continuous increase in building material costs, including global market fluctuations, currency devaluation, foreign exchange regulations,<sup>4</sup> and domestic production bottlenecks. This increase in costs leads to project delays and cancellations, erosion of profit margins, compromised quality, and reduced housing affordability.

## **The Covid-19 Pandemic and Force Majeure**

Force Majeure clauses are often included in construction contracts to address unforeseen events beyond the reasonable control of the parties by excusing parties from performing contractual obligations. The COVID-19 pandemic was an immediate health crisis affecting the Nigerian construction industry. Beyond this, the pandemic triggered disruptions which raised complex legal questions surrounding force majeure clauses within construction contracts. The pandemic led to a disruption in the supply chain due to global lockdowns and travel restrictions. To be practical, a construction project of a high-rise building in Lagos may face delays due to the unavailability of specialized fire-resistant glass panels which are often imported from China. By this, the supplier could use this disruption as a potential force majeure event. The pandemic restricted the movement of skilled labor due to travel restrictions and social distancing measures. The pandemic also necessitated the closure of some construction sites and this halt in activity significantly delayed project timelines and consequently inflated costs. Moreso, the economic fallout from the pandemic caused financial strains due to cost overruns. These strains create disputes over contract payments and potentially trigger insolvency issues for some construction companies.

## **Permit Delays**

Delay in obtaining permits is a persistent and debilitating obstacle to the progress of transnational construction projects. These delays are not only a bureaucratic inconvenience but also have an adverse effect on transnational construction projects and are caused by a complex interplay of factors. First, the construction sector in Nigeria operates under a regulatory framework with overlapping jurisdictions at the different tiers of government. Transnational partnerships involving foreign entities are faced with inconsistencies between federal and state-level regulations which lead to delays in obtaining requisite permits. There is also a lack of clear and readily available information regarding permitting requirements, and this is in addition to the inconsistent application of regulations in different jurisdictions. Furthermore, there are allegations of inefficiency and corruption within some agencies thus leading to missing or misplaced paperwork, and unofficial demands. There is however the National Anti-Corruption Strategy that aims to address these issues although this is not yet fully realized.<sup>5</sup> Moreover, there are limited inter-agency communications leading to the creation of bottlenecks, inadequate expertise in agencies responsible for permit issuance especially those involving new technologies or innovative approaches, and political interference.

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<sup>4</sup> Please see:

<https://www.cbn.gov.ng/Out/2024/FPRD/Revised%20Regulatory%20and%20Supervisory%20Guidelines%20for%20Bureau%20De%20Change%20Operations%20in%20Nigeria.pdf>

<sup>5</sup> The **National Anti-Corruption Strategy (NACS) 2017-2020** [https://nesgroup.org/download\\_policy\\_drafts/Final%20Nat%20Anti-Corruption%20Strategy-%20February%2010th%202017%20pdf\\_1661855536.pdf](https://nesgroup.org/download_policy_drafts/Final%20Nat%20Anti-Corruption%20Strategy-%20February%2010th%202017%20pdf_1661855536.pdf)

## Effective Construction Agreements for Cross-Border Projects

The rise of cross-border construction projects involving foreign investors makes it pertinent for parties to have well drafted agreements that anticipate and mitigate potential disputes. The agreements should, as a minimum requirement, contain governing law clauses, and dispute resolution clause, which may refer the provisions of the AMA<sup>6</sup> or any similar statutory provisions as the parties may choose. Elements of such a contract should also include a clearly defined specific and general rights and obligations for the parties, as well as the scope of work including deliverables, specifications, and timelines to reduce the risk of disagreements over project expectations. It should also contain clear payment terms and schedules including milestones and payment methods. The language in construction contracts ought to be non-ambiguous.

Additionally, the agreement should clearly allocate the risks associated with unforeseen circumstances like delays, material price hikes, or changes in regulations. By this, risk mitigation strategies like force majeure clauses should be outlined. The dispute resolution clause should explicitly state the agreement of the parties to resolve disputes through arbitration under the AMA and it should further specify the number of arbitrators, the language of arbitration, and the governing law. Additional legal considerations for cross-border projects include the acknowledgement of potential application of laws from different jurisdictions as well as tax implications in both countries for project income, material imports, and foreign worker remuneration.

### Recommendations

Firstly, there should be standardized contracts with clear definitions on key aspects like the project scope, the payment terms and schedules, and risk allocation. Secondly, the AMA should be leveraged on for the dispute resolution in construction projects given that it contains a structured framework for arbitration and mediation – both of which are suitable for the resolution of disputes in an efficient, effective and expedited manner. Next, the parties should explore the implementation of currency hedging strategies using financial instruments like currency forwards and option contracts in order to guard against the currency fluctuations that plague Nigeria.

Additionally, currency escalation clauses should be incorporated into construction agreements. Alternative material sourcing should also be explored to reduce the effect of currency fluctuations and global market disruptions. The government could also ensure streamlined permitting systems to reduce bureaucracy, improve efficiency, increase permitting transparency, and enhance inter-agency communications. There could also be investment in Agency Expertise to upgrade skills and improve the efficiency of government staff. Finally, and as mentioned earlier, other partnership structures for complex transnational projects should be considered.

<sup>6</sup> Arbitration and Mediation Act 2023 <https://www.lawyard.org/wp-content/uploads/2023/05/Arbitration-and-Mediation-Act.pdf>