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THE ENFORCEABILITY AND APPLICABILITY OF THE FIDIC SUITE OF CONTRACT IN NIGERIA

Introduction

The construction industry in Nigeria is a rapidly evolving sector that plays a significant role in the country's economic development. However, its development is often marred by challenges such as contract disputes, delays, and cost overruns. To mitigate these issues and foster a more efficient and predictable construction environment, the adoption of standardised contract forms has become increasingly prevalent. Among these, FIDIC contracts, renowned for their comprehensive and internationally recognized provisions, offer a potential solution. While their use is on the rise in Nigeria, understanding the intricacies of their enforceability within the country's legal framework is paramount for stakeholders in the construction sector. This analysis will delve into an overview of the FIDIC suite of contracts, their relevance to Nigeria's construction industry, and the legal challenges and opportunities surrounding their implementation.

An Overview of the FIDIC Suite of Contracts

FIDIC, an acronym for Fédération Internationale Des Ingénieurs Conseils, which translates to the International Federation of Consulting Engineers. In addition to being an international standards organisation for consulting engineers, FIDIC is well-known for producing a suite of standard contract forms specifically designed for the construction and engineering industries. These contracts are widely used in international engineering and construction projects.

Contractors often choose FIDIC contracts because of their numerous advantages, including their global recognition, simplicity, clarity, and adaptability. FIDIC contracts provide comprehensive coverage of all aspects of construction works, making them highly versatile for various project types. They streamline project management by clearly defining the roles and responsibilities of the parties involved, fostering efficiency and ease of business. Due to their reputation for being straightforward yet detailed, FIDIC contracts remain a preferred choice for international projects, ensuring consistency and legal reliability across jurisdictions.

FIDIC contracts are often identified by their color-coded covers. One of their key advantages is the consistent use of definitions and standardised clause structures across all contract types. This ensures that terms have the same meaning throughout the suite, enhancing clarity and understanding. As FIDIC contracts were drafted by engineers, it's common for projects using FIDIC to be supervised by an engineer employed by the contractor.

The FIDIC Suite consists of two main parts: the General Conditions and the Particular Conditions. The General Conditions are a universal framework that governs the relationship between the employer (client), contractor, and engineer, and cover a broad range of topics such as contract administration, risk allocation, payments, variations, and dispute resolution; while Particular Conditions allow for the necessary adjustments to ensure the contract is appropriate for the specific project and local context.

The Various forms of FIDIC Contracts are :

1. **Red Book (Conditions of Contract for Construction, Building and Engineering Works Designed by the Employer):**[1] This is the most widely used FIDIC contract, suitable for projects where the employer provides the design. Administration of the project and supervision of the works is executed by the Engineer who the employer employs.

2. **Green Book (Short Form of Contract):** Ideal for smaller-scale projects, the Green Book offers a simplified approach requiring minimal specialised expertise for interpretation while maintaining essential contractual elements.

3. **Pink Book (Harmonized Construction Contract):** Multilateral Development Banks (MDBs) have long utilised FIDIC contracts as part of their Standard Bidding Documents (SBDs). The Pink Book was created to streamline the process by harmonising the Red Book to suit the procurement requirements of MDBs, such as the World Bank, African Development Bank, and others. While it still allows for specific adjustments in the Particular Conditions, this harmonisation simplifies and accelerates the bidding and contract processes.

4. **Yellow Book (Conditions of Contract for Plant and Design-Build):** Specifically designed for projects involving electrical and mechanical plants where the Contractor is responsible for both design and construction. It applies specifically to projects where the Contractor handles the design and installation of electrical or mechanical systems and the overall execution of engineering works.

5. **Orange Book (Conditions of Contract for Design-Build and Turnkey):** Suitable for projects where the contractor assumes responsibility for both design and construction.

6. **Silver Book (Conditions of Contract for EPC/Turnkey Projects):** Tailored for large-scale projects that are either privately financed or carried out through public-private partnerships (PPP). In these contracts, the Contractor is responsible for all aspects, including

1. SThe Constructor, "Fidic Suite of Contracts" https://theconstructor.org/construction/fidic-suite-contracts/563305/ (Last accessed 6/9/2024)

financing, design, and construction, and must deliver the project according to pre-agreed specifications with the Employer. The Contractor has significant control over the project but must adhere to the outlined specifications.

7. **Gold Book (Design, Build and Operate):** Used for projects where, in addition to design and construction, the Contractor is also responsible for long-term operational and maintenance phase after completion.

8. **Blue Book (Dredgers and Reclamation Contract):** Specifically designed for dredging, reclamation, and related construction projects. In these contracts, the Employer typically takes responsibility for the design, while the Contractor focuses on the dredging and reclamation operations, operating under various administrative setups.

Legal Framework For Contract Enforcement In Nigeria

In Nigeria, contracts are primarily governed by principles derived from common law, alongside the various legislations regulating contracts enacted by different states of the federation. Contract law in Nigeria remains rooted in foundational doctrines of common law, such as offer, acceptance, consideration, and the intention to create legal relations. However, states may also introduce specific legislations, creating a more robust landscape.

In terms of jurisdiction, the Federal High Court and the various State High Courts share concurrent jurisdiction to entertain contractual disputes, depending on the nature of the case. While certain matters may exclusively fall within the purview of the Federal High Court (e.g., maritime contracts or disputes involving federal agencies), most general or simple contractual disputes are typically heard by the State High Courts.

Under Nigerian law, particularly section 4 of the Statute of Frauds 1677 and section 5 of the Law Reform (Contracts) Act (No. 64), 1961, contracts that involve the lease of land or the transfer of any interest in land must be in writing. This statutory requirement is critical in construction contracts where building over landed property is concerned, as it ensures that agreements affecting property rights are clearly documented and legally enforceable. This written formality safeguards the interests of the parties and provides a definitive record of their intentions.

In practice, however, construction contracts in Nigeria are almost always executed in writing, even when not legally mandated. This is primarily due to the significant capital investment involved in construction projects and the need to clearly articulate the terms and conditions governing such projects. Written contracts reduce the likelihood of disputes by providing a clear reference to the obligations, rights, and expectations of the parties. They also serve as vital tools for managing risks and ensuring that all aspects of the project are understood and agreed upon by all stakeholders.[2]

One of the core tenets of contract law in Nigeria is the principle of party autonomy, which grants contracting parties the liberty to choose the governing law for their agreements. This principle is especially significant in a globalised commercial environment where cross-border transactions are common. Nigerian courts, in recognising this autonomy, have repeatedly upheld the enforceability of choice-of-law clauses, allowing parties to select either Nigerian law or foreign law to govern their contractual relationships. This is particularly crucial in international contracts, where parties from different jurisdictions may prefer a neutral or familiar legal system to resolve disputes.

Nigerian courts have reinforced this commercial freedom in several landmark cases, affirming that parties retain the right to dictate the legal framework under which their contract will be interpreted and enforced. This respect for contractual autonomy is rooted in the principle that, barring any illegal or unconscionable provisions, the court should honour the intention of the parties as expressed in their agreement. The judiciary has emphasised that as long as the chosen law does not contravene public policy or violate statutory provisions, the courts will uphold the parties' decision to select their governing law.

This recognition of choice-of-law clauses is not only aligned with global best practices but also reflects Nigeria's commitment to fostering an enabling environment for international trade and commerce. By allowing parties to freely determine the governing law, Nigerian courts reinforce predictability and stability in contractual dealings, which are essential for fostering confidence among foreign investors and international business partners. Consequently, Nigeria is seen as a jurisdiction that respects commercial agreements, thereby enhancing its attractiveness as a destination for cross-border transactions.

Nevertheless, there are certain limitations. Nigerian courts will not enforce foreign law or jurisdictional clauses if they are contrary to public policy or Nigerian law. For instance, contracts that involve illegal activities or clauses that attempt to circumvent mandatory legal provisions in Nigeria will not be upheld, regardless of the choice-of-law agreement between the parties. Moreover, where foreign law is chosen but remains unclear or

2. Jaafar U.A., Ukponu U.E., Sulayman Y., "Fidic Contracts in Africa and The Middle East"

Enforceability of FIDIC Contracts in Nigeria

Although contracts based on FIDIC forms are enforceable under Nigerian law, they are often tailored to suit specific project needs and local conditions. The dispute resolution mechanisms, particularly the Dispute Adjudication Board (DAB) under the FIDIC contract, are often excluded in Nigerian construction projects. This is largely because the DAB process is not widely understood or utilised in Nigeria, and parties may view it as an additional, unnecessary layer that duplicates efforts. The adjudication process is seen as potentially elongating dispute resolution, especially since the DAB's decisions can ultimately be reviewed in arbitration or court proceedings. As a result, unless the contract is financed by development finance institutions (DFIs) or requires a standing DAB, parties tend to prefer direct arbitration or litigation.

However, the exclusion of DAB mechanisms can raise issues, particularly in a jurisdiction like Nigeria where there is no statutory framework regulating the use of dispute boards for adjudication. One of the main challenges is enforcing an adjudicator's decision if one party refuses to comply voluntarily. The FIDIC contracts—specifically the 1999 and 2017 Red and Yellow Books—address this by requiring that the adjudicator's decision be binding and promptly complied with, even if a party is dissatisfied. The 2017 versions go a step further by specifying that the duty to comply applies regardless of dissatisfaction. If a party is dissatisfied with the DAB's decision, they must submit a Notice of Dissatisfaction (NOD) within 28 days to proceed with arbitration. If no NOD is submitted within this time frame, the DAB's decision becomes final and binding. This ensures that DAB decisions are temporarily binding, but they may become final if no timely objections are raised. [3]

The lack of familiarity with the DAB process and the absence of a statutory adjudication regime in Nigeria create enforceability issues. If one party fails to comply with a DAB decision voluntarily, the other party may have to seek enforcement through the courts or arbitration, which can defeat the purpose of having an expedited adjudication process in the first place. This is one reason why many contracts in Nigeria exclude DAB provisions, opting instead for more familiar arbitration or court proceedings.

In addition to these concerns, some FIDIC clauses should be amended to better reflect the realities of construction projects in Nigeria. The construction industry in Nigeria faces numerous challenges, including payment delays, frequent disruptions, and other stressors. In this context, it is often impractical to apply the conditions strictly or pedantically. For

3. Agunbiade-Adeyemi A., "Construction Adjudication in Nigeria: Navigating the Enforcement Landscape" https://africaconstructionlaw.org/construction-adjudication-in-nigeria-navigating-the-enforcement-landscape/ (accessed 6/9/2024)

instance, payment delays are prevalent in Nigeria, with periods often exceeding the 56 days allowed by FIDIC or the 28 days recommended by the Joint Contracts Tribunal (JCT). Given these realities, it is crucial to amend dispute-prone clauses to reflect local conditions, or for the parties to adopt a more flexible, less legalistic approach to avoid unnecessary conflicts that could undermine the success of the construction contract.

Conclusion

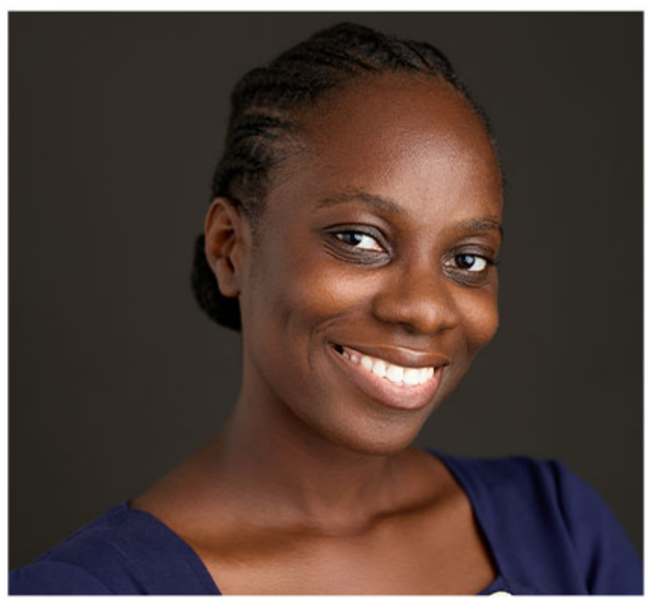
While FIDIC contracts are widely enforceable in Nigeria, they must be adapted to address specific local challenges. This includes modifying clauses related to site access, dispute resolution, and payment terms to suit the local environment. Moreover, the absence of a statutory adjudication regime and the prevalence of payment delays in Nigeria highlight the need for a more pragmatic approach to the application of FIDIC provisions. By tailoring FIDIC contracts to align with the practical realities of construction in Nigeria, parties can ensure smoother project execution and greater contractual success.

For further information or assistance, please contact Famsville:

Phone: +234 9068909300
Email: info@famsvillelaw.com
Website: www.famsvillelaw.com
Address: 214B, Eti-Osa Way, Dolphin Estate, Ikoyi, Lagos, Nigeria

Key Contacts:

Woye Famojuro
Partner
Woye.famojuro@famsvillelaw.com



Jane Ibikunle
Associate
Jane.ibikunle@famsvillelaw.com

Rachael Olayemi
Associate
rachael.olayemi@famsvillelaw.com

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