

Compare and Contrast Risk Allocation Clauses in African Construction and Infrastructure Projects

This article examines the use of risk allocation clauses in construction and infrastructure contracts in the two largest economies on the African continent, namely Nigeria and South Africa.

Standard Forms

In general, the approach to risk allocation in both these jurisdictions mirrors that commonly adopted internationally in substantial construction and infrastructure projects. In both jurisdictions there are local forms of contract, such as in South Africa, the General Conditions of Contract for Construction Works and the Joint Building Contracts Committee series, and in Nigeria the Federal Ministry of Works Contract (which is a variant of the UK originated JCT standard form). However, for larger scale projects, in particular where there is international investment, the standard form contracts typically used will be one of the FIDIC suites of contracts, or latterly in South Africa the UK-originated NEC3 suite of contracts.

Pricing

In both jurisdictions the impact of inflation and foreign exchange fluctuations are key factors in determining the pricing of contracts. The fact that these factors are often unpredictable means that wholly fixed-price contracts are relatively rare in South Africa, with the pricing values often linked to agreed indices either for some or for the whole of the price of the contract.

It is not unusual for a contractor to accept as fixed a certain percentage of the contract price, but in general the majority of the risk exposure for these factors typically lies with the employer through indices or forward cover taken out by the employer. The fact that the employer usually takes the lion's share of the risk associated with currency fluctuations and inflation means that premium pricing by the contractor to hedge against such risks is avoided.

In contrast, in Nigeria it is more common for the contractor on larger construction and infrastructure projects to be responsible in some degree for the risk associated with increases in price caused by inflation and/or for exchange fluctuations. It is respectfully suggested that this may be a counter-productive approach in that in such circumstances it is highly likely that contractors will charge premium pricing in order to protect themselves against such a risk.

Fitness for Purpose

Indeed, as a general proposition, a greater preponderance of risk tends to be placed on the contractor in Nigeria than it does in South Africa. This, typically, might include accepting a fitness for purpose obligation and also the risk of a change in law. In general, neither of these risks would be acceptable to a contractor in South Africa. With regard to accepting a fitness for purpose obligation, as for example in the UK, insurance would not generally be available to cover this.



Limitation of Liability

In South Africa, it is common practice to limit or indeed exclude liability for consequential and losses and this might even extend to a cap on the contractor's liability for direct damages. As in the UK and many other common law jurisdictions, it is not typical for delay damages and the proceeds from insurances to be taken into account in the calculation of whether a cap has been reached.

Similar considerations apply in Nigeria where caps on liability would rarely exceed the contract price and in some sectors, the cap may be considerably lower than this. In both jurisdictions, as is typical in most common law jurisdictions, it is generally not possible to limit liability where death or personal injury, fraud or wilful misconduct has occurred. Post-completion in both jurisdictions, the contractor will seek to limit its liability for defects and warranty periods, whilst in many cases the employer will seek to impose performance guarantees upon the contractor.

Force Majeure

Force majeure clauses are prevalent in both jurisdictions with the courts placing emphasis on precisely defined events and the need for these circumstances to arise in every particular before relief will be granted. In both jurisdictions, particularly close attention is paid to the precise wording of clauses dealing with political circumstances that might give rise to a force majeure event. In both jurisdictions the courts are keen to emphasize that circumstances which simply make it more difficult for the parties to perform their obligations under the contract will not give rise to a force majeure event.

Professional Appointments

With regard to professional appointments, as with contracts for larger construction and infrastructure projects, these are typically based on the FIDIC Model Services Agreement or latterly in South Africa the NEC3 Professional Services Contract. In the public

sector, it is common for bespoke appointments to be prepared which contain many of the features of the international standard form appointments but also address specific public procurement requirements.

Many of the issues outlined above in respect of construction and infrastructure contracts are also encountered in the drafting and negotiation of professional appointments. Especially in Nigeria, employers may seek to impose a fitness for purpose obligation on the consultant, with the consultant in turn seeking some variation of a reasonable skill and care obligation. Typically, in both jurisdictions the latter standard will generally prevail due to the unwillingness of professional indemnity insurers to offer cover at the higher standard.

Summary

The good advice that risk in a construction or infrastructure contract should sit with the party best able to manage that risk applies just as much in Nigeria, South Africa and the African continent as a whole as it does anywhere else in the world. So, risks that can be controlled by management or planning, or which are quantifiable and/or insurable, might typically sit with the contractor. Risks that are unpredictable or are by their nature less easy to quantify, such as unforeseen ground conditions or political risk, should more usually sit with the employer. In broad terms the experience of contracting in South Africa might seem to follow this approach, as it does to a considerable degree in Nigeria, although perhaps to a lesser degree in certain key areas such as exposure to inflation and currency fluctuation, and fitness for purpose obligations.

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