CONSTRUCTION LAW FORUM

PRESENTS

ITS MONTHLY WEBINAR

THEME:

UNDERSTANDING CONSTRUCTION LAW WITHIN THE NIGERIAN CONSTRUCTION AND LEGAL LANDSCAPE

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ATTEMPT AT DEFINING CONSTRUCTION LAW

Broadly, like many legal concepts, Construction law can mean array of things, and as such, it may be difficult to say that, this is a universally agreed definition of the term construction law. However, as an area of practice, and looking at what a typical construction lawyer does on a daily basis, I will say that, Construction law is a branch of law that deals with matters relating to building and engineering construction and related activities.

SCOPE OF CONSTRUCTION LAW

Construction law covers a wide range of legal issues including but not limited to:

Contract (Construction) -This is qualified, because, construction contracts are specialized contracts, which require subject matter competence. They are different from a regular business contracts that we normally come across as regular lawyers. It concerns issues such as drafting construction contracts, understanding the clauses in construction contracts, negotiating construction contracts, construction industry standard practices, standard forms of construction contracts, etc. There will be a special webinar session, where we will discuss solely on construction contracts.

Negligence

Bonds and guarantees

Bankruptcy

Tendering

Building and Construction Permits

Building Information Modelling

Construction Claims – Variations/Change in Scope, Delays, Payment, Extension of Time, Liquidated Damages, Force Majeure etc

Construction Dispute Resolution – Negotiation, Mediation, Conciliation, Expert Determination, Arbitration.

Looking at the scope of construction law, one would agree that, construction law affects and relates with many professionals and participants in the construction industry including engineers, builders, architects, quantity surveyors, surveyors, estate surveyors, planners, construction workers and even financial institutions. It is therefore imperative for a construction lawyer to have subject matter competence and technicalities of how construction activities and construction practices work.

HISTORY OF CONSTRUCTION LAW

The principles of law pertaining to construction and the built environment can be traced back to more than 4000 years ago. This can be traced back to the earliest development of western civilization.

The earliest known principles of construction law can be found in the Code of Hammurabi. Hammurabi was the sixth king of Babylon who ruled from 1792 BC to 1750 BC. The Code of Hammurabi contained 282 laws inscribed on twelve stone tablets which were placed in public view. Hammurabi was one of the earliest written codes of law in recorded history, and several of the laws pertained to construction and the built environment.

With the above background, you will agree that, construction law has always been with us since the beginning of time, however, due to the inherent technicalities involved, coupled with lack of awareness of its importance, there are up till now, very few and limited number of practitioners in this unique field of practice in Nigeria.

To be factual, modern day construction projects typically involve extraordinarily complex scenarios, technical issues as well as legal issues. Therefore, disputes arising from such projects requires an in-depth knowledge and understanding of construction law and complex construction technicalities and construction industry standard practices. In addition, construction technology daily evolves, and as such, a construction lawyer must be ready to also evolve and adjust to accommodate the differs changes, so as to remain relevant in the field.

WHY CONSTRUCTION LAW KNOWLEDGE MATTERS

In the twenty-first century, the construction industry remains the largest single segment of the production sector of the Nigerian economy and probably of the world economy. The industry also remains one of the most technologically complex. The development of modern engineering principles, sophisticated construction practices, and new building and materials technologies produced equally added to the complexities around construction in modern times.

Construction is an inherently complex business. If you have ever been involved in a construction process, you will be amazed by the enormous amount of information required to construct a project. Ranging from hundred or even thousands of detailed drawings, technical specifications, request for information and other documents required, not to mention the complex calculations used to produce the designs.

These complexities call for many professionals and stakeholders to be involved in construction projects. Different entities undertook different parts of a project, both for design and construction. In addition, construction activities also involved a huge movement of cash referred to as cash flow, which as rightly put, the life blood of every construction project.

Like every other highly complex fields of human endeavor, the construction process has spawned its own unique customs, practices, and technical vocabulary, which in turn calls for a need to develop legal principles consistent with industry realities.

Construction law has derived much of its uniqueness from industry experience, customs, and perceived foreseeable risks, which in turn have shaped evolving principles of common law and statutory law applicable to the built environment.

WHERE WE ARE IN NIGERIA

Sadly, in Nigeria, a lot of construction professionals and legal practitioners do not know that the practice of construction law has evolved. As rightly put in the William Mitchel Law Review, in his review of Construction Law as applicable to the American context, which in my view is similar to what is obtainable in Nigeria, many practitioners still view “construction law” incorrectly as

"advanced contract law" – a misunderstanding that arises from viewing "construction law" through the prism of a historically narrow academic discipline rather than through the kaleidoscope of complex legal and factual issues inherent in the construction process itself.

He further rightly put - Construction Law is a "capstone" subject, a towering legal edifice built out of modern statutes, "contextual" common law principles and foundational legal concepts sustaining and binding the multitude of parties- architects, engineers, builders, quantity surveyors, contractors, subcontractors, material suppliers, material manufacturers, sureties, insurers, tradesmen, etc., typically engaged in varying degrees on construction projects.

The import of the above is to bring to fore that construction law as a field of practice is a distinct and a rare breed of practice. Construction law, though boundaries with contract law, is not contract law. Every construction lawyer needs adept knowledge and subject matter expertise to effectively discharge their roles as a result of complexities and technicalities involved in Construction projects.

THE NEED FOR SUBJECT MATTER COMPETENCE

As has been previously explained, to efficiently practice as a construction lawyer, subject matter competence is required to be acquired for who to be construction lawyer. This is particularly due to the fact that, every construction project involves many stakeholders and professionals involved, with different views, ideas and mindset. In addition, construction contracts, as it were, contain a host of complex issues unique to construction, such as:

i. Originality of each construction project to siting, design objectives, construction requirements, design and construction professionals, and ownership;
ii. Novelty of construction risks such as unforeseen site conditions, scheduling and coordination of numerous subcontractors and material suppliers, frequent changes in project design, deviations in construction work and specialized payment security afforded by surety bond, etc;

iii. Rapid technological advances in building materials, systems, techniques and equipment;
iv. Statutory mandates promoting competition and various social objectives in the award of public contracts;
v. Use of multiple project delivery methods;
vi. Different design standards, building codes and licensing requirements applicable to different jurisdictions and types of projects
vii. Unusual varieties of construction contract pricing arrangements, such as lumpsum/fixed price contract, item rate/unit price contract, Cost plus percentage contract, cost plus fixed fee contract, design and build contract, management contract, EPC contract, BOT, BOOT, etc.
viii. Legal principles unique to construction damage measurement
ix. Construction standard practices/policy prohibitions in some jurisdictions against the use of certain stringent clauses i.e pay if paid clauses, no damage for delay and other provisions invoking penalties;
x. Multitude of parties involved in the construction process, each with its own written or oral contracts.

CONCLUSION

In summary, modern construction's factual and legal complexity and contextual considerations require broad industry education among all participating members of such complexity to avoid communication problems among the different segments of the construction industry.

One extra-ordinary non-legal characteristic of the construction industry that differentiates it from other fields of human endeavor and adds complexity to the construction process has been the marked differences among its participants in mindset, training, and approach to construction problems. Contractors, Architects, Engineers, Employers, all have different mindsets and views about construction process, and all of this shape the uniqueness of construction industry.

In contrast, lawyers and judges rarely view disputes as all black or all white, inevitably identify different gray in their search for fairness and equity, and ponder amid the shifting sands of construction industry practices and mores

whether circumstances warrant enforcement of or excuse from contractual obligations willingly assumed.

There is a basic difference in the training and thinking of lawyers and engineers. It is a difference which you must understand, if you want to comprehend how conclusions are arrived in many construction cases, which may to you appear to be entirely contrary to the clear and express provisions of a contract.

These and more, are what everyone aspiring to venture in the practice of construction law must be ready to learn.

We cannot exhaust everything in a session, as this is a continuous monthly webinar. In the subsequent sessions, we will discuss other germane concepts to enhance the knowledge and practice of construction law in Nigeria.

QUESTION

Looking at the Nigeria's current legal instruments, is it safe to say that there is a robust law that shape and regulate construction activities/practices in Nigeria? We will discuss further on this in our next episode of the webinar come next month.

Stay tuned and thank you for being a part of this webinar.