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FIVE IMPORTANT CONTRACT CLAUSES EVERY NIGERIAN BUSINESS SHOULD AUDIT NOW

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BACKGROUND

Most Nigerian business owners know their contracts need attention. Yet, only a few have read them recently. There is a gap between what a contract actually says and what a business truly needs. In terms of scale, risk exposure, and commercial relationships, it grows wider every year the document is left unreviewed.

This article examines five clauses that we consistently find in Nigerian business contracts. Each of them has real commercial consequences if it fails. All of them are fixable if the problem is identified before the dispute, the loss, or the failed deal.

1. FORCE MAJEURE

A party is excused from performance under force majeure clauses where circumstances beyond its control prevent performance. The events mentioned in most Nigerian commercial contracts were drafted some few years ago and have not been reviewed and updated since then despite the annual or occasional renewal of these contracts by parties.

These are the risks that should now appear in any properly drafted Nigerian force majeure clause: shortages of foreign exchange and difficulty in obtaining foreign exchange at the official rate, sudden regulatory intervention including CBN directives, NRS enforcement actions, and unforeseen sector-specific regulatory changes, digital infrastructure failures

including internet outage or cloud service disruption, critical business systems become unusable because of power supply and energy failures, etc.

An outdated or unsupported force majeure clause is not protection, it is a false sense of security. The real question for every contract is not simply "does it contain a force majeure clause?" but "would this protect us if something went wrong today?"

2. GOVERNING LAW AND JURISDICTION

The governing law determines which country's laws will be applied in interpreting the contract. The jurisdiction that is stated is what will determine which court can hear the dispute. The difference between specifying Lagos courts and specifying Nigerian law as governing law and jurisdiction is not the same thing and this is one of the most frequent drafting errors in Nigerian commercial contracts. The governing law determines which country's laws apply to the interpretation of the contract while jurisdiction determines which court can hear and determine the dispute.

A contract between two companies that provides "Lagos courts" but not Nigerian law is an ambiguity that an adept opposing counsel will exploit in a dispute. As well, a contract that sets Nigerian law as the governing law without specifying jurisdiction opens the door to litigation in a venue neither party expected.

As such it is important that every contract must state:

- The governing law (Nigerian law, English law, or another law as appropriate), and
- The dispute resolution forum (a specific High Court, the Lagos Court of Arbitration, or institutional arbitration under LCIA or ICC International Court of Arbitration).

3. IP OWNERSHIP

Intellectual property rights are contractual, and in many Nigerian businesses, the contractual position is quite opposite to what the business owner takes for granted. Under Nigerian copyright law, the work creator is the first owner of copyright unless otherwise agreed upon in writing. This means that a freelance designer who draws your logo, a software developer who builds your platform or a content creator who draws your marketing materials may all legally be the owners of the IP in what they created unless your contract specifically assigns that IP to your company.

Every contract with a creative or technical service provider must contain two elements:

1. An express IP assignment clause that transfers ownership of all work product (including future rights) to the commissioning company; and
2. A confirmatory assignment provision requiring the contractor to sign all further documents needed to perfect the transfer.

Without both, the company gets nothing. This is a particularly acute risk for Nigerian technology and creative businesses and can create serious obstacles during due diligence in any sale or investment transaction.

4. PAYMENT AND PENALTY TERMS

Nigerian commercial contracts often contain legally unenforceable payment terms and late payment penalties. The most common issues include: clauses in which the loss is treated as liquidated damages without a genuine pre-estimate of loss (which Nigerian courts may regard as unenforceable penalties rather than enforceable liquidated damages provisions); provisions imposing interest rates above the legal limits or tied to reference rates that are no longer valid; and payment obligation structures that fail to clearly define when the payment obligation is triggered or what constitutes a valid invoice.

In contracts with government bodies or large corporates, payment terms must also align with the counterparty's internal processes (purchase-order requirements, approval workflows, banking mandates, etc.). A clause that ignores how the other side actually pays, leaves the business unable to enforce overdue amounts.

A non-executable payment clause is not a payment clause. It is legal protection disguised as a negotiating positionand it will fail when the business needs it most.

5. DISPUTE RESOLUTION

Unenforceable, ambiguous, or internally inconsistent arbitration clauses are worse than having no arbitration clause at all.

They create unrealistic expectations as to how the disputes will be resolved and may prevent either party from effectively accessing arbitration or the courts.

The most common problems we face in Nigerian commercial contract dispute resolution clauses are: references to arbitral rules or institutions that no longer exist in their stated form; clauses that require arbitration but do not specify key elements such as the seat, the number of arbitrators, the governing procedural rules, or the language of the proceedings; clauses that improperly combine arbitration and litigation; and 'mediation-first' clauses that are legally binding in theory but fail to define when mediation is deemed to have failed.

A new Arbitration and Mediation Act was enacted in 2023, changing the Nigerian arbitration landscape. As a result, contracts relying on the Arbitration and Conciliation Act 1988 need updating. For domestic arbitration proceedings seated in Nigeria, the applicable procedural framework is now primarily governed by the Arbitration and Mediation Act 2023, and the Lagos Court of Arbitration Rules 2021.

CONCLUSION

Contracts are not legal formalities. They provide the legal structure for your commercial relationships and what happens when the relationship is stressed depends on the quality of that structure. Having a contract audit done before a dispute, before a fundraiser, or before a significant new commercial relationship is one of the best legal investments a Nigerian business can make. It is a tiny fraction of the cost to fix these issues before they happen compared to managing them afterwards.

Please note that the contents of this article are for general guidance on the Subject Matter. It is NOT legal advice. For further information or to see our other service offerings, please visit www.goldsmithsllp.com or contact:

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