

# Where the Concrete *Stops*

*Navigating Termination and Force Majeure in Nigerian Infrastructure Projects*



June 2026

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# Introduction

Infrastructure is considered a driving force of industrialisation, as the availability of infrastructural facilities determines the nature of industrial development.<sup>1</sup> The need to bridge Nigeria's infrastructure gap has led to the adoption of various models, such as the Public-Private Partnership (PPP), in which government projects, usually financed by the government, are now completed with private funding.<sup>2</sup> Exit provisions covering termination and force majeure have become critical triggers in infrastructure contracts. Termination clauses allow either party to terminate a contract if the other party fails to meet their obligations. Conversely, force majeure provisions are designed to address performance barriers beyond a party's control, offering relief through suspension or extension of time rather than immediate termination.

In light of the above, this article critically examines these clauses and how they shape risk allocation, dispute resolution, investor exit routes, and the adaptation of infrastructure projects to Nigeria's industrial landscape.

## By the Numbers · Nigeria's Infrastructure Landscape

**\$878<sub>bn</sub>**

Projected infrastructure deficit by 2040

**30%**

Total infrastructure stock as share of GDP

**\$100<sub>bn</sub>**

Current financing gap across the federation

*The gap between ambition and concrete is where contracts are tested — and where well-drafted exit provisions earn their keep.*

# Beyond Default: Project Risk, Exit Provisions & Cost Implications

Standard provisions in public procurement frameworks allow the procuring entity to terminate a contract where the contractor fails to deliver goods or services on time or otherwise breaches material contractual obligations.<sup>3</sup>

Nigeria's infrastructure industry is clouded by risks beyond a contractor's control, such as supply chain disruptions or permit issuance delays.<sup>4</sup> These risks can compromise timelines and budgets, sometimes making strict enforcement of default provisions both impractical and commercially unsustainable.

While it may seem that terminating a contract affords the non-defaulting party a form of redress regarding enforcement, it carries significant financial implications for both the terminating and defaulting parties, resulting in costs rather than mitigation.<sup>5</sup> This explains the operation of exit provisions, which determine how financial exposure is allocated among project stakeholders when a project enters an exit phase, including potential exposure to arbitration or litigation costs.

Preventive measures, therefore, require early risk identification, proper project assessments, and the incorporation of robust clauses that define specific events, impacts, protections, and procedures to mitigate them.

## Three Pillars of Preventive Contract Design

### 01

#### Early Risk Identification

Surface jurisdictional, supply-chain, and political risk before financial close.

### 02

#### Project Assessments

Stress-test timelines, budgets, and counterparty capacity against material disruption scenarios.

### 03

#### Robust Clauses

Define triggering events, impacts, protections, and procedures with operational precision.

# Government Policy Shifts and Change of Law

Within the PPP infrastructure landscape, another type of clause in which many infrastructure contracts expressly include are the change-of-law or “Material Adverse Government Action (MAGA)” clauses. A government bulletin on Nigerian PPPs, for instance, lists “change in law”, “exchange rate fluctuation”, and “material adverse government action” as events justifying contract review.<sup>6</sup>

In PPP concession agreements, a prolonged force majeure event or a material policy shift can even be defined as a trigger for termination or renegotiation.<sup>7</sup> Even if a contract does not include a force majeure clause or include government actions as a force majeure event in the contract, Nigerian courts may still find that governmental interference, especially if unforeseeable and outside the parties’ control, entitles the contractor to relief.<sup>8</sup>

The Nigerian Courts have also stated that a contract will be frustrated where an intervening event makes performance impossible or fundamentally different from what the parties contemplated.<sup>9</sup>

This means that an anticipated law change during the project will not void the deal unless the contract did not account for it, and performance truly becomes untenable.

## MAGA Triggers · Recognised Contract-Review Events

|                                                                                                                          |                                                                                                                            |                                                                                                                                             |
|--------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|
| <i>i.</i><br><b>Change in Law</b><br>Statutory or regulatory change after financial close that alters project economics. | <i>ii.</i><br><b>Exchange-Rate Fluctuation</b><br>Material movement of the Naira against the project’s reference currency. | <i>iii.</i><br><b>Material Adverse Government Action</b><br>Discriminatory or expropriatory state conduct materially affecting performance. |
|--------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|

*A contract will be frustrated where an intervening event makes performance impossible — or fundamentally different from what the parties contemplated.*

Nigerian Judicial Position

# Supply-Chain Disruptions & Inflation

Recent years have seen acute supply chain crises, cost spikes, and inflation that strain infrastructure contracts. In Nigeria's real estate and construction sectors, for example, daily surges in material prices, Naira devaluation, and rising input costs have caused chronic delays and significant cost overruns. The devaluation of the Naira and rising input costs (cement, steel, labour) pushed up construction costs".<sup>10</sup>

These market shocks are a reality for project stakeholders, but ordinary economic hardship is not force majeure by default.<sup>11</sup>

Nigerian courts have consistently held that foreseeable business risks, even steep inflation or disrupted supply, do not excuse performance under a generic force majeure clause, unless the clause explicitly covers them.<sup>12</sup>

Contractors feeling the pinch of inflation or delays must instead seek relief through price-adjustment clauses or equitable doctrines. Standard practice is to build price escalation formulas into long-term contracts (indexing costs to inflation or currency rates).<sup>13</sup>

In fact, Nigeria's Public Procurement framework explicitly encourages price-adjustment provisions in long-term projects, requiring special conditions to address escalation (labor, materials, equipment) and inflation indices.<sup>14</sup>

Absent such clauses, courts may allow renegotiation under general principles of fairness if strict enforcement would cause unjust hardship.<sup>15</sup>

The doctrine of *rebus sic stantibus* (things standing thus) is recognised in Nigerian law to permit contract rebalancing when unforeseeable conditions fundamentally change the deal,<sup>16</sup> even though its direct invocation is rare. Importantly, under Nigerian case law precedent, neither frustration nor force majeure will rescue a party who simply finds performance more expensive or burdensome.<sup>17</sup>

## Cost Shock · Selected Nigerian Inputs, 2023 – 2024

**2.2×**

Cement: ₦4,000 → ₦8,800 per bag

**2.0×**

Iron rods: ₦800k → ₦1.6m per ton

**+130%**

Aggregate building materials, 2024

# Step-In Rights: The Realities for Lenders and Guarantors

## Obligations Assumed

Step-in rights constitute a contractual mechanism through which a lender, upon specified triggered events, "steps into" the shoes of the project company, acquiring the right to manage, control, and direct the contractor's performance.<sup>18</sup> This mechanism is particularly prevalent in limited-recourse project finance structures, where lenders' security interests are primarily confined to project assets and revenues rather than the borrower's general assets. Upon activation, lenders typically have a defined exercise period (commonly thirty to sixty days) to decide whether to assume control. This notice period serves multiple functions: it allows contractors the opportunity to cure defaults, permits lenders to conduct due diligence on project status, and provides project sponsors time to arrange alternative financing or contractor replacement if lenders choose not to step in.<sup>19</sup>

A critical consideration for lenders is the scope of obligations assumed upon the exercise of step-in rights. While step-in rights provide control over project performance, they simultaneously expose lenders to substantial operational and financial liabilities. Upon stepping in, lenders assume the project company's contractual obligations to contractors, including duties to make timely payment for work performed, to furnish site access and information, and to cooperate in project execution. Consequently, lenders must carefully evaluate whether the benefits of step-in rights justify the assumption of such substantial operational and financial liabilities.<sup>20</sup>

## Guarantor Interaction

In infrastructure projects where project sponsors provide performance guarantees, step-in rights interact significantly with guarantor liability. A guarantor's obligation is typically triggered upon the principal debtor's default. However, the exercise of step-in rights by lenders can either mitigate or exacerbate guarantor exposure, depending on the guaranteed structure and how they exercise those rights.<sup>21</sup>

Nigerian law recognises that a guarantor's liability is not suspended merely because the creditor exercises remedies or assumes control of performance. However, a guarantor may be discharged or have its liability reduced if the creditor's actions materially prejudice the guarantor's position or increase the guarantor's exposure.<sup>22</sup>

### Exercise Window

# 30-60

Day notice period

The standard window during which lenders decide whether to assume control. It serves three concurrent functions: **cure** for contractors, **due diligence** for lenders, and **substitution planning** for sponsors.

# The Termination Playbook: *Notice Requirements, Negotiation Strategies, Dispute Avoidance, And Preservation Of Project Value*

Unlike termination in ordinary commercial contracts, termination of infrastructure projects involves complex interactions among multiple parties, intricate financing structures, and substantial sunk cost which must be executed with precision to preserve project value, minimise dispute escalation, and protect stakeholder interests. This section provides a comprehensive framework for navigating the termination process in Nigerian infrastructure projects.

## Notice Requirements & Procedural Compliance

Proper notice is essential for lawful termination. The notice must clearly state the breach or triggering event, reference the relevant contractual provisions, specify any cure period, and indicate the effective termination date. It must also be delivered according to the method agreed in the contract. The length of the notice and cure period is generally governed by the contract. Although, they usually range from 7 to 30 days depending on the nature of the default. Failure to allow the defaulting party an opportunity to remedy the breach may invalidate the termination, and if significant steps are taken to cure the default within the cure period, a court may consider the termination premature and award damages to the affected party.<sup>24</sup>



*Termination effected without honouring the cure period exposes the terminating party to a finding of **premature termination** — and consequent liability in damages to the counterparty.*

## Negotiation Strategies & Settlement Approaches

In cases of contractor default, the project sponsor and contractor should first engage in good-faith and amicable discussions to identify the root cause of the default, assess whether it can be remedied and whether continuing the project is commercially feasible. If the default results from temporary challenges, the sponsor may offer relief, such as extended payment terms or revised timelines, in exchange for stronger performance guarantees, helping to avoid the high costs of replacing the contractor. Where amicable discussions do not yield a satisfactory resolution, parties may consider various alternative dispute resolution (ADR) mechanisms. Negotiation remains the most flexible option, allowing parties to retain control over the outcome and preserve commercial relationships, although it may be ineffective where positions have become entrenched. If negotiations fail, parties may turn to mediation or expert determination, as many infrastructure contracts require mediation before arbitration or litigation. Mediation is often preferred because it is confidential, faster, less costly, and allows for flexible solutions beyond strict contractual remedies.<sup>25</sup> Its principal limitation is that the outcome is non-binding unless incorporated into a settlement agreement.

Depending on the nature of the dispute, expert determination may also be appropriate, particularly for technical issues relating to construction standards, project specifications, delay analyses, or valuation disputes. Expert determination is generally faster and more specialised than formal proceedings, although parties may have limited rights to challenge an expert's decision. Dispute Adjudication Boards (DABs) or Dispute Avoidance/Adjudication Boards (DAABs), commonly found in FIDIC-based contracts, may provide interim determinations that help maintain project momentum while disputes are being resolved.

Where ADR mechanisms fail or are contractually exhausted, parties may proceed to arbitration or litigation in accordance with the dispute resolution provisions of the contract. Given the complexity and commercial significance of infrastructure projects, parties should carefully consider the most appropriate dispute resolution pathway, balancing considerations of cost, speed, confidentiality, enforceability, and the need to preserve ongoing commercial relationships.

## Preservation of Project Value During Termination

When an infrastructure project is terminated, stakeholders should aim to preserve as much of the project's value as possible and minimise financial losses. This involves assessing the work already completed, materials purchased, and equipment mobilised. Such an assessment helps determine termination costs and identify resources that can still be used. In many Nigerian infrastructure projects, materials and equipment obtained by the original contractor can be used by a replacement contractor, helping to reduce overall project costs.<sup>26</sup>

# Conclusion

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In conclusion, effectively managing termination and force majeure in Nigerian infrastructure projects requires a strong understanding of the legal framework, proper compliance with termination procedures, and strategic negotiation. By utilising mechanisms such as step-in rights and pursuing negotiated settlements, project stakeholders can protect their interests, preserve project value, and minimise disputes when faced with contractor default or unexpected events.

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