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# ENERGY & INFRASTRUCTURE CONSTRUCTION LAW ROUNDTABLE

ROUNDTABLE MATERIALS



# Programme

Time	Event	Presenter
9:30 - 10:00	Registration	
10:00 - 10:10	Introductory Remarks	Oghogho Makinde (Partner, Aluko & Oyebode)
	<b>Session A: Future of the African energy market: trends and implications for the construction and industry sector</b>	
10:10 - 11:30	<ul style="list-style-type: none"> <li>The constitutional amendment in Nigeria and its impact on the transportation and power sectors</li> <li>Commercial and legal considerations in relation to energy transition projects</li> <li>Procurement and delivery of infrastructure projects</li> </ul> Q&A	Oghogho Makinde (Partner, Aluko & Oyebode) Oludare Senbore (Partner, Aluko & Oyebode) James Doe (Partner, Herbert Smith Freehills) Kolapo Joseph (Chief Corporate Finance & Corporate Development Officer, North South Power Company Ltd) Primah Atugonza (Head, PPP & Infrastructure Portfolio, African Legal Support Facility)
11:30 - 11.45	Coffee Break	
	<b>Session B: Hot topics in the resolution of international construction disputes</b>	
11:45 - 13:05	<ul style="list-style-type: none"> <li>Choice of contract</li> <li>Termination</li> <li>Methods of assessing delays</li> </ul> Q&A	James Doe (Partner, Herbert Smith Freehills) Ngo-Martins Okonmah (Partner, Aluko & Oyebode) Tayo Okunade (Director, Accuracy) Osinachi Nwadem (Senior Associate, Aluko & Oyebode)
13:05 - 13:15	Closing Remarks	James Doe (Partner, Herbert Smith Freehills)

# Presenters



**Oghogho Makinde**

Partner, Aluko & Oyebode

**Oghogho** is the head of the Business Advisory Group at Aluko & Oyebode, and a key member of the Firm's Banking and Project Finance team and Energy and Natural Resources department.

She advises on banking and commercial transactions, oil and gas project finance, infrastructure finance/PPP arrangements, E&P restructurings, company formations and restructuring, all Nigerian statutory and regulatory compliance matters, environmental laws and permits and corporate governance issues amongst others.

She was described by IFLR 1000 as *"thorough, very dogged and excellent"* and has been described in Chambers Global as a lawyer *"who not only works well under pressure but is spot-on when it comes to finding solutions"*.



**Oludare Senbore**

Partner, Aluko & Oyebode

**Oludare** is a partner in Aluko & Oyebode's Corporate and Commercial Practice Group and heads the Firm's Power team. He specialises in Energy and Natural Resources, Power & Infrastructure and Project Finance.

He advises on matters such as local and foreign currency syndicated lending, leases transaction, structured finance, project finance, mergers and acquisitions, structured trade finance, due diligence issues and advisory services, foreign investment advisory services, privatisation, real estate and the regulatory framework relating to utilities, with specific focus on the following sectors: power and infrastructure, energy and natural resources.

Oludare was described by IFLR1000, as one of the leading lawyers in Banking, Mergers & Acquisitions and Project Finance.



**Ngo-Martins Okonmah**

Partner, Aluko & Oyebode

**Ngo-Martins** is a Partner and key member of the Litigation and Arbitration practice of Aluko & Oyebode. He is a skilled litigator and arbitration lawyer with expertise in construction law, oil & gas, intellectual property, shipping, and aviation law. He currently oversees the firm's construction and engineering practice. He has advised and represented clients in enforcing and recognizing arbitral awards before Nigerian courts.

Ngo-Martins has experience advising on construction and engineering contracts, including FIDIC, NEC, JCT and bespoke funder's led EPC, EPCM contracts in a variety of sectors, including oil & gas, power and general infrastructure. Importantly, he has acquired significant experience advising and representing clients in leading and complex intellectual property, shipping and aviation disputes in Nigeria over the years.



**Osinachi Nwandem**

Senior Associate, Aluko & Oyebo

**Osinachi** is a Senior Associate in the Aluko & Oyebo's Dispute Resolution and Tax practice.

He has broad know-how in acting for and advising on legal issues concerning engineering and construction projects. He has assisted property developers, engineers, architects, contractors, subcontractors, consultants, and suppliers in the drafting, reviewing, and negotiating of several construction contracts, and has represented clients in several construction arbitrations.

Osinachi is a regular contributor to several construction law platforms, publications, and peer reviewed journals. Osinachi's publications on legal issues affecting construction projects and contracts offer practical guidance to players in the engineering and construction industry.



**James Doe**

Partner, Herbert Smith Freehills

**James Doe** is a Partner and Joint Global Head of Construction Disputes at Herbert Smith Freehills. James focuses on major infrastructure, construction and engineering projects.

James has experience in helping clients through his expertise in international arbitration (under the ICC, LCIA and UNCITRAL rules), litigation and alternative dispute resolution, and is experienced at handling the most legally, factually, and technically complex disputes.

James works to deliver successful outcomes for clients in disputes across a range of sectors, including infrastructure and energy.

Based in London, James brings with him a wealth of experience of working with clients across the globe, in particular in Africa, the Middle East and Asia. He was previously based in Seoul, and before that he was head of our disputes practice in Doha.

James' expertise is recognised by the leading legal directories, including Chambers & Partners, who note that *"He's very able and does a good job for his clients."* and the Legal 500 UK who notes that James *"has excellent clarity of thought and gets straight to the key issues."*



**Kolapo Joseph**

Chief Corporate Finance & Corporate Development Officer, North South Power Company Ltd

**Kolapo Joseph** is an astute investment banker and financial services expert with over a decade of experience. He Holds a degree in Finance from University of Maryland, College Park, U.S.A and MBA from the University of Chicago, Booth School of Business.

In his current capacity as the Chief, Corporate Finance and Development Officer at North South Power Company Limited, Kolapo is responsible for developing and driving the company's strategy and finance related activities.

Owing to his experience and exploits in the last 18 years, Kolapo Joseph sits on the board of numerous companies.

Kolapo continues to work to tackle two major issues that can drive Africa's success story-power and finance.



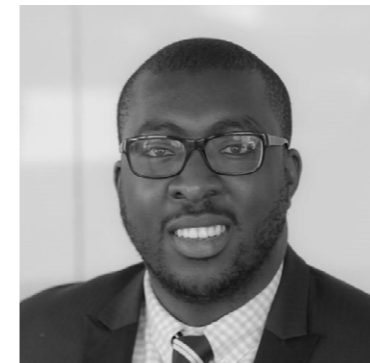
**Primah Atugonza**

Head, PPP & Infrastructure Portfolio, African Legal Support Facility

**Primah Atugonza** is a senior legal counsel and the head of the PPP/Infrastructure portfolio at the African Legal Support Facility. The ALSF is an international organisation that provides legal advice and technical assistance in negotiation of complex commercial transactions and capacity building to African Countries.

As head of the PPP Portfolio, Primah is responsible for driving portfolio growth, providing technical input on PPP projects, and offering general insight for PPP project implementation at the Facility. Prior to this, Primah practiced project finance with a leading law firm where she advised on numerous energy and infrastructure projects.

Primah is also passionate about coaching and mentoring young women and currently mentors with Girls for Girls Uganda and Infra Africa.



**Tayo Okunade**

Director, Accuracy

**Tayo Okunade** is a delay expert and director at Accuracy based in the UK. He specialises in assessing delays to large international energy and infrastructure projects.

He has over 15 years' experience of providing expert and strategic advice on time-related matters, in both formal dispute and pre-dispute situations. He uses his programming expertise along with his practical knowledge of delay analysis techniques to assist parties, their legal advisors and decision-makers in dispute resolution forums including international arbitration proceedings where he regularly provides written and oral opinion on delay topics.

# Checklist for discussion on choice of construction contracts

In determining a suitable choice of contract for a project, the following is a guide on considerations to be considered by an Employer:

1. What key issues would a party reflect on upon identification of a construction project?
  - Scope of the works
  - Budget/cost
  - Schedule/time
  - Accountability
  - Risk allocation
  - Owner's desired level of control
  - Contractor
2. How can these key issues assist in determining the appropriate contract delivery method for a party?
  - Traditional Build only method
  - Design and Build method.
  - EPC/Turnkey
  - EPCM
3. What difficulties would the project encounter if the appropriate contract delivery measure is not determined?
4. What contractual options would be explorable to resolve a contractor's request for contract price adjustment owing to supply-chain disruption?
  - Is there a price escalation clause?
  - What other clause can be explored in the absence of the price escalation clause?
    - Variation clause (*barring automatic entitlement to additional costs*)
    - Force majeure
    - Provisional sum
    - Suspension or termination

5. What non-contractual best practices can be explored in addition to contractual options?
  - Re-sequencing of work activities
  - Sourcing alternative materials
  - Pre-purchasing and stockpiling of construction materials
  - Purchasing materials directly from suppliers.
6. Given the contractual options may be limited in application except modified, what bespoke drafting can be included during contract negotiations to maximise cost-effective solutions to supply-chain disruptions when they arise?
  - Price escalation clause.
    - Maximum limit of contract adjustments or frequency.
    - Reciprocity - Allowing a decrease in the baseline price in the event of cost decreases.
  - Force majeure
    - Tailoring to allow for material shortages.
  - Early warning provisions
    - Timely response to the problem.
    - Seeking alternatives and changing to a less expensive or more readily available material.
    - Eliminating or pausing portions of the scope of work not on the critical path.
  - Termination
    - Adding to the list of reasons for termination any issues that may arise due to material supply chain issues and material costs.
  - Provisional sum provisions
    - To cover price increases and provide greater flexibility.

For more information, please contact Ngo-Martins Okonmah or your usual Aluko & Oyebode contact.



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# Termination checklist for construction contracts

The following is a checklist of some of the key issues to be considered by a party prior to terminating or when receiving a termination notice under a construction contract:

1. What is the contractual (or other legal) basis for terminating the contract?
  - The availability and scope of remedies may differ depending on the specific ground for termination.
  - The governing law of the contract will often provide for mechanisms which allow the termination of a contract, but these can differ widely between legal systems.
2. Are there any restrictions on the right to terminate? For example:
  - Express contractual restrictions.
  - Implied or non-contractual restrictions.
  - Restrictions contained in project agreements (eg finance agreements).
  - Restrictions placed by the governing law of the contract.
3. What supporting evidence is there to substantiate the ground(s) for termination?
4. What contractual/legal procedures/formalities need to be complied with? For example:
  - Any cure periods following default by one party.
  - Time bars.
  - Notice requirements.
  - Court rectification/approval.
5. What impact does termination have on other provisions of the contract? For example:
  - Delay liquidated damages clauses.
  - Insurance.
  - Any terms that survive termination.

6. What impact does terminating the contract have on other project agreements?
7. Where the project is incomplete, can work be given to a third-party contractor?
8. Have alternatives to termination been fully explored? For example:
  - Varying the contract and/or scope of works.
  - Submitting to the dispute resolution mechanism under the contract.
  - Settlement.
9. Beware of the consequences of wrongful termination:
  - Seeking to terminate when there is no right to do so can itself constitute a ground for the counterparty to terminate the contract for cause.
  - The consequences in terms of legal liability can be severe (including damages for breach of contract including lost profit etc.).

For more information, please contact James Doe or your usual Herbert Smith Freehills contact.



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# Checklist for assessing delay on construction contracts

The following is a checklist of some of the key points to be considered by a party when engaging independent delay experts to assess construction delays:

1. What are typical time and money claims arising from construction contracts?
  - Contractor: Extensions of Time, relief from liquidated damages and prolongation costs.
  - Owner/Employer: Liquidated Damages.
2. What does the contract say is required to demonstrate entitlement to Extensions of Time and prolongation costs?
3. Is there a need to differentiate between the following types of construction delays in the context of the claim?
  - Non-critical delays.
  - Critical and non-excusable delays.
  - Critical, excusable and compensable delays.
  - Critical, excusable and non-compensable delays.
4. Is a delay expert required to assist with assessing construction delays?
  - delay experts provide independent opinion to address criticality, quantification and factual/technical causation.
  - legal teams interpret the contract to address contractual risk and legal causation: Excusable vs. Non-excusable (culpable) and Compensable vs. non-compensable.
5. What methodology might the delay expert employ to assess construction delays (eg determine critical path and quantify delay impact)?
  - As planned versus as built in windows.
  - Time slice windows analysis.
  - Time Impact analysis.
  - Impacted as planned.
  - Collapsed as built analysis.
  - Retrospective longest path.
6. What factors do delay experts consider when identifying the most appropriate delay analysis methodology in the specific circumstance of the project?
  - Relevant conditions of contract.
  - The nature of the delaying issues/events.
  - Date of the assessment.
  - The nature of the project.
  - The value of the dispute.
  - The nature, extent and quality of progress records available.
  - The nature, extent and quality of schedule information available.
  - The forum in which the assessment is being made.
  - Time available for the analysis.
  - The nature of damages sought.
7. What information does a delay expert typically require to analyse construction delay?
  - Contract and appendices.
  - Baseline programme and update programmes.
  - As built and progress information.
  - Contemporaneous evidence (correspondence, meeting minutes, progress reports, submitted claims etc.).
8. Once the delay expert concludes on the extent, incidence and causes of critical path delay, the legal team interpret the contract and apply legal tests to conclude on liability.

For more information, please contact Tayo Okunade or your usual Accuracy contact.



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