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The National Construction Authority (Defects Liability) Regulations, 2020

Introduction

The National Construction Authority (Defects Liability) Regulations, 2020 ('the Regulations') have been published. They shall be effective upon approval by parliament. The Regulations apply to commercial buildings. Commercial Buildings are defined as premises occupied wholly or partially for trade, business or for rendering services for money or its worth.

We summarize below, key aspects of the Regulations.

Practical Completion Date

The Regulations define the Practical Completion Date as the date when the relevant county government issues a Certificate of Occupation.

This definition will determine the date when the Defects Liability Period (DLP) starts. This differs from the typical definition in standard form construction contracts and off plan sale agreements (Sale Agreements). They define the Practical Completion Date as the date when the architect certifies the building as substantially fit for use.

Should the Regulations be approved and given the use of the Practical Completion Date in Sale Agreements usually impacts key items such as when a buyer gets possession, when the final instalment is paid and when transfer of ownership occurs. Developers of commercial buildings will need to review sale agreements and construction contracts to ensure conformity with the Regulations once they are approved.

Defect Liability Period

The Regulations provide that all construction contracts for commercial buildings must have a patent and latent DLP.

A patent defect is one which can be identified upon reasonable inspection during the construction period while a latent defect is a structural flaw that is concealed or not readily detectable during the DLP.

The Regulations prescribe a patent DLP of at least twelve (12) months from the Practical Completion Date. The latent DLP is a minimum of six (6) years from completion of the patent defects liability period.

Under the standard form construction contracts currently used in Kenya, the DLP is a matter of contract left to the parties to negotiate freely. They also do not provide for a distinction between the Patent Defect Liability Period and Latent Defect Liability Period, arguably creating an ambiguity.

Should the Regulations be approved, the DLP shall be a key consideration for contractors in pricing, given mandatory thresholds will be set out in Law. Sale Agreements and Leases for units in commercial buildings will also need review to provide sufficient collateral warranties for purchasers. This will allow purchasers direct recourse against the Contractor, despite the seller's exit.



Liability

Other than the contractor being liable for defects as is typical in standard construction contracts, the Regulations also makes the engineer, architect, quantity surveyor or sub-contractor (engaged by the owner) liable for patent and latent defects ('Liable Parties').

The Regulations imply that the Liable Parties are jointly liable.

This may be aimed at introducing an increased sense of responsibility on all the professionals involved in the construction of a commercial building. These professionals will need to obtain a professional indemnity cover for latent defects. This obligation will extend to the Main Contractor and any sub-contractors, engaged by them.

Professionals engaged in construction of commercial buildings will need to consider this cost in their fee negotiations and update their professional indemnity covers, to cover these new risks if the Regulations are approved.

Owner Continuing Obligations

The Regulations, if approved, will require the owners of commercial building to always insure the commercial building against structural damage attributable to them.

Conclusion

We note that the Regulations are limited to commercial buildings. Residential buildings, which form a huge chunk of buildings currently under construction due to the Affordable Housing Program and oversupply of office space, are excluded.

The Regulations make a case for the finalising of the review of the JBCC Contract as published by the Joint Building Council, Kenya to conform to the Regulations. The length of the DLP may be left to the parties.

The Regulations do not touch on liability for latent defects during the patent defects liability period. The assumption is that this is a drafting issue and liability would still attach. Finally, while the Regulations do not prescribe a penalty for parties who do not comply, upon approval of the Regulations, contractors could be suspended under the National Construction Authority Act for failure to comply.

We shall keep track of its progress in Parliament and provide further updates.

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