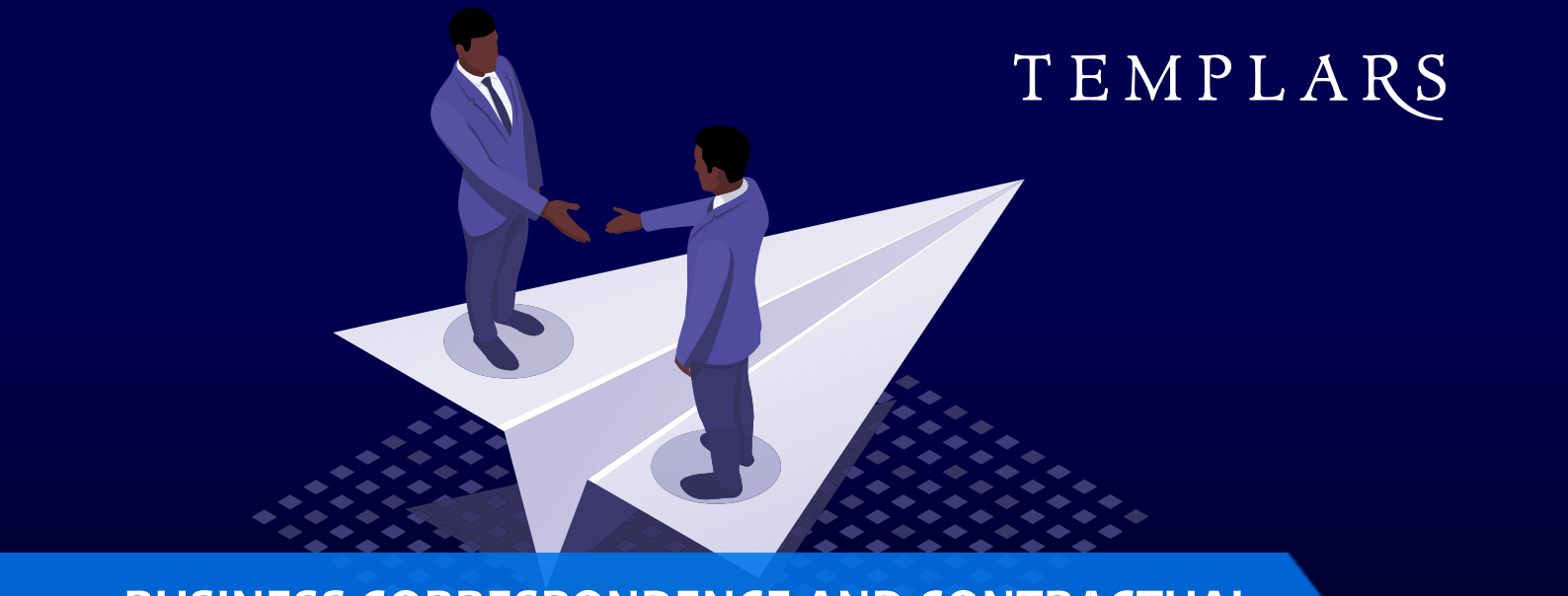

BUSINESS CORRESPONDENCE AND CONTRACTUAL RELATIONSHIPS: WHAT PARTIES MUST KNOW

Introduction

In the business world, correspondence is exchanged between business parties—existing and intending contractual parties—on a daily basis. In the process, binding, and sometimes far-reaching, contractual obligations are created and existing contracts are modified, even without the parties knowing it. And most times, this happens before lawyers get involved.

In the course of advising clients, lawyers frequently encounter situations in which an email should have been sent but was not. It may well be that an email ought not to have been sent or the wording ought to have been different. Cases are lost and won on the basis of that one-line email or one-paragraph letter that ought to have been sent. Indeed, sometimes a one-paragraph response to the counter party was all that was needed to save the day.

Author

Chidiebere Ejiofor
Senior Associate
chidiebere.ejiofor@templars-law.com

Key Contact

Godwin Omoaka, SAN.
Partner
godwin.omoaka@templars-law.com

This article examines the need for business correspondence to be taken seriously and be given appropriate responses when such responses are required and their contents subjected to some rigour before they are shared. The article will, in the paragraphs that follow, share a few thoughts on how the exchange of business correspondence can affect parties' business relations and how parties can avert or limit exposure to avoidable liabilities arising from inadvertent use of correspondence. In particular, it will discuss how business correspondence can:

I) create contractual relationships;
ii) modify existing relationships;
iii) be used to establish liabilities; and
iv) serve as an aid to construing the intentions of the parties.

Contractual relationships can be created through business correspondence

Usually, intending parties to a contract would discuss, exchange emails or letters and later reduce their agreement into a single formal document which memorializes the terms by which their relationship would be governed. There may therefore exist this erroneous belief that until such a formal contractual document is produced and executed by the parties, no binding contractual relationships are created.

The truth, however, is that a contract is created the moment the basic elements of a valid contract exist. These are: offer, acceptance, consideration and intention to enter into legal relations.

All four basic elements of a valid contract above can be established by exchange of correspondence though the parties are yet to execute a formal contract. Once these elements are established, a binding contractual relationship is created.[1] A party who is still expecting the execution of a formal contract may be in the erroneous belief that it is not yet bound. In reality, however, it may be too late for the party to walk away without being liable for breach of contract against the other party. It is also possible for the exchange of correspondence to create separate binding obligations for the parties that continue even after their negotiations and the execution of a formal contract by the parties. This would be especially so where the contract is silent on the matters to which these obligations relate and such obligations are not inconsistent with the express terms of the contract.

To avoid a situation where a party is held bound to contractual obligations against his real intentions—when all he thought he was engaged in were mere negotiations and exchange of correspondence—it would be helpful to enlist the assistance of some safeguards provided by law. In this regard, parties may consider inserting an ***Entire Agreement Clause*** in their contract. The purpose of an Entire Agreement Clause is to make clear that the document in which it appears (and any other documents specified) constitute the whole agreement between the parties with previous correspondence between the parties expressly excluded.

Parties may also state clearly in any correspondence exchanged in the course of negotiations prior to executing a formal contract that such correspondence is subject to contract. This could be by way of marking the correspondence "subject to contract" or by prefacing the correspondence with expressions such as "subject to parties executing a formal contract", "subject to further negotiations on the subject by the parties,"etc. This would have the effect of shielding the parties from being bound by any contractual obligations that could have been created by such exchange of correspondence until a formal contract is executed by the parties.[2]

Existing contracts can be modified through business correspondence

As has been shown above, a contract is created once the elements of a valid contract can be established. Parties who want to be protected would usually insist on putting the contract in writing. Sometimes they go a step further to insert certain safeguards into the contract by way of some boiler plate clauses such as an Entire Agreement Clause and/or a clause stating that any waiver, variation or modification of the contract must be in writing and signed by all the parties. With all these contractual armors, one may be tempted to rest their oars in the exchange of correspondence in the mistaken belief that the contract cannot be amended or rights waived thereunder except as agreed under the contract—in writing signed by all the parties.

The fundamental truth parties must know is that the attitude of the courts to contracts is that a contract is the parties' contract and as such parties retain the absolute freedom to modify their contract and waive any right thereunder as they please.[4] . Thus, notwithstanding anything contained in a contract—to the effect that it can only be modified or any rights thereunder can only be waived in writing signed by all parties—such contracts may still be modified and the rights waived by the conduct of the parties.[5] On this note, what the court looks at

[1] See Zakhem Con. (Nig.) Ltd v. Nneji (2006) 5 SC (Pt. 11) 78 at 90 - 91
[2] See U. B. A Ltd. v. Tejumola & Sons Ltd. (1988) 2 NWLR (Pt. 79) 662
[3] As discussed above

is not whether there is a signed document between the parties evidencing such a waiver or modification but whether the parties' course of dealing gives evidence of such. The exchange of business correspondence may come very handy in this regard. In other words, the court would usually look, among others, at the exchange of correspondence between the parties to understand their course of dealing and to what extent same has modified their contract.

For example, in the Nigerian **case of United Calabar Company v. Messrs Elder Dempster Lines Ltd**[6], the plaintiff entered into an agreement dated 1 October, 1961 with the defendant to enter into stevedoring services for and at the instance of the defendant at the port of Calabar. The contract was for a one year period—between 1 October, 1961 and 30 September, 1962. It was a material term of the contract that the plaintiff shall furnish to the defendant's agents written confirmation that the plaintiff had obtained full insurance cover against all risks contained in clause 13 of the agreement. The plaintiff did not obtain the necessary insurance cover as agreed.

On 17 September, 1962, toward the end of the contract, the defendant purported to terminate the contract and later disclosed that its reason for terminating the contract was the plaintiff's failure to obtain full insurance cover for the risks agreed by the parties in breach of a material term of the agreement. In deciding that the defendant had waived its right to insist on that term of the contract, the Supreme Court held:

> ***Besides, by their letter Exhibit D dated the 13th December, 1962 certainly after the discovery of the non-fulfilment of clause 13 by the plaintiff, and after the letter Exhibit C, they were offering new contract jobs to the plaintiff, asking him to complete the offloading or handling of the vessels irrespective of their date... Second, the letter... was a waiver of condition...' The facts of the present case are clear, and it would be completely inequitable for the defendants, after allowing Exhibit B to run its natural course, and after writing Exhibit D to be allowed to contend that the Plaintiff has been in breach."***

In the above case, the Supreme Court relied on the parties' business correspondence—the letter of 13 December 1962—by which the defendants offered new jobs to the plaintiff even after the discovery of the non-fulfilment of clause 13 by the plaintiff, in arriving at the decision that the defendants had waived their right.

What is recommended in the circumstance therefore is for a party to reject any departure from the agreed terms of the contract in writing and reserve and/or insist on its rights under the contract. And in the event that the innocent party has no choice than to follow the particular course, though contrary to the clear terms of the contract, he may do so in protest and reserve his rights under the contract in a letter or email as often as that happens.

Liabilities can be established through business correspondence

Parties to a contract usually exchange correspondence in the course of their business relationships in furtherance of their business objectives for the most part. It could also be to notify the other party of its breaches, to establish facts for the record and to make demands of the other party. It could be a demand letter alleging that certain sums are owed. It could be accusatory. Sometimes, they are a precursor to commencing a legal action in an innocuous manner.

A contracting party must know that such correspondence and the responses thereto should not be treated with kid gloves; they should be taken seriously and their contents carefully weighed to avoid undue liability. A party should not make the mistake of ignoring clear assertions, if he holds a contrary position, no matter how frivolous and comical such assertions may seem to him. They should be immediately refuted.

The settled legal position on this point is that "*where a party to a contract receives a correspondence from the other party [to] the contract and he keeps silent thereon in circumstances in which a reply or reaction is obviously expected, he is presumed to have consented to the contents of the correspondence.*"[7] It is therefore a mandatory

[7]Oriloye v. Lagos State Government & Ors (2014) LPELR-22248(CA); Weidemann vs. Walpole (1891) 1 QB 534 @ 537. Iva Vs. Amakiri (1976) 11 SC 1, Gwani Vs. Ebule (1990) 5 NWLR (Pt. 149) 201 and Vaswani Vs. Johnson (2000) 11 NWLR (Pt. 679) 582.

legal requirement that such assertions be immediately refuted in material particular if their contents are not acceptable. Failing to do so would mean that those allegations are deemed admitted and would require no further proof in court by the counter party.

This is particularly necessary in cases of monetary demands. It is typical for a party to a contract to write the counter party asserting indebtedness and demanding payment of the alleged sum. If the counter party disputes the alleged debt or any part thereof, he should immediately respond to the material allegation of debt against him and specifically deny same (or the part he disagrees with) in a corresponding letter or email.

What usually obtains in practice is that, in some cases, a debt may be partly disputed but the party involved is more concerned about maintaining a good business relationship with the counter party than in refuting the aspect of the debt his disputes. Thus, he may acknowledge the indebtedness and, instead of refuting the part he disagrees with, proceed to make a plea for some concessions, in the belief that the aspect he disagrees with would be reconciled in due course. However, having not refuted the material allegation of indebtedness at that earliest opportunity, he may not be allowed to do so subsequently. On the basis of such admission, the counter party may be able to successfully pursue (i) an action for judgment on admission, (ii) undefended/summary judgment proceedings, or (iii) a winding-up action against him.

The effect of such failure to refute specific allegations was emphasized by the Supreme Court in the case of Kenfrank (Nig) Ltd v U.B.N. Plc. Where the court beautifully held as follows:

> ***To allow the appellants to get away with the denial of peripheral facts, when the meat of the matter was left unanswered would be to allow them to dribble the plaintiff out of judgment to which it was lawfully entitled. I condemn in the strongest terms this attempt. It shows ingratitude of the highest order on the part of the defendants/appellants. They benefited from the largess provided by the plaintiff/respondent. They acknowledged this in the numerous letters they wrote. They not only acknowledged indebtedness, but also pleaded for and did get mercy...***

Business correspondence as an aid to construction

In interpreting a contract, the presumption is that parties intend the plain and ordinary meaning of the words and terms used in their contract. The courts will therefore give effect to them without any addition or subtraction. The general rule is that extraneous matters are not admissible to explain the intentions of the parties in a written contract.

However, sometimes, due to the dichotomy between the mind and its verbal representation, the intention of the parties may not be so clear. As much the parties may have tried to make their intentions clear at the hypothetical stage, it may not be as clear when it comes to the actual implementation of the terms. In that case, the court would embark on some aids to interpretation to discern what the parties actually intended at the time the contract was negotiated and entered into.

One of the aids the court would usually have recourse to are the pieces of correspondence exchanged between the parties at the time the contract was negotiated which midwifed the execution of the formal contract. This would give the court insight into the minds of the parties and what they envisaged. It is therefore necessary to examine carefully the contents of letters and emails exchanged by the parties prior to executing a formal contract as they may become the determinants of the parties' contractual rights and obligations in deserving circumstances.

[8] (2002) 8 NWLR (Pt.789) 46, Per ARIWOOLA, J.S.C. (P. 40, paras. C-G)

Conclusion

Parties or intending parties to a contract must take business correspondence seriously. Business letters, unlike social correspondence, deserve to be responded to as appropriate. A contracting party must know that such correspondence and the responses thereto should not be treated with kid gloves; as they can go a long way in creating or shaping the parties' contractual rights and obligations and sometimes even beyond what a party had envisaged.

To avoid undue liability, therefore, it is not just enough to write or give a response to a letter or email, the content of such correspondence should be carefully weighed to ensure that it is not only properly worded but also adequately addresses the issue or issues involved.