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THE LEGAL FRAMEWORK FOR CONSTRUCTION DISPUTE RESOLUTION IN NIGERIA: A REFORM-ORIENTED ANALYSIS

by

^{*1} Barakat Adebisi Raji,
Muyiwa Oladele, Kayode Sodiq,
and Oniye Mashood

Abstract

The number of construction projects awarded daily either by individuals or government shows the relevance and role of the construction industry in the socio-economy of Nigeria. However, the most striking aspect of this is that most of these projects are left uncompleted after sometime due to many factors which include disputes. The concern is that disputes emanating from construction contracts are yet to be properly addressed with the existing legal framework for dispute resolution in Nigeria. It has been observed that there are no Alternative Dispute Resolution (ADR) mechanisms designed to handle construction dispute resolution in Nigeria. At present, major construction disputes are settled through litigation and thus involve long process. This paper therefore, examines the practice of ADR in construction industry in Malaysia and UK, its effects on the parties concerned, the attitude of courts in relation to construction disputes with a view to propose a lasting solution to the problem(s) identified. Specifically, the use of ADR provisions is yet to be explored for resolution of construction disputes in Nigeria. This paper adopts mainly a qualitative legal research method. There is a need for the doctrinal legal research method to identify the relevant primary and secondary materials relevant to this paper. However, it is prudent to lay down a general conceptual framework on ADR within the context of construction disputes and provide a general outlook of the Nigerian legal system and other legal systems from other commonwealth jurisdictions (Malaysia and UK). The findings of this paper revealed that ADR is yet to be fully practiced in courts in Nigerian courts except in Lagos state. Lack of awareness of ADR mechanisms was identified as one of the major factors impairing the use of ADR mechanisms in construction industry in Nigeria. Based on the situations in other developed and developing countries such as United Kingdom and Malaysia respectively, it was also found that the use of ADR is essential in resolving the disputes associated with construction industry. It was evident from the study that ADR mechanisms would make a remarkable contribution to the existing practice of the construction dispute resolution in Nigeria.

Keywords: Legal Framework, Construction Dispute, Resolution, Reform Oriented Analysis

Introduction

There is no doubt that construction industry handles expensive and sophisticated projects and the much pressure to complete the project within a stipulated time makes

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disputes inevitable. The disputatious nature of the construction industry is universally acknowledged and not peculiar to Nigeria. Litigation has been the preferred form of dispute resolution in construction projects. Although, parties would usually try to negotiate a settlement and if this fails, parties would go to court.² However, litigation has proved to be time consuming and expensive and this has given rise to the use of arbitration in construction disputes. Arbitration in terms of cost and time is more beneficial than litigation. However, arbitration is almost sharing the features of litigation hence the need to introduce alternative dispute resolution in the construction industry globally. Nowadays, resolving disputes with alternative forms of dispute resolution has been on the rise in the construction industry.³

Alternative forms of dispute resolution have been preferred because of the complex nature of construction disputes and the high cost of resolving disputes through litigation and the damage that this have impacted on the parties' business relationships.⁴ Parties wish to have control over their matters given the complex nature of the industry, hence the need for experts in the field to give rulings in line with professional ethics in response to dispute at hand.⁵ On the other hand, the newly introduced mechanism known as "statutory adjudication" is widely gaining recognition and becoming a household name in construction industry in almost all the commonwealth countries.⁶ The concern of this paper is that major construction disputes still suffer in the hands of litigation thereby resulting in wasting of materials, resources and abandonment of projects. This paper therefore, examines the practice of ADR in construction industry in Nigeria, its effects on the parties concerned, the attitude of courts in relation to construction disputes with a view to propose a lasting solution to the problem (s) identified.

Nature of Construction Dispute

Disputes are inescapable in any given construction industry due to the complex nature of the industry itself.⁷ The most common disputes associated with the industry are delay in the supply of materials, delay in payment for completed work, improper construction method, delay caused by the subcontractor and discrepancies in contract documents between the various parties.⁸ There are bound to be disputes because different professionals are always involved in the execution of construction projects

² O. J. Oyeboade, 'Strategies for Resolving Legal Matters on Civil Engineering Contracts in Nigeria' [2015] *International Journal of Construction Engineering and Management* 4 (5), 159-164; J. O. Oga, 'The Viability of applying Alternative Dispute Resolution Processes in the Niger Delta Conflict', (Diss. University of Warwick, 2013).

³ M. K. Alhaji and D. I. Abubakar, 'Causes of Delay in Nigeria Construction Industry' [2012] *Interdisciplinary Journal of Contemporary Research in Business* 4 (2), 785-93.

⁴ L. Overcash Allen, 'Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration', [2015] *Construction Lawyer* 35 (1), 23-53.

⁵ *Ibid.*

⁶ M. J. Kathleen, and Harmon, 'Resolution of Construction Disputes: A Review of Current Methodologies', [2003] *Leadership and Management in Engineering* 3(4), 187-201.

⁷ K. A. Mohammed and A. D. Isah, 'Causes of Delay in Nigeria Construction Industry' [2012] *Interdisciplinary Journal of Contemporary Research in Business* 4 (2), 785-794.

⁸ Mohammed, *op. cit.*, 786.

although each with distinct and well defined specialized role. Delays can also give rise to suspension of work and loss of productivity, late completion of project, increased time, related costs, third party claims and abandonment or termination of contract.⁹ Other factors include contractor related problems, owners' financial constraints, high inflation/increased material price; design change by client; defective design; weather conditions; delayed payment on contracts and defective construction work.

When delay occurs in a project, it will have adverse consequences on project objectives in terms of time, cost and quality.¹⁰ Construction-related disputes can consume a lot of time, money and in most cases the expenses involve in pursuing a dispute is far out of proportion to the money actually at stake.¹¹ Moreover, the contract form which defines the rights and obligations of parties to construction contract fails to state how dispute should be resolved between them. This necessitates the parties to choose whatever means available for resolution of their disputes.

Emergence of construction dispute resolution

Disputes are inescapable in any given business including construction industry. Construction disputes can occur from various stakeholders within the industry and ranges from disputes between clients and contractors, consultants and contractors, contractors and suppliers, contractors and employees, amongst others.¹² It may also be as a result of time and cost overruns, poor execution of work, payment delays to contractors, suppliers, and workers.

Litigation and arbitration have for a long time being in existence in the construction industry. Research has revealed that litigation and arbitration need to be supported with other alternative dispute resolution mechanisms for efficient and effective performance of the industry.¹³ It has been argued that delay occasioned through court process normally damages business relations of the contracting parties. The unsuccessful party is made pay the legal costs in addition to what has been accrued to the successful party. Disputes relating to construction projects usually use up enormous amount of funds and time. However, the world has shifted from adversarial to interest-based dispute resolution mechanisms with equitable functions in construction

⁹ A. Othman, and S. Ismail, 'Delay in Government Project Delivery in Kedah', Malaysia (Paper presented at the International Research Conference on Business, Economics and Social Sciences, IRC, 2011, 111). See also Afshari et al, 'Identification of Causes of Non-Excusable Delays of Construction Projects' in *Conference on E-Business Management and Economics*, [2010], 42-46.

¹⁰ M. Abedi, M. S. Fathi and M. F. Mohammad, 'Major Mitigation Measures for delays in Construction Projects', [2011], 1-7; A. R. Ismail, et. al., 'Relationship between Factors of Construction Resources Affecting Project Cost', *Modern Applied Science* [2013] 7 (1), 67-75.

¹¹ F. Firas, Chapter 1 Introduction 1.1, (PhD Thesis, UMP, 2010), 1.

¹² R. Isa and F. Emuze, 'Stakeholders' Perceptions of Construction Dispute Resolution Mechanism in Nigerian Construction' (PhD Candidate, Central University of Technology, Free State, 20 President Brand Street, Bloemfontein, South Africa, 2015), 12-20; S. Y. Anyam, 'Assessment of Professionals' Perception of Knowledge and Skills Requirement of Contractors for Mass Housing Construction', (PhD diss., 2014).

¹³ C. H. Wong, 'Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry', (Dissertation, UTAR, 2011); D. Irikpen, 'Disputes: When ADR Becomes Succour', *This Day Live*, Monday 29 December, 2014.

industry.¹⁴ This paradigm shift has given rise to demand in amicable mode of settlement in the industry. Globally, the stakeholders in the industry has made tremendous effort to put in place some efficient and adequate mechanisms such as mediation, statutory adjudication, dispute review board, expert determination, neutral evaluation and construction court for resolving disputes owing to the exigencies of the industry.¹⁵

The changing world today has accounted for the emergence of new types of proceedings for settlement of construction disputes. These proceedings have been developed, and they are proving beneficial in saving time and money to the stakeholders in the construction industry. However this does not mean that the existing mechanisms before the emergence of new ones are obsolete and still not relevant and should be discarded.¹⁶

The Major Processes of Construction Dispute Resolution

The major current methodologies for preventing or resolving construction disputes are Dispute Resolution Advisor (DRA), Dispute Review Board (DRB), Expert Determination, Mediation, Neutral Evaluation and Statutory Adjudication. DRB, expert determination, neutral evaluation and adjudication are the latest mechanisms introduced into the construction industry for speedy dispute resolution in the industry. The DRA, DRB and DAB are used and referred to as on-site dispute avoidance mechanisms while others such as litigation, arbitration expert determination, statutory adjudication, and Mediation are called off-site dispute resolution mechanisms.¹⁷ The former are employed to resolve any dispute that may arise during the pendency of the construction project while on site to avoid the cost of arbitration or litigation as the case may be. These processes have been proved to be cost-effective, simple, time-bound and user friendly.

On Site Dispute Resolution and Avoidance Mechanisms

On site dispute resolution and avoidance mechanisms are the mechanisms used during the pendency of project when dispute arises between the parties to construction contract. This is to reduce or avoid any form of disputes likely to impair the work -in-progress and to enable a timely delivery of the projects. This is because dispute left unattended to can give rise to major issues due to the nature of construction industry. Major dispute can be very costly and time consuming and the logic behind the emergence of these mechanisms. These mechanisms include Dispute Review Board (DRB), and Dispute Adjudication Board (DAB). It is highly desirable for Nigerian construction industry to take a clue (to serve as a guide in the solution to a problem).

¹⁴ O. Famakin, et al., 'Assessment of success factors for joint venture construction projects in Nigeria', *Journal of Financial Management of Property and Construction* [2012] 17 (2), 153-165; I. Mahamid, and N. Dmaid, 'Risks Leading to Cost Overrun in Building Construction from Consultants' Perspective', *Organization, Technology & Management in Construction: An International Journal* [2013] 5(2), 860-873.

¹⁵ E. R. Odiri, 'Alternative Dispute Resolution', (Paper presented at the Annual Delegates Conference of the Nigerian Bar Association at Le Meridien Hotel - Abuja, 22nd - 27th August, 2004).

¹⁶ S. Joon, 'Discussion on the Models of ADR', *Legal Studies Honors Thesis*, spring (2011).

¹⁷ D. Agdas, 'Analysis of Construction Dispute Review Boards', *DRBF Forum* 17, No.3, (September 2013), 1-28.

Dispute Review Board (DRB)

This has been used and tested for the resolution of disputes between client and Contractors on capital infrastructure development contracts such as highways, railroads, airports and government buildings including hospitals and schools in the US and beyond.¹⁸

The early DRB pioneers and practitioners formed the Dispute Review Board Foundation (DRBF) in 1996. The DRBF is a non-profit corporation dedicated to the resolution of construction disputes through the use of DRBs and to the furtherance of the DRB concept. The mechanism used in the construction industry for resolving disputes during the pendency of construction work, established at the beginning of the job by total agreement of the parties and before any conflict arises. It is also known as Dispute Board (DB). It is geared towards minimizing and avoiding the issues which may likely give rise to disputes if left unattended.¹⁹ This board consists of a three-member panel. Members are mutually selected by the both the contractor and the owner, comprises experts with technical know-how in the area of construction. The selection is done prior to the commencement of the project in order to bring disputes to the barest minimum level.

Members meet at a regular forum for discussion on contentious matters and identify ways to solve them. They also create valuable opportunities for the parties to avoid disputes by keeping proactive communication with them. Their recommendations serve as a reinforcement with a positive impact on the project's outcome as well as creating good rapport among the stakeholders. For instance, the board had been used to resolve disputes emanated from construction projects like the channel tunnel, the Hong Kong Airports and World Bank financed contracts.²⁰

Dispute Adjudication Board (DAB)

This is a new mechanism introduced by contractual dispute adjudication board. The procedures, is meant to serve the construction industry. This board is constituted to deal with issues and matters which arise during the pendency of the project. DRB, DAB and DRA are referred to as on-site dispute management processes. This is because they are instruments through which disputes are brought to the barest minimum level while

¹⁸ R. M. Matyas, A. A. Mathews, R. J. Smith and P. E. Sperry, *Construction Dispute Review Board Manual*, (McGraw-Hill, 1996). Note that the 2nd edition is due to be published in October 2003. This article draws heavily on DRBF guidelines and specifications. See <http://www.DRBF.org> DRBF 6100 South centre Blvd. Suite 115 Seattle, WA 98188-2441 USA.

¹⁹ N. Gould, 'Dispute Resolution in the Construction Industry: An Overview', (Paper Presented at Construction Law Seminar: Introduction to a Basic 27, 2004).

²⁰ P. H. J. Chapman, 'The Use of Dispute Boards on Major Infrastructure Projects' [2015] *Turkish Commercial Law Review* 1 (3), 219-232; G. Paula and B. Ong, 'Look before you Leap: Avoiding the Traps and Maximizing the Benefits of Your DRB', *Construction Law Journal* [2012] 28 (4), 310-337; R. Talib, 'Dispute Review Board as an Alternative Dispute Resolution', (Diss. UTAR, 2011), Chapter 2, 1.8.2, 16; S. C. Chua, 'A Study on the Issues of Construction Dispute in Malaysia and Singapore' (Diss. UTAR, 2012); C. Cyril, on *Dispute Board*: John Wiley & Sons, 1-21, (2008). He explained further on DRB thus: Dispute Board were first introduced almost twenty (20) years ago, since then close to \$100 billion dollars worldwide has been spent on construction projects that have used DB, of these 98% were constructed without any court battles and of the remaining 2% of dispute board decisions were upheld by either arbitration and or the court, a truly impressive record yet very little is known about this mechanism and how they operate.

work goes on at the site. Parties to construction contract are required to appoint a DAB within 28 days of the commencement date of the contract.²¹ There is this board in Nigeria but with a slight difference in the nomenclature. It is called "site supervision." This board usually consist of three members, each party nominates a member for the approval of the other and the parties then consult with their nominated members before agreeing to a third member to act as the chairman.²² It is a tripartite agreement involving the employer, contractor and members of DAB. After the commencement of the project, the board meets regularly and periodically visits the site and receives project information to ensure familiarity with the project and the parties. They device a timetable for receiving submissions, reviewing the documents, visiting the site regularly and conducting the hearing in order to issue decisions. The board meets regularly to discuss project and any disputes. When a dispute arises, the board swings into action, hears presentations from the parties, immediately evaluates the dispute and makes settlement recommendations to the parties.

The DAB decision is binding and parties are required to respect and give immediate effect to it. If either party is not satisfied, then such party has twenty-eight (28) days within which to issue a Notice of dissatisfaction. This does not relieve the dissatisfied party of the obligations of complying with the decision in the interim. The use of this mechanism has resolved a lot of cases which ordinarily should be instituted in court.²³

Expert Determination

Expert Determination (ED) is a very useful device in the construction industry for dispute resolution. The expert is appointed by disputing parties in construction industry to make a determination on the subject matter of dispute and he is allowed to use his own expertise in the final determination of the dispute. Engineers and or construction professionals are relevant in this circumstances for providing technical expertise, project management and contract administration.

His determination can only be challenged in limited circumstances, that is, on the grounds of fraud or lack of impartiality. Expert determination produces binding results, he decides the outcome of the dispute because of his expertise in the area of the dispute.²⁴ Expert determination can be used to deal with the valuation aspects of a complex dispute. Expert determination is used for resolving technical issues borne out of disputes in the construction industry. For example, where disputes are in respect of certified sums, unpaid certificates, defective workmanship, defective equipment, defective materials, and performance shortfall. If the parties are already in dispute,

²¹ Clause 20 of the 1999 FIDIC Conditions as set out in the Procedure.

²² N. Gould, 'Dispute Resolution in the Construction Industry: An Overview, (A Paper Presented At King's College London and Society of Construction Law Construction Law Seminar, 3rd September, 2013).

²³ Burns, Robert James Cowan, 'A study of the Impact of the Housing Grants, Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and Construction Act 2009 on Resolving Disputes within an industry which appears to embrace Conflict in the UK and a Comparative Global Study on ADR and Dispute Resolution Techniques and Applications' (PhD diss., Robert Gordon University, 2013).

²⁴ N. Gould, 'The Expert Determination: An Update', <<http://www.fenwickelliott.com>. P5 > viewed on 1 January, 2015.

perhaps heading towards an arbitration or the court is appropriate, but it may be possible to have a part of the dispute that relates to valuation, to be determined by the expert.

This can often save time and money, for example in a construction dispute the expert may be able to determine the value of disputed variations. In the construction industry, it is primarily used to resolve technical issues, such as observed defects in construction works during the pendency of a given project, claims relating to extension of completion period, claims relating to fluctuation in the cost of construction materials and variation claims relating to unforeseen circumstances like underground soil structure. The process is relatively quick, informal, confidential and inexpensive when compared to other processes.

Statutory Adjudication

Adjudication is a way of resolving disputes in construction contracts. The use of statutory adjudication for construction dispute resolution is becoming popular worldwide. The economic downturn in the construction sector has highlighted the lack of formal contractual arrangements and bad payment practices in the sector. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have and continue to cripple the construction industry.²⁵ The financial problems affecting some construction companies have in turn affected sub-contractors and suppliers further downstream along the construction value chain.

This affects the quality of work and the livelihood of many people.²⁶ It is still a prompt procedure, particularly when dealing with a (complex) large dispute. In addition, it is a speedy and cost-effective mechanism for resolving construction dispute. The procedure in statutory adjudication for referral of dispute is that disputes must be referred within seven days of the notice.

Appointment of adjudicator can be done by the parties or through the director for regional for arbitration centre. Adjudicator's decision is binding on the parties but is not final unless the contract so provides in the agreement.

The decision of the adjudicator is binding unless it is overturned by the court or by an arbitrator depending on the agreed dispute resolution forum within the particular construction contract. The adjudicator is required to reach a decision within 28 days of the referral, plus any agreed extension, and must act impartially. The Act governing the procedure of this mechanism has been in Singapore since 2006 and is known as Building and Construction Industry Security of Payment Act 2006 (Rev. Ed). This has been introduced and used in the Malaysian construction industry through the enactment of

²⁵K. Dabeesingh, 'Statutory Adjudication in the Construction Industry', *Business Magazine*, No. 1100 (October, 2013).

²⁶Martinsuo, et al., 'Developing a Supplier's Third-party relationships and Cooperation in Project Networks', *International Journal of Managing Projects in Business* [2015] 8 (1), 74-91; M. Frödel, et al., 'Integration Barriers for Purchasing Organisation in a Large Construction Company: Towards Requisite Disintegration', *The IMP Journal* [2013] 7(1), 46-58; Bemelmans et al., 'Supplier-contractor Collaboration in the Construction Industry: A Taxonomic Approach to the Literature of the 2000-2009 Decade', *Engineering, Construction and Architectural Management* [2012] 19(4), 342-368; W. C. Benton, et al., *Construction Purchasing & Supply Chain Management*, (McGraw-Hill, 2010).

Construction Industry and Payment Adjudication Act (CIPAA) in 2012. Statutory Adjudication will bring a positive change in the payment attitude in the construction industry in Nigeria.

Recommendations

Based on the earlier discussion, it is recommended that the policy makers should take a second look at these mechanisms and adopt the same for use in the Nigerian construction industry for settlement of payment claims so that Nigeria can be in tandem with the international practice. Secondly, that Dispute review board be introduced when capital projects are on-going to enable the completion of such projects without much litigation. Thirdly, expert determination, dispute avoidance or dispute board should be explored when minor dispute cases occur in small scale projects for effective resolution of disputes. Fourthly, Statutory adjudication process is highly recommended for prompt payment and timely projects delivery.

Fifthly, ADR centres should be established in every state in Nigeria for providing services on construction dispute resolution. These centres should be fully financed by government and staffed with experts in construction dispute resolution to hear and determine cases of construction within a reasonable time as it is done in other clime. Finally, construction disputes are better addressed through alternative means other than litigation because of the nature of many of the projects.

Conclusion

Disputes are inevitable in the course of executing a project in the construction industry due to number of factors which have been discussed in the earlier part of this study. What is germane in this regard is that parties to construction contracts should try and study all the available dispute resolution mechanisms, know how they work to enable them to choose an appropriate one suitable for speedy resolution of any given dispute without breaking up the relationship which has been established at the inception of their construction business. The choice of choosing the appropriate mechanism matters so that the life span of the project will also not be affected. For instance, at the inception of a project, parties are expected to put in place the Dispute Review Board members who will be monitoring the success and progress of the project until the completion period to enable the control of disputes and avoidance of risk. The board members will know at what stage other mechanisms should be employed in order to avoid total collapse or abandonment of the projects. Hence the need for a reform orientation of the construction dispute mechanisms used for construction disputes in Nigeria.