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STATUTORY ADJUDICATION: A PANACEA TO PAYMENT PROBLEMS IN CONSTRUCTION INDUSTRY IN NIGERIA

Barakat Adebisi Badmus-Raji*

ABSTRACT

This paper examines the reality of payment problems bedeviling stakeholders in the construction industry and the enormity of the threat that it poses in the delivery of projects in general and the economic development in particular in Nigeria. It x-rays the causes of these problems and possible solutions as well as the attempts that have been made to tackle the menace through the instrumentality of law both in other countries and in Nigeria. Consequently, this paper identifies among others the report of the Project Audit Commission set up in year 2013 to investigate cases of abandoned federal government projects. The report revealed that over 12,000 projects awarded by the federal government of Nigeria had been abandoned across the country while those of the states were even worse especially with the present economic recession. The deleterious effects of this phenomenon such as loss of lives, unemployment among others are catalogued. Hence, the paper suggests a number of ways through which these challenges can be tackled including the adoption of statutory adjudication Act, which has assisted the construction industry in other commonwealth countries. Finally, the paper makes certain recommendations for tackling these problems in Nigeria such as the need to revisit the legal framework for construction dispute resolution and modification of the existing laws guiding the resolution of construction disputes in Nigeria to accommodate statutory adjudication.

1. INTRODUCTION

It is apparent that efforts are geared towards finding solution to payment problems such as delayed and non-payment facing the construction industry in Nigeria. There is now a grown consensus that payment mode in the Nigerian construction industry needs an overhauling for effective delivery of projects. The problem of paying the contractors, subcontractors among others has brought a lot of setbacks to both the stakeholders and many projects. The report of the Project Audit Commission set up in year 2013 to carry out investigations on the Federal Government abandoned projects revealed that over 12,000 projects awarded by the Federal Government of Nigeria had been abandoned across the country while those of the states were even worse especially with the present economic recession. At the moment, major construction disputes are settled through litigation in Nigeria. The inadvertent delay occasioned in court on construction dispute cases has resulted in loss of time, cost

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and quality of projects. This has also resulted into loss of jobs, unemployment, bankruptcy and loss of lives and property of some of the stakeholders concerned. However, in an attempt to find a lasting solution to the question of what could have caused these problems the paper examines the use of statutory adjudication as practised in other Commonwealth countries for resolution of payment problems facing their construction industry.

2. THE USE OF STATUTORY ADJUDICATION

Statutory adjudication is a new mechanism specially designed for resolution of payments affecting the construction industry from completion of projects as at when due. This mechanism has proved to be speedy and effective in the resolution of payment problems both in Malaysia and UK in general.¹ However, this is yet to be introduced in the legal framework used for resolution of payment problems bedeviling the Nigerian construction industry. The stakeholders in the Nigerian construction industry who were interviewed during the fieldwork expressed their concern regarding poor performance of their colleagues in the industry due to delayed and non-payment of the work done by clients of the projects. One of the interviewees had this to say:

'It was also found that contractors and other stakeholders had been financially affected by this attitude of the clients. Many of these stakeholders have been compelled to wound up their construction business; some have died while others have been plagued with dying sickness. This is because the existing processes is not adequately designed and catered for resolution of payment problem. This has resulted into having majority of the complex construction projects being abandoned.'

The most striking aspect of this is that when construction cases are taken to court, the client will not pay serious attention. Most times the cases are struck out for want of diligence. At the end of the day both contractors and the projects suffer. Nigeria construction industry stands to gain from Malaysia and UK experience on the use of statutory adjudication mechanism through the establishment of the payment Act as argued in this paper.

3. EFFECT OF DELAY IN COURT

The inadvertent delay occasioned in court on construction dispute cases has resulted in loss of time, cost and quality of projects. This has also resulted into loss of jobs, unemployment, bankruptcy, and loss of lives and property of some of the stakeholders concerned. However, in an attempt to find a lasting solution to the question of what could have caused these problems the paper examines the use of statutory adjudication in other construction industry as practised in other

1 Ismail, Zulhabri, "A Framework for Effective Private Dispute Resolution in the Malaysian Construction Industry", *PhD in the Specialism of the Built Environment (AP990)*, Faculty of Architecture Planning and Surveying, Universiti Teknologi MARA, Shah Alam (2010).

commonwealth countries. Statutory adjudication process had been introduced to reduce the cost that goes into settlement of construction dispute across the globe to facilitate prompt delivery of projects. This process has been adopted by other Commonwealth countries such as South-Africa, Ghana, Singapore and currently Malaysia as a lasting solution to the delayed and non-payment problems confronting the construction industry. It is a common knowledge that arbitration provides technical issues to be handled by those who possess the requisite technical knowledge of the subject matter of dispute.² However, arbitration only comes to play after negotiation, and perhaps mediation or conciliation has been utilised and failed.

A delayed payment by a party involved in the process of payment claim may have an influence on the supply chain of payment in whole. Problems in payment at the higher end of the hierarchy can give a serious blow on cash flow problem down to the ebb of the chain of contracts. The research done by Hasmoriet *al.*³ stated that client's employees are wrongfully holding the payment and most of the time they do this to obtain some kind of "gift" from contractors once they issue out the payment. According to Ye and Abdul Rahman,⁴ clients deliberate delay for financial advantages, delay in releasing of the retention monies to contractor and wilful withholding of the payment for personal reasons are the major cause of the paymaster's withholding of payment.

Based on result analysis by Ye and Abdul Rahman, contractors in Malaysia perceived that delay for few day less than 5 working days is acceptable. This acceptability could be due to the inherent culture of late payment in the Malaysian. According to Ye and Abdul Rahman, delay in certification by parties involved in the project might also cause late payment issues. The parties involved may delay in approving the application for payment claim due to certain reasons which may arise because of his own or other parties involvement.

4. BENEFITS OF STATUTORY ADJUDICATION TO CONSTRUCTION INDUSTRY

Statutory adjudication process encourages free flow of cash for smooth running in the execution of projects. Problem of cash-flow has always been a barrier in the prompt execution of projects. However, Nigerian construction industry stands to gain in the adoption of statutory adjudication because of free flow of cash for the execution of projects. Once this barrier is removed, contractors, subcontractors and even suppliers of material will gain their profits within a very short time and the

2 Mallam-Hussani Adamu Dikko, "Experts Explore Arbitration as Alternative Dispute Resolution in Construction Industry", *Vanguard* (June 30, 2015).

3 Hasmoriet, M. Fikri, Izuddin Ismail, and Ilias Said, "Issues of Late and Non-Payment among Contractors in Malaysia", (Paper presented at the 3rd International Conference on Business and Economic Research, Bandung, Indonesia, 2012).

4 Ye and Abdul Rahman (2010).

client gets the good services he pays for as well. Statutory adjudication enhances the socio-economy growth because good environment promotes economic growth in any given country. There are many problems contractors face in the event of late or non-payment on the part of their client. Formerly, contractor who has expended on materials and labours had to wait until payment by his client is made and had no right to suspend the work but reverse is the case now. A contractor can suspend work when his client refuses to pay but he must do this vide a written notice served on the client.⁵ This has established a cheaper and speedier system of dispute resolution in the form of adjudication.

The Act also provides for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as a right to reduce the rate of work progress or to suspend work or even to secure direct payment from the principal.⁶ It further makes provisions for default payment terms in the absence of provisions to that effect in the construction contract. There is no doubt that statutory adjudication has come into play to assist all the stakeholders concern in the construction industry. Hence, it is highly recommended to the Nigerian construction industry so that the industry will be in tandem with its contemporaries. It will also make the industry compete effectively among its counterparts.

5. PROCEDURE FOR STATUTORY ADJUDICATION

The Act serves as the practice direction for statutory adjudication in Malaysia. The Act allows the parties to follow the payment modes of the construction contract.⁷ Where a party has failed or refused to pay the other party for the work which he has done, the unpaid party has the right to serve the payment claim on the non-paying party.⁸ The responding party could then admit or dispute the claim in whole or in part within 10 days of the payment claim. The non-paying party has ten working days within which to reply to the said claim. His failure to respond within the time frame, is an indication that the entire payment claim is not disputed. In other words, either parties can make a referral of the dispute to adjudication. The claimant (referring party) shall no later than seven days after serving a Notice of

5 See Clause 30.7 of PAM form 2006. See also Wong, Chen Hin, "Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry" (B.SC Dissertation, UTAR, 2011), 73-84.

6 Azman et al, "Payment Scenario in the Malaysian Construction Industry Prior to CIPAA" *Law and Dispute Resolution* (2013), 105-114. See also Zakaria et al, "Cause and Impact of Dispute and Delay the Closing of Final Account in Malaysia Construction Industry", *Journal of Southeast Asian Research*, (2012), 1- 12. See also Hasnori et al (2012), 82-93. See also Azman et al, "Payment Issue in Malaysian Construction Industry: Contractors' Perspective", *Jurnal Teknologi* 70, no. 1 (2014).

7 Supardi et al, "Security of Payment Regime in Construction Industry: Are Malaysian Sub-contractors Ready?", *The Built Human Environment Review* 4, no. 1 (2011): 122-137. See also Sinden, Gary F et al, "The New Construction Act views and perceptions: of construction industry stakeholders," *Structural Survey* 30, no. 4 (2012): 333-343. See also Amoako, Kwame Boateng, "The Effect of Delayed Payment on Cash Flow Forecasting of Ghanaian Road Contractors", (PhD diss., 2011).

8 Ang, Tony Su Sin, "Payment Issues-the Present Dilemmas of Malaysian Construction Industry", (PhD Thesis, Universiti Teknologi Malaysia, 2006), 7. See also Abdullah et al, "Causes of Delay in MARA Management Procurement Construction Projects", *Journal of Surveying, Construction & Property* 1, no.1 (2010): 123-138.

Adjudication, register the matter at the KLRCA.⁹ This must be served on the Director of the Kuala-Lumpur Regional Centre for Arbitration. A non-refundable registration fee must be attached with the notice to the Centre in accordance with the payment.¹⁰

Steps had been taken by the KLRCA to devise some forms to ease the process of adjudication for a party who wishes to adjudicate his payment claim, which the other party has failed to pay. These forms have been labelled and sequentially numbered just like company registration forms. The adjudicator must decide on the dispute and deliver the adjudication decision within forty-five(45) working days after the service of the adjudication response and reply to the response.

- 1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.
- 2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within –
 - a) Forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;
 - b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or
 - c) Such further time as agreed to by the parties.
- 3) An adjudication decision which is not made within the period specified in subsection (2) is void.
- 4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.
- 5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.
- 6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.

6. CONCLUSION

The stakeholders are very much aware and recognize the need to reform the law regulating the disputes occurring in the industry, in order to tackle the several problems bedevilling it. However, there is a need for committed leadership and

9 Wong, Chen Hin, "Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry?" (Diss., UTAR, 2011), 95-98. See also Chong, H. Y., & Rosli, M. Z., "The Behaviour of Dispute Resolution Methods in Malaysian Construction Industry" in *Industrial Engineering and Engineering Management*, International Conference on IEEE, 2009; 643-647.

10 Pursuant to schedule III, Rule 2 of the KLRCA Adjudication Rules & Procedure 2014.

management to drive forward a law for improvement. There must be a drive from the stakeholders to communicate the cultural requirement and operational changes needed in the industry since disputes have become part and parcel of the industry.¹¹ Having realized that money allocation is a major factor identified causing problems between the client and contractor, it will be difficult to provide 'quality' when clients select designers and contractors primarily on the basis of cost and value for money, hence the need for the client to study and comply with the Procurement Act in this regards. However, this can be handled through the provisions of statutory adjudication process.

To achieve performance improvement, the industry must adopt a dispute resolution mechanism targeted at quality improvements in the efficiency performance of the industry which guarantees safety and high labour productivity. The DRB can be of great help in this regard. The board guarantees quality performance and prompt delivery of projects because experts are involved in the day to day running and management of the resources on site. With the establishment of a construction court all disputes affecting the growth of the industry can be summarily done with and there will be sanity for quality performance and prompt delivery of projects guiding construction industry to facilitate regular and timely payment, as a mechanism for speedy dispute resolution through adjudication. Therefore, the stakeholders must establish team work and find a way of engaging the government to be more committed. There is a need for good rapport between the client and other stakeholders to enable the payment Act see the light of the day for free flow of cash to be realised and for prompt delivery of projects to meet the quest of the clients as planned. This will also enable the stakeholder change their slogan "Pay only when paid" which is the obstacle that is affecting the industry. This has led to mass movement of many reputable construction practitioners out of the industry. Hence, the urgent need for statutory adjudication payment mechanism to be added into the existing legal framework for construction dispute resolution in Nigeria.

11 Datta, M. "Challenges facing the construction industry in developing countries", (A Paper Presented at the 2nd International Conference on Construction in Developing Countries: Challenges Facing the Construction Industry in Developing Countries, Gaborone, Botswana, 2000).