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Adjudication: A Dispute Resolution Mechanism for Infrastructure

Development in Nigeria

ABSTRACT

Adjudication is an alternative dispute resolution method introduced by the judiciary. The study

evaluates the essential frameworks from the contractual and legal aspect, it talks about

applicable skills and on hand training that could be offered, and ascertains the important and

impact in the practice of adjudication. Adjudication emerges to have been accepted in the

Nigerian construction sector, however it is concluded that the sector has not being able to realize

the full potential of adjudication, the main reason for this is lack of Information.

This paper is aimed at exploring requirements for the full realization of the potentials required

for adjudication.

Key Words: Adjudication, Alternative Dispute Resolution, Nigerian Construction Sector,

Litigation, Conflicts, Infrastructure Development

INTRODUCTION

In the process of doing business, it is anticipated that differences of opinions will arise

intermittently among business partners or connected persons. However, it is a known fact that

commercial disputes are universal and frequent; the way and manner they are dealt with can

have a philosophical impact on the outcome of the business. It is proven that unresolved disputes

are factors affecting business ventures, scare investors and also affect the stock market

performance of a registered business.

Disputes are normally an unavoidable part of human dealings which may be naturally domestic,

civil, commercial or economic in character. Litigation has been the conventional process of

settling disputes, which may arise as a result of defaulting (sometimes not deliberate) by an

accomplice. Ultimately, the procedure of litigation has turn out to be guzzling time, costly and

weighty which leads to overcrowding and setback in passing their resolutions.

According to Uff (2005), increase in globalization and the contemporary business world has

been a reason in the improvement of more flexible way of resolving disputes that provide

alternatives to court-based litigation governed by the law and procedure of a specific country.

For the first time in Nigeria, Adjudication and other forms of Alternative Dispute Resolution

(ADR) is backed up constitutional in section 19(d) of the Constitution of the Federal replublic of Nigeria (CFRN) 1999 and it provides for the settlement of disputes by Arbitration, Mediation,

Conciliation, Negotiation and Adjudication.

According to Odiri (2004), every business sector which brings people together to work and

achieve a common goal, there is likelihood that disagreement, variance and arguments may

arise. These factors are common in the construction sector. As you may know, conflict and

dispute may perhaps signify same meaning since the duo involves a disagreement over some

issues at hand. However, there are various theoretical dissimilarities between the two terms.

Conflict as it is explained, subsists wherever there is an incongruity of concern. The Oxford

English Dictionary describes conflict as a serious disagreement or argument; a prolonged armed

struggle. However, Suleman (2015) is of the view that a thorough assessment of the socio-

political atmosphere of the construction sector in Nigeria disclosed growing occurrences of

varied opinions and disagreements among stakeholders. In turn, this also explain that the

implementation of Infrastructural Development master plan for Nigeria led to the Increase in

Economic activities in and around the construction sector and relationships needs to be managed

so as to understand the clauses that makes up contracts being signed by parties whom have come

together for a common goal.

Adjudication was introduced into the FIDIC, NEC and GCC conditions of contract as the

standard means of dispute resolution early 2000 as an international rule practice. Adjudication

as it is known is comparatively a new model which is not implicit as all adjudicators are well

trained and have experience in the other forms of dispute resolution. The rationale behind this

paper is to examine the requirements on how to apply adjudication in construction and

Infrastructure development in Nigeria. To aid this, the researcher reviewed the essential

framework and other permissible factors, discusses significant skills and available training, and

establishes the impartation of adjudication in Nigeria.

The need for Adjudication in Nigerian Construction and Infrastructure Development

Kconflicts

This section starts with a reflection of the need for adjudication in construction and

Infrastructure development in Nigeria through the following questions:

* How does the construction industries in Nigeria understand adjudication, how is it

differentiated from other types of dispute resolution,

* Is adjudication sufficiently offered for in the contractual and legal framework?
* Are there sufficient adjudicators and relevant trainings available on adjudication in

Nigeria?

**Assumption**

Construction industries in Nigeria does not apprehend the complete prospective of adjudication

because it is not commonly practiced. According to Uff (2005), adjudicate is to make an official

decision about who is right in a disagreement between two groups or organizations. Recently,

adjudication emerges as a type of alternative dispute resolution (ADR) available to theconstruction industry in Nigeria. Povey (2005) explained that there are more meanings to the

definition than how it is understood. It further explained that an adjudicator is expected to:

* Arrive at a free & fair decision.
* Act without prejudice and in accordance with the rule of law Initiative.

**Review of literature on Nigerian construction industry**

 According to Dantata (2008), the construction sector is a key sector for the Nigerian economy. The construction sector, according to DBIS (2013), is defined as: (i) construction contracting industry; (ii) provision of construction related professional services; and (iii) construction related products and materials”. The construction industry is a system containing all the practitioners including the clients, the contractors, sub-contractors and consultants, and those in the manufacture, supply and distribution of construction materials. It also includes the construction training schools from technical to research institutes, to polytechnics and to universities.The construction industry can be divided into three major segments. These include; construction of building by Building Contractors, or General Contractors. These contractors build residential, industrial, commercial, and other buildings. The second category is the Heavy and Civil Engineering Construction Contractors that build sewers, roads, highways, bridges, tunnels, and other projects. Specialty Trade Contractors who perform specialised activities relating to construction such as carpentry, painting, plumbing, tiling, and mechanical and electrical works form the third segment. Those that lease heavy earth moving equipment, plant and machineries for construction purposes are also in this category (Austin et al, 2003).Construction industry in Nigeria is neither organised nor controlled. There is no clear cut between the contractors and some of them are just in business to make profit irrespective of the nature of work (Oyedele, 2012). In 1985, Julius Berger Nig Plc, a major player in the construction market in Nigeria, supplied Mercedes Benz saloon cars to the federal government. Though major construction companies in Nigeria segregate jobs by scope, internationally, market segregation has gone from scope to specialisation in the industry. For example, Redrow, popular United Kingdom builders, will not go out of residential buildings construction and Lang O’Rourke will not do anything other than Public-Private Partnership (PPP).The Nigerian construction industry major players are the foreign ones. According to Nnabugwu (2013), the federal government has warned indigenous construction companies in Nigeria to desist from recruiting foreign labourers as it is against the tenets of building local capacities. The federal government is culpable in lack of local capacities building of indigenous contractors by giving preference to foreign companies in the award of her major jobs.The construction industry is very sensitive to economic change. It is the first sector to notice economic depression, without government intervention, in any nation and the last to enjoy economic boom, without government interference. It therefore, requires heavy financial back-up either from government, infrastructure bank and/or the industry. The construction sector in the UK has been affected disproportionately since the recession of 2008. In 2007, the construction sector accounted for 8.9% of the UK’s GVA but by 2011 the sector’s contribution had decreased to 6.7%. In early 2012, the construction contracting industry in the UK returned to recession for the third time in 5 years.The Nigerian construction industry is not controlled as anybody can build any structure without government knowledge or observance of building code stipulations. This practice has led to incessant

building collapse with great casualties in Nigeria (Nwachukwu, Emoh and Egolum, 2010) despite the promulgation of National Building Code 2006. In the seventies and early eighties, major construction jobs were done by expatriate (foreign) contractors who observed ethics of the profession. Buildings were not erected on natural drainages because of the future implication and the integrity cost to the builders/contractors. Nowadays, there are many ‘emergency contractors’ (both foreign and indigenous) in the industry who lack integrity and do not observe ethics.The industry is underfunded. Major players in the industry have cried loud about this underfunding of the construction industry in Nigeria and have suggested setting-up Bank of Construction like Bank of Industry (BOI) and Bank of Agriculture (BOA). This underfunding led to wide national road infrastructural gap and 17million housing deficit as at 2011 (World Bank report, 2012). The industry is unprofessional (NIOB, 2014). There are many non-professionals bragging as contractors in Nigeria. Dantata (2008) stated that “with double digit growth rates in the last 3 years, the construction industry has outgrown all other sectors of the Nigerian economy. However, its contribution to the Nigerian GDP and employment of labour are still very low. Despite its impressive performance, the industry faces a significant number of challenges including lack of local skilled labour, power shortage, the unavailability of materials, and the unethical practices that are very common in the industry”. The Construction Skills Certification Scheme (CSCS) which is viewed by construction employers as the best approach to tackling the skills crisis (Mackenzie, Kilpatrick and Akintoye, 2000) is not practiced in Nigeria.Nigeria construction industry is laden with vertical, lateral and diagonal adversaries. Vertical adversary exists between contractors and sub-contractors or site manager and tradesmen. Lateral adversary exists between clients and contractors or bricklayers and plumbers and electricians and carpenters. Diagonal adversary exists between manager in a mechanical consultancy firm and tradesmen in an electrical consultancy firm and vice-versa or between a manager in the general contractor’s firm and a lower cadre staff of the consultants or the manager of a consultancy firm and a tradesman.The industry is primitive which allows several opportunities to exist especially in the building materials manufacturing, supply chain management, ICT, education, and subcontracting sectors without tapping. Akintoye and Black (2000) opined that “it appears that construction supply chain management (SCM) is still at its infancy but some awareness of the philosophy is evident”. The suppliers, contractors and sub-contractors are not integrated and lack team-work, team-spirit, team-players and are not team-oriented which considerably affect team-focus and team-goals. The industry is slow in adopting change and has not fully adopted project management (Oyedele, 2012), LEAN operations, Six Sigma, Marketing Management, Quality Management, Strategic Management, Contracting Management and e-commerce.It is highly litigious and has high appearance record in Nigerian courts. The construction industry in Nigeria has high rate of entry and exit by contractors according to the Corporate Affairs Commission (CAC) records. The industry also has high turnover of employees. According to News Agency of Nigeria (NAN, 2011), Mr Babatunde Liadi, the Secretary General of The National Union of Civil Engineering, Construction, Furniture and Wood Workers, opined that “40,000 members of the union have been thrown into the labour market in the past two years because of abandoned projects. He cited the Sango-Ota road, the bridge on Lagos-Abeokuta Expressway and the Abuja-Lokoja Road as examples of abandoned projects” which have rendered construction workers jobless.Construction project finance in Nigeria is majorly a public affair with government controlling over 80% of construction start (Oyedele, 2013). Apart from construction of building and offices where the private sector contributes meagerly, major construction works like construction of roads, bridges, dams and extensive residential estates like Gwarimpa Estate Team 1 to 7, rehabilitation of Rainbow City in Port Harcourt, Rivers State, are only done by governments.3

The life-span of construction projects in Nigeria is unpredictable. There are many abandoned projects all over due to improper planning, litigation and lack of finance. Construction projects suffer from “capital flight, capital stagnation and capital sink” (Oyedele, 2013). Capital flight occurs due to imported materials and imported technical inputs into construction projects. Capital sink occurs due to bad planning, mis-procurement, wrong location of projects and over-design in construction. Inflated contract sums and abandoned projects due to bad cash-flow are all parts of capital sink. Capital stagnation occurs where a project has a time over-flow more than necessary. There is also no succession plan in Nigeria public projects leading to a lot of abandoned projects and completed projects not utilized. The law that will make it compulsory for a successor in government to carry on the projects of his predecessor is not in operation.

**Methodology**

The methodology for this research is the qualitative and quantitative research methods. Monkey survey was adopted to extract data for analysis from the respondents. E-mail Questionnaires which were developed using Monkey survey software were sent to participants in the construction industry. The first part of the Questionnaires dealt with qualification and year of experience of the respondents. The questions asked bothered on position in their organisations and years of experience of the respondents in construction industry. It was stipulated in the Questionnaires that anybody that does not have minimum of 10 years experience cannot proceed to the next part on the next page. A question also requested the respondents to state their category, client, contractor or consultant.Ninety-eight Questionnaires were received from all the six geo-political zones in Nigeria and were organised in a manageable form for analysis. Respondents were required to choose the problems of construction industry applicable to Nigeria from a list of 62 problems identified from literatures and to state more problems that were not identified by literatures. Rensis Likert scale of 5 points for strongly agree, 4 points for agree, 3 points for undecided, 2 points for disagree and point for strongly disagree was adopted. Percentages, frequencies and points were also adopted for interpretation of data.

**The foundation of Adjudication**

Gould (2006) explained that there has been an expression of various views concerning the

foundation of adjudication. However, Maritz (2007) is of the opinion that the main aim of

adjudication is to bring parties on a table and agree on the terms of payment since payment has

been an issue in construction and Infrastructure development in Africa. Gaitskell, (2005)

explained that in the 1970’s, Adjudication was used in the United Kingdom as a medium to

mediate between contractors and sub-contractors resolving payment problems upon completion

of works and hand over. However, Adjudication was considered expensive in the United States

due to cost associated with paying for legal fees and it led to emergence of dispute resolution

boards in the 1960s.

**Benefits of Adjudication**

In Construction and infrastructure development, stakeholders are striving hard to make sure they

do not run into issues that would result to any dispute resolution process, however, if need be,

they would prefer to go through adjudication. Butler & Finsen (1993) outlined the following

factors as the benefits of adjudication:

* Experience of Members of the Adjudication Panel
* Lower cost associated with the process
* Shorter turnaround time
* The process is convenience and flexible for parties in dispute
* Limited publicity

ATable 1 below shows the three tiers of adjudication application according to M’khomazi. able 1: The Umbrella Bodies (UK).

|  |  |  |
| --- | --- | --- |
| **Stage of Application** | **Forms Of Contract Reviewed** | Verdict |
| Forms of contract | * JBCC 2005
* GCC 2004
* FIDIC '99 "Red Book"
* NEC 3 "Black Book”
 | Adjudicator's (or DB's) appointment: by the parties, otherwise by a named authorityAdjudicator's conduct; impartial, independentInquisitorial: can ascertain the facts and the lawAdjudicator not liable and not called as witnessDispute scope: anything under contractDecision: immediately binding |
| International guidelines | * JBCC, CIDB
* DUDF, AAA
* ICC, World Bank CUB

(UK) | More detail than forms of contractProcedural and administrative aspectsFunding institutions may prescribe |
| Legislation | * UK
* Singapore
 | Conditional payment clauses outlawed (e.g. pay-when-paid)Establishing minimum payment termsEstablishing statutory adjudication systemRemedies available for non-payment |

\*AAA - American Arbitration Association; DRBF - Dispute Resolution Board Foundation; ICC -

International Chamber of Commerce; CUB - Construction Umbrella Bodies (UK).

Skills and Techniques Required by Adjudicators

An assessment was drawn from information on adjudication skills and training from selected

institutions, such as the:

* New Engineering Contract (NEC)
* Chartered Institute of Arbitrators (ClArb)
* The International Federation of Consulting Engineers (FIDIC)
* American Arbitration Association (AAA)
* Nigerian Society of Engineers (NSE)

The following skills are required:

* Formal Legal Training & Experience
* Continuing Professional Development (CPD) as an on-going requirement has become

universal

* Contract Administration and Management Experience

However, with the exclusion of court-possessed modus operandi, ADR is in actual fact an

appearance of clandestine justice and it is not a surrogate to legal action. Van Langelaar (2001)

is of the opinion that, there is trepidation that the increase in the use of ADR which is also

known as private justice and it will ruin the advancement of legal standard and as a result

weakens the authority of the courthouse which in turn brings about constructive social change.

Another shortcoming of ADR is the reality that it can influence remedies that are bespoke to the

circumstances which law courts would not likely to award. In the process of ADR, the

committee of adjudicators may not be able to grant disciplinary damages to discourage

comparable behavior in the nearest future. Only law courts are capable of awarding damages of

this kind.

The drawbacks of ADR discussed are, nevertheless counteracted by the reality that ADR does

not admit to be a replace with litigation. As a matter of fact, it is set to complement litigation.

Per se, litigation is the foremost dispute resolution procedure in existence and will continue to

offer obligatory standards for circumstances leading to disputes in construction business in

Nigeria.

The research questionnaire was designed to accommodate the following Information:

1. Adjudicator background

2. Knowledge and Years of experience in Dispute resolution

3. Forms of contract and guidelines frequently used

4. Skills and techniques

5. Impact of possible resolution

CONCLUSION

Adjudication has come to be accepted in the construction Industry in Nigeria. However, more

cases which a result of default in the contract signed by parties reported to the law court should

be channeled to an ADR panel so as to enable the panel handle more cases.