



Significance of Arbitration and Conciliation Proceedings in A Construction Contract

¹Reuben Agodi Okereke, ²Chukwuemeka Samuel Nwosu, ³Nkechinyere Perpetua Nnolum

¹Department of Quantity Surveying, Imo State University, Owerri

²Department of Quantity Surveying, Federal Polytechnic, Nekede, Owerri.

³Department of Quantity Surveying, Federal University of Technology, Owerri

ABSTRACT

Construction contract disputes have been identified as one of the major causes of non-completion of construction projects. This paper reviewed construction dispute resolution methods, Vis-à-vis the provisions of Arbitration and Conciliation Act (ACA) 1988 and Standard Form of Building Contract (SFBC) 1990. The paper further outlined the powers of the Arbitrator, contents of arbitration agreement and highlighted essentials of alternative dispute resolution (ADR). Generally alternative dispute resolution techniques are more economical than litigation process. Other benefits of ADR include maintaining existing business relationships, confidentiality, flexibility and satisfaction of stakeholders. The paper identified lapses in SFBC 1990 clause 35 (Arbitration) in the areas of language of proceedings, seat of arbitration and duration. this paper recommended customized (bespoke) correct forms to take care of these shortcomings

Keywords – Arbitration, conciliation, dispute resolution, bespoke.

INTRODUCTION

The construction industry is home to a variety of contracts ranging from manufacture, supply of goods and services and erection and completion of infrastructures. Majority of construction industry projects are vast, complex, conditionally contractual and take lengthy time, which makes them vulnerable to risks and disputes (Ojo and Akinradewo, 2011).

This paper provides a review of dispute resolution techniques that are used in the construction industry. The focus is the Nigerian domestic construction market.

The aim is to critically examine the practice of Arbitration and Conciliation in construction contracts in Nigeria with a view to highlighting the importance of this skill and suggesting new ways of improving the practice in Nigeria.

Many researches on the causes of construction contract failures have cited unresolved disputes during the execution of the construction contract as a major issue (Ojo, 2014)

Against this backdrop, construction contract agreements now reasonably contemplate dispute between parties and therefore include dispute resolution clauses into construction contract agreements. This allows parties the ability to plan early for possible disputes and the flexibility to customize the most time and cost effective resolution process for their cases thereby reducing the impact of these disputes on the project when and if they occur (Brian et al, 2008).

Disputes in the Nigerian construction industry can be political, commercial, project delivery, claims related or legal risks. Commercial projects and legal risks can be as a result of lack of regulatory expertise, ambiguity in contractual requirements, poorly defined project scope, improper risk allocation matrix, lack of sophistication of project team, poor risk planning and performance management of resources and cost and disruption in the supply chain (Fagbohunda and Okonmah, 2021). Claims commonly arise as a result of variations, extension of time, retention payment, delays in performance or payment, defective or product quality issues, termination, valuation of work or professional negligence.

Disputes may be resolved by litigation, arbitration and other means of alternative dispute resolution (ADR). As a result of concerns about the speed of the judicial process and the technical nature of construction disputes, arbitration is increasingly being adopted to resolve construction contract disputes regarding both international and domestic contracts. (Bryan et al, 2008)

CONSTRUCTION CONTRACTS

The principal legislation regulating public procurement in Nigeria is the Public Procurement Act (PPA). The PPA applies to the procurement of goods, works and services carried out by the federal government and all procurement entities and other entities that derive at least 35 percent of the funds appropriated for any type of procurement described in the Act from the Federation share of the consolidated revenue fund.

The PPA provides a mechanism for resolving disputes involving public contracts. It provides that a bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provision of the Act, by submitting a complaint against a procuring or disposing entity to the accounting officer who is required to give a decision indicating the corrective measures to be taken including the suspension of the proceedings if necessary. In event the bidder is not satisfied with the decision of the accounting officer, the bidder can make a complaint to the Bureau of Public Procurement (BPP). Upon receipt of a complaint, the bureau shall completely give notice of the complaint to the procuring or disposing entity concerned and suspend any further action by that entity until the bureau has settled the matter. The bureau is required to rule on the complaint. Where the bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with the decision of the bureau, the bidder may appeal to the federal high court.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

The concept of dispute resolution techniques are an alternative to the litigation system, this is used to describe the use of a third party mediator who assists the parties to arrive at a voluntary consensual negotiated settlement.

ADJUDICATION

There is no statutory framework for adjudication under Nigerian law. Parties intending to resolve their dispute by adjudication must incorporate it in the dispute resolution clause. As there is no framework for adjudication, there is always the question of enforcement of the adjudicator's decision. This could be done by suing on the decision under common law.

ARBITRATION

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal chosen by the parties.

Arbitration is a process which is available as an alternative to litigation. Arbitration is an adjudicatory process for the resolution of disputes outside the court in which a neutral third party is empowered to decide disputed issues referred to it (Ojo, 2014)

Arbitration is applicable under the ACA (Arbitration and Conciliation Act, 1988), trade dispute act Cap T8 laws of the federation of Nigeria (LFN, 2004), Nigerian Investment Promotion Act Cap N117 LFN, 2004.

Arbitration agreements are contractual in character. Under the separability principle, an arbitration clause which forms the part of a contract is treated as an agreement independent of the rest terms of the contractual agreement and a decision that the contract is null and void shall not entail under the law the invalidity of the contractual clauses

JURISDICTION FOR ARBITRATION

ACA (1988) expressly mandates that arbitration agreements must be written in the language best understood and signed by the parties. The Nigerian ACA (1988) in section 12 and 13 essentially requires the arbitral tribunal to possess jurisdiction to decide a dispute.

Jurisdiction is the heart and soul of a case, no matter how convincing a case is conducted and decided without the jurisdiction of the court to adjudicate, the outcome of the exercise would amount to a nullity (Rhodes-Vivour, 2011). The tribunal decision describes its authority or power to decide a dispute (Alexander, 2006).

Pursuant to ACA 1988, the following are the powers of the arbitrator;

- To rule on his jurisdiction (section 12)
- To order interim measures of protection in respect of the subject matter of the dispute (section 13)
- To determine the procedure to be adopted in the arbitral proceedings (section 20)
- To administer oaths (section 20, 5)
- To appoint experts (section 22)
- To determine the language of the arbitral proceedings (section 18)
- To record a settlement in the form of award (section 25)

The purpose of jurisdiction in arbitral proceedings is that jurisdiction to hear and determine a dispute is raised before the arbitral panel within the time stipulated in the arbitral act. It can only be raised after the stipulated period, if the arbitral panel finds reasons for the delay justified. An appeal on the issues of jurisdiction can be entertained by the high court provided there was no submission to jurisdiction. A party who did not raise the issue of adjudication before the arbitral panel is foreclosed from raising it for the first time in the high court. The reason being that the foundation of jurisdiction in an arbitration is submission.

PROVISIONS OF ARBITRATION AGREEMENT

The requirement for a valid arbitration agreement as contained in the ACA are;

- The arbitration agreement must be in respect of a dispute capable of settlement by arbitration under the law of Federal Republic of Nigeria.
- The parties to the arbitration agreement must have legal capacity under the law applicable to them.
- The arbitration agreement must be valid under the law to which the parties have subjected it or under the laws of the federal republic of Nigeria.

In addition to the aforesaid, arbitration agreement for construction contract agreement will incorporate the following;

- The place of arbitration
- Language of arbitration
- Composition (number of arbitrators)
- Appointment and qualifications of arbitrators
- Statutory governing law

These elements in the arbitration agreement would ensure that the parties have good measure of control and autonomy and enhance arbitrator's ease of determination of jurisdiction.

CONSTRUCTION CONTRACT PROVISION FOR ARBITRATION

Standard form of building contract of Nigeria (1990) is the major contract in use in Nigeria building construction industry. Most parties adopt it without any amendment. The SFBC clause 35 arbitration is quoted here in full "provided always that in case any dispute or difference shall arise between the employer or Architect on his behalf and the contractor, either during the progress or after completion or abandonment of the works as to the construction of this contract or as to any matter or thing of whatsoever nature arising there under or in connection therewith (including any matter or thing left by this contract to the discretion of the Architect) or the withholding by the Architect of the certificate to which the contractor may be entitled or the measure and valuation mentioned in clause 25, 26, 32 and 33, the same shall not be allowed to interfere with or delay the execution of the works but either party shall forthwith give to the other notice in writing of such dispute or difference shall be and is hereby referred to arbitration and final decision of a person to be agreed between the parties to act as arbitrator. Such a person shall be an experienced professional in the construction industry or failing agreement, a person appointed (at the request of either party) by the president of the Nigerian Institute of Architects)

35.2 the award of such arbitrator shall be final and binding on the parties

35.3 whatever the nationality, residence or domicile of the employer, contractor, any subcontractor or supplier, or the arbitrator and whatever the works or any part thereof are situated, the law of the Federal Republic of Nigeria shall be the proper applicable law of the contract and shall apply to any arbitration under this contract whatever the same or any part of it shall be conducted.

However this clause is silent and irresponsive to language of proceeding, seat of arbitration and duration prior arbitral proceeding.

MEDIATION OR CONCILIATION

This is a voluntary form of dispute resolution, a neutral party, the mediator or conciliator facilitates negotiation and acts as a catalyst for the parties to reach a resolution of their dispute. It is non-binding, but the agreement reached between the parties becomes binding in the form of a contract.

In a conciliation, where no agreement is reached, the conciliator makes a recommendation (Bunni, 2012).

THE MEDIATOR/CONCILIATOR TASK

The task of the mediator/conciliator includes;

- Explore with parties their interests
- Finds their strengths, weakness and needs

- Identify possible areas of accommodation or compromise
- Search for alternative solution

THE MEDIATION OR CONCILIATION PROCESS

Each party to the dispute should first prepare a document containing the facts, the issues, the legal principles, the remedy required and the time frame needed for the process. A joint initial arising of rules and views.

The problem solving phase which involves private meetings and finally a joint session to negotiate the terms of agreement.

POWERS OF THE MEDIATOR/CONCILIATOR

The mediator/conciliator has powers to do the following;

- Issue further directions
- Meet and question the parties together or separately
- Investigate facts and circumstances of dispute
- Visit the site
- Request production of documents
- Request attendance of people
- Conduct the proceedings as he/she wishes
- Obtain legal advice

THE SIGNIFICANCE OF ARBITRATION AND CONCILIATION IN CONSTRUCTION CONTRACTS

The significance of Arbitration and Conciliation as alternative dispute resolution methods in construction contracts, can be viewed from the opportunity cost of the alternative given up (Gould, 2004)

BUSINESS RELATIONSHIP

The process of mediation and conciliation can maintain existing relationships as the parties are guided to amicable settlement. The parties do not see themselves as enemies.

TIME

ADR processes are time effective, the dispute can be resolved within a short period unlike the litigation process that is characterized by adjournments and can last for years. The importance of time is very germane in construction contract dispute resolution. Time affects the schedule date of completion of the project and consequently delays the possession of the completed works by the owner. This also means that the project cannot be put to its intended use. When projects are not completed at schedule date, additional costs are usually incurred as a result of fluctuation in prices. There is also the issue of loss of anticipated profit on the side of the project owner, especially on commercial projects like shopping malls or hotel development.

PROJECT ABANDONMENT

Unresolved disputes in a construction contract can lead to project abandonment. Project abandonment is a very expensive phenomenon. The contractor closes down the project site by moving out equipment and men, this results in loss of jobs for many artisans, labourers and professionals employed on the project. The contractor also loses anticipated profit in addition to hurting his business image.

CONFIDENTIALITY

The proceedings of conciliation/mediation and arbitration are largely confidential. This is in contrast to litigation which is in the public domain. Confidentiality is an advantage as stakeholders wish to keep their disputes from the public domain

FLEXIBILITY

The ADR process gives the parties freedom of choice to choose the mediator/conciliator. There is also the advantage of flexibility in the procedure and nature of the award.

The mediator encourages the parties to search for a solution which meets both parties needs.

ECONOMY

Evidently a short conciliation period is a cheaper event than a short trial. In most ADR cases, lawyers are not necessary in the process and this can be considered as cost saving.

SATISFACTION OF STAKEHOLDERS

Generally, the ADR process and the outcomes are more satisfying for the parties than a court trial. The parties to the dispute, consider the reaching of settlement by consensus as satisfying.

A mediated outcome is considered more satisfactory than other forms of imposed decision such as litigation.

SUMMARY

The construction industry requires timely and effective dispute resolution techniques to function efficiently. As attractive as Arbitration might be to investors in the Nigerian construction and infrastructure market, issues of dispute which seem to characterize the construction industry are very important to consider. The provision of the standard form of binding contract (SFBC) 1990, clause 35 (Arbitration) is silent on language of proceeding, seat of arbitration and duration prior to arbitral proceedings. The ADR methods are clearly cheaper to execute and give stakeholders satisfaction.

CONCLUSION AND RECOMMENDATION

Arbitration, conciliation and mediation as alternative dispute resolution techniques provides a means for ameliorating the heavy losses incurred on construction contracts, arising from unresolved disputes. The couching of appropriate ADR techniques into the contract forms at the inception of the project provides a platform for dispute resolution if and when disputes arise.

Nigeria seeks to amend its federal arbitration, legislation, Arbitration and Conciliation Act, 1988 (ACA). This is currently going through the legislative process through an amendment Bill. The Bill contains innovative provisions that when passed into law and practice in Nigeria, the provision will greatly affects dispute resolution generally and construct contract disputes particularly.

RECOMMENDATION

The observed deficiency in the standard forms of building contract 1990 will need to be addressed. There is a need to include language of proceeding, seat of arbitration and duration. It recommended that stakeholders use Bespoke contract forms which address these omissions as an addendum to SFBC (1990).

Reference

-
- Noel G. Bunni (2012). Dispute and their resolution, FIDIC contract, Corbet and Co international construction lawyers ltd, London
- Edward Corbet (2012). Dispute and their resolution, FIDIC contract, Corbet and Co international construction lawyers ltd, London
- Babatunde Fagbohundu and Ngo-Martins Okonmah (2021). Construction disputes law review, law business research, Nigeria.
- Bryan S. Shapiro, Shapiro H. and Knutso S. Construction claims and construction strategies, <https://www.shk.ca>
- Nicholas Gould (2004) Dispute resolution in the construction industry, an overview. Fenwick Elliot LLP, Aldwych house, London. WC2B4HN
- Arbitration and Conciliation Act ((1988) Cap A18, Vol, 1, law of the federal republic of Nigeria, 2004 section 12(2)
- Rhodes –Vivour (2011). Lead judgment delivered in the case between NNPC v Clifco Nig. Ltd
- Arbitration and conciliation act, 1990. Cap A18 Vol. 1, Law of the federal republic of Nigeria, 2004.
- Alexander J. (2006) Consequences of Multi-tier Arbitration clauses: issues of enforcement 72:329-338.
- Ade Ademola Eytipe (2014) Determinants of jurisdiction in arbitral proceedings for construction contract dispute resolution in Nigeria. Journal of law and conflict resolution Vol.6(2) pp 24-31, May 2014.
- Ojo AE, Akinradewo (2011). Essentials in arbitral clause for construction contract dispute resolution in Nigeria in: Egbu, C. and Lou, E.C.W (Eds) Procs 27th Annual ARCOM Conference, 5-7 September, Bristol, UK, Association of Researchers in Construction Management, pp. 615-622.
- Nicholas Gould (2004) dispute in construction industry, an overview: construction law seminar 9th September, 2004