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Review of Effective Construction Dispute Resolution towards Nigeria's Economic Recovery

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ABSTRACT

This paper deals with the causes, prevention and actions to be taken in the event of occurrence construction disputes so as to minimize costs. This is critical especially in this period when Nigeria is 'snailing' out of economic recession. The paper outlines several preventive and curative measures to be taken in order to reduce the incidence of construction disputes.

INTRODUCTION

Data recently released by the National Bureau of Statistics (NBS) at the 2nd Quarter of 2017 indicates that Nigeria is slowly inching out of economic recession after a record 5th consecutive quarterly negative growth (Kazeem, 2017). The recession is defined by National Bureau of Economic Research (NBER) as a significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in the real gross domestic product (GDP), real income, employment, industrial production and wholesale-retail sales (Jones, 2016). Consequently, its effects on the economy are enormous. In Nigeria, this has led to the loss of jobs, the decline in real incomes, slowdown in industrial production and manufacturing, and a general slump in consumer spending. Things generally have evidently become more difficult and tougher than during the periods of no recession.

The construction industry plays very significant role in a nation's economy. In Nigeria, it contributes an average of 3% to Nigeria's gross domestic product (GDP) (Isa et al, 2013). In monetary term, it rose to N660.92064 billion in the 1st quarter of 2017 from N623.34923 billion in the 4th quarter of 2016. On the average, the contribution of construction industry averages N554.52061 billion from 2010 until 2017 (Trading Economics, 2017). It is therefore significant and noteworthy that persistent conflicts in the construction industry will result in negative effects in the Nigerian economy. However, disputes amongst the construction stakeholders all over the world have been on the increase (Kumaraswamy and Yogeswaran, 1998).

Meaning and Causes of Construction Disputes

Chen et al (2014) noted that "interactionism" posits that all social structures have inherent conflicts within them that can yield positive or negative effects on organization's performance. Conflicts, therefore, occur when people have different opinions, lack respect for each other or simply misunderstand intentions. Disputes or conflicts can also arise when the behavior of one party is interfering with the actions or inactions of the other party (Shin, 2000).

In the construction industry, disputes become inevitable due to the complex, multidisciplinary relationships which exist amongst different stakeholders, and also due to the lengthy processes involved from design to construction phases of projects (Nairaproject.com). Oladapo and Onabanjo (2009) noted that construction industry worldwide is dispute-prone

due to the complex and fragmented nature of the industry,and the adversarial relationships, which traditionally exist amongst project participants. Kumaraswamy and Yogeswaran (1998) noted that disputes arise when a claim or assertion made by a party is rejected by the other party and the rejection is not accepted. Conflicts would also arise due to behavioral problems such as poor communication amongst the project team, multi-cultural team problem and reluctance to check the constructability, clarity, and completeness of the project (Shin, 2000).

Kumaraswamy and Yogeswaran (1998) and Shin (2000) stressed that ‘conflicts' should be an anticipated an integral ingredient in the resume of project management.

Shin (2000) also noted that the immediate resolution of disputes when they occur will affect the quality of projects in terms of time, cost and quality. Adamu (2000) observed that disputes arise mostly due to monetary, time and quality-related issues.

There are specific factors which have been identified to be responsible for disputes in the construction industry. Kumaraswamy and Yogeswaran (1998) identified issues bothering on variation, the extension of time, payments, quality of technical supervision, availability of adequate information, administration and management, unrealistic clients' expectations and determination. Kathleen (2003) identified other factors such as insufficient resources of time, materials, labour and/or equipment. Cheung and Seun (2002) noted that delay in the execution of projects by either the contractor or the client is a major cause of dispute in the industry. He also noted that delayed interim payments from the client, improper project scheduling by the contractor, delayed response from the Architect during application of extension of time by the contractor, poor or perceived poor quality of work, error in pricing or costing, discrepancies in contract documents and documentation; disagreements over the nature, extent and scope of work, poor valuation of variations by the quantity surveyor and late instruction from the Architect or Engineer can readily cause disputes. Oladapo and Onabanjo (2009) noted that incessant contractor’s claims and client’s reluctance to settle monies due to contractors generate more crises. Turner (2005) identified several factors which can cause disputes. These include whether or not work is to the specified standards, whether work is or not a variation, pricing variation, whether instructions are adequate or late, whether a valuation or financial certificate is adequate or late, whether completion is likely to be delayed, whether regular progress is being disrupted and ascertainment of loss and/or expense.

Disputes generate a number of negative consequences both to the industry and the national economy at large. Kathleem (2003) identified the breakdown in communication and professional relationship; reduction in productivity, tension and dampness of team spirit as some of the negative consequences of disputes in the industry. Cheung and Seun (2002) observed that disputes in the construction industry can lead to delay in the progress of work, increase in project costs and erosion of both profit and confidence. In summary, construction disputes require time and money before they are resolved, which when aggregated erode individual and national economy.

Precautions and Actions during Dispute

Adamu (2000) rightly noted that the management of construction disputes is a decisive test of the emotional and intellectual maturity of construction stakeholders. This paper, therefore, concentrates on those factors which will eliminate or reduce construction disputes to the barest minimum in order to help rejuvenate Nigeria's economy. This is because it is better to prevent than to cure a disease.

Some precautions need to be adopted to reduce the incidence and prevalence of construction disputes. These measures are supported by Turner (2005), Ryam (2015), Chen et al (2014), Oke and Lawal (2013) and Adamu (2000). They include the following:

(i) Specifying the method(s) of resolving disputes favorable the parties in the contract from the outset.

(ii) Documents intended as contract documents must be clearly stated and signed by the parties to the contract. For civil engineering contracts, for instance, these may include a statement of the scope of the contract issued by the client during "Invitation to tender", data affecting the execution of the works such as site conditions, climate, etc, priced bill of quantities (BOQ) and priced schedules, programmes for the construction and completion of the works, the conditions of contract, site regulations, the form of tender (the offer), unconditional acceptance of the tender, guarantees and bonds.

(iii)Contractors/subcontractors should keep good, adequate and continuous site diaries. Often, these diaries reveal little more than the weather and how often they fizzle out.

(iv)The Architect should keep a ‘log’ of things that are going on as well as items that are present on site. He should also note the apparent effects of any unusual occurrences, delays and so on.

(v) The Quantity Surveyor should annotate dimensions, notes and figures (with dates) gleaned for the purposes of interim valuations or final measurement. These will serve as broad records of progress on site.

These documents ((iii) to (v)) provide the basis for creating a ‘statement of relevant facts'. These documents, if carefully and honestly prepared, could help the parties in disputes to agree on it in substantial part. Such agreement is more likely if the facts are broken down into simple, brief elements of information where at least some of the elements can be agreed upon. For instance, it is likely that no agreement would be reached on a statement such as "There was an excavator type X and two dumpers capacity Y on site and all were unable to operate for three days for the sole reason that the employer had deposited large crates of machinery on the location of the base to be excavated". The Rather substantial agreement would be likely on elements of the same or similar facts if set down as:

(a) Present on site from (date) to (date) were:

1 Excavator type X

2 Dumpers type Y1 and Y2

(b) These plants had commenced working on bases 5 to 12

(c) These plants did not operate from (date) to (date) on these bases as below stated:

Excavator for 3 days

Dumper Y1 for 3 days

Dumper Y2 for 3 days

(d) There was no other work for :

The Excavator

Dumper Y1

Dumper Y2

(e) The employer had on (Date) deposited crates of machinery (described in attached list) in the location shown on the same attached drawing

(f) The crates were wholly or partly overlapping the following bases: 5, 6, 7, 11, 12

(vi)If an Architect's Instruction is not intended as a variation, it should be made clear. It is necessary whether one is the issuer or the recipient to always crosscheck in order to avoid future arguments.

(vii) It is better to always seek acknowledgment. This is because; communication is the key to resolving disputes and assuming that the other party understands or agrees with what is being communicated is heading for trouble.

(viii) It is better to talk, not argue as argument flares temper which could lead to later regrets.

(ix)It is advisable to put everything agreed upon in writing (with time and dates in chronological order) to serve as evidence in case of disputes.

(x) Ensure the facts are beyond reasonable doubts as accurate information makes your case iron-clad. It is better to always refer back to notes and contract to check the authenticity of your claims.

(xi)It is better and cheaper to resolve each issue rather than dissolving the relationship.

(xii) If a change of product or of execution is suggested by the contractor, it should be made clear whether this is a variation or whether it is something to be allowed without financial effects, and who takes responsibility for its execution.

(xiii) When applying for the extension of time, the applicant should think in terms of the provision of the relevant Conditions of contract (for example clauses 25.1 and 25.2 of JCT 1980 form of contract). These provisions relate to:

- Giving notice as soon as actual or likely delay to progress is reasonably apparent;
- Giving adequate details (i.e. state of the job before the problem);

- Detailing what has happened/is happening, which will or is likely to cause delay;
- Indicating what sub-clause of the contract is relevant;
- Indicating the extent of likely delay to work affected and to overall completion;
- Indicating what can be done to avoid/alleviate the delay (and whether any such procedure would involve cost to the employer);
- Keeping subcontractors informed, whether nominated or domestic.

(xiv) It is advisable to keep the work programmes updated, informing all concerned about the update. It is absolutely necessary to inform subcontractors who are not yet due on site of the likely effects of such updates upon their timing. It is important to avoid over-optimistic or spuriously short programmes. This is because they benefit no one at the end and make it almost impossible for the Architect to properly carry out his functions as they cause confusion and problems.

Processes involved in resolving disputes

It has been demonstrated that it is almost impracticable for disputes to be absent in the construction industry, the reasons being advanced in the introduction part of this paper. Most disputants are always eager to rush to the conventional court as the first choice of seeking redress. However, it has been established that litigation hampers the speedy execution of construction contracts in Nigeria (BCERT 5, 2015). Litigation also almost neglects the fact that construction disputes are better handled by those with sound technical knowledge and legal expertise (BCERT 5, 2015). Several disadvantages have also been identified for rushing into litigation as the primary source of redress. These include inflexibility of venue and processes, lack of privacy, uneconomical and absence of finality, especially at lower courts (Chen et al, 2014, Oke and Lawal, 2013 and Jaffar et al, 2011). Litigation, most often than not, continues even after the life span of the project, thus becoming of little benefit to the disputants for issues which require urgency during the project's life span. All these translate into the greater erosion of national economy. If we want to contribute our quota towards Nigeria's economic recovery, what ways are available to minimize these losses in the event of disputes?

The following processes are supported by Turner (2005) and Ryam (2015). They include, but not limited to:

1. In-house discussion with someone previously not involved and who is chosen because of his ability as a devil's advocate. This can often either indicate that you are wrong or point the way to a solution which can be 'floated' with the other side.

2. Setting down all relevant facts concisely in writing and passing that and the background documents to a higher level in the organization possibly with a similar result.

3. Arranging for those directly involved on each side to 'put one's case' (not to argue or discuss, but to set out) individually and in private to a higher level 'decision-maker' on the other side. This can cause either one of the parties to drop one's argument, thus resolving the disputes or the two 'decision makers' can discuss the issue; hopefully with an increased chance of agreeing on a settlement or compromise, or reducing the areas of conflict.

4. Both sides agreeing to refer the matter to an independent expert (with brief written submission to the expert and provision for a report back in accordance with a tight time-scale) and agreeing to be bound by the expert's decision. The problem with this type of arrangement is the enforcement. It is very difficult and complex to seek its enforcement than an arbitral award.

5. Both sides agreeing to call in an independent expert as a conciliator to help bring the parties together. This is a 'gentlemanly' kind of procedure, but has no teeth and should have a time limit.

6. Referring the dispute to a speedy form of arbitration, and doing so before any massive amount of executive work and cost has been expended. This process is best written into the contract from the outset, although it can be adopted later by an ad hoc written an agreement. It should cover such matters as:

(a) Whether a sole named arbitrator should be appointed from the outset, in effect to be 'on call' for speedy response in the event of unresolved disputes which could not or should not be left over; or whether there should be similar appointment provision as at present in the standard forms of contract; or whether there should a team of arbitrators (say Architect, QS and Engineer) with provision for defining to which member of the team any particular dispute

would be referred (and with provision to avoid one party 'locking' the procedure by, for instance, arguing that the dispute was not an engineering matter).

(b) The nature of, and tight time-scale for, submissions to the arbitrator.

(c) Restraint upon, or provision for, independent expert evidence; the preparation of such experts' reports (and possibly, if the time-scale would allow for it, or a physical meeting between such experts be allowed)

(d) The extent to which the arbitrator was empowered to use his own professional and technical experience and expertise in determining both liability and any quantum. This would be particularly important should the parties wish the arbitrator to use such experience and expertise in gap-plugging any deficiencies in the arguments submitted.

(e) Whether the arbitrators could act in an inquisitional or partially inquisitional role; and whether there should be no limit to the extent of questioning which the arbitrator might feel it appropriate to put.

(f) Whether the Arbitrator should specifically issue an interim award in certain defined circumstances (e.g. where there is patently money due from one party to another of at least a certain sum)

(g) Specify a time or period of the publication of the award, with provisions for procedure should it not be so published in that time

(h) When the arbitration agreement was an ad hoc one, generated after the dispute had arisen, the matter of whether or not the right to apply for leave of appeal was excluded

(i) Provisions for the giving of reasons (which would be necessary should the right to appeal be retained- and would be useful in other situations in determining the future conduct of the parties with reference to the type of matter which had generated the dispute).

7.The last option, of course, is referring the matter to litigation which could rarely be of benefit during the life of the project.

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