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EDITORIAL

This is a special collection of articles on law and policy, it is the second volume of Novena University Law Journal (NULJ). It is a peer reviewed but uncurated selection of papers aimed at inspiring our students, judges, practitioners law and policy makers on the contemporary art and science of law in society. This new edition of the journal explores articles and cases that provide timely and timeless insight into the essential culture and values of legal research and reasoning. The thirteen (13) articles in this volume draw on several aspects of legal jurisprudence and specialized frontiers of law. The questions raised by these papers are relevant and timely, but like the century old good principles of law, these articles and cases are also important and timeless. I hope these reflections will inspire you to read each paper and case for yourself and to imagine your own contribution to the law and policy Journal of Novena University Continuous Legal Education Series.

The Case Reporting and Article Selection Process

The principle and process description has become necessary because of the high number of articles and cases we have declined publication due to our external assessors' assessment. Quite a number of comments we have received concerning the above suggest obscurity of journal editing styles and adherence to the highest standards possible. Simply put, the official editorial policy guiding Novena University Law Journal (NULJ) – Case Reporting and Article Selection Process (CRASP) may be cumbersome at first blush, but it's an integral part of the quality assurance Novena University College of Law represent.

The purpose of the CRASP is to inspire coherence and clarity of legal reasoning amongst stake holders particularly, our referred scholarly contributors who must comply with the writing format and style approved for authors. As a University we appreciate the difficulties rigid adherence to set standards pose to our researchers. These challenges notwithstanding, our scholarly guide lines need not constrain innovation and imaginations of prospective scholars. CRASP is a qualitative and functional response to oral/written English, law and policy research curriculum deficiencies of our educational process over the years.

In adhering strictly to the Chicago Style Manual approved under our CRASP process in conducting legal research and writing, we found an impressive number of format styles used in several journals. A critical perusal through these other styles unfolds suitability to fields like: humanities, anthropology, architecture, arts, classics, design, drama, film, history, humanities, language, literature, and music. In the contrary, at Novena University Law College our prescribed legal writing style and format is part of our conventional professional teaching module. A prerequisite of our global IVY – link standard – driven inter disciplinary legal research which remains a charming curiosity to our international partners. The thirteen (13) articles in this second volume are presented as compelling unpublished articles providing a glimpse of our journal's potential high impact range.

NULJ is usually compiled after the call for papers. The Editors compile the whole entries for the Provost/ Dean and Editor – in – Chief who forwards the whole

EXPLORING THE IMPLIMENTATION OF ADR IN THE NIGERIAN CONSTRUCTION INDUSTRY

Barakat A. Raji and Ashgar Ali Ibn Ali Mohamed **

Keywords: Alternative Dispute Resolution, Nigerian Construction Industry.

ABSTRACT

The Nigerian construction industry is one of the pivotal sectors that sustain the Nigerian economy outside oil and gas. The construction sector is highly hazardous and a dispute prone industry. The use of Alternative Dispute Resolution (ADR) techniques as a panacea to address the ever increasing challenges and problems of the construction sector have gained considerable acceptability in Nigeria. All tiers of governments have after some reluctance now embraced ADR as a fundamental tool in recent years. The Nigerian Government and key private sector contributors have accepted inclusion of ADR methods as an integral part of the dispute resolution procedure in the standard forms of contracts for use in Government and private projects.

Several reasons currently account for the low utilization of ADR in the Nigerian construction industry. These include lack of experience and knowledge. This paper examines the legal cum policy framework and implores the conceptual process and prerequisites of a successful ADR process. The study reveals that the nature of dispute dictates the type of mechanism to employ. A dispute may become complex if appropriate mechanism is not employed. Therefore, ADR has a lot to offer in streamlining the dispute resolution mechanisms used for construction dispute resolution in Nigeria. The major part of the study is dedicated to propose reforms in administration of justice in construction disputes in Nigeria. Meanwhile the UK and Malaysia models of ADR for construction dispute resolution are closely studied with a view to proposing practical reforms for dispute resolve in Nigeria.

1. INTRODUCTION

The Nigerian construction industry is one of the real sectors of the national economy, engaged in a variety of activities that include the alteration and repair of buildings, structures (bridges, flyovers, etc) and other real property.¹ Construction is a high hazard industry that comprises a wide range of activities involving construction, alteration and/or repair. Residential construction, bridge erection, demolitions, large scale painting, excavations, road way

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¹ Eric Authier, *Problems and Prospects of the Construction Industry in Nigeria*, at P. 1 (2016). Available at <https://indigenigeria.com/problems-prospects-construction-industry-nigeria/>

paving, etc are all construction activities.¹ Usually, construction is critical determinant of several things to different people in society. For example

...the construction industry is an integral part of any nation, as is the eyes of the citizens or electorates, development in a country or state is seen through the construction of roads, bridges and drainage systems. Governors continually receive praises and bask in glory when major roads are either constructed or repaired in their territory. Even when the lay men in the state cannot see development from the perspective of GDP, Per capita income, etc, they can always see it in the physical structures which beautify their state.²

But in real life construction both in theory and practice call for a clear and precise legal cum policy framework for stakeholders to benefit from the gains and advances the construction industry offer in the 21st century. This explains the importance governments now attach to the industry.

2. PROBLEMS INHERENT WITH THE CONSTRUCTION INDUSTRY.

In Nigeria the construction industry remains one of the rapid and steady economic growth determinants in the Nigerian economy. This impressive prospect notwithstanding the Nigerian construction industry faces robust and daunting problems which have hugely limited the industry in many respects. These challenges include a). Poor planning, b) Finance, c) corruption, d) poor management, e) trained personnel, f) equipment, g) bureaucracy, h) foreign exchange fluctuations, i) insecurity, etc. Although there is no conclusive scientific assessment or findings on how much each of these problems negatively impact on or result to protracted disputes as to degree and prevalence. But one obvious fact acknowledged by scholars is that the industry needs faster and more acceptable dispute resolution mechanism.

Given this stark reality, Alternative Dispute Resolution (ADR) techniques in construction is viewed as the panacea to the problems facing the industry and have gained great momentum in recent years in Nigeria. The federal, state and local governments have initiated the inclusion of ADR methods as an integral part of the dispute resolution procedures in the prescribed or applicable standard forms of contracts for use in their projects.³ In practice several reasons encourage the use of ADR in the Nigerian construction industry.

¹ *Id.*

² *Id.*

³ Sai-On Chiong, Critical factors affecting the use of alternative dispute resolution processes in construction Projects, *International Journal of Project Management* at pp. 188-194 Vol. 17, No. 3, (1999).

The evolution of Alternative Dispute Resolution (ADR) in Nigeria can be traced to Arbitration and Conciliation Act 1990 (now Arbitration and Conciliation Act Cap A18 Laws of Federation of Nigeria (LFN), 2004, as amended) which was enshrined in section 19 of the Nigerian Constitution 1999. Prior to above legal framework which complemented the Arbitration and Conciliation Act 1990, so much time was wasted due to the unusual length of litigation. But as a compelling necessity the Nigerian construction industry key players gradually signed up to industry best practices which in the main sought to incorporate into construction contracts ADR clauses. This was further consolidated with extended training of industry advisors and lawyers who participate actively with their new knowledge in resolving disputes in Nigeria. At one time, it was considered that the construction industry's cost was increased because of the cost of resolving disputes emanating from construction contracts. Therefore in 1992, alternative form of disputes resolution were formulated and Arbitration and Conciliation were overhauled to become a more effective dispute resolution procedure enabling the Arbitrator to manage the timetable and cost of Arbitration more effectively. At inception the process was abused, but over time experience has showed that construction disputes are no longer taken to court in huge numbers.

3. ADR TECHNIQUES IN USE IN THE NIGERIAN CONSTRUCTION INDUSTRY

Today, several ADR processes are in use in Nigeria with arbitration and conciliation standing out as the dominant methods of choice. This curious fact has by no means influenced the direction of literature on the subject.

The above explains the intricacy in today's complex nature of construction projects and the impetus required to addressing these challenges. This includes a wide variety of activities ranging from the selection of a dispute resolution process to the participation in the actual negotiation.² Thus it is inevitable that stakeholders in the Nigerian construction industry understand the various forms of dispute resolution processes, particularly the ADR process and techniques.

There is consensus amongst scholars that formalised dispute resolution techniques like arbitration and litigation have been well developed for the resolution of construction disputes. However, the lengthy process and the high cost involved have called for alternatives. These alternatives are characterised by the flexibility allowed. Collectively, these processes are called Alternative Dispute Resolution (ADR). The use of ADR in the construction industry is still embryonic. In the public sector, it was in the early 90s that Government incorporated mediation as an integral part of the dispute

² Supra note 4.

resolution clause in all the standard forms of contracts for use in Government projects. In the private sector, arbitration remains the prevailing dispute resolution method. It has been suggested that resistance to change is the major obstacle to the implementation of ADR in construction. Lack of knowledge and experience underpin such resistance.....⁶

I. Prevention

The Nigerian construction industry practice on dispute resolution starts with prevention as a technique. This is usually an informal process that leverages on a coordinated teamwork predicated on mutual cooperation that ultimately prevents dispute. Under this technique clients are encouraged to build on their existing business or filial ties with the opportunity to build long time relationships between the parties.

"It has been suggested that where long-term relationship is important to the contracting parties, prevention techniques should be adopted. Prevention techniques do not guarantee total dispute elimination. Problems cropping up during construction still need to be resolved. Resolving construction problems has both local and international dimensions"⁷

II. Negotiation

In practice, negotiation starts with the parties taken their stand on issues that eventually defines the nature of the disputes. This is however, regardless of typically form, process or nature of the type of agreement in question. "In negotiation, the parties have absolute freedom with respect to the form, process and type of agreement".⁸ Negotiating construction problems demand cooperative effort from the disputants⁹. The reality in negotiations is that if negotiation fails, the disputants may choose to seek assistance elsewhere without prejudice.

III. Neutral Third Party Engagement

This mean constructive engagement from a neutral third party aimed at resolving any dispute. Usually, there are several methods of engagement but the two outstanding or dominant formats a) the standing neutral and b) nonbinding resolution. The standing neutral and nonbinding resolutions methods both entails the active involvement of a neutral person or board, who for all intents and purposes is adjunct to the construction phase of a project,

⁶ Id.

⁷ *Supra*note 3.

⁸ *Supra*note 4.

⁹ Id.

holding meetings with the parties and in the process identifies the problems and through the active participation of the parties eliminate all barriers of communication, including gross misunderstandings¹² and solve the problems at the source. Although Nigerian construction observers view this method as least expensive, it must however be observed that for this method to be effective the problems howsoever described must be addressed relatively early while facts are fresh and the forum must be strictly informal. Dispute review boards and dispute resolution advisors have been used for this purpose.¹³

In Nigeria industry documented cases or precedents of ADR are fairly scarce. However, Alternative Dispute Resolution techniques such as mediation, mini-trials and adjudication are typical examples of non-binding resolution.¹⁴ These are employed after a problem has become fully developed into a dispute. A fact scholars believe is the thresh hold of ADR success. Commenting on the critical and delicate nature of the ADR process, Sai-On Cheung argues that

these processes require more development of historical facts and greater preparation. Beyond this stage, positions become more polarised and cost to both parties begin to mount. If the dispute is not resolved amicably through ADR procedures, the next step is to refer the dispute to a third party for a binding decision. This, typically, is a giant step, involving formal identification of opposing positions and issues. These require considerable preparation by the parties, typically with the assistance of lawyers, consultants and expert witnesses. This will be a case for arbitration, a proceeding before a private judge, or the even more public and expensive step of litigation. Arbitration is by far the most commonly used method to resolve construction disputes. Most construction contracts contain arbitration clauses requiring the parties to refer any dispute to arbitration.¹⁵

IV. Litigation

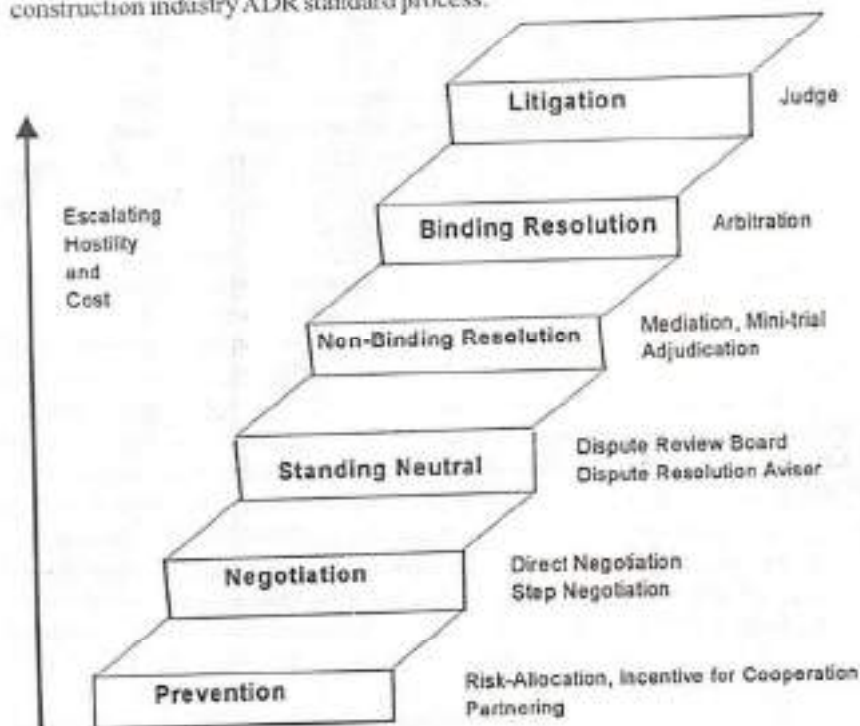
In Nigeria, for several decades parties involved in construction disputes resorted to litigation. This was expensive, time wasting and above all was not capable of resolving disputes for several reasons because after litigation there is usually "bad blood" and the parties hardly find common ground to resolve the issues that divide them. Following industry preferences the full gamut of ADR starts with prevention; negotiation; standing neutral; non-binding resolution; binding resolution; and end with litigation. "At the top end of the stair-step chart as seen in Figure 1 bellow is litigation. Litigation is a rigidly

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

regulated process, the process is subject to the rules and procedures set out by the court. By adopting the litigation route, the parties surrender their control over the process and the outcome will be imposed by a third party".¹³ Several methodologies and step by step processes have been put forward over the years. But the most enduring and useful in terms of clarity, cost effectiveness and flexibility appears to be that originally by Groton 1 and reproduced by S.O. Cheung.¹⁴ Adopted hereunder as suitable to the Nigerian construction industry ADR standard process.



The point needs be made that construction dispute resolution technique is largely dependent on the preferences of the parties. However, the stair-step chart of Figure 1 adopted in this research depicts the dispute resolution methods that are commonly used in the Nigerian construction industry. Most of these are private except arbitration and litigation that are statutory controlled. The rising steps in the chart intimate the escalating levels in hostility

¹³ *Infra* note 14.

¹⁴ S.O. Cheung Critical factors affecting the use of alternative dispute resolution processes in construction: Figure 1 Construction Dispute Resolution Steps (Adapted from Groton 1).

and cost associated with the various forms of dispute resolution¹⁷.

In all we note without further elaboration that whereas contract provisions are helpful in resolving disputes the normative challenge appears enormous because the 'devil is usually in the details'. In the words of Professor S.O. Cheung

Formalised disputes resolution processes Construction ventures are characterised by a high degree of uncertainty and complexity. Drafting of construction contract documentation is no easy task and typically involves the inclusion of provisions for anticipatory contingencies. However, complete visualisation of all eventualities is almost impossible. Construction disputes often arise over such unanticipated happenings. Whilst formalised dispute resolution processes such as arbitration and litigation are useful in vindicating right and wrong, however, this may not be the real desire of the disputants. In this context, a rationalised dispute resolution process that meets the real expectations of the dispute resolution users would gain wide acceptance. Alternative dispute resolution techniques have been introduced to meet this need.

These challenges have led to calls for reform in ADR in the Nigerian construction industry. Scholars have called for the remodeling of the civil procedure rules to provide for front-loaded case filing system as well as options for alloying ADR mechanism before the commencement of the trial proper.¹⁸ A good example is the Lagos State Multi-Door Courthouse which was established to attend to cases which needed quick response and referring such cases to the appropriate ADR door or mechanism best suited to its resolution. This is a laudable program, but because the civil procedure rules has not made provisions for adjudication and for resolving construction dispute, the participants in the construction industry are still not been given the best possible in the circumstances, because there is room for improvement.¹⁹

Others like Oyeniyi has called for Nigeria to consider the need to enhance commercial activities in Nigeria and the indisputable rights of international parties to resolve disputes through arbitration. He emphasized on the desire for Nigeria to sign and ratify the New York Convention which he said is important. Arguing further he insists that the use of the ADR mechanism for resolving commercial disputes in the country will make Nigeria more competitive.²⁰ Kasimu Abubakar and Isah examined and suggested that the

¹⁷ Id.

¹⁸ ADEKOYA, F. & OLOWU, A.T, QUESTION AND ANSWERS GUIDE TO DISPUTE RESOLUTION IN NIGERIA, Nigeria Business Guide/ Newfired, Practical Law Publishing Ltd. (2009).

¹⁹ Id.

²⁰ Kehinde A., "ADR and the relationship with court processes", A Conference Paper Presented at the Nigerian Bar Association Annual General/Delegate Conference, Abuja, 2004 as cited by Ayinla L.A in his thesis (PhD Degree, IJUM, 2011).

major cause of dispute in the construction industry was delay.¹⁹

A critical evaluation of the use of ADR in the Nigerian construction industry reveals that operational cost, time, quality related factors, tendering methods and variation orders appear to be the major factors strongly affecting projects performance²⁰ in construction industry and often lead to disputes in the industry. Despite the recognized usefulness of ADR in the Nigerian construction industry clients, stakeholders, practitioners and consultants should also be encouraged to explore the potential of adjudication in Nigeria as a panacea to payment problems in the Nigerian construction industry which is one of the objectives this paper is out to achieve.

4. ADR in Construction Disputes in Malaysia and UK

International best practices evolve with alternative review options and convergence on what is good practice over time. The main concern in this paper in this section is to attempt a comparative over view of the Malaysian and United Kingdom construction dispute processes. One interesting feature of the use of ADR in construction disputes in both Malaysia and UK is that both recognize adjudication as an integral part of their ADR process. Faced with the problem of how construction disputes are resolved without acrimony. In the UK introduced a specialized adjudication process to address the issues of payment in 1990. To speedily address and resolve cash flow problems in the construction industry. This has been replicated by many countries including Australia, New Zealand, Sri Lanka, South Africa, Malaysia, Singapore and a host of others.

In the case Malaysia, before the introduction of the new Construction Industry Payment Act 2012, the construction industry was also faced with payment problems which could not be adequately settled under the existing dispute resolution mechanisms. For example mediation could have been the best process but because of its non-binding effect, the liable parties were not complying with the rulings of the mediators. For litigation, it is a long process and majority of the participants in the industry whose rights were affected resort to it when there is no alternative especially where the liable party would not comply with the decisions of mediator. Arbitration was used to be more effective but was abused later which caused a lot of impediment in the construction industry in Malaysia.

Commenting generally on the topic, Nicholas Gould, observed that the UK construction industry has had it so good with the introduction of ADR processes for resolution of disputes arising from the industry. Thus the emergence of the processes has provided avenues for the involvement of non-lawyers in mediation, conciliation, expert determination and

¹⁹ Ogunwusi, O.E. The Effects of procurement Related Factors on Construction Project Performance in Nigeria The Ethiopian Journal of Environmental Studies and Management, Vol 6 No.2 (2013)

adjudication.²¹ Several reasons are conceived for the reasons why ADR is a preferred alternative. According to Howard Klein, arbitration was introduced into the UK construction industry essentially because of time and cost of litigation as early as 1990s.²² On his part Matthew Patrick Tucker, wrote that arbitration has turned out to be a twin sister of litigation except that the arbitrator controls the proceedings. All the litigation procedures are adopted in arbitration and this has contributed to the high cost of arbitration.²³ At inception the dispute resolution procedures available for resolving construction disputes were mainly litigation, arbitration, and mediation.²⁴ The Late Tan Sri Dunuk Amar Lee Him (the former Chief Justice of High Court of Sabah and Sarawak) lamented on the high rate of construction cases in court and wished for a specialized construction court to be established wherein cases of construction disputes could be heard without delay and had this to say:

It has been noted that court's delay in the administration of justice apart from the issue of cost, the drawbacks in litigations have caused the construction players to consider other methods that could provide them with more realistic options in preserving their rights, profits as well as their present and future between relationship.²⁵

Problems caused by cash flows are much higher than the benefits of having the delayed interest paid through the court's judgment. This excerpt was used to form part of the opinion expressed. Between 2006 and 2008 the general public was alarmed by suggestions that their referral to ADR made since 2000 had to be made in 2008 due to bureaucracy.²⁶ This spurred the director of KLRCA to organize some seminars and workshops with participations from the stakeholders in construction industry to see how the problems facing the industry can be resolved. The issue of delayed and non-payment in the construction industry has been long lamented by the Master Builders Association Malaysia (MBAM). Surveys on payment issues carried out by

²¹ Nicholas Gould, "Alternative Dispute Resolution in the UK Construction Industry", Gould, N *Alternative dispute resolution in the UK construction industry*. In: Hughes, W (Ed.), 14th Annual ARCOM Conference, 9-11 September 1998, University of Reading, Association of Researchers in Construction Management, Vol. 2, (1998), 428-37.

²² Howard Klein, "Alternative Dispute Resolution Procedures used to Resolve Construction Disputes in the UK", XXIII FIG-Congress TS, 2006.

²³ Matthew Patrick Tucker, "An Overview of Alternate Dispute Resolution use in the Construction Industry", (Diss. University of Texas at Austin, 2008), 18.

²⁴ Nur Farwa, M. et al., "A Revisit on the Current Practice of Dispute Resolution and ADR in Malaysia Construction Industry", *Journal of Design and Built Environment*, vol 1 No.10(2012), 1-113.

²⁵ He made the speech in 1987 when he forecasted that construction disputes were not given the adequate attention in courts because delay defeat equity in construction industry, cases of construction disputes require urgent attention given the nature of the project which eventually hamper the working progress of the industry.

²⁶ News Strait of ... 2012 as cited by Mohammad Denurik & others', A Revisit on the Current Practice of Dispute Resolution and ADR in the Malaysian Construction Industry, *Journal of Design and Built Environment* 10(2012).

them confirmed that default in payment is the focal problem in the construction industry. During the construction industry roundtable held in June 2003, the Construction Industry Development Board Malaysia (CIDB) together with other construction industries had identified payment as one of the ten priority areas in the Malaysian construction industry. Consequently, Construction Industry Working Group on Payment (WG10) led by Institute of Surveyors Malaysia (ISM) was then formed.

In June 2004, the group made various recommendations during the construction industry roundtable which was chaired by the Honorable Minister of Works. The creation of a Malaysian CIPA is one of the recommendations done by the group. The problems identified include withholding of certificates, deposit of retention money in a separate Bank account amongst others. This cash flow has severely and adversely affected the progress in the construction industry and this requires urgent attention.²⁷ It is against this back drop adjudication was found to be useful as a means of resolving disputes arising from construction contracts. Sandra Rajoo, pioneered the campaign for the adoption of adjudication process for serving in the construction industry whenever dispute arises.²⁸ The UK model of Housing Grants, Construction and Regeneration Act of 1996 was adopted to resolve payment problems facing the construction industry. The model received the royal assent in Malaysia on 18 June, 2012, and published in the Gazette on 22nd June, 2012 and came into force sometimes in 2013.

Noushad Ali Naseem Ameer Ali also wrote extensively on the topic. He like most other contributors concluded that the issue of cash flow had been a stumbling block causing a setback to some construction projects in Malaysia before the adoption of adjudication process in 2012.²⁹ A similar research was conducted by Wong Chen Hin, who found out that globally, payments has been an issue in construction industry, and argued that the existing dispute resolution methods available to resolve payment dispute were inadequate until statutory adjudication was first introduced in United Kingdom as a mean of improving payment practices in the construction industry. Noushad observed that the use of adjudication in construction industry became the subject of discussion, after much debate. The construction Industry Payment and Adjudication Act 2012 of Malaysia received a royal assent on 18th June, 2012 under the rules of Malaysian Act 746.³⁰ Adjudication became the process of use

²⁷ As rightly pointed out by Lord Denning MR, "There must be a 'cash flow' in the building trade. It is the very lifeblood of the enterprise", in *Modern Engineering (Bristol) v Gilbert Ash (Northern) (1973)*, 71 LGR 162, CA at 167.

²⁸ Sandra Rajoo, KLRCA Adjudication Conference Discusses "Future Landscape of Construction Industry". A Press Release of 24TH October, 2012.

²⁹ Noushad Ali Naseem Ameer Ali, gives an overview of ADR in Malaysia including proposals for a construction Industry Payment & Adjudication Act. (2013).

³⁰ Wong Chen Hin "Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry" (Master Degree, University of Tunxis Abdul Rahman, 2011).

in resolving a larger scale of disputes including payment claims in construction industry. The Act applies to all construction contracts made in writing after 22nd June, 2012 including those entered into by the Government of Malaysia. *The Mudajaya Corporation Ltd Berhad v Leighton Contractors (Malaysia) Sdn Bhd* was the celebrated case where the Gazette Notification P.U (A) 104 of 2014 which empowered the Minister to exercise the effect of statutory adjudication Act from 14 April 2014.¹¹

By virtue of section 28 of the legal framework of adjudication Act in Malaysia, adjudicator's decision has been placed on equal footing with the decision of the High Court. An adjudicator can give several other remedies to the favored party under an adjudication decision, where the respondent has not paid the full or part of the stipulated amount pursuant to the adjudicator's decision, and in addition the adjudicator can suspend the work in the event within the stated time.¹² The Act covers all construction contracts made in writing that relates to construction work carried out wholly or partly within territory of Malaysia including one that is entered into by the Government of Malaysia. This also includes local and international construction contracts, and where the adjudicated amount pursuant to the adjudicator's decision has not been paid wholly or partly within the stipulated time. Part V of the Act stipulates the functions of KLRCA as the adjudication authority. Today, it's generally believed that the Act in Malaysia, and that of KLRCA can amongst its other functions set competency standards and criteria of an adjudicator, and provide administrative support for the conduct of Adjudication.¹³

The CIPA will be applicable to every written construction contract that relates to construction work carried out either or wholly or partly within the territory of Malaysia.¹⁴ In the case of *Subang Skypark Sdn Bhd v Accradius Sdn Bhd*, the court held that parties may settle any dispute with the adjudicator's decision by written agreement between the parties or by arbitration.¹⁵ In effect, a claimant may commence adjudication proceedings by serving a written notice of adjudication to the respondent. The written notice must specify the nature, description of the dispute and the remedy sought together with supporting document on the respondent. The effect of the Act is to facilitate a regular and timely payment and speedy dispute resolution mechanism through adjudication. It may be too early to give full account of the success of the Construction Industry and Payment Act on the industry now because the process is still at its infancy stage. However, record reveals that a large percentage of the participants are highly satisfied with the outcome of the

¹¹ *Mudajaya Corporation Ltd Berhad v Leighton Contractors (Malaysia) Sdn Bhd* [2015] MJU 293

¹² Part I of the act covers all various issues relating to payment, see Noorhad Ali Nasser Amur Ali, pres. Of the Institute of surveyors Malaysia and chair- construction industry working group on payment (wg. 10).

¹³ Section 6 of the CIPA, 2012.

¹⁴ Section 8 of the CIPA, 2012.

¹⁵ *Subang Skypark Sdn Bhd v Accradius Sdn Bhd* [2015] MJU 286 (Unreported).

Adjudication procedure.³⁶ In Singapore, similar problems were faced within the construction industry. This led to the majority of the researchers into knowing the real problem behind the high rate of disputes in the construction industry over flooding the courts. Chua Shu investigated into the cause of the failure and impacts of ADR in relation to dispute resolution in the construction industry.³⁷ His findings revealed that construction disputes have not received the proper attention it deserved under the existing dispute resolution mechanisms which formed the introduction of adjudication. Research carried out by Rozina Bint Mohd Zafian revealed that the aspect relating to payments has been the major area of conflict/dispute in construction industry.

According to Kennedy P, in the UK there has been a dramatic increase in the use of adjudication. The statistical figures given by him suggest the mechanism has really assisted to reduce the disputes between contractors and subcontractors over the issue of none and delayed payment. Still on the success of statutory adjudication, Mark Entwistle opined that:-

"The use of adjudication is self-evidently linked to overall construction output, but the popularity of the process can now be said to be secure as a preferred formal dispute resolution mechanism for the construction industry..."³⁸

Adjudication was widely considered to have been successful except in 2007-2008 when the industry experienced a substantial downturn in its workload.³⁹ Adjudicator is to be appointed by the authorized nominating body within seven days of receipt of the adjudication application. On settlement of a dispute, seven days is set aside for dispute settlement within which response is to be provided and neither the claimant nor respondent may seek to clarify any matters and respondent provides a payment amount. Where he fails to pay or varies the payment the claimant is entitled to make an application⁴⁰ for the enforcement of the adjudicated amount in court.⁴¹

Claire King explained that the amount of progress payment to which a person is entitled under a contract will either be the amount calculated in accordance with the terms of the contract or if the contract does not so provide the amount, it will be calculated on the basis of the value of the construction

³⁶ Rozina, *Id*.

³⁷ Chua Shu Cing "A Study on the Issue of Construction Disputes in Malaysia & Singapore" (Bachelor Degree, University of Tunku Abdul Rahman, 2012).

³⁸ *Id*.

³⁹ Kennedy, P., Miligan, J., Cattarachi, L., & McCluskey, E. "The development of Statutory Adjudication in the UK and its relationship with construction workload: In Proceedings of 2010 COBRA Conference, Paris, France, 1-14.

⁴⁰ Section 22(1) of the Act.

⁴¹ Section 22(1) of the Act.

work carried out or the goods or services supplied.⁴² This work also gives explanation on the date provided for the progress payment to be made as provided in the Act. Where the contract provides for the date on which a progress payment becomes due and payable on the date as specified or determined in accordance with the terms of the contract or the date immediately upon expiry of thirty-five (35) days after.

The adjudicator is empowered to determine his or her own jurisdiction on a provisional basis and that the determination will be binding unless it is challenged in the High Court. Adjudication determination is treated as a decision of the High Court.⁴³ Recently in UK, there was an amendment in the Construction Act, the abolition of the requirement for construction contracts to be in writing has been amended. Part 8 of the Local Democracy, Economic Development and Construction Act in England, Wales and Scotland was domesticated to increase clarity in construction contracts; to introduce a "better" payment regime and improve rights of contractors, to suspend work in non-payment circumstances and encourage the use of adjudication for resolving disputes. The construction act is now applicable to all construction contracts- whether wholly, partly in writing or wholly oral. The stipulation period for final determination of construction dispute is to be conducted within 28 to 30 working days.⁴⁴ Adjudication is a quick and cost efficient process in which an independent third party makes a binding decision on construction contract disputes. The adjudicator's powers are defined by the parties in relation to the contract under which he has been appointed. His decision is mandatory on the parties.

The current concern with adjudication is that there has been an increasing trend for larger and complex disputes being referred to adjudication such as delays, disruptions and accelerated claims. Jon P. asserted that some disputes, particularly on the completion of projects, are too complex to achieve a fair adjudication process within the time limits of the scheme.⁴⁵ The ability to refer complicated disputes to adjudication has led some members of judiciary to suggest that it is not suitable for all disputes and parties should consider using arbitration and litigation where appropriate.⁴⁶

⁴² Section 22(1) of the Act.

⁴³ Claire King, "RICS Legal Issues in Construction Dispute resolution update" 29 November, 2011. Dispute resolution update www.fenwickellion.co.uk

⁴⁴ Albert, Munichion, "Reform of the Domestic Arbitration", Quarterly Newsletter of Building Dispute Tribunal (NZ) 1st vol. 16 No. 2. (2009).

⁴⁵ James, L. "The Construction and its Amendment Adjudication" Legal News and Guidance from Pinant (September 2, 2013): Mason.

⁴⁶ Jon, E. "Adjudication- its Impact on ADR and Litigation", e-mail: Jonathan.Prudhoe@trent.com (Retrieved from net on 27th, Dec., 2013).

⁴⁷ Bowsher J in RG Carter V Edmund Nutall, 2002 as cited in the work of Jon, Prudhoe.

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⁴² Section 22(3) of the Act

⁴³ Claire King, "RCS Legal Issues in Construction Dispute resolution update" 29 November, 2011, Dispute resolution update www.fenwickelliott.co.uk

⁴⁴ Albert, Menichino, "Reform of the Domestic Arbitration", Quarterly Newsletter of Building Dispute Tribunal (NZ) Ltd vol. 16 No. 2, (2009).

⁴⁵ James, L. "The Construction and its Amendment Adjudication "Legal News and Guidance from Pnarex (September 2, 2013): Mason.

⁴⁶ Jon, E. "Adjudication- its Impact on ADR and Litigation", e-mail: Jonathan.Prudhoe@nrtt.com (Retrieved from net on 27th, Dec., 2013).

⁴⁷ Bowsher J in *RG Carter V Edmund Ntala*, 2002 as cited in the work of Jon, Prudhoe.

Conclusions

In the light of the findings presented in this study is revealed that, ADR processes used for construction dispute resolution have not been optimally explored for there to be effective and adequate dispute resolution mechanism in Nigeria. Among the ADR Centers established by the government to relieve courts of cases that require urgent attention, only Regional Centre for international commercial arbitration in Lagos is not functional this is the reason that gave birth to Multi-Door courthouse. Others have been dormant because of inadequate awareness of their existence and purpose to the public. Hence there is a need on the part of these Centres to create enlightenment to the public at large telling them what they stand to gain. On this note, it is pertinent to know that the ADR Centre in Ilorin (a city in the North-Central) is breaking through, on land matters. There is a need for this branch to make known to the stakeholders in the construction industry about the ADR processes available for them and what they stand to gain.⁴⁷

Finally, it needs be said that construction dispute resolution is poor hence the need for overhauling of the existing legal framework for construction dispute resolution in Nigeria. Processes such as Statutory Adjudication, Dispute Review Board and Expert Determination need to be introduced to supplement the existing ones. Statutory Adjudication Act needs to be considered by the legislative arm of government to provide for prompt payment in the industry. ADR Centres must be ready to give administrative support for the conduct of adjudication under this act. Lawyers and other stakeholders must be trained as adjudicators for them to act in this capacity. There is a need for use of the expert determination process as provided for in the ADR Provision in Nigeria. Establishment of construction court is highly desirable to facilitate prompt dispensation of justice and give final verdicts on construction disputes.

⁴⁷ This opinion was expressed by Architect Abdul-Rabem Abdul-Baqi, the Director of Land and Building, Ilorin, Kwara State in the North-Central Zone in the interview conducted on him by the researcher on 17th June 2015.