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Readings in Law and Contemporary Issues

A Publication of
Faculty of Law,
Rivers State University



Edited by:
Dr Chris C. Wigwe

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In

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Readings in Law and Policy

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A Publication of
Faculty of Law, Rivers State University

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Chapter 12

A Revisit of the Use of Arbitration in the Resolution of Construction Dispute in Nigeria.

Barakat Adebisi Raji (PhD)*
& Aladokiye E. Gabriel-Whyte**

Abstract

Arbitration is ranked as one of the best alternative instruments for resolution of construction dispute globally. Arbitration Act is well couched and specially designed to cater for all the technicalities involve in the resolution of construction disputes. However, the cost and time frame within which arbitral award is granted to parties to construction dispute seem to make the process ineffectual thereby defeating its goal. Many times contract sum is lost to arbitration for resolution of construction disputes thereby defeating the purpose of award of construction projects. There is a need for upward review of the arbitration Act for effective resolution as well making the process more attractive to the foreign investors into construction business in Nigeria. The objective of this paper is to evaluate the impact of arbitration process used for resolution of construction disputes in Nigeria with a view to draw lessons from both UK and Malaysia. Utilising content analysis of cases of arbitration in construction disputes obtained from law reports. The finding of this paper shows that arbitration has more advantage over litigation of construction dispute resolution. The paper suggests among others the need to revisit the cost of arbitration and the timeframe within which construction disputes are heard and determined so that foreign investors as well as local contractors could have a better chance when venturing into construction business in Nigeria.

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Introduction

The world over, arbitration is seen as the best option for the solution of construction disputes.¹ The need to introduce arbitration into the commercial activities including construction became more compelling because of the delay in construction disputes occasioned in courts which has resorted into low quality performance, bankruptcy, and claims of lives and properties of the stakeholders concerned. Also the indisputable rights of foreign investors in construction industry needed to be protected as it is not possible to have only local contractors in construction industry. Arbitration has a landmark decision with far-reaching implications on construction disputes resolution. The need to enhance construction activities has compelled the stakeholders to enshrine arbitration clause into construction contract form. Arbitration has been in use in Nigeria as a form of dispute resolution since the early 20th century and it is regulated by arbitration and conciliation decree now known as Arbitration and Conciliation Decree (ACD).² The Arbitration and Conciliation Act (ACA) is the procedural law on arbitration in Nigeria. The decision of an arbitral tribunal is usually considered as valid and enforceable as a judgement in the High Court as established in the case of Onward Enterprises where steps taken by a respondent was considered as a waiver of arbitral award.³ Generally, Court will give effect to arbitration once it can be established that parties agreed to it. The court emphatically submits on this:

¹Van Zyl, Carl, Basile Verster, and M. S. Ramabodu, 'Dispute Resolution Alternatives: Problems, Preference and Process', in *Proceedings of the Construction, Building and Real Estate Research Conference (COBRA 2010) of the Royal Institution of Chartered Surveyors (RICS)*, 2-3, 2010; J. J. P. Verster, M. S. Ramabodu, and C. H. Van Zyl, 'Construction Dispute Resolution as seen by Quantity Surveyors and Construction Managers', in *Proceedings of the 7th International Cost Engineering Council World and the 14th Pacific Association of Quantity Surveyors Congress, Singapore, 2010*. J. J. P. Verster, 'Managing cost, contracts, communication and claims: A Quantity Surveying perspective on future opportunities' in *Proceedings of 1st ICEC & IPMA Global Congress on Project Management, 5th World Congress on Cost Engineering, Project Management and Quantity Surveying*, (2006), 23-26.

² The Arbitration and Conciliation Decree 11 of 1988. However, this same law has been incorporated as Cap A18, Laws of the Federation of Nigeria 2004. This is now known as Arbitration and Conciliation Act, Cap 18, in the Laws of Federations of Nigeria, LFN, 2004.

³*Onward Enterprises Ltd v MV Matrix* (2010) 2 NWLR (part 1179), 530.

...Once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court will give regard to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to hold parties to the bargain which they freely entered.⁴

Hence, the use of arbitration cannot be underscored in the Nigeria commercial activities given the number of cases receive by arbitrators.

Parties to Arbitration Agreement

Parties to arbitration are obliged by the state to honour their contractual obligations and settle their disputes amicably. Arbitral tribunal can be constituted by either one or more arbitrator (s) subject to agreement between the parties concern. Once parties are bound by arbitration agreement, they cannot open their case in court until after the decision of the tribunal is challenged in the court. Parties are compelled by law to first explore arbitration where they have agreed to use arbitration for settlement of their disputes before going to court. This was established in *Confidence Insurance Ltd v The Trustees of the Ondo State College of Education Staff Pension*⁵ where under Section 5 of the ACA to insist on referring a dispute to arbitration.⁶

Commencement of Arbitration

Commencement of arbitral proceedings is usually initiated by written notice of the arbitration by one of the parties called "the Claimant" to the other party, referred to as "the Respondent." Arbitral proceedings are deemed to have commenced when the Claimant serves the Respondent with a notice to that effect. In domestic arbitrations, the arbitral panel must apply the procedures set out in the Arbitration Rules. These rules are substantially similar to the UNICTRAL Model Law. Where the rules are silent on a

⁴ This is to show the extent to which Courts give support to enforcement of arbitral award.

⁵ (1999) 2 NWLR (Pt. 591) 373 at 386-387.

⁶ *Ibid.*

particular matter, the arbitral panel can determine the procedure, as long as any rule adopted ensures a fair hearing. In international arbitrations, the parties are free to agree on what rules or procedure to apply.

In arbitrations where the Arbitration Rules are not mandatory, the arbitrator's powers are decided by the parties or by the rules which they agree will govern the proceedings. However, the general rule is that in arbitral proceedings, arbitrators must ensure that the parties are treated equally and are given full opportunity to present their case. Unless the parties otherwise decide, the presiding arbitrator has the power to make procedural decisions for the other members of the panel. The Arbitration Rules provides that the arbitrator must hold oral hearings if either of the parties requests it. Arbitration on the basis of documentary evidence can only occur in the absence of such a request.

Breach of Arbitration Agreement

Where a party commences a court proceeding for breach of arbitration agreement, the other party can make an application to the court to stay the proceedings, pending a reference to arbitration. The court will first look into the agreement between the parties. Where parties have agreed to be bound by arbitration for settlement in case there is a dispute, the court will order a stay of proceedings and refer the parties to arbitration. The Nigerian courts have recognised the importance of honouring parties' agreement to arbitrate as established by the Supreme Court of Nigeria in *The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Limited* held that even if one of the parties fails or refuses to participate in the arbitration proceedings, the arbitration may still proceed.⁷

Also, a party can challenge the commencement of arbitration on the ground of a valid jurisdiction clause by raising a preliminary objection to the arbitration, and asking the arbitrator to determine the issue of his jurisdiction at a preliminary stage. The local courts have

⁷ *The Owners of MV Lupex v Nigerian Overseas Chartering & Shipping Limited* (2003) FWLR [pt. 170] 1428.

jurisdiction to grant an injunction to restrain proceedings commenced overseas in breach of an arbitration agreement. Section 48 of ACA provides for the circumstances under which a court can set aside an award. Court is empowered to set aside an arbitral award if the party making the application furnishes proof that the other party to the arbitration agreement is under obligation which must be fulfilled.⁸

A party who was not given proper notice of the appointment of an arbitrator can proceed to ask the court to set aside arbitral award as established in the case of *NNPC v Lutin Investment Limited*.⁹ The award can also be challenged where it deals with a dispute not contemplated by or does not falling within the terms of the submission to arbitration. Where the award contains decisions on matters which are beyond the scope of submission to arbitration such decisions on matters submitted to arbitration can be separated from those not submitted and only that part of the award which contains decision on matters not submitted to arbitration may be set aside.¹⁰

Section 48 is a mere reproduction of Article 4 of 1958 New York Convention and the Model Law. However, there is a distinction between setting aside an arbitral award and recognition and enforcement of such award. Setting aside where it is done by the court of the seat of arbitration may affect the validity of the award in such a way that no other national court in any other country will regard the award as valid for recognition and enforcement as established in the case of *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation* where an application for partial enforcement of an award was granted because it was regarded as not a serious subject to challenge.¹¹

⁸See Section 48 (a) (i) of Arbitration Act, CAP 19 LFN 2004.

⁹ (2006) 2 NWLR (pt. 965) 506.

¹⁰See Section 48 (iii-v) of the Arbitration and Conciliation Act, CAP, 19 LFN 2004.

¹¹ (2003) FWLR [Pt.170] 1428.

Arbitrability of Construction Disputes in Nigeria

The inclusion of arbitration clause in construction contract has made any form of dispute arising out of construction contract agreement arbitrable. Moreover, arbitration is a technically based dispute resolution mechanism suitable for construction disputes with expert sitting like a judge to settle contractual agreements.¹² The first construction case to be celebrated in Nigeria in this circumstance was the case of *Kano State Urban Development Board v Fanz Construction Ltd* which allows parties to freely appoint arbitrator of their choice for fair hearing and determination of their case.¹³

On whether the High Court has jurisdiction to hear arbitration cases has been settled in the case of *Ras Pal Gazi Construction Company Ltd v FCDA* and jurisdiction to determine the validity of the award has been vested in the court; so a party can apply to court for enforcement.¹⁴

¹² T. Cunningham, 'Dispute Resolution under the Principal Irish Forms of Building Contract,' (2015); C. Bvumbwe and D. W. Thwala, 'An Exploratory Study of Dispute Resolution Methods in the South African Construction Industry' (A Paper Presented at the IACSIT Press, International Conference on Information and Finance, 2011); B.W. Barth, 'An Investigation into the Suitability of Arbitration as a Dispute Settling Mechanism in the Construction Industry' PhD Thesis 2016; M. J. Maritz and V. Hattingh, 'Adjudication in South African Construction Industry Practice: Towards Legislative Intervention', (2015) *Journal of the South African Institution of Civil Engineering*, 57 (2), 45-49; Jun Young Cho, 'A Review of Construction Delivery Systems: Focus on the Construction Management at Risk System in the Korean Public Construction Market' (2016) *KSCE Journal of Civil Engineering*, 20 (2), 530-537.

¹³ (1986) 4 NWLR (PT 35) 301 603; 459 473.

¹⁴ (2003) FWLR [pt. 170] 1428; A. O. Eyioppe, 'Determinants of Jurisdiction in Arbitral Proceedings for Construction Contract Dispute Resolution in Nigeria', (2014) *Journal of Law and Conflict Resolution*, 6 (2) 24-31; A. O. Ujene, G. I. Idoro, and I. A. Odesola, 'Contractors Perceptions of Effects of Project Overhead Costs on Building Project Performance in South-South of Nigeria', (2013) *Civil Engineering Dimension* 15, (2), 102-113; A. O. Ujene, E. Achuen, and E. O. Abakadang, 'The Nature and Effect of Subcontracting on the Performance of Building Projects in South-South Zone of Nigeria', (2011) *Journal of Architecture, Planning & Construction Management*, 1 (2), 1-20; Yusuwan, Norazlan Mohamad, and Hamimah Adnan, 'Issues Associated with Extension of Time (EoT) Claim in Malaysian Construction Industry', (2013) *Procedia Technology*, 9, 740-749; Zhang, Xiaoling, Yuzhe Wu, and Liyin Shen, 'Embedding "Green" in Project-Based Organizations: the Way Ahead in the Construction Industry?' (2015) *Journal of Cleaner Production*, 107, 420-427.

Recognition and Enforcement of Arbitral Award

Arbitral awards must be sufficient and adequate to settle all the issues raised under the submission. It must resolve all the disputes canvassed by the parties and the necessity for resorting to further judicial process is eliminated. The fact that an award is final and binding does not necessarily mean that it will be recognised or enforced. A party to an arbitration agreement may request the court to refuse recognition or enforcement of an award made under the agreement on the grounds stated under s.29 and 30 of the ACA. This normally happens where: an arbitrator has misconducted himself, or where the arbitral proceedings, or award has been improperly procured, the court may on application of a party set aside the award, or an arbitrator who has misconducted himself may, on the application of any party, be removed by the court. The act has not provided other grounds upon which a domestic award can be challenged except in the above circumstances. It implies that an award cannot be challenged frivolously. This was established in *Ras Pal Gazi Construction Co v FCDA* where an award made pursuant to Arbitration proceedings constitute the final judgment on all matters referred to the arbitrator.¹⁵

¹⁵*Ibid.* *Kano State Urban Dev. Board v Fanz Construction Company Ltd* [1986] 5 NWLR (Pt.39) 74 (Court of Appeal) 135; G. G. Otuturu, 'Some Aspects of the Law and Practice of Commercial Arbitration in Nigeria', (2014) *Journal of Law and Conflict Resolution*, 6 (4), 67-77; F. C. Okpaleke, A. C. Otegbulu, and C. R. Emele, 'Mitigating Risk Impact of Disputes on Real Estate Business and Investment in Lagos: The Alternative Dispute Resolution (ADR) Approach', (2016) *Covenant Journal of Business and Social Sciences*, 6 (1); E. Onyema, 'The Multi-Door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC', (2013) *Apogee Journal of Business, Property & Constitutional Law*, 2 (7), 96-130; P. A. Anyebe, 'Towards Fast Tracking Justice Delivery in Civil Proceedings in Nigeria', *Nigerian Institute of Advanced Legal Studies, Judicial Reform and Transformation in Nigeria: A Tribute to Hon. Justice Dahiru Musdapher, Chief Justice of Nigeria*, 2nd Edition, (Epiphany Azinge, 2012), 136-169; P. N. Okoli, 'Arbitration Clauses in Nigerian Leases', (2011) *Commonwealth Law Bulletin*, 37 (1); (1999) 2 NWLR (Pt. 591) 373 at 386-387 (2011): 135-143; D. Ufot, 'The Influence of the New York Convention on the Development of International Arbitration in Nigeria', (2008) *Journal of International Arbitration*, 25 (6), 821-836.

Stay of Proceedings

A party is allowed in law to commence action in High Court for a stay of proceedings whenever there is a breach of arbitration agreement from the other party. However, the party making the application must be seen not to have taken any steps to defend the matter in court other than entering an appearance as provided for in the Act.¹⁶ Where a party takes a step to defend the action in the High Court by filing a defence, he cannot seek for enforcement of the arbitration agreement.¹⁷ Once a party responds to the action to challenge the arbitration decision in court by the other party, he would be deemed to have waived his right to arbitration as established by *Mr. Popoola Elabanjo & Anor*, where defendant filed a preliminary objection challenging the jurisdiction of the trial court.¹⁸

Arbitration cum Litigation in Nigerian Construction Industry

Arbitration process is practised in addition to the court proceedings in the Nigerian Construction Industry. This has enabled corporations, individuals and states to negotiate freely and settle their disputes amicably. Arbitration is generally faster and less expensive because there is far less discovery and no appeal. While litigation is more time consuming, expensive and cumbersome, the ever increasing number of cases in courts have occasioned congestion of cases awaiting trials and delay in their determination. The average contract-based lawsuit takes approximately a minimum of two years to resolve in court of first instance, another two years at the Court of Appeal while four years minimum at the Supreme Court.¹⁹ The average duration of similar cases in arbitration can be as

¹⁶ S. 4 and S.5 of the Arbitration and Conciliation Act, Cap 19 LFN, 2004.

¹⁷ See the case of *Fawehinmi Construction Co. Ltd. v OAU* (1998) 6 NWLR Pt. (553) 191 where the Supreme Court gave the meaning to what constitute taking of a step.

¹⁸ *Mr. Popoola Elabanjo & Anor v Chief (Mrs) Ganiat Dawodu* S.C. 386/2001.

¹⁹ M. J. Ramseyer and E. Rasmusen, 'Comparative Litigation Rates', (2010) *Harvard Law School*, 5-13; M. L. Marcus, 'Judicial Overload: The Reasons and the Remedies', (1978) *Buff. L. Rev.* 28, 111; T. Lightcap, 'Crucial and Routine Decisions: A New Explanation of Why Ideology Affects US Supreme Court Decision Making the Way It Does', (2009) *Tul. L. Rev.*, 84, 1491; L. S. Underkuffler, and W. D. Larson, *Civil Appellate Practice in the Minnesota Court of Appeals*, (Butterworth-Heinemann, 2014), 43-63; J. R. Weisberger,

short as five or six months. If the extra eighteen months of delay will impact positively on the relationship between the parties and the economic health of either party, then arbitration is worthy of adoption to be included in the contract.

In addition, the complexity of court litigation often times tends to increase costs which parties naturally would want to avoid. However, monetary claims can easily be settled amicably without going to court for a redress. Consequently, Arbitration and other Alternative Dispute Resolution mechanisms have been developed such that disputes are settled within a reasonable time than litigation.²⁰ Arbitration helps parties in the selection of a judge with expertise in the area of the dispute and submission to a jury with such expertise.

However, litigation may be an option when the industry feels like instituting a legal precedent to discourage similar suits, or, make use of the full range of discovery allowed by the courts which cannot be obtained by mutual agreement of the parties. Parties resort to litigation where arbitration fails to get their dispute resolved. This is what was established in the cases of *B.C.C Ltd. v Imani & Sons Ltd /Shell Trustee Ltd* the matter was entertained in court for fair hearing because of the failure in arbitration hearing for determination of the dispute.²¹ The case of *NNPC v Lutin Invest. Ltd* became process is also

²⁰ Appellate Caseload: Meeting the Challenge in Rhode Island', (1982) *U. Mich. J. Reform.*, 16, 527.

²¹ D. Chappell, *Construction Contracts: Questions and Answers* (Routledge, 2015), 27-44.

²² (2006) NWLR (Pt.1013), 1; Omran, Abdelnaser, and Abdu Aziz Hussin, 'Construction Site's Disputes in the Context of Money', (A Paper Presented at the International Conference in Economics and Administration, 2011), 6; Fisseha, Shimekilt, 'Payment Issues; the Case of Selected Public Building Construction Projects in Addis Ababa', (Ph.D. dissertation, AAU, 2015), 22-30; Derege, Gezahegne, 'Study on Cost Related Claim Practice in Federal Road Projects; Focused on Local Contractors', (Ph.D. dissertation, AAU, 2015), 14-20; Towey, Donald, *Cost Management of Construction Projects*. John Wiley & Sons, 2013; Tadesse Ayalew, 'Causes and Effect of Variations in Ethiopian Federal Road Projects' (PhD Dissertation, Addis Ababa University, 2009): 36-51; Hefer, A., D. Vosloo, and B. Botha, 'The Influence of Project Management Service Provision on Role-Players within the South African Construction Industry', (A Paper Presented at Postgraduate Conference 2014), 547; Y. Xing, Yan, Jin Fang Zheng, Peng Yuan Liu, and Xi Lu Deng, 'Discussion on Perfecting Engineering Guarantee System', In *Applied*

becoming very slow and its award is difficult to enforce within a reasonable time.

This is one of the major problems facing the case of construction dispute being arbitrated, given the essence of time-line in construction projects. Arbitration is currently considered a sibling of litigation, and no longer a quick response to construction disputes resolution. Arbitration administrative costs, fees for arbitrators and other related costs are increasingly expensive thereby making things difficult for parties to contractual agreement to settle their disputes. This calls for a review in the cost and time spent in the hearing of arbitration cases.

Awareness and the challenges on the use of arbitration for construction dispute resolution

There is the need to re-orientate the lawyers who have found their ways into construction arbitration practices. They need to acquire skill and knowledge to enhance their grasp of construction processes and practice. This will not allow them to take arbitration for litigation because the rules guiding arbitration is drastically different from that of litigation. The problem of time consuming in arbitration can be overcome when arbitrators guide against undue delay in the pre-hearing conference. Cost of arbitration can be reduced by exploring the context of S. 49 (2) which says "that the fee of arbitrator must be reasonable in amount taking account the amount of dispute, the complexity of the subject matter", the time spent by the arbitrator and other relevant circumstances of the case". The problem of cost causing disaffection in arbitration can be surmounted if arbitrators would charge parties reasonably according to the volume and nature of dispute. There is a need to review the Act to provide for consolidation and concurrent proceedings as well as the right of parties to continue construction even while arbitration progresses.

Mechanics and Materials, 209, (2012), 1491-1495. Trans Tech Publications, 2012; Lee, Dong-Gun, and Hee-Sung Cha, 'An Exploratory Research on Quantitative Risk Assessment Methodology throughout Success Factor Analysis in Project Financing', (2013) *Korean Journal of Construction Engineering and Management*, 14 (5), 92-102.

The Current Position of Arbitration in the Nigerian Construction Industry

Despite all odds, arbitration still remains the popular dispute resolution mechanism used for construction dispute resolution in Nigeria. This is preferred for construction cases because it is a technical based mechanism required for resolving construction disputes.²² Presently in Lagos state, arbitration has been improved upon. Arbitration proceedings run between four to six months now.²³ However, there is still a need to improve upon arbitration Act to provide for consolidation and concurrent proceedings. The mechanism is still not adequate to meet the quest in the construction industry in terms of delay and non-payment of work done on projects which are the major critical issues that hamper the progress and growth of the industry. This calls for urgent attention.

Conclusion

This study observed that arbitration has gained more recognition for construction dispute resolution over litigation in Nigeria. However, what is highly needed in the resolution of dispute in Construction Industry requires a more expeditious mechanism, than litigation and arbitration in that order, considering the nature of transactions in the Industry.

²² T. Haugen, and A. Singh, 'Dispute Resolution Strategy Selection', (2014) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 7(3) 05014004; H. M. C. Alhumaidi, Construction Contractors Ranking Method Using Multiple Decision-Makers and Multiattribute Fuzzy Weighted Average, (2014) *Journal of Construction Engineering and Management*, 141(4) 04014092; A. Tanielian, 'Arbitration still best road to binding Dispute Resolution', (2012) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 5 (2), 90-96; P. K. Tam, 'Alternative Dispute Resolution Effectiveness and its Acceptability to the Construction Industry of the HK SAR' (1998); O. Bozorg-Haddad, and A. Azarnivand, 'Discussion of Dispute Resolution Strategy Selection' by T. Haugen and A. Singh, (2016) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 8 (2), 07016001; Cheung, Sai On, and Karen Hoi Yan Pang, 'Anatomy of Construction Disputes', *Journal of Construction Engineering and Management*, 139 (1), 15-23.

²³ Lagos state was the former Capital Territory of Nigeria and presently the commercial hub of the country.

The reason is that all disputes arising from commercial transactions are treated alike, inclusive of those emanating from construction industries, which ordinarily ought to be handled by specialised legal process, devoid of inherent intricacies in arbitration and litigation as obtainable in other commonwealth countries like Malaysia and the UK, that share the same legal system with Nigeria. It has also been observed that litigation causes a lot of setback to construction projects because of time lag as time is of essence in any given construction works. Hence, there is the need to introduce other alternative dispute resolution mechanisms used in the other commonwealth jurisdictions such as Malaysia and Singapore which have been found to be more cost-effective and speedy in the resolution of disputes arising from the construction industry. Both litigation and arbitration are nowadays resorted to when one of the parties has failed to comply with the recommendation of the third neutral person agreed by the parties to resolve their disputes. The issue is not that there are no other alternatives to arbitration and litigation in Nigeria; it is just that they have not been given enforcement and recognition to make them popular like these two processes. There is an urgent need to rescue many projects from being abandoned with huge sums of money going down the drain, revamping the economic status of the country and allow the industry to take its position as the leading sector of the economy.

Recommendations

The following recommendations are suggested

- Arbitration Act 2004 is far remote from the present happenings in the construction industry in Nigeria, hence this paper calls for a revisit of the Act to enable arbitration be in tandem with the global practice.
- Arbitration Act 2004 is too general there is a need to provide some sections clearly stating how construction disputes should be managed.
- Arbitration centres should be more proactive to enable the public feel their importance. The cost of arbitration process should be well spelt out, considerable and affordable to

stakeholders in the construction industry without affecting the subject matter in issue.

- Time is of essence in construction projects, therefore, there is a need to revisit the time within which a construction dispute should be resolved so that the purpose for which the project is awarded will not be defeated.
- There is a need to make arbitration more attractive to the users by regulating the cost and making it affordable without losing the focus for which arbitration was introduced.