

CHAPTER ONE INTRODUCTION

1.1 Background of the Study

All modern societies have setup courts for resolution of disputes. Due to historical reasons, proceedings incourts are lengthy and conducted in a very legalistic manner. Hence those whoare not lawyers often find themselves lost in litigation procedure. Hence withthis motives bearing in mind that some dispute are basically technical and notlegal, it calls for a satisfactory method to resolve disputes and that beingthrough Alternative Dispute Resolutions, such as arbitration where partiesinvolved in the disputes are able to participate on the procedures involvedmaking easy for the judgment to be accepted with minimal appeals. Arbitrationis therefore an adjudicative process in which the parties present evidence andarguments to an impartial and independent third party who has the authority tohand down a binding decision based on objective standards, (Trank, 2009).

An arbitral award is final andbinding. It is equivalent to judgment of a court of law and is recognized assuch. It is an important method of deciding disputes other than litigation andis regulated by fairly well established principles of law Although the law onarbitration has been part of the statutory framework for many years, it is onlyrecently that the practice of arbitration has attracted serious attention andattempts are now being made to ensure that it takes its rightful place in thedispute resolution hierarchy, International dispute resolution involves the useof appropriate rules and customs in handling disputes between countries UNCITRALis under the united nation office of legal affairs and its core function is toregulate International trade using the UNCITRAL model law on internationalcommercial Arbitration. However the model law is not binding, but individualstates may adopt the model law by incorporating it into their domestic law.

Many construction conflictsworldwide are due to either jurisdiction or difference in cultures henceimportant to have the knowledge on the international constructing law to ensureone has the necessary tools to manage and resolve conflicts arising fromdisputes on the construction projects. In Africa there is no doubt that thecontinent represents today the world's most formidable development challenge invarious sectors one of them being the infrastructure. The significant growth ofinvestments and international trade with African

countries raises the importantissue of knowledge of its diverse cultures and people in order to establishsolid long term relationships and development when needed besides coming upwith a method to resolve its disputes successfully. Adoption of the UNCITRALModel Law on international commercial arbitration in 2010 showed the way,(Beatty, 2010).

Today Nigeriah has a localchapter of the Chartered Institute of Arbitrators with a membership of about4000 registered arbitrators. In addition to being a member, the arbitratorsundergo training for six months to ensure the characteristic they displayduring arbitral process is unexceptional and their handling of arbitrationprocedures is acceptable to both parties involved in the dispute. Lamentably,most of the arbitrators are based in Abuja . Although these developments have raised the profile of arbitration asa dispute resolution mechanism, the level of utilization of this mechanismremains dismal. In our view this state of affairs is traceable to the manner inwhich arbitration was introduced and the shortcomings of the

successive legal frameworks, (Benjamin, 2009). The transplantation of English law through the Orders-in-Council 1900 and 1907 saw the beginning of a new historical epoch in dispute resolution in colonial Kenya.¹⁵ It heralded the demise of customary practices of dispute resolution. But surprisingly, arbitration was re-introduced by the Arbitration Ordinance 1914 as an extrinsic concept.

The Ordinance was based on the English Arbitration Act 1889 whose central feature was the absolute control of the arbitral process by courts of law, (Bok, 2011). The English statute was amended in 1950 but retained the main provisions of its predecessor. After independence, Kenya's parliament promulgated a new Arbitration Act, Chapter 49 (now repealed). This Act was a carbon copy of the English Arbitration Act of 1950 and remained the operative statute until 1995 when the current Arbitration Act was proclaimed. Noteworthy, none of the successive statutes ever made reference to customary arbitration or alternative dispute resolution mechanisms. It is thus imperative to examine the suitability of the framework on arbitration and make the necessary recommendations for reforms. As arbitration and other ADR become increasingly institutionalized, it is essential that the law encapsulates the necessary policy changes, and reflects societal and global dynamics. This is inevitable if the country is to take advantage of international investment and commerce.

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Undeniably, investors and traders attach a high premium on the availability of operational, neutral and flexible dispute resolution mechanisms as an alternative to the court system. Arbitration is the preferred option, owing to the privacy it offers where the dispute resolved is made non-public only known by the parties involved, and again the liberty to set the rules of engagement and venue for the proceeding to take place. Finally, arbitration takes much less time compared to litigation ensuring businesses or projects like those in construction continue their operations soon to meet their timeline. This mechanism encourages investment and engenders growth. Our recommendations in this paper could assist policymakers, business people and legislators in formulating the future policy and legal framework on arbitration and ADR (Brewer, Gates and Goldman, 2010).

1.2 Statement of the Problem

A dispute within the construction industry covers a diverse range of issues that deserve to be addressed specifically and in depth. The construction industry is one that comprises a diversity of interests, professions and procedures which interact to create a completed project. All of those involved may share a common goal, but they inevitably have differing and often divergent purposes. In the quest to achieve their goal the chances or the likelihood of disagreement or disharmony are substantial (Gould, 1999).

If unresolved in time, construction disputes can become very expensive, considering the finances, personnel, time lost, and the opportunity costs. Quantifiable costs include hiring of attorneys, expert witnesses and the dispute resolution process itself. The less visible costs like company resources assigned to the dispute, and lost business opportunities and the intangible costs which include damage to business relationships and potential value lost due to inefficient dispute resolution are also considerable, although quite difficult or impossible to quantify. (Vermunt and Wilke, 2011).

Nigeria has had laws on Arbitration from as early as 1914, is a signatory to both the New York and the Washington Conventions³ and adopted UNCITRAL's Model Law in 1995. Nevertheless, arbitration has yet to win the confidence of business contracts as one of the basic dispute resolution mechanisms in the

country, and the continued usage of litigation to solve technical disputes like those found in the construction industry has led to untenable

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backlog of cases that have diverted the judiciary from its core mandate. The level of utilization of this important method of resolving construction industry disputes is disconcerting and there is an overwhelming case for a paradigmatic shift of emphasis from litigation to arbitration. The Nigeria chief justice Dr. Willy Mutunga is put into record on the March east African newspaper having encouraged Nigerians to adopt alternative methods to pursue justice other than going to courts, which are not only expensive but fuel hatred among family members, this when opening Gatundu law courts in Kiambu County.

The most basic hallmark of arbitration is the liberty enjoyed by the parties in fashioning the proceedings. They have capacity to tailor the scope of the submission. They enjoy wide latitude in selecting the persons who will serve as arbitrators with the technical knowledge. This is a form of security that has no parallel in litigation. Essentially, arbitration is a private process with a significant degree of autonomy and self-sufficiency. (Thornton, 2012)

In the construction industry arbitration is characterized by countless advantages; notably, neutrality, finality, binding nature of decisions, speed and confidentiality. Although the arbitral process has several shortcomings and is unsuitable in circumstances in which the dispute involves many parties, it is commonly a perfect substitute for litigation. It does not deny the parties the right to seek judicial opinion if they so desire and more importantly, if a party is dissatisfied with the arbitral award, it is entitled to challenge the award in the High court which has jurisdiction to set the award aside (Lipsky, 2009). Amazingly, even on technical disputes like the construction industry parties to contracts and undertakings prefer ordinary courts in dispute resolution. As a consequence, court diaries are perpetually clogged and cases take far too long to conclude. On average, construction cases take between two and four years to conclude others like land disputes may take as long as twenty years. Most litigants are unaware of other cost effective and reliable alternatives.

To my understanding arbitration has yet to attain the level of acceptance and utilization necessary to make it an important dispute resolution mechanism in technical areas like the construction industry in Nigeria and against this background, the importance of arbitration in dispute resolution cannot be gainsaid.

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1.3 Purpose of the Study

The purpose of the study was to investigate the influence of arbitration in the success of dispute resolution among construction industry in the Abuja County

1.4 Objectives of the study

- i. To establish the influence of liberty in arbitration processes on dispute resolution within construction Industry.
- ii. To establish the influence of flexibility in arbitration processes on dispute resolution within construction Industry.
- iii. To determine the influence of neutrality on arbitration processes in resolving disputes within construction Industry
- iv. To determine how privacy in arbitration influences disputes resolution among construction Industry in

Abuja

1.5 Research Questions

- i. What is the influence of liberty on arbitration processes in the rate at which disputes are resolved in the construction industry?
- ii. How does flexibility in arbitration processes influence dispute resolution within the construction industry?
- iii. To what extent does neutrality in arbitration processes contribute to dispute resolution within the construction industry?
- iv. How does privacy in arbitration processes influence how disputes are resolved in the construction industry?

1.6 Significance of the Study

Arbitration is a realistic alternative to litigation designed to resolve disputes. Construction industry is a key pillar for nurturing economic growth for any country because it contributes greatly to the infrastructure network. In Nigeria construction industry comes third after agriculture and manufacturing in contributing to the growth of domestic product (GDP) by 21.5%. In addition social economic transformation one of the pillars in Kenya's vision 2030

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has infrastructure as one of the six foundations which on the other hand incorporates construction industry. Construction projects are bound by time, scope and budgets hence very important to eliminate and manage any obstacle like disputes that may pull them behind. In case of a dispute arising it is very important for all the parties involved to fully participate and contribute in the resolution process, an important role not found with the litigation process in the courts.

Hence against this background when construction projects are carried out with minimal interruption like conflicts among the parties involved not only would it ensure that the economy of a country propagates but also aid a developing country like Nigeria attain its target goals like vision 2030. In addition on not forgetting the important role construction industry plays in ensuring modern housing and decent roads are put up to cater for the social well-being of the rising Nigeria population.

The government of Nigeria would benefit significantly through supporting a well-established arbitration institution by bringing both local and foreign investors to put in resources in the construction industry, and create a lot of employment opportunity for the citizen. The findings would be useful to the construction industry stakeholders to adopt arbitration as the preferred method to solve their disputes

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