

Construction Contracting Disputes and Use of Alternative Disputes Resolution Techniques for Sustainable Development in Anambra State

Yohanna Samuel Adamu **Abstract**

*Department of Estate Management
and Valuation, School of
Environmental Design and
Technology, Federal Polytechnic
Oko, Anambra State*

Construction contracting disputes and use of alternative disputes resolution techniques for sustainable development in Anambra state were investigated using survey research design with a view to ascertaining their causes and consequences on three key construction stakeholders in Anambra state: clients, consultants and contractors. Construction contracting disputes are inevitable and keep occurring. The management of construction disputes is always an acid test of the emotional and intellectual maturity of clients, consultants and contractors. Construction contracting disputes may be destructive but at times constructive. It is important to understand the nature, causes and consequences of construction disputes among clients, consultants and contractors as it relates to claims for more money, time extension, defective quality work and the inadequacy of client brief. The study specifically adopted two alternative dispute resolution methods; mediation and conciliation techniques. These two techniques were purposely chosen because they are non-litigation alternatives, fast and cost-effective. The results revealed that construction contracting disputes are most times money, time, and quality related. The study also revealed that contemporary use of mediation and conciliation techniques is capable of quick resolution of disputes. Recommendations such as discouraging the frequency of construction disputes that are money time and quality related, encourage the contemporary use of mediation and conciliation as non-litigation alternatives, timely and proper dissemination of technical information, incorporation of mediation and conciliation clause in construction contracts, extensive training through seminar, workshops and conferences on the subject of human relationship were suggested as panacea to construction contracting disputes.

Keywords:

Construction contracting disputes, Alternative dispute resolution, Mediation, Conciliation, Construction industry, Construction contracting

Corresponding Author:
Yohanna Samuel Adamu

Background to the Study

Construction contracting disputes are not in themselves bad; on the contrary, construction disputes are veritable instruments of progress in human relationships (Olowu, 2005). The construction industry is plagued, perhaps more than any other industry with disputes due to inherent interest between the client (owner), consultant and contractor, unrealistic expectations; that is the client wants speedy completion and a quality building at a low price, the contractor may want more time, a more reasonable quality and maximum price; misunderstanding due to poor communication, changes to plans deadlines and payment dates etc.

According to Henk (2000) construction contracting disputes frequently appear to be problem of money, time, quality and inadequacy of client brief. The complexity of construction projects and their susceptibility to numerous risks made construction disputes so frustrating, upsetting and time consuming. A delay in the resolution of construction disputes can be particularly damaging because it slows down the completion process.

Construction projects are among the most complicated of human enterprises. High level of art and craft are required to translate the owner's vision into plans and specification then into real structures; one that fits the need of the individuals and the public (Steve, 1995). In addition to technical skills, the ability to coordinate the diverse efforts of many individuals is crucial to success.

The perceived short coming of litigation with its concomitant rise in costs and delays has encouraged the rapid growth and use of mediation and conciliation in resolving disputes by the construction industry worldwide (Cheung, Henry & Lam, 2002).

According to McKee (2006) mediation is a dispute mechanism in which a neutral third party meets the disputants and facilitates negotiation for parties to come to their own resolution. Conciliation on the other hand needs the involvement of a third party in settling disputes with expert opinion in amicable dispute resolution process (Olagunju, 1998).

The study will provide answers to two important questions out of several others that are germane to the causes of construction contracting disputes and the use of mediation and conciliation techniques to resolve contemporary construction contracting disputes among three key stakeholders of clients, consultants and contractors in a holistic, healthy and positive way.

Statement of research problem

Defective quality work, time extension, inadequacy of client brief and payment of variations and/or reimbursement of loss and expense account for 70% of construction

disputes (Robert, 2004). Increase in claim for more money, time and quality may lead to project delay, unexpected additional or extra work, cost overruns, structural failure and disputes if not quickly resolved by all stakeholders. It is therefore necessary that clients, consultants and contractors address the situation using ADR preferably mediation and conciliation techniques for resolving construction disputes which minimize cost and time spent in litigation (Sandhir, 2010).

According to loose more (2002), the construction industry is fragmented and has many problems because it involves multi-organizational activity. Disputes can therefore exist at all levels in the construction contractual chain between the client, consultant and contractor. Translating the client's vision into plans and specification and then into real structures requires team work with inherent conflicting interest.

Aim and Objectives

The aim of the study is to evaluate construction contracting disputes and use of alternative dispute resolution techniques in resolving construction disputes in the Nigerian construction industry. To achieve this, the following objectives are pursued:

1. To identify the major causes and consequences of construction contracting disputes between clients, consultants and contractors..
2. To analyze the relationship between the contemporary use of mediation and conciliation in generating rapid solution to construction contracting disputes.

Research Questions

The research questions attempt to provide answers to the following questions:

1. What are the causes of construction contracting disputes on clients, consultants and contractors?
2. To analyze the contemporary use of mediation and conciliation in generating rapid solution to construction contracting disputes resolution.

Methodology

A survey research method was used to derive information use for the study. The survey research design assesses construction contracting disputes and use of alternative disputes resolution techniques specifically, mediation and conciliation techniques. The study used literature search, structured questions and oral interview for clients, consultants and contractors on construction contracting disputes in the industry.

The population of the study comprises 278 construction firms in Anambra state. (Vconnect, 2019). A good number of construction firms do not maintain record of permanent employees but rely heavily on the services of casual workers due to the seasonal nature of their job. As a result, a convenient sample of 30 of the stakeholders was selected representing 10 each for clients, consultants and contractors in the state.

The sampling technique adopted for this study is the simple purposive sampling. Purposive samplings are ideal when developing interview schedules used only for a small proportion of the population on a wide range of phenomenon under investigation. Reduced costs, greater speed, greater scope and greater accuracy made the purposive sampling ideal.

Data analysis

The research presentation adopted a qualitative methodology which is descriptive and narrative in style. The analytical technique used in analyzing the data was based on findings using a 5-point likert scale to determine the level of acceptance or non-acceptance of responses calculated using the mean score method. The ratings used are as follows:

- | | | | |
|----------------------|------|-----|--|
| 1. Strongly Agree | (SA) | = 5 | |
| 2. Agree | (A) | = 4 | |
| 3. Neutral | (N) | = 3 | |
| 4. Disagree | (D) | = 2 | |
| 5. Strongly Disagree | (SD) | = 1 | |

Literature Review

The Nature and Structure of the Construction Industry

Construction, also called building construction, is the techniques and industry involved in the assembly and erection of structures, primarily those used to provide shelter. (Pao-Chi and Alfred 2019)

The term “construction” is generally defined as the activity, which creates all type of new building and engineered structures, as well as the maintenance and repair of existing facilities. Construction in any country is a complex sector of the economy, which involves a broad range of stakeholders and has wide ranging linkages with other areas of activity such as manufacturing and the use of materials, energy, finance, labour and equipment (Hellebrandt, 1985).

The construction industry is a major contributor to the economy of a country. Despite many positive contributions, the industry suffers from a negative image due to persist and unresolved construction disputes. The contribution of construction industry to a country's national development may be broken down into the following components (Field and Ofor, 1988):

1. Production of specific and national basic needs
2. Provision of fixed capital assets and infrastructure of a country
3. Direct contribution to the gross Domestic product (GDP), thereby stimulating further growth via its backwards and forward linkages with other industrial sectors:
4. Employment generation.

According to Seeley (1984), the construction industry embraces a wide range of loosely integrated organizations that collectively construct, alter and repair a wide range of building and civil engineering structures. The structure and organization of the construction industry varies considerably among countries.

Construction Contracting

According to Clough & Sears (2014), construction contracting are agreements that need to be signed to give the legal protection to the construction work of any kind. Like all the contracts, construction contracting contains the list of rights, obligations for all the parties involved in the construction. Furthermore, the construction contract contains the rules governing the deal in the form of clauses.

There are many advantages of working with a contract than opting for not working under a contract. First and foremost, the job would be protected by the law of the country and not signing a contract is a violation of the law which in turn breeds disputes. Secondly, if all is going well, then it is hard to realize the need of a contract but whenever there is a dispute over anything, then only on the basis of the contract can the matter be taken to the court of law for possible resolution.

Not signing a contract can allow the contractor to come up with never ending wish list and on the other hand, the construction party can do work according to their facility as there is no legal binding on them. Timely completion of the project is also at stake when there are no legal bindings over the parties by contract. Payment is the most troublesome area for both the parties.

It is important to note that a construction contract must contain only legal clause. A contract which contains illegal terms cannot be presented in the court for any dispute. Construction contract also contain the penalty clause if any of the parties involved fail to perform its due action.

Construction Contracting Disputes

The construction process involves multi-organizational activity. Disputes can therefore exist at all level in the contractual chain. Such dispute can be between client/consultant, client/ contractor, consultant/contractor, contractor/sub-contractor, sub-contractor/sub-contractor, client and sub-contractor etc. The types of dispute arising from construction contractual relationship can be summarized into three categories:

1. "Time" related, that is claim from the contractor for the extension of time for completion of the project.
2. "Money" related; that is claim from the contractor for payment of the value of variations and/or reimbursement of loss and expense.
3. "Quality" related: that is assertion by the client of defective material and workmanship

According to John (1990) disputes are short-term disagreements that are relatively easy to resolve. Disputes are a normal part of living. It is inevitable and it keeps occurring. Everyone has dignity, and deserves respect. The management of dispute is always an acid test of the emotional and intellectual maturity of those at the helm of affairs. Disputation is not bad! Disputes can be destructive but at times, constructive. It is important to understand the nature, causes and sources of disputes among human beings. It is better to learn skills and ways to resolve disputes other than litigation (Olowu, 2005).

Construction contracting disputes frequently appear to be problems of money (Henk, 2000). He identified some reasons why disputes occur on construction sites beside money thus:

1. Misunderstanding due to poor communication.
2. Value difference between people, professionals and skills.
3. People often have unrealistic expectations. The client wants speedy completion and a quality building at a low price. The contractor may want more time, a more reasonable quality and maximum price.
4. Emotions. A person's self esteem or lack of it can cause dispute. Such as language, dynamics, geography, childhood experiences, upbringing and religion.
5. Education levels, both structured and unstructured learning can have an influence on dispute.
6. Many things are different between projects. There are different teams, funders and designers.
7. Not all people are equally skilled to visualize two-dimensional drawings in a three dimensional way, Changes to plans, deadlines, payment dates, delay and Parties often inadequately define quality.

Alternative Dispute Resolution

Alternative Dispute Resolution is increasingly being accepted in Nigeria as appropriate mechanism for resolving disputes.

According to Nwosu (2005) alternative dispute resolution refers to all means or methods of resolving disputes outside courtroom litigation. These include a wide range of processes that encourages dispute resolution primarily by agreement of the parties as against a binding decision in litigation. Thus, the word "Alternative" refers to other "options" to litigation.

Although, disputes cannot be completely settled, the trend is definitely in favour of upholding and enforcing agreements, which is the best known and most formalized alternative to litigation (Sandhir, 2010).

Mediation

Mediation is a mechanism in which a neutral third party meets with the disputants and facilitates negotiation to help the parties come to their own solution (Yuena, 2002). It is a

voluntary but structured with ground rules agreed upon by the parties. The mediator assists the disputants to generate options; helping both parties understand better their respective positions and manage emotions. Although, the mediator controls the process, he or she does not impose any resolution or opinion on the merits of the case, promoting a win/win situation, leaving the disputants themselves to control the outcome.

According to Sandhir (2010) mediation involves an attempt by the parties to resolve their dispute with the aid of a neutral third party. The mediator's role is simply advisory. The mediator may offer suggestions but resolution of the dispute rests with the parties themselves. From the foregoing, the researcher is of the opinion that mediation proceedings are confidential and private. The two definitions have one thing in common – control. The parties control the process i.e. they can agree to fashion a process or combination of processes especially well suited to the dispute between them.

There are several reasons why mediation is an increasingly popular process for resolution of construction disputes. Mediation is a response to the financial cost and emotional stress to contractors, owners, developers, design professionals and others who resort to litigation to resolve their disputes. Mediation allows construction executives minimize legal costs, control the decision making process, avoid most of the emotional stress, maintain construction relationships and provides the most rapid process for full and final resolution of disputes.

It was McKee (2006), who said that mediation is negotiation with the assistance of a neutral third party. It is often referred to as structured negotiation. Statistics show that over 75% of commercial mediations result in settlement either at the time of the mediation or within a short time thereafter.

The one advantage that mediation has over all other dispute resolution procedures is that there is opportunity within the mediation for the parties to seek a commercial settlement to the dispute. Mediation is a private, quick, cheap process, compared to arbitration or litigation where a third party makes possible dialogue between the parties in other that the parties can reach their own decision that is initially non-binding. The parties can however, agree to be bound by their final decision.

In the words of Chancellor (2001) mediation is a private and structured form of negotiation assisted by a third party that is initially non-binding. Mediation is a flexible process and does not take long.

It was McKee (2006) who said that Alternative Dispute Resolution (ADR) is any procedure or combination of procedures entered into voluntarily by the parties to dispute or disagreement. He described ADR as a commonly used term to include a range of processes which involve the use of external third party and which can be considered as alternative to litigation.

Hodgetts (2012) stated that ADR is a broad range of mechanisms and processes designed to assist parties in resolving differences. These alternative mechanisms are not intended to support court adjudication, but rather, to supplement it. ADR provides an opportunity to resolve disputes creatively and effectively finding the process that best handles a particular dispute.

Conciliation

According to Dighello (2000) conciliation is a process similar to mediation except that the conciliator can express an opinion in the merits of the case and is required to recommend a solution if parties fail to agree. The power of the conciliator is conferred by status.

In the words of Nwosu (2005) conciliation is a process whereby a third party intervenes to assist the parties to resolve their disputes. To a large extent, conciliation share the characters as mediation and in most jurisdiction, both are used interchangeably. Sometimes, attempt is made to differentiate mediation from conciliation by emphasizing the following attributes of conciliation:

- a. It is usually statutorily provided.
- b. Often, the conciliator is a government official who is required to act as an advocate of government policy and has a statutory obligation to further the objectives of legislation; e.g. the minister for labour under the trade disputes act.
- c. A conciliator may give an opinion or suggest an agreement for the parties as provided for by the Arbitration and Conciliation Act Cap 19 Laws of Federation of Nigeria, 2004.

It was Klein (2006) who said conciliation is very similar to mediation except that the conciliator is either named in the contract, agreed to by the parties, again usually by three names being given to the responding party for it to select one, or if agreement is not made, appointed by a professional institution. Conciliation is very similar in procedure to mediation except that if the parties fail to agree to a settlement, then the conciliator will issue a recommendation on what he considers is the fair and reasonable settlement of the dispute referred to him.

In conciliation however, the third party neutral does not always meet together with the parties. The conciliator's role is also broader than in the mediation as it advises the parties on the possible result of the dispute if it were resolved in either arbitration or litigation.

In conclusion, both mediation and conciliation often used interchangeably as alternative dispute resolution techniques in the Nigerian construction industry have the following advantages:

1. They are flexible to meet the requirements of the dispute, allow the parties to control the procedure and provide the parties with an opportunity to be heard.
2. Provide the parties with an opportunity to understand their respective positions, a forum for “decision makers” to get involved.

3. Remain confidential to the extent agreed by the parties, provide the support of a third party neutral to facilitate discussions and/or resolve the dispute.
4. Allow consideration of outcomes other than strict contractual entitlements and help to maintain working relationships
5. Reduce costs.

Therefore, the aim of mediation and conciliation is to find a resolution to the dispute that both parties can accept. The construction industry may resort to these techniques early in any developing dispute, as a quick and inexpensive way of finding a solution before the project or relationships becomes damaged.

Results and discussion

Stakeholders' qualification

To further achieve a purposive research, respondents provided their respective professions and qualifications which are also structured using tables and percentages thus:

Table 1: Profession and Qualification

Item	Variables	Response	Percentage (%)
What is your profession?	(a) Architecture	10	20
	(b) Building	15	30
	(c) Civil Engineering	8	16
	(d) Electrical/Electronic Engineering	6	12
	(e) Mechanical Engineering	6	12
	(f) Others	5	10
Total		50	100
Qualification	(a) HND/PGD	15	30
	(b) B.Sc., B.Eng, B.Tech and B.Ed	30	60
	(c) M.Sc., M.Eng., M.Ed	3	6
	(d) Others	2	4
Total		50	100

Source: Author's Field Survey (2019)

Analysis in table 1 above shows that respondents are clearly drawn from different academic backgrounds and professions. Academically, the respondents are qualified based on their respective educational qualification.

Research question 1: general causes of construction disputes

A number of identified variables responsible for construction contracting disputes from the questionnaire were recovered. Table 2 below shows the table summary of variables causing disputes in the construction industry.

Table 2: Causes of construction disputes

S/no	Variables	SA (5)	A (4)	N (3)	D (2)	SD (1)	Mean Score
1	Inadequate briefing is a major cause of construction disputes among construction stakeholders	23	15	5	4	3	4.02
2	Inadequate quality of designs, drawings and specifications results in disputes	18	14	9	7	7	3.88
3	Poor workmanship is a sensitive cause of construction disputes	20	12	8	6	4	3.76
4	Non-engagement of professionals in the construction process is a variable responsible for construction disputes	17	15	8	5	5	3.68
5	Low productivity is a function of delayed project due to unresolved disputes	15	13	10	8	4	3.54

Source: Researcher's Field Survey Analysis (2019)

It is observed from table 2 above that the major cause of construction dispute is inadequate briefing of stakeholders with 4.02 by the clients or their representative consultants. Inadequate quality of designs, drawings and specifications account for 3.88 of construction dispute. Poor workmanship account for 3.76 of the major cause of construction disputes. The table also showed that non-engagement of qualified professionals is another major cause of construction disputes with 3.68 respondents. While low productivity in the table suggests that 3.54 of the major cause of construction disputes can be trace to it.

Research question 2: The use of mediation and conciliation techniques in generating rapid solution to contemporary dispute resolution

Construction business is often fraught with risks and uncertainties which demand the frequent use of mediation and conciliation techniques in resolving contemporary disputes.

Table 4: Contemporary use of Mediation and Conciliation Techniques

S/no	Variables	SA (5)	A (4)	N (3)	D (2)	SD (1)	Mean Score
1	Mediation technique is frequently used in contemporary dispute resolution in the industry	24	16	4	4	2	4.12
2	Claim for money time extension and quality requirement by stakeholders is always settled using mediation and conciliation methods	22	14	8	6	2	4.08
3	Frequent use of conciliation technique will always checkmate contemporary disputes resulting from project delay, unexpected additional or extra work, cost overruns and structural failure	20	14	8	6	2	3.88

Source: Researcher's Field Survey Analysis (2019)

The trend in table 4 above indicates that 4.12 of respondents noted that mediation and conciliation technique is always employed in resolving contemporary construction disputes, 4.08 agreed that mediation and conciliation techniques is appropriate in construction contracting disputes resolution, 3.88 of respondents observed that mediation and conciliation being a fast track method of resolving construction contracting disputes will effectively checkmate project delay, unexpected additional or extra work, cost overruns and structural failures if applied in the early stage of disputes.

In summary, all responses point to the fact that mediation and conciliation techniques are often used in contemporary dispute resolution, having passed the acceptance region of 2.50 and above. This could be due to the savings in time, money and energy which otherwise would have being wasted in litigation and the need to safe guard working relationships between stakeholders by avoiding delays or disruptions of any kind. The techniques often times ensure rapid resolution to disputes in a friendly manner without stalling the progress of work on site.

Findings and Recommendations

Findings

The summary of the findings revealed the following:

Disputes are not in themselves bad: On the contrary, disputes can be veritable instruments of progress in human relationships. What made disputes disreputable is negative dispute management which sees only "rights" and "wrongs" and labels disputants as "winners" and "losers". This approach makes parties to do everything to win.

Construction dispute is often money, time and quality related. The respondents are also of the opinion that timely use of mediation and conciliation mechanisms will prevent disputes relating to delays, lack of clear brief, communication gap and poor design concept in defective quality work.

There is a clear construction policy for dispute resolution using mediation and conciliation mechanisms of construction dispute resolution. A mediation and conciliation technique is most times used in resolving 70% of construction disputes related to time, money and quality requirements by stakeholders. Only but a few go to litigation.

Mediation and conciliation techniques becomes a last resort where construction stakeholders neglect to record in writing many key agreements and understanding reached between them when goodwill and trust are usually at their high points.

Recommendations

Construction contracting disputes cause a lot of concern with regards to claims for additional money, time extension, defective quality work and the inadequacy of client brief which in turn contributes significantly to construction contracting disputes but have not reached a point of no return. It is therefore, recommended that:

1. The frequency of construction contracting disputes related to increased demands for more money time extension, defective quality work and the inadequacy of client brief be greatly discouraged. Clients, consultants and contractors should as a matter of urgency, incorporate mediation conciliation clause in all construction contracts because of its ability to generate rapid solution to construction contracting disputes.
2. Properly guided construction contracting dispute resolution techniques such as the contemporary use of mediation and conciliation techniques be encouraged by all construction stakeholders. Construction design information should be complete. Improvements are needed in the dissemination of technical information at all levels of construction to avoid disputes arising at different stages of construction.
3. Extensive training through seminar, workshop, conferences and the creation of awareness by clients, consultants and contractors on the subject of human relationship, interpersonal relationship, ethics, negotiating skills and a thorough supervision should be carried out on the construction work by respective designers as well as necessity for team work is of paramount importance.

References

- Adbissa, D. & Girmay, K. (2003). *Dispute resolution guidance by ADR techniques*
- Agarwal, V. (2001). *Alternative Dispute Resolution Methods. Unitar Sub-Regional Workshop on Arbitration and Dispute Resolution, Harare.*
- Anago, I. (1998). *Mediation, conciliation and arbitration approaches. A seminar paper presented on Contract Administration and Dispute Management in Construction Industry – Nigeria in Perspective organized by the Institute of Construction Industry Arbitrators. 1 (2), pp 18 – 24.*
- Botha, H. (2000). *Conflict in the construction industry*, Bellstone Training International Limited.
- Boulle, L. (1996). *Mediation: Principal, process and practice*. North Ryde, Sydney, Butterworths.
- Dighello, J. (2000). *Dispute Resolution: When does every dry disagreement develop into a genuine dispute or potential claim*. Hartfold.
- Ezemeribe, A. (2002). *Problems militating against the Role of clients and consultants in effective building projects delivery in Nigeria – time, cost and quality*. A paper presented at a seminar organized by the Anambra State Chapter of the Nigerian Institute of Building on the theme: Effective Building procurement and Delivery Awka.
- Ezeokonkwo, J. (2002). *Delays and disruptions in construction project – Effects on project cost and Quality*. A paper presented at a seminar organized by the Anambra State Chapter of the Nigerian Institute of Building on the theme: Effective Building procurement and Delivery Awka.
- Hodgetts, R. M. (2012). *Mediation technique for commercial dispute resolution*, Philadelphia, P.A.
- Klein, H. (2010). *ADR procedures used to resolve construction disputes in the UK. A paper presented at a Seminar – Shaping the change XXIII Fig Congress, Munich, Germany.*
- Lavers, A. & Brooker, P. (2001). *Commercial and construction ADR: Lawyers attitudes and experience*. *CWIL Justice Quarterly*, 20 pp 327 – 347.
- Loose more, M. (2000). *Crisis management in construction Projects*, ASCE Press.
- McKee, K. (2006). *ADR methods – A paper presented for talks at the Thames Valley Branch of the Chartered Institute of Arbitrators*, London pp 4 – 7.

- Nicholas, J. (2009). *The use of mediation in construction disputes – A Research paper conducted by the Centre of Construction Law and Dispute Resolution, Kings College London and Technology.*
- Nwosu, K. (2005). *ADR – Negotiation, mediation, arbitration and hybrid processes. A professional Foundation Course Material Part 1 organized by DCON Consulting in Collaboration with the Association of Professional Negotiators and Mediators.*
- Olowu, A. (2005). *Nature, sources and causes of disputes in human relationships, a professional foundation lecture on Alternative Dispute Resolution (ADR) organized by DCON in collaboration with the Association of Professional Negotiators and Mediators, 8 – 21.*
- Pao-Chi, C & Alfred, S. (2019). *Building construction*, Retrieved on 6/11/19 from <https://www.britanica.com>
- Robert, E. (2004). *How construction contracts cause litigation*, Greenberg Training, New Jersey.
- Sandhir, S. (2006). *Alternative dispute resolution methods: A paper presented for talks at the Thames Valley Branch of the Chartered Institute of Arbitrator*
- Vconnect, F. (2019). *Vconnect Web Services*, Retrieved on 24/10/2019 from <https://m.vconnect.com>>anambra