Stakeholders' Perceptions of Construction Dispute Resolution Mechanism in Nigerian Construction

Rasheed Isa[1] and Fidelis Emuze[2]

Abstract

The nature of construction projects requires the participation of parties with different skills. Clients, designers, contractors, subcontractors, suppliers and manufacturer are always party to a project. Diversity in interest and goals means dispute can occur where multiple parties are involved. For instance, construction projects in Nigeria experience breakdown due to disputes. This shows justification for this research, which addresses perceptions of construction stakeholders relative to dispute resolution in Nigeria. The descriptive survey research design was employed, and a questionnaire was used as the tool for data collection where eight dispute resolution mechanisms were identified and classified. The results ranked negotiation and mediation top among the mechanisms. However, negotiation was ranked high because it is perceived to be time and cost saving, while improving working relations. The study concluded that negotiation and mediation were effective alternative dispute resolution mechanism based on the dynamics of project relationships in Nigeria.

Keywords: construction, dispute, projects, stakeholders, Nigeria

Background

The construction industry contributes majorly in developing and achieving societal aim as it affects people and it also contributes about 10% of Gross Domestic Product (GDP) of many nations (Navon, 2005). The complex nature of construction projects requires the participation of parties with different skills and varying interests. Clients, designers, contractors, subcontractors, suppliers and manufacturer are always party to a project that normally deepen its fragmentation and complexity. Although, the ultimate goal of a project team is to accomplish, in the best way possible, the various tasks within the traditional performance indicators of cost, time, and quality, tasks performance often leads to deliberate pursuance of some narrow priorities that provides platforms for disputes. The nature of dispute in the construction industry is so complex that if not properly managed, it can reduce productivity and escalate to prolonged litigation (Okuntade, 2014).

Construction disputes involve various stakeholders within the industry, for instance, dispute between clients and contractors, consultants and contractors, contractors and suppliers, contractors and employees, and so on. These may be as a result of time and cost overruns, poor execution of work, payment delays to contractors, suppliers, and workers (Pinnell, 1999). Disputes relating to construction projects usually use up enormous amount of funds and last over a period of time. Most times, the efforts in pursuing construction disputes far out-weigh the benefits accrued after settlements, especially when the right

[1] PhD Candidate, Unit for Lean Construction and Sustainability, Central University of Technology, Free State, 20 President Brand Street, Bloemfontein, South Africa, Tel: +27515073915, Fax: +27515073254, E-mail: risa@cut.ac.za.

[2] Associate Professor, Department of Built Environment, Central University of Technology, Free State, 20 President Brand Street, Bloemfontein, South Africa, Tel: +27515073915, Fax: +27515073254, E-mail: femuze@cut.ac.za.

dispute resolution mechanism is not applied (American Bar Association, 1983). To this end, Kubal (1994) and Donald (2000) state that the construction industry have been making efforts in evolving and establishing effective techniques in preventing and resolving disputes. Kubal (1994) stated that there is more scope for boosting of effective dispute resolution. Today, various mechanisms for dispute resolution are available and maturing within the sector. The traditional court system and alternative dispute resolution (ADR) are used for dispute resolution through adjudication, arbitration, expert determination, litigation, mediation, mediation / arbitration (Med/Arb), mini-trial, and negotiation (Fenn, Lowe, & Speck, 1997). Table 1 shows the nature and characteristics of some dispute resolution mechanisms.

Table 1: Nature and characteristics of some dispute resolution mechanisms

Mechanism	Descriptions	Characteristics	References
Adjudication (F)	An umpire decision that can be further reviewed through arbitration and/or litigation.	Economical, faster and effective; agreement between parties for adjudicator.	Nicholas, 2004
Arbitration (F)	Agreement between parties for a neutral party for settlement that is normally based on arbitration clauses inserted in the contract.	Less complex in nature; reduced cost and time saving compare to litigation.	Stipanowich, 2001
Litigation (F)	Dispute resolves through the law court, normally employed when legal matters or extension of a contract law are involved.	Complex in nature; consumes cost, time and destroys cordial relationship; reduced profitability.	Kellogg, 2001 Trantina, 2001
Mediation (I)	Mediation is a settlement sessions held by an unbiased third neutral party that make dialogue possible for mutual agreement between the disputing parties.	Flexible in nature; quicker, cost effective, satisfying manner for dispute resolution; normally involves an experience and respected mediator; procedurally prone.	Harmon, 2002
Med/Arb. (I & F)	The combination of mediation and arbitration, a forum for further review of mediation outcomes through arbitration that is more bidding from onset.	See; S/N 2 & 5.	Stipanowich, 2001
Negotiation (I)	Standard contract tends to incorporate negotiation as the foremost method for dispute resolution, where the parties come together on a round table for clarification, compromise and understanding.	Flexible in nature; economical, saves time and build cordial relationship within parties; procedurally prone.	Eilenberg, 2003

Key: (F) – Formal (legally bidding); (I) – Informal (not legally bidding)

Backing up the general intuitions about the construction industry being complex in nature and thereby involves numerous disputes, coupled with the chance to take proceedings of these disputes in a law court, has makes the construction industry to be known for being legally action oriented (Tazelaar, & Snijders, 2010; Du Preez, 2012). Litigation through the courts process can be rigid, time consuming and expensive. It is little wonder then that there is an increasing focus on ADR procedures such as arbitration; dispute resolution boards (DRBs) and mediation (Currie & Robey, 1988). ADR involves various methods which are different from litigation that have been created for the purpose of resolving disputes and its use has turn out to be predominant in contracts that are either local or international. Construction industry ADR procedures have broad usage and the purposes of utilizing these procedures by parties' involved in disputes are enormous and diverse. The high cost of litigation and the lengthy time it takes to resolve dispute are the main purposes why disputing parties' seem to put ADR to consideration as an alternative means in resolving disputes. ADR procedures are reasonable substitutes to litigation in that they are less expensive and faster mechanism of resolving disputes that does not end up in engendering adversarial relationships (Harmon, 2001; 2002).

However, anecdotal evidences suggest that in Nigeria, the lack of human resources and legal frameworks needed for effective and efficient dispute resolution is affecting the construction industry. Despite the numerous benefits associated with dispute resolution mechanisms beside litigation, the adoption of dispute resolution mechanism is still dismal and level of expertise is abysmally low in South Africa, a country within the same region as Nigeria (Verster, 2006). For instance, construction projects in Nigeria experiences breakdown due to disputes and such disputes are aggravated by religion, ethnicity and tribes bias (Okuntade, 2014). The question now is; *what is the most suitable and effective method of dispute resolution in Nigeria construction industry?* In answering this question, the next section of the paper presents a succinct account of the nature of dispute in the construction industry. Thereafter the method used for obtaining perceptions on dispute resolution is discussed before the findings are presented. The plausible answers to the questions then form the concluding section of the paper.

Nature of Disputes in the Construction Industry

All formal contracts in the construction industry detail the rights and obligations of various role players in a project. A significant feature of a construction contract is the involvement of a person normally called the architect or the engineer or the superintending officer, in the various forms of contract documents, whose duties and powers are also defined (Du Preez, 2012). Other role players include clients, contractors, quantity surveyors, civil and structural engineers, mechanical and electrical engineers, acoustic consultants, landscape architects and others.

Further, major project live-cycle from conception can be a result of a long-drawn process which can take years to bring it to fruition. It normally starts with feasibility studies, securing of financing, securing planning approvals from governments both state and/or federal and even those of the local government (some may even add political approval), environment impact assessment studies, engagement of various professionals, design and documentation, tendering and selection of contractor, procurement of materials and equipment, construction, commissioning, securing of certificate of fitness for occupation and others. With these expertise involved in the same project, it will not be surprising that disputes can occur. Disputes can occur as a result of the actions, or inactions, of the client, the contractor or the various consultants. Differing opinions on whether certain works constitute variations within the meaning of the contract and if so their valuation; entitlement of extension of time and its

quantification; certification of interim payments; the exercise of the powers of the consultants; delay or alleged delay in the provision of information; and many others will have their contractual implications (Okuntade, 2014).

It can therefore be seen that construction industry disputes will have subject matters, which are highly technical in nature, highly specialized and involve issues of law, which also require as modes of proof documents that may run into many volumes. All these will translate into money and time. Construction industry dispute is therefore, technically complex, tedious in the appreciation of the facts and, in view of the fact that contract sums awarded can be considerable. The amount in dispute in a construction industry dispute can also be quite substantial, in other words, a lot is at stake (Kheng, 2003). These levels of complexities in construction industry dispute have brought-forth varying resolution mechanisms over the years for industry's productivities. Beside the traditional method of litigation for dispute resolution in the construction industry, there are various other ADR mechanisms in use in the industry. These alternatives are becoming more popular as a result of increasing cost and time required for dispute settlement through litigation and its tendency for disrupting healthy and sustained relationship necessary for industry productivity.

Research Method

The primary focus of this research is to determine the perception of stakeholders regarding the mechanisms for dispute resolution in Nigerian construction. The descriptive survey research design was employed. A structured questionnaire was the main tool for data collection where eight dispute resolution mechanisms were identified and classified from the views of stakeholder, based on three critical criteria's of time, cost, and maintenance / improved working relationship. The research work was carried out on project sites in the Federal Capital Territory (FCT) of Nigeria, Abuja. Abuja is the epicenter of construction activities in Nigeria. Abuja is developing with infrastructures development, such as road and rail network, high-rise building, bridges, towers, shopping complex, infirmary, schools, and cinemas that are product of the construction industry. Twenty (24) active construction projects were identified and selected in Abuja in 2014. Based on logistical reasons, clients, consultants, and contractors for each project constitute the target respondent group. The questionnaires were administered personally on site and at the offices of the respondents. Four weeks were allotted for the survey. To improve the response rate, reminder telephone calls were put through to the respondents on a weekly basis. Three questionnaires were to be completed on each site. This gives a total of seventy two (72) self-administered questionnaires to be returned. At the expiration of the allotted time for collection, a total number of fifty six functional responses were collected, representing an effective response rate of 77.8%. This is considered appropriate for the study to continue. Table 2 shows the response rate and the distribution pattern among the respondent to the survey.

Table 2: Response rate and the distribution pattern of the survey

	Client	Consultant	Contractor	Total
Distributed	24	24	24	72
Received	15	19	22	56
Percentage (%)	62.5	79.2	91.7	77.8

N=72

Results and Discussion

The descriptive survey data were analysed and descriptive inferences were drawn based on respondents' perspectives on dispute resolutions mechanism. The findings show that 29% of the respondent indicates that they have been involved in one form of dispute or the other during the course of their career in the construction industry, while the remaining 71% have not been involved in dispute resolution processes. This reflects the low level of development in the area of dispute resolution outside the traditional method of litigation. Table 3 shows that about 37.5% of the respondents with previous experience in dispute resolution choose to adopt negotiation as a mechanism to resolve their dispute; this indicates that negotiation is favoured by most of the respondents. The next was mediation having 31.3%, arbitration followed with 18.7%, while litigation was 12.5% and the remaining dispute resolution mechanism was not used.

Table 3: Frequency and percent of the mechanism used to resolve disputes

Mechanisms	Frequency	Percent (%)	Cumulative
Adjudication	0	0	0
Arbitration	3	18.7	18.5
Expert Determination	0	0	18.7
Litigation	2	12.5	31.3
Mediation	5	31.3	62.5
Med/Arb	0	0	62.5
Mini-Trial	0	0	62.5
Negotiation	6	37.5	100.0
Total	16	100.0	

N=16

Table 4 shows the preference for time saving through negotiation that has been ranked with RII = 0.864. Majority of the respondents perceive negotiation as the most effective form of resolving dispute when time management is a critical factor. Since negotiation does not involve a third party interference - just the parties involved try to see a mutual area of interest and come to settlement - it leads to a quick win – win situation with mutual respect and ability to concentrate on other critical matters. Negotiation can actually take a limited time for the parties to come to settlement. In this same category, mediation was ranked in the second position by respondents with RII = 0796. This is based on the fact that mediation does not require much time to resolve dispute as an average mediation can last 1-2 days, especially where the mediator has the required expertise for the job. In third position was expert determination with RII = 0.639, this indicates that an expert witness does not take much time as he is a specialist in the field of construction dispute, who tends to determine a case. At the rear position is litigation having an RII=0.396 which is very low. This implies that in Nigeria, litigation is not an effective mechanism of dispute resolution based on time factors as much time is being wasted on discovery, awaiting trial date, and adjourning of case. Taking a case to court might take up to years before it is finally resolve (Keil, 2009).

In Table 5, it is shown that when savings cost takes a center stage in the resolution of a dispute, negotiation with RII=0.896 is the most referred mechanism. The reason is that little or no money is spent during negotiating periods between the disputing parties as each parties tries to understand their strength and minimum trade-off and resolve their differences amicably. This indicates that negotiation is the most effective mechanism to resolve dispute

when it comes to cutting down cost. In the second and third position are mediation and expert determination. This is because the parties initially agrees on the sum to pay the third party involved in the mechanism and the cost is actually shared between the disputing parties to reduce the cost burden on both parties. Litigation was ranked last with RII = 0.325, this implies that litigation is ineffective when it comes to saving of cost as there is much money to give away at discovery process, money to hire lawyers and judges, and at the end of the day, you might just be the losing party after spending a lot of money (Trantina, 2001).

Table 4: Ranking of dispute resolution mechanisms based on time savings

Dispute Resolution Mechanism	VE 5	E 4	PE 3	PrE 2	I 1	NR	TS	RII	RNK
Negotiation	29	17	9	1	0	56	242	0.864	1
Mediation	18	26	7	3	2	56	223	0.796	2
Expert Determination	2	20	22	11	1	56	179	0.639	3
Arbitration	4	10	23	15	4	56	163	0.582	4
Med/Arb	1	13	24	12	6	56	159	0.568	5
Adjudication	4	9	25	9	9	56	158	0.564	6
Mini-Trial	4	5	21	24	2	56	153	0.546	7
Litigation	3	6	7	11	29	56	111	0.396	8
MEAN							173.50	0.619	
STD. DEVIATION							41.507	0.148	

Keys: VE = Very Effective, E = Effective, PE = Partially Effective, PrE = Poorly Effective, I = Ineffective, NR = Number of Respondent, TS = Total Score, RII = Relative Importance Index, RNK = Rank

Table 5: Ranking of dispute resolution mechanisms based on cost savings

Dispute Resolution Mechanism	VE 5	E 4	PE 3	PrE 2	I 1	NR	TS	RII	RNK
Negotiation	39	9	5	2	1	56	251	0.896	1
Mediation	10	28	14	2	2	56	210	0.750	2
Expert Determination	3	11	24	17	1	56	166	0.593	3
Mini-Trial	2	13	23	17	1	56	166	0.593	4
Med/Arb	1	9	28	16	2	56	159	0.568	5
Arbitration	3	6	22	20	5	56	150	0.536	6
Adjudication	2	10	14	21	9	56	143	0.511	7
Litigation	1	2	7	11	35	56	91	0.325	8
MEAN							167.00	0.597	
STD. DEVIATION							47.226	0.169	

Keys: VE = Very Effective, E = Effective, PE = Partially Effective, PrE = Poorly Effective, I = Ineffective, NR = Number of Respondent, TS = Total Score, RII = Relative Importance Index, RNK = Rank

Insights from Table 6 shows that negotiation is the most preferred for maintaining and improving working relationship among parties with an RII = 0.893. This may not be unconnected with the fact that negotiation is obviously non-adversarial in nature as it does not destroy the already built rapport of the parties, rather it goes on to strengthen their relationship since the both parties mutually step down for each other in other to arrive at a settlement (Blake et. al., 2006). Mediation with RII = 0.811 came up in this category as second most preferred, because as with negotiation, mediation is also non-antagonistic in

nature. The mediator in this case does not compel the parties to resolution rather he tries to make them see reason for settlement (Povey, Cattell & Michell, 2006). In the third position is expert determination, since this mechanism is not binding on both parties rather it is based on the agreement of both parties if they wish to abide by the determination of the expert or not. In the eighth position is litigation which has RII = 0.361. This is because contractors generally tend to avoid litigation as it will destroy his reputation and tarnish his image both presently and in the nearest future. It also severe further relationships with the client, consultant and all communication will be broken resulting to breakdown of the project. It can be emphatically stated that litigation is ineffective as regards keeping the relationship of the parties.

Table 6: Ranking of dispute resolution mechanisms based on improving working relation

Dispute Resolution Mechanism	VE 5	E 4	PE 3	PrE 2	I 1	NR	TS	RII	RNK
Negotiation	41	5	6	3	1	56	250	0.893	1
Mediation	25	16	10	3	2	56	227	0.811	2
Expert Determination	1	17	21	15	2	56	168	0.600	3
Mini-Trial	1	14	23	14	4	56	162	0.579	4
Med/Arb	0	16	22	12	6	56	160	0.571	5
Arbitration	2	5	20	20	9	56	139	0.496	6
Adjudication	1	7	14	15	19	56	124	0.443	7
Litigation	1	6	8	7	34	56	101	0.361	8
MEAN							166.380	0.594	
STD. DEVIATION							50.071	0.179	

Keys: VE = Very Effective, E = Effective, PE = Partially Effective, PrE = Poorly Effective, I = Ineffective, NR = Number of Respondent, TS = Total Score, RII = Relative Importance Index, RNK = Rank

On a whole, negotiation and mediation seem to most preferred dispute resolution mechanisms by the role players. Negotiation was ranked high because it's capacity for time and cost saving while improving working relations within the industry stakeholders. A review of methodologies for the resolution of construction disputes by Harmon (2003) mirrors the thinking of the respondents to this Nigerian study in terms of preference for negotiation and mediation as opposed to litigation. Harmon (2003) gave an overview of the advantages and disadvantages of each mechanism and concludes that the law, facts, time and money are the determinants of the route to follow when a choice is to be made. The preference for non-litigation mechanism for dispute resolution has thus gain traction in the construction industry. This realisation led to the use of dispute review boards (DRBs) in the United States of America (USA) since the 1970s. In a trend analysis, Menassa and Pena Mora (2010), determine that DRBs is now commonly used in the USA since 1975 and it has proven to be mostly effective. Even in Ireland that has traditionally relied on informal channels of dispute resolution, the introduction of a new legislation have moved parties towards conciliation that is akin to adjudication (Owens, 2008). Thus, a move away from litigation as a mechanism of choice for the resolution of disputes in the construction industry is afoot in most countries.

Conclusion and Recommendations

Observation from this descriptive survey show that stakeholder's perceptions favours negotiation and mediation as the most suitable and effective dispute resolution mechanism based on the dynamics of project relationship in Nigeria. These ADR mechanisms among others show capacities for time and cost saving while improving working relations within the industry stakeholders. Stakeholders tend to avoid litigation, mostly used as last results, because of its associated costs, litigation time and ultimately the need for protecting the reputation and cordial working relationship of the firms involved. Therefore, the study recommended the needs for stakeholders to explore the option of ADR mechanisms such as negotiation rather than outright litigation for settlement of dispute whenever it arises in the Nigerian construction industry. The industry's stakeholders should support the key practitioners within the construction sector, through adequate training that can create a critical mass of human resources with the right competence level that can effectively adjudicate in case of dispute. Further, the country regulatory system should be robust enough to handle and also have within its legal framework the legal backing for dealing with potential defaults of ADR.

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