



# MEDIATION TECHNIQUE OF ALTERNATIVE DISPUTE RESOLUTION: A WIN-WIN APPROACH TO DISPUTE SETTLEMENT BETWEEN CONTRACTORS AND CLIENTS IN THE POST COVID – 19 ERA

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## ABSTRACT

*The aim of this research is to determine the effectiveness of mediation technique of alternate dispute resolution (ADR) as a win-win approach to maintaining good business relationship between contractors and clients. Ten research hypotheses were formulated based on previous literatures on ADR techniques. Twenty research questions were developed directly from the null and alternative hypothesis based on opposing views of the researchers. Respondents from clients, consultants and contractors' organizations were allowed to score the twenty research questions based on their different perspectives on five Likert – scale judgments. Non – parametric; Kruskal–Wallis's test was used in conjunction with Spearman's rank correlation to analyze data. The results showed that mediation has overriding merits over arbitration in these areas; Cost effectiveness (0.791), Timelier – effectiveness (0.733) and, Privatness and confidentiality (0.776). It was concluded that mediation is extremely advantageous over arbitration when time is of great essence and issues of dispute are to be made essentially private. Suggestions were made that mediation should be used in the stead of arbitration when considering cost of ADR, timeliness of ADR, and finally, when issues at hand are very sensitive to the public and as such should be made essentially private and confidential.*

**KEYWORDS:** Construction project contractor's team, Client's team, Consultants, Building industry, Projects delivery, Construction sites, Construction contracts, Project Management, Alternative dispute resolution, Dispute settlement, Arbitration, Mediation, Conciliation, Negotiation, Adjudication.

## INTRODUCTION

Alternative dispute redressal method is increasingly acknowledged in construction project management system. The construction project management system in itself consists of the contractor's team, the client's team and consultants which are often a conglomerate of all professionals in the building industry. Within each team there are about seven core professionals who should mandatorily be involved in the construction projects delivery, either administratively at the head office or technically on the construction sites. With this background phenomenon, dispute is inevitable even when all protocols have been duly observed. In addition, there are often too many contingencies associated with construction contracts, besides the unascertained issues propping up at the time of signing the contracts. All these phenomenon leads to disputes on the construction matters. Nigerian Institute of Project Management and Nigerian Institute of Quantity Surveyors have long-time seen the need to avoid litigation system as it is ultimately, time-consuming and often brings adversarial relationship between Clients and

Contractors, in order to embrace alternative dispute resolution (ADR) to promote good business relationship between Contractors and Clients. However, the popular method which is usually resulted into amongst the numerous ADR techniques available to be used within the construction industry is only arbitration. It is worth noting that arbitration in itself is not without its inherent deficiencies. It is on this note that overriding merits of mediation over arbitration is being investigated.

Alternative dispute resolution (ADR) is a process of initiating alternative methods of resolving a civil or commercial dispute without resorting to litigation. Litigation can be expensive, cumbersome, and time-consuming. According to Baksi (2010), Michael (2012) and Isaac (2020) ADR processes and litigation cannot run together, it has to be one process at a time. Ideally, ADR is usually resorted to before instituting a court action but subject to the circumstances of each case, it can be resorted to before judgment is given in a matter. Manjur *et al.* (2020) and Kuseme (2020) explained that if litigation is pending and the parties' resort to ADR, the terms of the settlement reached by the parties would be brought to court and entered as a consent judgment.

According to Winifred and Olushola (2021) ADR is regulated by the Arbitration and Conciliation Act (ACA), applicable to the whole federation. The Constitution of the Federal Republic of Nigeria 1999 (as amended) gives constitutional backing to ADR in Section 19, which provides for the settlement of international disputes by Arbitration, Mediation, Conciliation, Negotiation, and Adjudication.

**METHODOLOGY**

Using an in-depth semi-structured interview (exploratory) and questionnaire survey on project management practitioners; Consultants, Contractors and Client (government officials), ten (10) statement of hypothesis were formulated for the research. The ten statements of hypotheses are;

- H<sub>(0) 1: Flexibility</sub>**; No significant difference between flexibility of mediation and arbitration.
- H<sub>(0) 2: Cost</sub>**; No significant difference between cost of mediation and arbitration.
- H<sub>(0) 3: Triviality</sub>**; No significant difference between triviality of mediation and arbitration.
- H<sub>(0) 4: Amiability</sub>**; No significant difference between amiability of mediation and arbitration.

**H<sub>(0)5: Responsibility</sub>**; No significant difference between responsibility of Mediator and Arbitrator.

**H<sub>(0)6: Negotiation</sub>**; No significant difference between negotiation of mediation and arbitration.

**H<sub>(0)7: Timeliness</sub>** ; No significant difference between timeliness of mediation and arbitration.

**H<sub>(0)8: Confidentiality</sub>**; No significant difference between confidentiality of mediation and arbitration.

**H<sub>(0) 9: Neutrality</sub>**; No significant difference between neutrality of mediator and arbitrator.

**H<sub>(0)10: voluntariness</sub>**; No significant difference between voluntariness of mediation and arbitration.

The ten (10) hypotheses were directly developed into twenty (20) opposing views using questionnaire factors based on null and alternative hypotheses. Kruskal–Wallis’s test was used to analyze data. Kruskal–Wallis’s test is one-way ANOVA. It is a non-parametric method for testing used for comparing two or more independent samples of equal or different sample sizes. It is used to test agreements of scoring amongst groups of respondents. Spearman’s rank correlation was used in conjunction with Kruskal Wallis test. Kruskal – Wallis Formular is presented below.

$$H = \left( \frac{12}{n(n+1)} \sum_{j=1}^k \frac{R_j^2}{n_j} \right) - 3(n+1)$$

where *k* = number of comparison groups,

*n* = total sample size,

*n<sub>j</sub>* = sample size in the *j*th group,

*R<sub>j</sub>* = sum of the ranks in the *j*th group.

**RESULTS OF THE ANALYSES**

The results of the analyses are presented in table 4.

**Table 4: Tabulation of results**

Factors	Clients’ RII	Contractors’ RII	Consultants’ RII	Average RII	Rank	Effective Level
Mediation is more flexible than Arbitration	0.817	0.773	0.789	0.793	1	Most effective
Mediation is less costly than Arbitration	0.841	0.788	0.744	0.791	2	Most effective
Mediation process is private and Confidential	0.823	0.752	0.751	0.775	3	Most effective
Arbitration is more trivial and cumbersome than Mediation	0.757	0.748	0.74	0.748	4	Most effective
Mediation is more amiable than arbitration	0.82	0.704	0.709	0.744	5	Most effective
Mediation is voluntary and non – cohesive	0.774	0.713	0.73	0.739	6	Most effective
Arbitrators cannot be held responsible in case of misjudgments	0.776	0.712	0.73	0.739	7	Most effective
Mediation employs more negotiation than assertion	0.775	0.711	0.73	0.738	8	Most effective
Mediation is timelier effective than Arbitration	0.786	0.71	0.705	0.733	9	Most effective
Mediator cannot be held responsible in case of misjudgments	0.677	0.603	0.663	0.648	10	More effective



Mediation is more trivial and cumbersome than arbitration	0.686	0.606	0.635	0.642	11	More effective
Mediator is more neutral than Arbitrator	0.656	0.667	0.604	0.642	12	More effective
Arbitrator is more neutral than Mediator	0.651	0.663	0.604	0.639	13	More effective
Arbitrators employs more negotiation than assertions	0.562	0.599	0.628	0.596	14	Least Effective
Arbitration is less costly than mediation	0.563	0.597	0.628	0.596	15	Least Effective
arbitration is timelier effective than Mediation	0.554	0.587	0.596	0.579	16	Least Effective
Arbitration is more amiable than Mediation	0.552	0.586	0.595	0.577	17	Least Effective
Arbitration is voluntary and non – cohesive	0.551	0.583	0.595	0.576	18	Least Effective
Arbitration process is private and Confidential	0.55	0.581	0.595	0.575	19	Least Effective
Arbitration is more flexible than Mediation	0.502	0.577	0.593	0.557	20	Least Effective

### DISCUSSION OF RESULTS

Mediation’s relative effective index on flexibility of ADR technique was 0.793-(most effective factor) while arbitration was 0.557-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted. Considering cost of ADR, mediation’s relative effective index was 0.791-(most effective factor) while arbitration was 0.575-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted. Investigation on ADR which adhere to privacy and confidentiality, mediation’s relative effective index was 0.775-(most effective factor) while arbitration was 0.575-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted.

The investigation on ADR technique that is most trivial and cumbersome showed Arbitration as more crucial with relative effective index was 0.748-(most effective factor) while mediation was 0.577-(least effective factor), therefore, the null hypothesis was accepted and alternative hypothesis was rejected. For amiability concerning the judges, investigation reveals mediation is more amiable with relative effective index was 0.744-(most effective factor) while arbitration was 0.557-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted. Considering responsibility for misjudgment; Arbitration’s relative effective index was 0.739-(most effective factor) while mediation was 0.648-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted. Investigation on ADR that uses Negotiation than Assertion showed Mediation’s relative effective index was 0.738-(most effective factor) while arbitration was 0.596-(least

effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted.

Time is of great essence in construction contract, under ADR which is timelier – effective; mediation’s relative effective index was 0.733-(most effective factor) while arbitration was 0.579-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted. Result of the ADR which its judge is more neutral reveals arbitration’s relative effective index was 0.639-(more effective factor) while mediation was 0.642-(more effective factor), therefore, the null hypothesis was accepted and alternative hypothesis was rejected. ADR technique which its award is more of persuasion instead of cohesion of court order, Voluntariness and non – cohesive was scored for Mediation’s relative effective index was 0.739-(most effective) while arbitration was 0.576-(least effective factor), therefore, the null hypothesis was rejected and alternative hypothesis was accepted.

### SUMMARY

In Nigeria, arbitration method of ADR process is becoming an acceptable phenomenon and most popular method of ADR to resolve commercial disputes within the construction industry. However, arbitration process is not without its own inherent disadvantages. From this study, areas of deficiency in arbitration includes; cost, time, privacy and confidentiality. Those three areas are also a very strong area for mediation. Because one person is only involved in mediation while it is three in arbitration, on this note settlement of dispute with a neutral impartial person is very cheap and time it takes for one person to mediate and pronounce judgements is very limited, besides issues that involve three arbitrator is already a public issue, it is rather easy for a single



person to handle a case because of confidentiality and privateness than three persons. In construction contracts the tripod stand of projects delivery is always cost, time and quality, however quality in this sense can be likened to privateness and confidentiality of the matter at hand.

## CONCLUSION

It is saved to conclude that mediation has overriding advantages over arbitration in these areas.

1. Cost effectiveness
2. Timeliness
3. Privateness and confidentiality

## RECOMMENDATION

It is recommended that mediation as an alternative dispute resolution be used instead of arbitration when time, cost, privacy and confidentiality of the conflict matter is of essences.

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