THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE SETTLEMENT OF CONSTRUCTION DISPUTES IN GHANA – THE CONTRACTORS’ PERSPECTIVE

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Abstract
ADR is a term used to describe several different methods of resolving legal disputes without going to court. It is mostly classified into four basic types namely negotiation, mediation, conciliation and arbitration. Beyond these basic types, there are the hybrid forms: mediation-arbitration (med-arb), executive tribunal, case evaluation/early neutral evaluation and court ordered arbitration. It was to avoid some of the deficiencies of the court system that arbitration became widely adopted for the resolution of disputes. The adoption was because of its many inherent advantages especially where the relevant dispute was technical. The whole arbitration process is now expensive, time consuming and devoid of privacy and emotional expressions. This paper therefore investigates the various alternative dispute resolution methods that are used in the Ghanaian construction industry and how they contribute effectively towards the settlement of disputes. It also identifies the factors enhancing or limiting the use of alternative dispute settlement methods apart from litigation and binding arbitration. The extent of knowledge and application of the ADR techniques in dispute settlement are also investigated and the most appropriate ADR method that could be most suitable and readily used to resolve construction disputes in Ghana is also recommended.

Key words: alternative dispute resolution, arbitration, negotiation, litigation.

Introduction
Traditionally, construction disputes were settled by litigation or arbitration, like other commercial disputes. It was to avoid some of the deficiencies of the court system (the rising cost of litigation and high legal fees, unsatisfactory outcomes, technical proceedings, damaging confrontations, need for precedent, interim orders and enforcements as well as power imbalance between parties, backlog of dockets, delays), that arbitration became widely adopted for the resolution of commercial disputes. Arbitration came with some promises such as limited processes, flexible proceedings, less expensive, non-confrontational approach, a relatively prompt hearing, privacy and above all on informed judgement in the settlement of commercial disputes. But of late Arbitration is seen to suffer from similar deficiencies of the court system. Lawyers have been accused of hijacking the arbitration process most obviously to protect their own position and authority against other professionals (architects, surveyors, engineers). Arbitration, instead of being an alternative to litigation is in danger of being seen as not much better. Instead of being the solution, it is regarded as part of the problem. The general disappointment with arbitration and litigation has led to the growth of interest in Alternative Dispute Resolution methods. It is practiced in the chieftaincy and religious institutions, schools, families, homes and offices but hardly practiced in the construction industry. The Ghanaian construction industry seems slow to fully come to terms with the ADR concepts and its appropriateness for resolving disputes in construction. Its advantages (fast, economic, non-confrontational, exclusion of legal proceedings, and so on) makes the ADR methods seem appropriate and better preferred to litigation or arbitration.

Sources of ADR
The ADR methods was developed in the USA some fifty seven years ago by the American Arbitration Association (AAA) to address the problem of court delays and the high cost of litigation created by over crowded court system and as a social movement aimed at solving community problems. It has been successfully employed in resolving disputes in North America, Europe, South Africa, Asia and the Far East. In West Africa, the ADR movement was started by an African Professor called Ernest Uwazie, Director of the Centre for African Peace and Conflict Resolution, California.
State University, Sacramento in 1996 (Amegatcher, N 1999). In Ghana, the National Labour Commission (NLC) was established by the Labour Act in 2003 to facilitate the settlement of industrial disputes and to investigate labour related complaints in particular, unfair labour practices and take such steps as it considers necessary to prevent labour disputes in the Country. The National Labour Commission and the Ghana Arbitration Centre have been the main bodies that operate as centres for Arbitration practice. Other individual and private arbitrators who practice arbitration strictly under the Arbitration Act and other international arbitration laws and have contributed immensely to ADR advocacy and practice in the country include Ghana Arbitration Centre, Ghana Association of Chartered Mediators and Arbitrators (GHACMA), Gamey & Gamey Academy of Mediation and the West Africa Dispute Resolution Centre (WADREC) (Adjabeng S.-2007).

The Alternative Dispute Resolution Act was passed by the parliament of Ghana in 2010. The ADR Coalition of Ghana comprises of a number of organizations involved in ADR, in a joint effort to advocate and unify the various practices and mechanisms of ADR through appropriate regulations. The Coalition is made up of the Judicial Service of Ghana, Commission for Human Rights and Administrative Justice, The Legal Aid Board, Ghana Association of Chartered Mediators and Arbitrators, the Ghana Arbitration Centre and the Attorney Generals Department (Adjabeng S.-2007).

CAUSES OF CONFLICTS AND DISPUTES
Conflicts and disputes may be caused by a number of factors. Some of them are:

i. Delays: delays may be due to strikes, re-work, poor project organisation, material shortage, equipment failure, variation orders, Act of God and so on. They are classified into two major types according to liability, namely excusable and inexcusable delays. Excusable delays are those not attributed to the contractor’s action or inactions and typically include unforeseen events e.g. Act of God. These events are beyond the contractor’s control and are without fault or negligence on his or her part. Non excusable delays are those which result from the contractor’s actions or inactions. This type of delay presents no entitlement to a time extension or delay damages for the contractor if the delay can be proved to have affected the whole project. (Sabah 1996).

ii. Unrealistic Expectations: unrealistic expectations occur when either contractor or client expects something unrealistic to be done, e.g. the buildability of a much complex design.

iii. Communication: effective communication is needed for productivity and efficiency. Where there is lack of communication, it tends to have a negative effect on the total project. Where there is also a distortion of information, conflicts and disputes are likely to arise.

iv. Payment: delays in payment of interim certificates/claims are the most sensitive spots in the construction contracts. The demand for unrealistic claims for variations or delays in performance on the part of the contractor or regarding payments on the part of the client could lead to conflicts and disputes.

v. Poor records keeping: Usually records such as receipts, invoices, site instructions and visitors book, waybills, material acquisition and transfer forms, stock record sheets; daily, weekly and monthly programmes, etc., are poorly organised, thus making it difficult for client-contractor, purchaser-supplier, or consultant-contractor to agree on issues, complaints, or agreements that will arise during or even before the execution of the contract.

vi. Delays in AFC drawings: Construction works begin before final approved for construction drawings are delivered to the contractor. Contractors may begin with interim working drawings which to the builder are just as good as the final drawings.

vii. Improperly award of Contracts: where contracts are improperly awarded to favourite or non-performing contractors, disputes are bound to arise if they fail to deliver; with threats from clients to take the contractor to court for failure to deliver.

viii. Errors and omissions: Errors, ambiguities, and omissions in plans and specifications are areas prone to disputes. A disagreement in any of these areas may result in dragging either party to arbitration for redress.

ix. Variation Orders or Oral/Written Instructions: Conflicting variation orders and oral or written instructions can also create problems for both parties, especially to the contractor where the contractor fails to confirm from the consultant, any oral instructions, directions or explanations involving a variation given by the consultant in relation to the works.
ALTERNATIVE DISPUTES RESOLUTION – Methods and Steps

The methods and steps involved in dispute resolution can be represented diagrammatically as shown in the figure 1 below:

As far as parties to building contracts are concerned, disputes are best avoided or resolved amicably between the parties. Abraham Lincoln, a renowned statesman also recommends the following:

“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.” (Chapter 19, FIDIC)

With that in mind, it is important to set out details of the available methods for achieving amicable settlement. The most practical ADR methods are as follows:

a) Direct Negotiation
b) Mediation
c) Conciliation
d) Hybrid Processes
e) Arbitration

Negotiation, mediation, conciliation and non-binding arbitration are non-adjudicatory processes. However, since negotiations sometimes breakdown or reach an impasse, a third person may be engaged to facilitate the resolution process. With the exception of direct negotiation, the above methods differ from arbitration in that they involve a process where a third party is called upon to assist the parties in reaching a settlement. The third party may issue a non-binding evaluation of the dispute and a recommendation of how it could be resolved. A summary of the various ADR techniques are presented in tables ‘A’ and ‘B’ below:

**Table A**

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Litigation</th>
<th>Arbitration</th>
<th>Mediation</th>
<th>Negotiation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Involuntary.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Binding/</td>
<td>Binding; subject to appeal.</td>
<td>Binding, subject to review on limited contract.</td>
<td>If agreement, enforceable as Contract.</td>
<td>If agreement, enforceable as Contract.</td>
</tr>
<tr>
<td>Nonbinding.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Med-Arb</th>
<th>Court Ordered Arbitration</th>
<th>Mini Trial</th>
<th>Case Evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary/Involuntary.</td>
<td>Voluntary</td>
<td>Involuntary</td>
<td>Voluntary</td>
<td>Voluntary or involuntary.</td>
</tr>
<tr>
<td>Third party.</td>
<td>Party-selected third-party decisionmaker, with specialized subject matter expertise.</td>
<td>Third-party arbitrator selected by the court.</td>
<td>Party-selected neutral advisor, sometimes with specialized subject expertise.</td>
<td>Imposed third party volunteer attorney or lawyer by a judge</td>
</tr>
<tr>
<td>Degree of</td>
<td>Informal</td>
<td>Informal.</td>
<td>Less formal than adjudicated</td>
<td>Procedural rules</td>
</tr>
</tbody>
</table>

Table B

“Hybrid” Dispute Resolution Processes
formality: procedure but highly flexible as to timing and place.

dication; procedural rules may be set by parties.

are informal.

Nature of Proceeding.

Opportunity for each party to present proofs and arguments.

Opportunity for each party to present proofs and arguments.

Opportunity and responsibility to present summary proofs and arguments.

Opportunity for each side to present summary proofs and arguments.

Outcome.

Mutually acceptable agreement between parties.

Principled decision supported by reasoned opinion.

Mutually acceptable agreement sought.

Principled decision; sometimes compromise without opinion.

Private/ Public.

Private, unless judicial enforcement sought.

Private unless disclosed in court.

Private usually public.


THE ADR METHODS

NEGOTIATION

Negotiation is the first course disputants take towards the settlement of their disputes. Norman Royce, an experienced arbitrator in construction disputes suggests that:

“…The most desirable way of resolving any dispute is that it should enjoy the confidence of the parties as a method likely to arrive at a just answer. The most desirable way of resolving any dispute is for the parties themselves to reach a mutually acceptable compromise. This is likely to be quicker and cheaper; no third party may be involved or even informed of the dispute; and future business relations can be maintained.” (Royce 1989).

Negotiation explained as communication for the purpose of persuasion without the intervention of a third party is the first course parties’ takes towards the settlement of their disputes. It is voluntary, private and more often than not, without prejudice. It is the most readily available method of dispute resolution and the most effective because of the speed and economy of procedure with which a dispute may be resolved. Although negotiation is thought to be the simplest and quickest way of resolving disputes, it is not an easy method especially if in the parties’ opinion; there are matters of principle at stake.

QUALITIES OF A NEGOTIATOR

The success of negotiation depends on the assertiveness and skill of the negotiator who plays a leading role in resolving disputes. The skilled negotiator should be knowledgeable and experienced in the matter under dispute and should have the ability to:

a) listen to the other party and to understand their point of view and the case being made,

b) recognise the needs of the other party and to identify his interests,
c) clearly express thoughts into words, both orally and into writing,
d) think clearly and rapidly under pressure,
e) persuade others, be patient, flexible and have the ability to control and to hide emotions.

STRATEGIES FOR SUCCESSFUL NEGOTIATIONS

1. Arrange to negotiate in your office.
2. Slightly outnumber your opponent.
3. Always time the negotiation to your advantage.
4. Make sure that you know the facts thoroughly.
5. Make one of your demands a "precondition".
6. When it is in your interest, let the other side make the first offer.
7. Sometimes, make your first demand very high.
8. Place your major demands at the beginning of the agenda.
9. Always protect your integrity.
10. Try to use two negotiators who play different roles
11. Invoke law or justice
12. Maintain that you do not have the power to compromise
13. Clear the agreement with your client before signing it
14. Promptly write the agreement yourself

It has also been suggested that negotiators sometimes fail to reach an agreement due to some or all of the following factors:

- They fail because of inadequate preparation.
- The parties fail to communicate effectively.
- Different perceptions of alternatives to agreement.
- Poor negotiation skills.

MEDIATION

Mediation is a facilitated settlement process involving a neutral, professional mediator (facilitator). It can also be described as a principled negotiation with the assistance of a neutral third party who does not impose a resolution on the parties but assists the parties to achieve a consensus – a process called "Helping People Help Themselves". Mediation is a by-product of failure, where disputants fail to work out their own differences. It is an informal, voluntary and private process devoid of legal representations and is only binding when parties have achieved an agreement.

CHARACTERISTICS OF THE MEDIATION PROCESS

a) Mediation is generally a voluntary process.
b) The mediation process is only binding on a party that agrees to accept the terms reached during the course of the mediation.
c) Mediation offers the first opportunity for the senior decision-maker of either party to confer with an informed and unbiased individual regarding the strengths and weaknesses of the case.
d) The process is informal and devoid of legal representatives.
e) Traditionally, mediators enter disputes with little authority, so their ability to help bring about settlements depends partially upon the willingness of the parties to accept the mediator.
f) The mediator needs to be knowledgeable in the areas of hostility reduction.
g) The process is also held privately at a place chosen by the parties themselves. Hence they avoid unwarranted publicity and can protect their trade secrets. (Goldberg 1991).

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FUNCTIONS OF A MEDIATOR

The mediator may either be a construction professional or a lawyer specialising in construction disputes and should be both acceptable to and trusted by the disputants. He should be able to:

- command the respect of the parties and their representatives through a display of leadership qualities: knowledge, experience, independence, impartiality and clarity,
- possess a strong personality while displaying humility, empathy, and understanding for the burdens that the disputing parties have to endure,
- display remarkable tenacity, particularly when the likelihood of success is bleak,
- guide the disputing parties to a negotiated settlement,
- exhibit or prove to the disputing parties that he has no interest in the conflict and only helping to bring about a resolution which is in the parties' best interest,
- treat the parties impartially, display honesty, and protect each party from being hurt during mediation by the other's aggressiveness or their own perceived inadequacies,
- perceive and appreciate all the relevant issues in the dispute and persuading the parties to focus on key issues,
- investigate, define, analyse, clarify and solve disputants differences,
- convey to the parties that he knows the essence of the problem (for him to be accorded confidence and respect) through empathic or active listening: listening for how the parties feel as well as to what they are saying, and proving verbal and non verbal (eye contact, facial expression, body position) feedback. (Madden 2001; Goldberg 1991).

CONCILIATION

Conciliation is also facilitated settlement process involving a neutral third party (conciliator) who has not been involved between the parties to a dispute in order to clarify the issues and bring about a resolution of their differences. Here, the conciliator suggests a resolution, typically known as a "conciliator’s proposal" which in his opinion, represents what is a fair and reasonable compromise of the dispute after hearing and discussing the case with the parties. The conciliator encourages discussions around his proposals and persuades the parties to focus on key issues. If the parties are able to compromise and strike a suitable agreement, the conciliator puts it in writing for both parties' to endorse. The aim of conciliation is to bring the disputing parties together before their respective attitudes or positions have hardened. Goodwill is an important ingredient of successful conciliation.

QUALIFICATION OF A CONCILIATOR

The conciliator selected by the parties should posses the qualification required to enable him win the trust and confidence of the disputing parties. He:

a) must be technically oriented and knowledgeable in the subject matter under dispute,
b) must posses the legal capacity to act as a neutral in the ADR process,
c) should be impartial between the mediating participants. He is to facilitate the ability of the participants to negotiate their own settlements,
d) should not be biased, showing ill feeling towards one of the parties or acting in favour or against any of the parties or any issue in the dispute,
e) must act in such a manner so as not to misconduct himself/herself. He should not be accused of accepting bribes, holding private caucuses, calling witnesses without the consent of the other party, improper admission or rejection of evidences pertinent to the controversy,
f) must be physically and mentally capable of conducting the proceedings properly without substantial injustice being caused to the other party,
g) should determine and reveal all monetary, psychological, emotional, associational or authoritative affiliations
that he/she has with any of the parties that might cause a conflict of interest or affect the perceived or actual neutrality of the professional in the performance of his duties.

THE HYBRID PROCESS

The ADR movement has spawned and revitalised a variety of hybrid processes. These hybrids are variants of the primary processes (negotiation, mediation, conciliation and arbitration) that are developed to resolve disputes not amenable to the primary processes. These hybrids are:

MED-ARB

This process involves a neutral advisor (third party, chosen by the disputing parties themselves) who first functions as a mediator in helping the disputing parties to arrive at a mutually acceptable solution. If the mediation fails, this same neutral advisor serves as an arbitrator who issues a final and binding decision. The stages involved or used in arriving at an outcome suitable to both parties follows the same processes in ‘pure’ mediation and ‘pure’ arbitration. The central advantage of med-arb over ‘pure’ mediation (if necessary) followed by ‘pure’ arbitration is that of efficiency. In the event that the mediation process fails, there is no need to educate a new neutral advisor; the neutral advisor who has been serving as a mediator already knows much, if not all the information he will need, to make a decision. The neutral advisor has decisional powers and each party's primary effort will be to persuade the neutral advisor that he/she is right. But this solution is usually agreed-upon in form only and accepted by the parties because the neutral advisor in using his decisional powers might have stated earlier that, if it were not accepted in mediation, it would be imposed in arbitration. This compels the parties to accept the terms reached and it becomes binding on them.

ADVANTAGES OF MED-ARB

i. There is efficiency in the whole process.
ii. The process also serves, as does mediation, the relational advantages of improving the parties' ability to resolve their own dispute.
iii. The information provided by both disputants during mediation could be useful in arbitration should the mediation process fail.
iv. Since the mediator has no arbitral power, candour in mediation is encouraged.
v. If the whole mediation process fails, the neutral can resort or begin arbitration straightaway.
vi. The success rate of med-arb is higher than in ‘pure’ mediation.

DISADVANTAGES OF MED-ARB

a) Disputing parties who know that the mediator also has decisional authority are likely to be less candid than they would be with a ‘pure’ mediator about such matters as to how they prioritise their interests and the least they will accept to resolve the dispute.
b) If an agreement is not reached during the course of settling their differences and a different neutral must be brought in to arbitrate, the process is likely to be lengthier and more expensive than standard med-arb.
c) If the combination of mediation and advisory arbitration does not lead to resolution, the parties must go to another neutral for final and binding arbitration

MINI TRIAL

It is a more formal mediation process with specific arrangements depending on the case and the parties' desires. It is a voluntary process where the parties negotiate and sign a procedural agreement that spells out the steps and timing of the mini trial process. Before the process commences, the parties informally exchange key documents, exhibits, summaries of witnesses' testimony and a short introductory statement in the form of briefs or memoranda and copied to the neutral and impartial advisor. Each party outlines its position on the dispute in question in the memo and
submitted to high-level representatives of the parties who are not lawyers but have authority or persuasive powers over
the decision of whether to settle. The non-legal representatives listen, observe, raise questions and or points for
clarification or seek advice from the chairman. Cross-examination of witnesses is also allowed during the trial.
Immediately after the parties’ adversarial presentations on the merits of the case, the non-legal representatives meet
privately in a separate room and try to negotiate a settlement. If they are able to reach an agreement it is put into
writing by the chairman for the parties, endorsement. On the other hand if no settlement is reached even after
‘caucuses’ with the parties’ within the duration of the trial, then the panel would submit a recommendation either
unanimously or by the chairman for acceptance to the parties.

CHARACTERISTICS OF THE MINI TRIAL PROCEDURE

The main features of the procedure are as follows:

- its aim is to settle disputes with the active co-operation of senior corporate officers or high level executives of
  the parties as associate members of the mini trial panel;
- it is quick, confidential and non-prejudicial;
- it is based on the consent of both parties;
- it concentrates on essentials;
- it maintains the dialogue between the parties.

CASE EVALUATION/EARLY NEUTRAL EVALUATION

A process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to
examine the facts of the case, explain points/issues raised by both parties to each other and inform them of their
chances of winning or losing should the case be heard in court. The evaluation of the expert can assist the parties in
assessing their case and may influence them towards a settlement.

COURT ORDERED ARBITRATION

This is a mandatory, non-binding form of adjudication provided for by statute or court rule. Disputes involving claims
that are brought to courts are referred to a court approved arbitrator, (usually a volunteer lawyer or retired judge), by
the judge for settlement. Having listened to the points raised in dispute the arbitrator evaluates them and gives his
award. After a specified number of days, if neither party raises an objection to the award and seeks no further redress
from the superior courts, the award becomes binding on the parties. Where a party goes to court to challenge the
decision of the arbitrator, his position on the award should be improved better by at least 10% than he did at
arbitration. Otherwise a penalty will be imposed on him for using the courts after arbitration and also wasting the
judge(s) and courts time.

ARBITRATION

Arbitration, the process whereby parties in dispute agree to submit the matter in dispute to the decision of a private
judge in whom they have confidence and trust and undertake to abide by that decision, has been an alternative to
litigation for a long time. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal
without unnecessary delay or expense. Before there can be arbitration there should be the existence of a dispute, there
must be an agreement to arbitrate and there must be an agreement to refer the dispute to arbitration.

The Process

This is well known to all but for the purposes of this paper, emphasis will be given to the salient points:
Two or more parties to a contract or subcontract are in dispute because one party has breached the contract or there is
a disagreement between the parties over claims, delays, compensations, variations, etc. The dispute is referred to an
arbitrator who is appointed by the disputing parties. The arbitrator calls the disputing parties to a preliminary meeting

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to discuss the modalities for submissions from the parties. The party initiating the dispute (the petitioner) prepares points of claim for submission to the other party (the defendant). The defendant also prepares points of defense for submission to the petitioner. In case the pleadings are not detailed enough, either party may make a request to the arbitrator for further and better particulars. During the process either party may examine the property (everything from a single component to a whole building complex) involved in the dispute. During the hearing, the arbitrator asks for statements clarifying the issues involved. The petitioner sets out his case on the claim. He calls in his witnesses and examines them. The petitioner’s witnesses are cross-examined by the defendant and or questioned by the arbitrator. After cross-examining the petitioner’s witnesses, the defendant sets out his case. The defendant later calls in his witnesses and examines them after they have taken the oath to testify to the truth. The defendant’s witnesses are also cross-examined by the petitioner and or questioned by the arbitrator. Having satisfied himself with the facts and particulars of the case, the defendant sums up his case in his closing speech. He may pass questionable comments in his closing speech, which may require the claimant to respond. The petitioner also replies the defendant in his round up speech. The arbitrator, having given directions regarding inspection and other relevant matters will finally close the hearing if he receives negative replies upon inquiring from the parties whether they have any further proofs to offer, or witnesses to be heard, or he is satisfied that the records are complete. He then makes his decision and serves his award which is final and binding on the parties.

THE LEGAL FRAMEWORK OF ARBITRATION

In Ghana, arbitration is controlled by the Arbitration Act, 1961 Act 38 of the Parliament of the Republic if Ghana. The Act seeks to regulate the settlement of differences by arbitration and to provide for the enforcement of awards. The Act is divided into four parts: Part I – Arbitration and Award (five sections)

- Part II –Domestic Awards (eight sub-divisions) namely:
  1. Operation of arbitration agreement (four sections)
  2. Arbitrators and Umpires (five sections)
  3. Conduct of proceedings (two sections)
  4. Provisions as to awards (five sections)
  5. Cost and fees (two sections)
  6. Case stated, Remission and other relief (eight sections)
  7. Awards by consent (one section)
  8. Application and extent (three sections)

- Part III-Foreign Awards (six sections)

- Part IV-Miscellaneous Provisions (four sections)

ARBITRATION AS A STANDARD CONDITION OF CONTRACT

The Ghana Government Conditions of Contract, 5th edition 1988, popularly known as the ‘pink form,’ provides for arbitration as the basis for the settlement of disputes under building contracts. Clause 32 of these contract conditions is what is referred to as the arbitration clause. The clause reads:

“Provided always that, in case any dispute or difference shall arise between the Employer or the Consultant and the Contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract as to any matter or thing of whatsoever nature arising thereunder or in connection therewith including:

- any matter or thing left by this contract to the discretion of the consultant, or
- the withholding by the consultant of any certificate to which the contractor may claim to be entitled to, or
- the measurement and valuation mentioned in clause 10 of these conditions, or
- the rights and liabilities of the parties under clause 20 or 21 of these conditions,

then either party shall forthwith give to the other, notice, in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to an Arbitrator and the provisions of the Arbitration Act (Act 38), 1961 or any statutory modification or re-enactment thereof shall apply to such arbitration. Such
reference except on the questions whether or not a certificate has been improperly withheld or is not in accordance with clause 25 of these conditions, shall not be opened until after the completion or alleged abandonment of the works, unless with the written consent of the consultant and the contractor. Without prejudice to the generality of his powers, the arbitrator shall have power to direct such measurements and or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain the and award any sum which ought to have been the subject of, or included in any certificate and to open up, review and revise any certificate, opinion, decision, requisition or notice, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.”

The clauses referred to in clause 32 above are concerned with:
- clause 10, Ascertainment of Prices for Variations,
- clause 20, Determination by employer,
- clause 21, Determination by contractor,
- clause 25, Certificates and Payments.

CASES APPROPRIATE FOR ADR

- When there is the need to preserve business relations.
- The disputing parties who want to have a ‘final shot’ at settlement and need privacy should consider ADR.
- ADR should be considered where disputes are too complex to manage in negotiation.
- Where there is difficulty in communication (oral or written) between the parties.
- Construction disputes are more commercial and technical in nature and hence are well suited to ADR.
- Where a legal ruling will not solve a basic problem and where the parties both wish to explore a settlement.
- Where the high costs / risks / stress of litigation /arbitration is concerned in disputes.
- ADR methods should be considered when there is a desire for fairness, not power, in business relationships and the pursuit of business interest rather than adopting strict legal positions.
- Where it is necessary for a third party to assist for negotiations to proceed, any of the ADR methods may be considered.

BENEFITS AND LIMITATIONS OF ADR—A SUMMARY

- Privacy in ADR is assured.
- ADR techniques offer the disputants the opportunity to have control over the process and the outcome.
- ADR methods provide quicker and healthier method for resolving disputes.
- There is a saving in cost because of the reduction in the settlement time and elimination of legal counsel costs.
- ADR processes are not procedural but flexible: it enables the disputants to fix the date and time to suit their own convenience.
- Both disputants understand and appreciate the strengths and weaknesses of each party’s case, which ultimately lends itself to a creative and amicable settlement.
- The disputing parties make every effort to find a mutually beneficial and commercial solution which will enhance their on going business relationship without loss of face.
- ADR processes also help to decongest the courts and enable the judges to have more time to handle those cases not amenable to ADR.
- Most construction disputes are technical and commercially oriented rather than legal; hence they are well suited to the ADR methods.

Though the above summary benefits easily promote the use of ADR, it nonetheless has some weaknesses that are summarized as follows:

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a) It is not effective where the disputants are not genuinely willing to negotiate a settlement.
b) The neutral party/advisor may lack understanding of the technical context of the case or may be biased and may be without the skill and expertise required for shaping the settlement.
c) ADR cannot be used for complex disputes, which require legal opinion, or in a case where public hearing or a legal precedent is required.
d) The neutral advisor may find it difficult to obtain the truth of an event in the dispute. This may prolong the settlement where litigation may be the only option.
e) As the approach is non-binding, an unscrupulous party can use the ADR process simply as a delaying tactic i.e. pretend he is interested in that mode of resolution only to draw back at the end of the proceedings and insist on litigation.

METHOD ADOPTED FOR THE STUDY
The procedures adopted include all the information that was relevant to the needed data, where those data were obtained and how they were obtained, the method used to obtain the sample size, the difficulties and problems encountered during the search for data, response rate and responses to the questionnaire, data collection and limitations.

The study began with two primary stages, the first being an extensive literature search. The second was an ‘indicator exercise,’ comprising personal interviews with some selected general building and civil contractors as well as sub-contractors listed in Ghanayello listing of all Contractors. Contractors in categories D1K1, D2K2 and D3K3 only were targeted for this study.

A total of 123 questionnaires were sent out to obtain data based on the objectives set for this study. Interviews were also conducted to obtain data. The overall response rate was 60.16% representing a gross total of 74.

FINDINGS
Number of years (n) in practice of contractors

<table>
<thead>
<tr>
<th>Contractors</th>
<th>n &lt; 5</th>
<th>5 ≤ n &lt; 10</th>
<th>10 ≤ n &lt; 20</th>
<th>n ≥ 20</th>
</tr>
</thead>
<tbody>
<tr>
<td>D1K1</td>
<td>4</td>
<td>7</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>D2K2</td>
<td>10</td>
<td>13</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>D3K3</td>
<td></td>
<td>18</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>14</td>
<td>35</td>
<td>21</td>
<td>4</td>
</tr>
<tr>
<td>Percentage 100%</td>
<td>18.90%</td>
<td>47.30%</td>
<td>28.40%</td>
<td>5.40%</td>
</tr>
</tbody>
</table>

Table 1: Working experience of contractors

Having been involved with construction works and undertaking various government and private projects, 47.30% of the contractors claimed they have been in practice between 5-10 years with D3K3 recording the highest number that is 18. Only 5.40% have been in practice for over 20 years with the highest being D2K2 contractors. 28.40% have between 10 - 20 years practical experience and 18.90% have not less than five years working experience. From the analysis above, 35 contractors have construction works experience averagely, 5 – 10 years. It was necessary to find out the working experience of the contractors so as to be able to justify the dispute settlement methods used.
DISPUTE SETTLEMENT TECHNIQUES USED BY CONTRACTORS

<table>
<thead>
<tr>
<th>Respondents</th>
<th>Arbitration</th>
<th>Negotiation</th>
<th>Mediation</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultants</td>
<td>Frequency</td>
<td>22</td>
<td>39</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Percentage</td>
<td>29.7%</td>
<td>52.7%</td>
<td>17.6%</td>
</tr>
</tbody>
</table>

Table 2: Dispute resolution methods

The representations in fig. 1: table 2 indicates that, 39 (52.7%) of the contractors adopt negotiations to settle their disputes, whereas 22 (29.7%) resort to Arbitration. 13 (17.6%) contractors attest that, they use mediation process to settle disputes but resort to arbitration when negotiations or mediations breakdown. Contractors favour the use of negotiations in their disputes because they want to have a ‘final shot’ at settlement and also to preserve business relations.

Fig. 1: Usual methods of dispute settlement used by the contractors.

Fig. 2: Contractors who have used and who would consider using the ADR methods.
**KEY**

A = Respondents who have used the ADR methods before.
B = Respondents who have never used the ADR methods before.
C = Respondents who would consider using the ADR methods.
D = Respondents who would not consider using the ADR methods.
E = Respondents who do not know whether to use the ADR methods or not.

**CONTRACTORS WHO HAVE EVER USED THE ADR TECHNIQUES**

The study as depicted in figure 2 above showed that, 52 (70%) of the contractors claimed they have used ADR methods before. Their reasons for using it (mainly negotiations), was its efficiency in terms of speed, satisfactory outcome, high flexibility, excellent business relationships and cost when contrasted with the high expense and unsatisfactory outcome of litigation and arbitration. Other reasons mentioned were the practicality of the solution offered, negligible legal representation and healthier business relationships. 22 (30%) contractors however claimed they have never used any of the ADR methods in dispute resolution. Their reason was they had no idea of their existence but further investigations revealed that, they used negotiation/mediation and or arbitration (apart from conciliation, med-arb, case evaluation) to settle their differences.

**CONSIDERATIONS FOR ITS USE**

Out of the 22 contractors who have never used the ADR methods, 12 (54%) said they would not consider its use to resolve a construction dispute and 3 (14%) remained indifferent as whether to consider its use or not. Only 7 (32%) said they would consider its use if it ever received legislative backing from government. The proportion of those contractors who were indifferent cited lack of knowledge of the ADR techniques as the main reason for their response. Other reasons given by the population (32%) who said they would consider its use in resolving disputes rather than litigation and or Arbitration are that, they believe it is faster and less expensive, business relationships are maintained among parties and the process is not as confrontational as in the traditional system. Other reasons are that, disputes can be settled outside the public arena quickly and amicably without hurting any party emotionally. The project in particular does not suffer any set backs or grind to a halt (as in litigation) since the parties understand each other’s strengths and weaknesses better and are able to arrive at an early settlement.

**CONTRACTORS’ AGREEMENT / DISAGREEMENT WITH A RANGE OF FACTORS THAT ENHANCE OR LIMIT THE USE OF ALTERNATIVE DISPUTE RESOLUTION METHODS.**

<table>
<thead>
<tr>
<th>Factors</th>
<th>Confrontational Approach</th>
<th>Cost</th>
<th>Process</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High Moderate Low</td>
<td>Expensive Moderate Cheap</td>
<td>Fast Slow</td>
<td>Good Bad</td>
</tr>
<tr>
<td>ADR</td>
<td>--- 9 43</td>
<td>--- 6 46</td>
<td>52 100% 100%</td>
<td>52 52</td>
</tr>
<tr>
<td></td>
<td>--- 17% 83%</td>
<td>--- 12% 88%</td>
<td>100% 100%</td>
<td>100% 100%</td>
</tr>
<tr>
<td>ARBITRATION</td>
<td>19 33</td>
<td>12 40</td>
<td>10 42 32 20</td>
<td></td>
</tr>
<tr>
<td></td>
<td>37% 63%</td>
<td>23% 77%</td>
<td>19% 81% 62% 38%</td>
<td></td>
</tr>
<tr>
<td>LITIGATION</td>
<td>48 4</td>
<td>52 100%</td>
<td>--- 52 6 46</td>
<td></td>
</tr>
<tr>
<td></td>
<td>92% 8%</td>
<td>100% 100%</td>
<td>--- 100% 12% 88%</td>
<td></td>
</tr>
</tbody>
</table>
Table 3: Enhancing or limiting factors

Analysis of table 3 above shows that the contractors agreed on following factors that enhanced the use of the ADR techniques —

1. Approach: ADR is non-confrontational as the rules or principles are not strictly applied.
2. Cost: The use of the process is cheaper in terms of cost. Attorney, expert and consultant expenses as well as administrative costs are reduced or eliminated entirely.
3. Process: The whole ADR process is very fast. It is faster than the traditional process.
4. Outcome: The outcome of the process when used to settle disputes is satisfactory.
5. Legal representation: The ADR processes have negligible legal representation but they do not take part in the process in any way. They only play advisory roles.
6. Business relationships: ADR procedures provide the keys to successful settlement and maintenance of business relationships.
7. Flexibility: In ADR the disputants settle their differences under no compulsion. They confide in each other. This makes the settlement process quicker and healthier.
8. Privacy: The ADR proceedings are conducted with confidential information and trade secrets kept outside the prying eyes of the public.

The following factors were found by the contractors to be limiting the use of the ADR techniques:-
1. Delay: - A negative concern expressed by the contractors was that, the ADR methods might be used to delay a final settlement of a dispute. If it is seen as such, and tainted with suspicion to that effect, however vague, it is likely to prove a telling effect militating against its widespread use.
2. Non-binding nature: - ADR decision is non-binding, which is a weakness in itself. The non-binding nature of the techniques should not be seen as a weakness.
3. Free-discovery of information: - The ADR process amounts to free-discovery of the parties’ information (documents, weaknesses, statements made) and positions.
4. Resistance to change: - The emphasis given to courts and lawyers as ideal dispute settlers in Ghanaian society is simply too pervasive to be easily disturbed.
5. Unfamiliarisation of the processes: - Disputants fail to make greater use of mediation and other alternatives to the courts because, they do not know about their existence.
6. Notion of litigation among the citizenry: - Psychological factors may also play a part in the gravitational pull of disputants towards the courts.
7. Fear of loss of control: - Another reason why disputants and especially lawyers do not make use of the ADR processes as against the courts system is the feeling of loss of control in the ADR process.
8. A waste of time: - Since ninety percent of all cases are settled anyway, lawyers often view ADR procedures as a waste of time and they fear that the impression gained by the mediator of their case may somehow be communicated to the judge.

CONCLUSION

During the course of the study it was realised that the whole ADR techniques was an entirely new concept to the contractors, although some established lawyers were very current with these techniques. Although most contractors claimed they were aware of the other ADR methods and used them often to resolve disputes, they rather used mainly negotiations and sometimes arbitration. I say sometimes arbitration because, it was when a dispute could not be settled at the negotiation stage that it was referred to arbitration. Their reasons for using negotiation were that, it was faster than arbitration, has satisfactory outcome usually a win-win situation and practicable, cheaper, less confrontational, usually with negligible legal representation, very flexible proceedings and with good settlement rate. All the same, most cases are settled at negotiation level. The other techniques – mediation, conciliation, med-arb, mini-trial, court ordered arbitration and case evaluation – are entirely unknown to most contractors. I can say that just a hand full of the contractors today are partially informed of but have little practical experience in the techniques. Contrary to that, some of the ADR principles especially mediation, conciliation and mini trial are practised in our traditional settings in areas such as the chieftaincy and educational institutions, offices, families and even among friends. Certain cases such as murder, theft, rape, treason, interpretation of the law and so on are not amenable to ADR but to the courts whereas commercial cases such as contractual differences, employer-employee conflicts, union revolts etc, are suited to ADR. As such ADR should rather compliment litigation and or arbitration. ADR has not come to displace the traditional process, but rather to strengthen the system and make it more effective.

ADR clauses should be included in construction contracts. This would also need some legislative backing from Parliament. The application of the ADR principles would go a long way to encourage the professionals in the construction industry to debate on and incorporate ADR clauses into contracts or make them part of the conditions of contract.

The general departure from arbitration to negotiation stems from the fact that, the whole arbitration process has become similar to the court system. The heavy presence of legal representatives and the pressure exerted by them on defendants or petitioners to extract information from them, the series of adjournments, the high cost and emotional stress makes contractors less interested in the process. However cases suitable to the courts are dealt with at the court level. The ADR techniques should not be subjected to the dictates of legal professionals since the disputing parties would determine their own settlement position. Any attempt to colonise the techniques should be vehemently rejected. Most contractors generally were impressed with the whole ADR concept. Those who had no knowledge of them initially became very interested and hoped to see their full implementation soon. Some of them feared that because of their non-binding nature and the free exposure of either party’s secrets, the principles would not be able to stand the
test of time. Despite these negative perceptions about the techniques, their numerous advantages outweigh their limitations. The ADR principles can be projected positively if the contractors or legal profession wish them to be so. After all the principles are not coming to replace the traditional system. Certain cases, for example crime or murder, cannot be settled by using the ADR principles. The principles are only coming to strengthen the old system and also help to resolve contractual differences within the construction, manufacturing and even the business community. The business environment is expanding rapidly and contractors would want a resolution technique that would not strain their business relationship but rather enhance it and make it more viable. Arbitration and litigation rather polarise disputing parties. The use of the techniques of ADR especially mediation, should enable business executives to merge their differences or hardened positions so that, they would understand where each party is coming from so as to tailor a suitable solution to their differences.

RECOMMENDATIONS

Figure 4: RECOMMENDATIONS – A summary
If the basic reason for the underuse of the ADR concept is unfamiliarity with the processes and the attendant fear of the unknown, then we need to look at ways of overcoming that unfamiliarity and uncertainties. The following approaches can be employed:

**EDUCATION AND PROMOTION**

Construction professionals, opinion leaders, heads of divisions and organisations, the judiciary, students, teachers, assemblymen, and ultimately the general public should be made aware of the existence of more economical and advantageous dispute settlement methods. Currently, the Ghana Association of Chartered Mediators and Arbitrators (GHACMA), the Faculty of law at Legon, the Legal Aid Board, Ghana Arbitration Centre, Gamey & Gamey Academy of Mediation and the West Africa Dispute Resolution Centre (WADREC) are all organizing some educational programmes (Workshops, public lectures, seminars, community discussions and training programmes) for construction professionals, community dispute resolution practitioners, employers and employees, corporate bodies and institutions. This educational campaign that is organised by the few members in these organisations is gradually gaining roots in the civil society. Most tertiary institutions have included the ADR techniques (conflict resolution skills) as part of the topics in their syllabus. Since the passage of the ADR Act, 2010 in Ghana, the judiciary and most civil organisations as well as ADR practitioners are advocating seriously for its adoption in commercial and civil disputes. The promotion can also be taken up by the professional institutions (GIA, GhIS, GHIE, GREDA, CIOB and others) through education of their individual members on the “modus operandi” and usefulness of adopting the ADR methods.

**INSTITUTIONALISATION**

The use of alternatives can best be enhanced by working the ADR techniques into the dispute processing system, so that there are frequent occasions when alternatives are systematically considered by disputants and various public institutions such as the courts and administrative agencies. The following establishing methods are recommended to enhance the efficient use of the ADR alternatives.

1. **PUT ALTERNATIVE DISPUTE RESOLUTION CLAUSES INTO CONSTRUCTION CONTRACTS**

With the rapid growth of interest in ADR processes in the commercial and industrial community, majority of the contracts should contain at least an ADR clause. Such clauses should specify some means other than traditional litigation for settling disputes arising out of the underlying agreement. Clients engaged in contracts with each other should try and negotiate different kinds of ADR provisions ranging from ‘negotiating-in-good faith’ clauses to elaborate provisions for mediation, mini-trials and case evaluation into their contracts. Some sample clauses are shown below:

A. **THREE-STEP DISPUTE RESOLUTION CLAUSE: Negotiation; Mediation; Arbitration.**

“The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by negotiations between senior executive of the parties who have authority to settle the controversy (and who do not have direct responsibility for administration of this agreement).

If the matter has not been resolved within sixty days (or otherwise) of the disputing party’s notice, or if the party receiving said notice will not meet within thirty days (or otherwise), either party may initiate mediation of the controversy or claim.

If the matter has not been resolved by mediation within sixty days (or otherwise) of the initiation of such procedure, or if either party will not participate in a mediation, the controversy shall be settled by arbitration in accordance with the rules of the Ghana arbitration centre and judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be --------. The arbitrator(s) are or are not empowered to award damages in excess of actual damages, including punitive damages.”

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B. FOUR-STEP DISPUTE RESOLUTION CLAUSE: Dual Negotiation; Mediation; Arbitration or Litigation.

“The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by negotiations between executives of the parties. If a controversy or claim should arise, Mr / Messrs--------- ------ of X Co. and Mr / Messrs ----------- ---- of Y Co., or their respective successors in the positions they now hold (herein called the “Project managers”), will meet at least once and will attempt to resolve the matter. Either project manager may request the other to meet within fourteen days (or otherwise), at a mutually agreed time and place. If the matter has not been resolved within twenty days (or otherwise) of their first meeting, the project managers shall refer the matter to senior executives, who shall have authority to settle the dispute (herein called “the senior executives”). Thereupon, the project managers shall promptly prepare and exchange memoranda stating the issues in dispute and their positions, summarizing the negotiations, which have taken place and attaching relevant documents. The senior executives will meet for negotiations within fourteen days (or otherwise) of the end of the twenty-day period referred to above, at a mutually agreed time and place. If the matter has not been resolved within thirty days (or otherwise) of the meeting of the senior executives, the parties will attempt in good faith to resolve the controversy or claim by mediation. If the matter has not been resolved by mediation within sixty days (or otherwise) of the commencement of such procedure, or if either party will not participate in mediation, [Select one of the following alternatives.]

(i) the controversy shall be settled by arbitration in accordance with the rules of the Ghana arbitration centre and judgment upon the award rendered by the Arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be----------. The arbitrator(s) are or are not empowered to award damages in excess of actual damages, including punitive damages.

(ii) Either party may initiate litigation [upon ---------- days written notice to the other party.]

All deadlines specified may be extended by mutual agreement.

2. LAWYERS SHOULD DISCUSS DISPUTE RESOLUTION OPTIONS WITH CLIENTS

Every lawyer should be familiar with various ADR options, and should have a duty at least to discuss these with their clients in the course of the representation. Some lawyers also say that, their clients want to win rather than settle or mediate. But I believe it is the client who should make that decision, after being fully informed of all the available options.

ENCOURAGE COURTS OR DISPUTE RESOLUTION CENTRES TO CONSIDER CASES FOR ADR.

Courts or dispute resolution centres can be encouraged to consider cases for ADR. This may involve legislation requiring referral to ADR in specific types of cases (example child custody, marital and commercial cases) or legislation authorising courts to refer cases to any of the already named ADR methods.

3. ESTABLISH NATION--WIDE OFFICES OF DISPUTE RESOLUTION

In Ghana, more effort is being made to set up ADR centres in the Regional Administrative Capitals, the High Courts, Regional Houses of Chiefs, within educational and professional institutions, and communities to be manned by qualified attorneys or respected senior citizens (retired judges), to help stimulate and coordinate the activities of ADR.

4. FUNDING

Government has been hesitant to budget for the development of the ADR techniques. Non Governmental Organizations and Donor Agencies fund almost all training and public lecturers or awareness of the ADR methods. Since the aim is to see to it that true justice is delivered, then one would expect government to help fund the project.

MEDIATION- The Best Alternative towards Amicable Settlement

Although the construction industry may be familiar with only negotiation, mediation, conciliation, mediation-arbitration, mini trial, etc., should be exploited sequentially to the fullest to help resolve their disputes. But sometimes,
negotiations do not achieve their goals especially where the parties have hardened positions. Based on this, I recommend the use of mediation.

THE FUTURE OF ADR IN GHANA

The prospects of the ADR techniques in Ghana are very bright having the ADR ACT passed 2010. Their numerous advantages outweigh their limitations. The citizens (including contractors) are gradually coming to terms with the techniques because of education and training. As such commercial and civil cases are gradually being referred to ADR at first instance before formal trial at the courts if settlement is not reached. In summary, contractors (and the construction industry in general) should see the ADR techniques as the best option to use in the settlement of their disputes.

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