

Harmonizing Ouster Clauses and Pre-action Protocols in Nigerian Construction Disputes

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ABSTRACT

This paper discusses how ouster clauses and pre-action protocols intersect when it comes to resolving construction disputes within the Nigerian context. Concerning dispelling ambiguity and providing sureness, ouster clauses point out ways of dispute resolution mechanisms. On the other hand, early resolution and cost saving can be encouraged through dialogue or cooperation before formal litigation thereby being said as the role of pre-action protocols in promoting such response before justice is sought. It is important to understand how these factors interrelate so that we can manage construction disputes effectively. While ouster clauses might influence when pre-action protocols are applied, they may also determine how parties understand and observe such provisions. Nigeria's legal system as far as construction disputes are concerned, should be managed to maintain a harmonious balance between the two mechanisms. The interdependencies of the entities involved in this process are explored here and the aim is to provide information that could be useful for those practicing law or those responsible for making decisions in other areas. The effectiveness of ouster clauses and pre-action protocols in construction disputes is assessed based on factors like resolution speed with a weighted mean of 2.53, legal enforcement (2.49), compliance rate (2.35), cost reduction (2.21). Ouster clauses limit the jurisdiction of courts or arbitrators by 34%, leading to prolonged litigation or arbitration (23%). Pre-action protocols impose procedural requirements (18%), causing delays and increased costs (16%). To improve the effectiveness of ouster clauses and pre-action protocols in construction disputes, it is crucial to enhance clarity, promote alternative dispute resolution, facilitate early engagement, strengthen enforcement mechanisms, and engage stakeholders.

Keywords: Construction disputes, Litigation, Ouster clauses, Pre-action protocols, Resolution.

INTRODUCTION

The construction industry in Nigeria is a significant economic development pillar, contributing to infrastructure growth and employment opportunities [1]. However, disputes often arise due to the complexity of construction projects, involving multiple parties, contractual relationships, and substantial financial investments. Nigerian legal frameworks exist, including pre-action protocols, to manage disputes efficiently. However, the presence of ouster clauses in construction contracts or legislation introduces complexity, limiting the jurisdiction of courts in certain matters and often requiring mandatory dispute resolution mechanisms like arbitration or expert determination [2]. This interaction raises questions about access to justice, procedural fairness, and the efficacy of dispute resolution mechanisms. This research aims to explore the dynamics between ouster clauses and pre-action protocols in Nigerian construction disputes, examining relevant legislation, case law, and practical experiences [3,4]. The study aims to contribute to the advancement of legal frameworks and practices that promote fair, efficient, and sustainable resolution of construction disputes in Nigeria. Objective 11(b) of the United Nations Commission on International Trade Law (UNCITRAL) provides that a major critical component of any enacted procedure is to "produce a fair and legally binding decision [5]." Pre-action protocols allow construction participants to point out the added value and reduce the time and expense connected with the legal resolution of their dispute. Non-compliance with a pre-action protocol is one of the major defenses that contractors bring to frustrate the enforcement of the statutory regime [6]. The coexistence of ouster clauses and pre-action protocols in Nigerian construction disputes raises

several concerns. Ouster clauses may restrict the process by mandating specific dispute resolution mechanisms, impacting access to justice, fairness, and procedural equity, the effectiveness of pre-action protocols, [7] compliance and enforcement, and impact on dispute resolution outcomes. Addressing these issues is crucial for enhancing the efficiency, fairness, and accessibility of dispute-resolution mechanisms in the Nigerian construction industry [8]. This research aims to identify potential shortcomings, propose solutions, and contribute to the development of legal frameworks for effective and equitable resolution of construction disputes. The study examines the impact of ouster clauses on Nigerian construction disputes, evaluating their lawful interaction, effectiveness, compliance challenges, and dispute resolution outcomes. It compares Nigeria's approach to other jurisdictions and proposes a new legal framework.

LITERATURE REVIEW

Legal Framework in Nigerian Construction Disputes

Construction law in Nigeria is a complex legal framework that governs the planning, execution, and resolution of construction projects. It is based on statutes, regulations, and policies at federal, state, and local levels, such as the National Building Code and the Public Procurement Act. Contractual relationships in construction projects are governed by statutory provisions and common law principles. Regulatory compliance is crucial to ensure the safety, quality, and sustainability of built structures [9]. Dispute resolution mechanisms include litigation, arbitration, mediation, and adjudication. Construction law in Nigeria faces challenges due to lack of regulatory expertise, ambiguity in contractual requirements, poorly defined project scope, combative contracting culture, lack of project team sophistication, poor risk planning, resource management, and supply chain disruptions [10]. Despite these challenges, Nigerian construction law offers comprehensive insights into dispute resolution mechanisms available to prospective parties. Arbitration is the primary means of dispute resolution in construction projects, as it is quicker and allows disputing parties to select subject matter experts as arbitrators. Various forms of dispute resolution mechanisms available in construction law include arbitration, adjudication, mediation, expert determination, hybrid methods, and arbitration mediation. Arbitration is regulated by the Arbitration and Mediation Act 2023, while adjudication is incorporated in the dispute resolution clause. Mediation is an Alternative Dispute Resolution process, while expert determination involves submitting a dispute to experienced experts. Hybrid methods, such as mediation-arbitration or arbitration-mediation, are employed in Nigeria [11]. The construction industry in Nigeria is constantly evolving, with new technical and legal issues to address. One such issue is the lack of proper record keeping in the Fidic book (1999) and the JCT 11 SBC/XQ. Local statutes regulating standards and practices in the industry are currently obsolete and unrealistic. It is recommended that a complete overhaul of the laws regulating the industry be done urgently [12]. The Nigeria Institute of Architects (NIA) is a professional association of Architects, but it is not responsible for the registration of Architects in Nigeria. The Architects Registration Commission of Nigeria (ARCON) determines standards and secures the register of Architects. Construction disputes in Nigeria are often inevitable due to the complexity of infrastructure projects, the multi-party nature of contracts, and the pressure of delivering well-built projects within reasonable timelines and at competitive costs [13]. Adjudication is a quick, private process used to resolve construction disputes by issuing interim binding decisions until the dispute is determined by litigation, arbitration, or mutually negotiated settlement.

Pre-Action Protocols Purpose and Importance

Pre-action protocols are essential in legal proceedings, particularly in civil matters, as they facilitate communication, encourage early resolution, promote procedural fairness, minimize costs, preserve relationships, and comply with legal requirements. They are procedural guidelines within the Civil Procedural Rules (CPR) that govern parties' conduct before court proceedings. Pre-action protocols are particularly important in construction disputes, as they help identify potential issues early, minimize project delays, and preserve project continuity [14]. They also promote cost efficiency, mitigate risks, preserve evidence, and foster collaborative relationships. Key elements of pre-action protocols include early notification, exchange of information, identification of issues, engagement in negotiation, consideration of alternative dispute resolution (ADR), timelines and deadlines, and preservation of evidence. The Pre-Action Protocol for Construction and Engineering Disputes is a protocol that governs parties' conduct before initiating formal legal proceedings [15]. It encourages parties to set out their cases and exchange sufficient information to understand each other's position, allowing them to narrow the issues in dispute, make an informed decision about the potential for settlement, or seek alternative dispute resolution (ADR) without starting proceedings [16]. Parties should engage in early discussions to resolve the issue without formal proceedings, saving time and costs. The preparation of a clear and detailed letter of claim should follow the requirements set out in the pre-action protocol [17]. Parties should be proactive in providing all relevant documents and information to the other side promptly to facilitate an efficient resolution process. If parties do not comply with the pre-action protocol, the court may impose sanctions, such as cost penalties or an order to follow the protocol [18]. However, there may be exceptions in cases where urgent action is required to prevent further harm or damage.

METHODOLOGY

In Nigeria, the implementation of ouster clauses and pre-action protocols in construction disputes is influenced by legal frameworks, cultural norms, and practical considerations. The methodology involves analyzing the legal framework, including statutes, regulations, case law, and contractual agreements, to determine the enforceability and interpretation of these clauses. Contractual agreements are reviewed to determine the presence and scope of these clauses. Customary practices and industry standards also influence the methodology. Alternative dispute resolution mechanisms, such as negotiation, mediation, arbitration, or adjudication, are often used. Enforcement mechanisms and remedies are considered, including the role of courts and arbitration bodies. Capacity building and awareness among stakeholders are crucial for effective implementation. This methodology helps navigate the complexities of these clauses and protocols, promoting efficient conflict resolution while ensuring legal compliance.

DATA ANALYSIS

By assessing these factors, stakeholders can establish the level of effectiveness of ouster clauses and pre-action protocols in construction disputes, identifying strategies to enhance their efficiency, fairness, and utility within the construction industry. The effectiveness of ouster clauses and pre-action protocols in construction disputes is assessed based on factors like resolution speed with a weighted mean of 2.53, legal enforcement (2.49), compliance rate (2.35), cost reduction (2.21), relationship preservation (2.18), and stakeholder perception (2.02). These measures reduce litigation, promote early settlement, and ensure fair resolutions as shown in Table 1 and Figure 1.

Table 1: Effectiveness of ouster clauses and pre-action protocols in construction disputes

Perceived effectiveness	Strongly agree	Agree	undecided	disagree	strongly disagree	Weighted mean
Resolution speed	74	52	12	2	0	2.53
Legal enforcement	68	58	8	6	0	2.49
Compliance rate	62	48	14	13	3	2.35
Cost reduction	52	42	26	14	6	2.21
Relationship preservation	42	51	33	8	4	2.18
Stakeholder perception	40	46	21	12	21	2.02

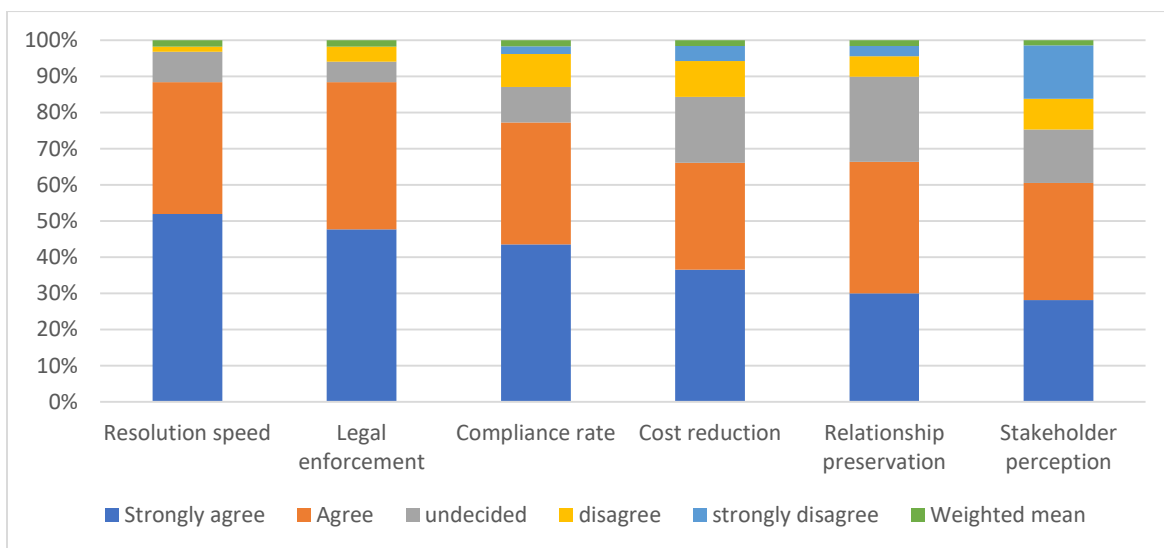


Fig. 1. Effectiveness level of ouster clauses

Ouster clauses and pre-action protocols in construction disputes can be challenging for parties and the judicial process. Ouster clauses limit the jurisdiction of courts or arbitrators by 34%, leading to prolonged litigation or arbitration (23%). Pre-action protocols impose procedural requirements (18%), causing delays and increased costs (16%). Non-compliance can result in adverse consequences. Balancing contractual autonomy, procedural fairness, and public interest is crucial for efficient dispute resolution in the construction industry.

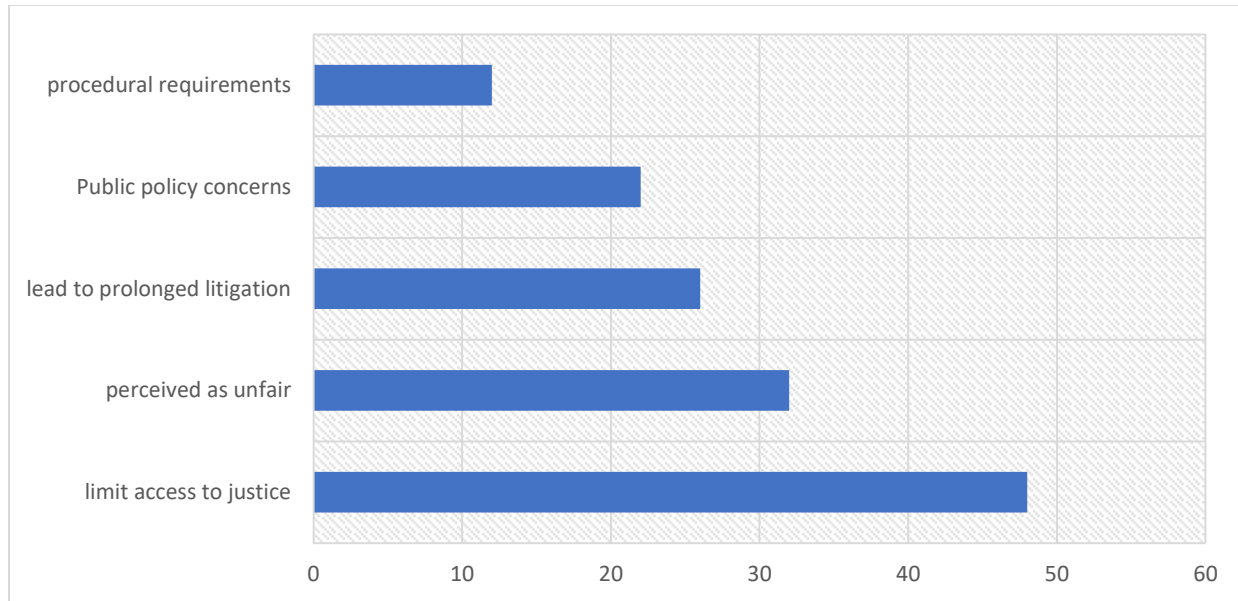


Figure 2: challenges of ouster clauses and pre-action protocols in construction disputes

Ouster clauses and pre-action protocols in construction disputes offer certainty, efficiency, and confidentiality for the parties involved. Ouster clauses provide a preferred method of dispute resolution, while pre-action protocols encourage early resolution, cost savings, and relationship preservation. They also facilitate early engagement, reduce litigation, and encourage alternative dispute resolution mechanisms like mediation or conciliation for sustainable outcomes.

CONCLUSION

Ouster clauses and pre-action protocols are crucial in resolving construction disputes. They provide certainty, efficiency, and specialized expertise, while pre-action protocols facilitate early resolution, cost savings, and improved case management. However, challenges like access to justice and compliance burdens must be addressed. A balanced approach promotes transparency, collaboration, and relationship preservation.

Contribution to knowledge

This study explores the relationship between ouster clauses and pre-action protocols in construction dispute resolution in Nigeria. It provides a comprehensive analysis of their interaction and influence, filling a gap in understanding the complexities of dispute resolution processes. The study also considers the unique legal, cultural, and practical factors in Nigeria's construction industry, offering valuable insights for practitioners, policymakers, and academics. The findings have implications for developing best practices, regulatory frameworks, and dispute resolution strategies to promote transparency, fairness, and efficiency in construction dispute resolution.

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CITE AS: Dike Ifunanya Elizabeth and Nnadi Ezekiel Oluwaseun Ejiofor (2024). Harmonizing Ouster Clauses and Pre-action Protocols in Nigerian Construction Disputes. NEWPORT INTERNATIONAL JOURNAL OF CURRENT ISSUES IN ARTS AND MANAGEMENT,4(2):45-49.
<https://doi.org/10.59298/NIJCIAM/2024/4.2.74549>