

Prevention Over Cure: The Construction Lawyer's Role in Driving Better Project Outcomes

A paradigm shift from reactive dispute resolution to proactive procurement governance

2026 NATIONAL CONSTRUCTION LAW CONFERENCE

UNIVERSITY OF ABUJA

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June 2026

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The Paradox: Why Disputes Persist Despite Sophisticated Resolution Mechanisms

The Question

If dispute-resolution mechanisms have become increasingly sophisticated, why do disputes remain so prevalent in construction?



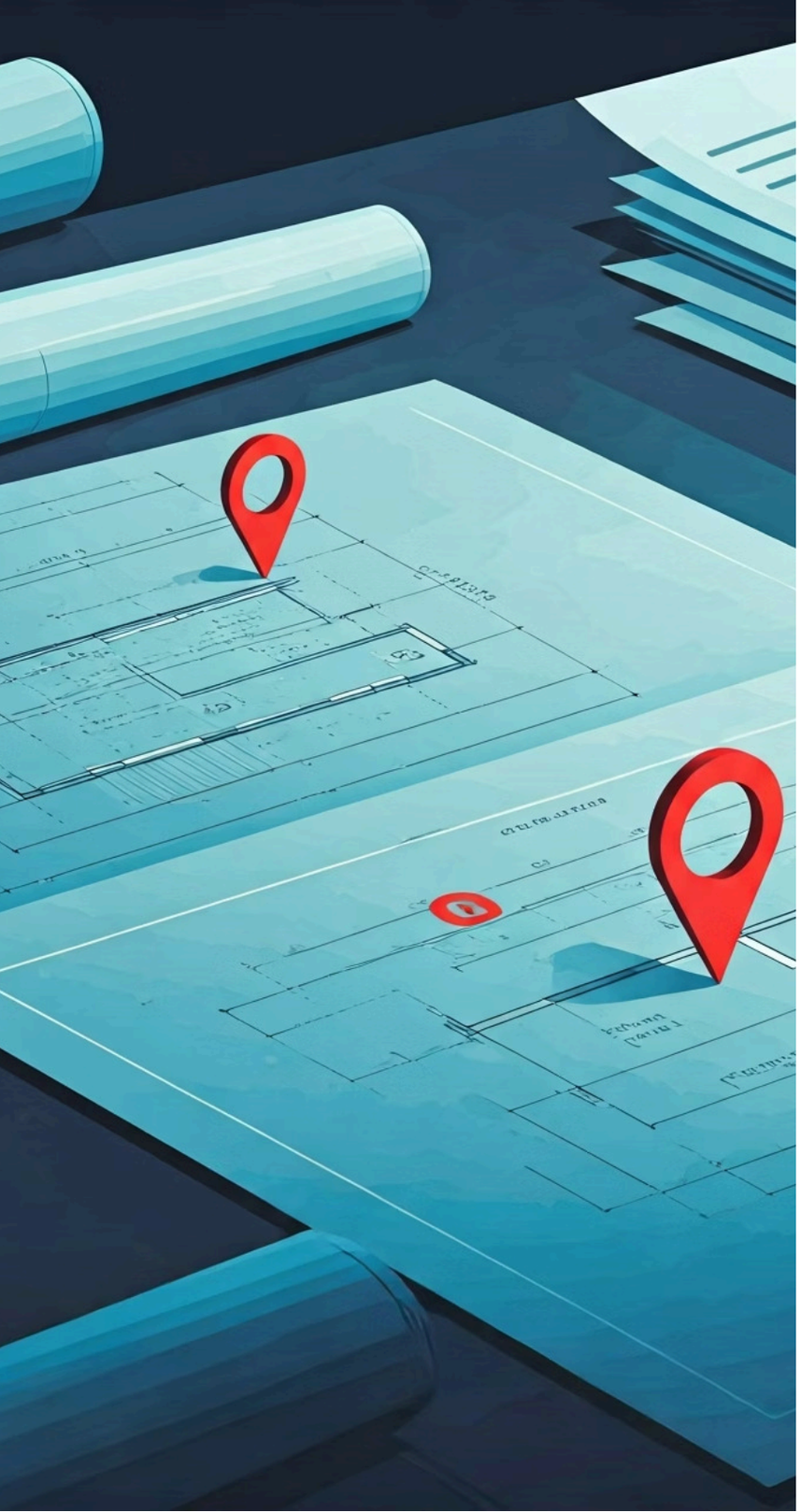
Available Mechanisms

- Litigation
- Arbitration
- Adjudication
- Mediation
- Dispute Boards
- Claims Management

Central Proposition: Many disputes are downstream manifestations of upstream procurement-governance choices.

Construction disputes and other poor project outcomes remain pervasive despite the availability of increasingly sophisticated dispute resolution mechanisms. The industry has developed extensive expertise in managing conflicts after they arise, yet the fundamental question remains unanswered: why do these disputes continue to occur with such frequency? The answer lies not in the quality of our dispute resolution tools, but in our failure to address the root causes that generate disputes in the first place.

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Where Disputes Actually Originate: The Upstream Problem

Empirical studies by Khalifa (2025) and Liyanawatta, Francis, & Ranadewa (2024) consistently identify the true sources of construction disputes. These studies reveal a pattern that challenges conventional wisdom about dispute causation.

Weak Contract Language

Ambiguous terms and contradictory clauses create interpretation conflicts

Document Conflicts

Contradictory project documents and inaccurate specifications

Quantity Errors

Inaccurate Bills of Quantities leading to cost disputes

Schedule Issues

Unrealistic schedules and excessive variations

Critical Observation: Most dispute-generating conditions originate during procurement and project-definition phases rather than during project execution. The seeds of conflict are planted long before construction begins.

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The Real Problem: A Reactive Industry

Before: Reactive

Disputes, litigation, arbitration dominate response



After: Proactive

Prevention, governance, early intervention reduce conflicts

According to Hietanen-Kunwald and Haapio (2021), the construction law discourse has become dominated by reactive mechanisms. While litigation, arbitration, adjudication, mediation, and claims management are indispensable tools in the legal arsenal, they share a fundamental limitation: they are reactive by nature.

The Reactive Paradigm

These mechanisms intervene after project relationships have deteriorated. They address symptoms rather than causes. The industry has developed sophisticated capabilities for managing disputes once they emerge, but has invested far less in preventing their occurrence.

The Consequence

We have become better at curing disputes than preventing them. This reactive orientation perpetuates a cycle where resources are consumed in conflict resolution rather than value creation. The cost—financial, temporal, and relational—is substantial.

⚠ The industry's focus on dispute resolution excellence has inadvertently created a blind spot: we have neglected the governance architecture that generates disputes in the first place.

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Infrastructure Procurement: A Governance Challenge

Infrastructure procurement is characteristically uncertain and complex (Hughes, Champion, & Murdoch, 2024; Winch, 2001). Understanding this complexity is essential to understanding why disputes emerge and how they can be prevented.

Uncertainty

Important future events (economic, political, regulatory), conditions (ground conditions), and behaviours (stakeholder actions) cannot be known with confidence at project inception.

Technical Complexity

Multiplicity of technologies and specialist skills required across different project phases and components.

Professional Complexity

Multiplicity of professional disciplines and institutions, each with distinct knowledge bases and institutional logics.

Legal Complexity

Multiplicity of contracts, obligations, rights, and liabilities creating intricate webs of legal relationships.

Relational Complexity

Multiplicity of actors with varying interests, incentives, power, information, and objectives that must be coordinated.

Disputes often emerge when these uncertainties and complexities are poorly governed. The challenge is not merely technical or legal—it is fundamentally a governance challenge requiring integrated expertise and strategic foresight.

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Procurement Strategy: The Hidden Governance Architecture

Procurement strategy is not a single decision but an architecture of interdependent choices for managing uncertainties and governing complexity. This architecture shapes project outcomes before construction begins.

Watermeyer Framework (2012)

01

Packaging Strategy

How work is divided and bundled

02

Contracting Strategy

Contractual relationships and structures

03

Pricing Strategy

Payment mechanisms and risk pricing

04

Targeting Strategy

Contractor selection criteria

PRIME Framework (Prasetya et al., 2026)

01

Understanding Outcomes

Defining success criteria

02

Market Engagement

Industry consultation

03

Packaging & Delivery Model

Work structure and execution approach

04

Contracting Model

Legal framework selection

05

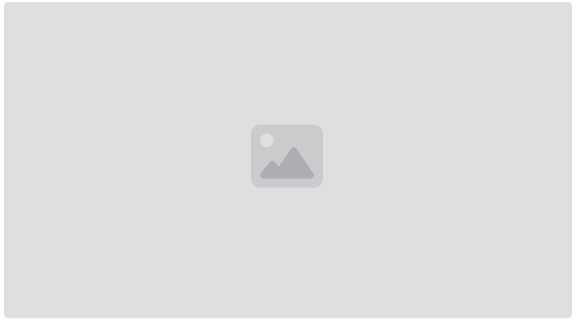
Tender Design

Procurement process architecture

> These decisions determine risk allocation, incentive structures, information flows, accountability arrangements, and dispute exposure. **Procurement strategy is therefore not merely a purchasing exercise—it is a governance activity.**

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The Governance Gap: Where Legal Expertise Falls Short



Construction lawyers are commonly engaged in three distinct roles, as identified by Nwandem (2023): Front-End Lawyers who draft initial contracts, Project Counsel who provide ongoing advice during execution, and Dispute Resolution Lawyers who manage conflicts when they arise. While these roles are valuable and necessary, they reveal a critical structural limitation.

The Advisory Position

Legal expertise is often positioned as advisory rather than structurally embedded within procurement governance (Castro & Sainati, 2024). Lawyers provide recommendations, but lack authority to ensure implementation. Advice may be ignored, as evidenced in the Mambilla Hydropower project (Isamotu & Shuaibu, 2026), where legal counsel was overridden by political considerations.

The Consequence

Governance deficiencies persist despite legal input. The lawyer's role remains peripheral to core procurement decisions. When legal advice conflicts with political, commercial, or bureaucratic interests, it can be marginalized or disregarded entirely.

⊗ Without structural integration into procurement governance, legal expertise cannot fulfill its preventive potential. Advisory capacity is insufficient—governance authority is required.

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The Embedded Construction Lawyer: A Governance Innovation

Definition

The **Embedded Construction Lawyer (ECL)** is a construction and procurement lawyer structurally integrated within an independent interdisciplinary procurement governance team from project inception. This represents a fundamental reimagining of the lawyer's role in infrastructure delivery.

Structurally Embedded

Not advisory but integral to governance decision-making with authority and accountability

Epistemically Embedded

Possesses deep understanding of construction processes, not just legal doctrine

Governance-Oriented

Focused on institutional design and decision architecture, not just contract drafting

Prevention-Focused

Identifies and engineers out dispute-generating conditions before execution begins

Domain of Operation

The ECL does not merely review contracts. The ECL participates in procurement-governance decisions relating to packaging strategy, contracting strategy, pricing strategy, tender design, risk allocation, and scope definition. The objective is to identify and engineer out dispute-generating conditions before execution begins.



Contract Stress-Testing

Subjecting contractual provisions to scenario analysis to identify vulnerabilities



Scenario Building

Constructing plausible future scenarios to test governance resilience



Dispute Simulation

Anticipating potential conflicts and designing preventive mechanisms



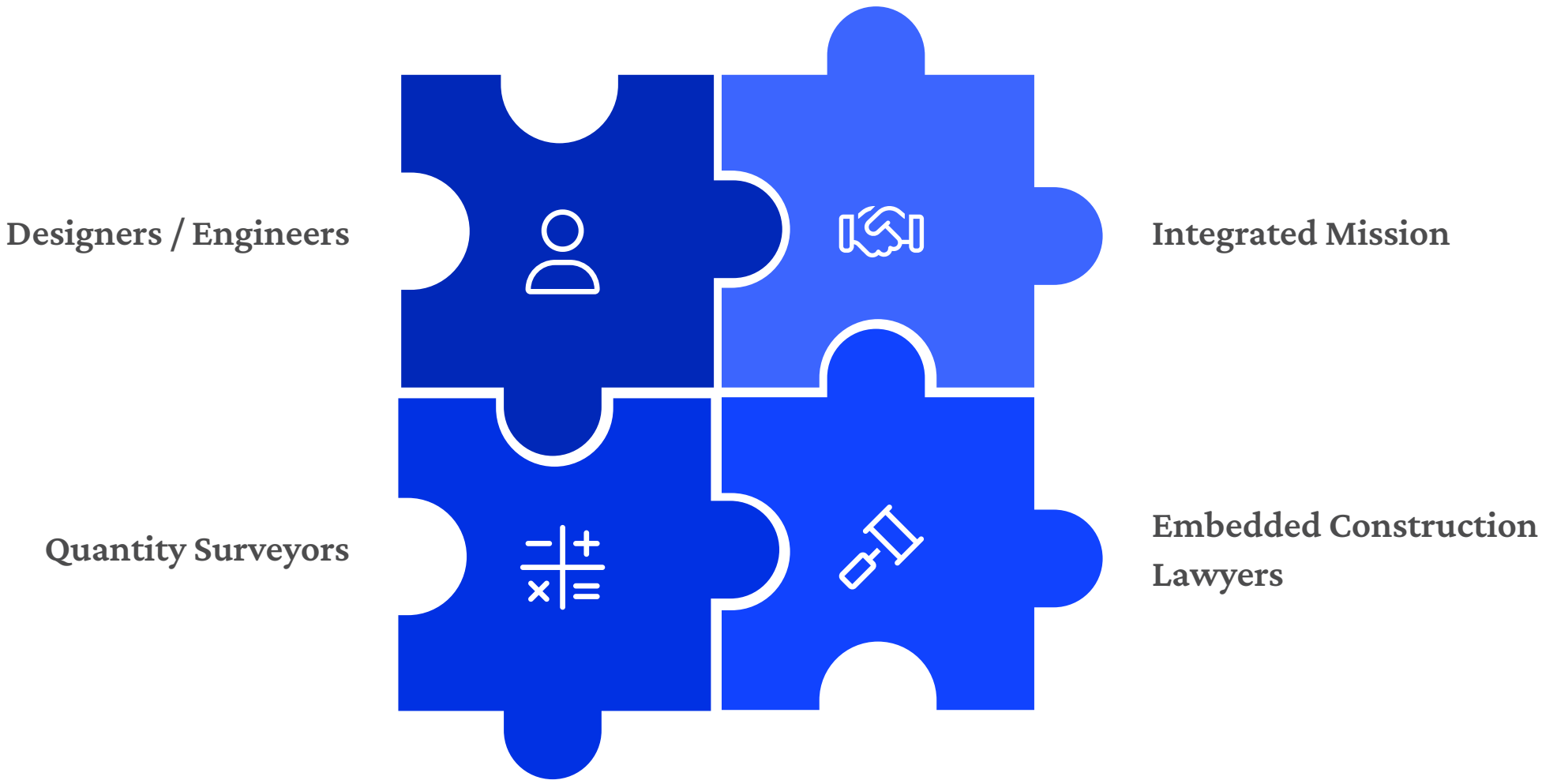
Risk Interrogation

Systematically examining risk allocation for fairness and efficiency

This approach applies *phronesis* (practical wisdom) to the specific project context, integrating legal knowledge with technical and commercial understanding to create robust governance architecture.

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The Independent Interdisciplinary Governance Team



The ECL operates within an independent interdisciplinary procurement governance team with a unified mission: reduce uncertainty, integrate knowledge, and improve project outcomes.

Why Independence Matters

Independence protects governance decisions from political interference, bureaucratic capture, rent-seeking behaviour, power brokers, and conflicted interests. It is a governance requirement, not merely an ethical preference.

Transparency

Decision-making processes are open and documented, enabling accountability and review

Accountability

Clear responsibility for decisions with mechanisms for oversight and correction

Responsibility

Professional duty to project success rather than partisan interests

Fairness

Equitable treatment of all stakeholders and balanced risk allocation

The Mambilla Lesson

The Mambilla Hydropower dispute illustrates the consequences of unresolved institutional logics. Where legal advice, technical advice, and political interests are not reconciled within an independent governance structure, the most politically powerful logic may prevail irrespective of legal or technical merit. This case demonstrates why structural independence is essential—advisory capacity without governance authority is insufficient to prevent poor decisions.

The ECL works with engineers and quantity surveyors to reconcile project documentation, improve risk allocation, align contractual architecture, reduce governance uncertainty, and build project-specific dispute-prevention architecture. The ECL is not merely a lawyer—the ECL is a governance integrator.

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Conclusion: A Paradigm Shift in Construction Law Practice

Construction disputes are frequently symptoms of procurement-governance deficiencies rather than inevitable consequences of project complexity. The persistence of disputes despite sophisticated resolution mechanisms reveals a fundamental misalignment: we have invested heavily in curing disputes while neglecting their prevention.

Better Procurement Strategy

Sophisticated governance architecture from inception

Better Governance

Independent, integrated decision-making structures

Better Knowledge Integration

Interdisciplinary collaboration and epistemic diversity

Better Uncertainty Management

Proactive identification and mitigation of risks

Final Proposition

The **Embedded Construction Lawyer** represents a governance innovation that embeds legal, technical, and commercial wisdom into procurement strategy before disputes emerge. This is not merely an enhancement of existing practice—it is a paradigm shift from reactive dispute resolution to proactive dispute prevention.

Better project outcomes require moving beyond the cure-focused paradigm toward a prevention-oriented approach. The ECL model offers a practical pathway for this transformation, positioning legal expertise where it can have greatest impact: at the source of dispute-generating conditions. By structurally integrating construction lawyers into procurement governance, we can engineer better outcomes rather than merely managing poor ones.

PREVENTION OVER CURE

GOVERNANCE INNOVATION

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