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An Exploratory Study of Dispute Resolution Methods in the South African Construction Industry

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Abstract. This study assessed the dispute resolution methods used in the South African construction industry. Arbitration, adjudication and mediation are the most frequently used dispute resolution methods in the construction industry. A literature review focused on arbitration, adjudication and mediation in the construction industry. Closed-ended and open-ended questionnaires as well as interviews were conducted among the senior construction participants who included architects, quantity surveyors, construction managers, project managers and attorneys. The questionnaires were completed by 70 construction participants. The research concluded that for alternative dispute resolution (ADR) to be effective in solving disputes in the local construction industry, mediators, arbitrators and adjudicators with knowledge of the construction industry should be appointed. In terms of its characteristics, ADR should be the best option to resolve construction disputes. However, it is not being fully utilised due to the characteristics of dispute resolution itself and the absence of an appropriate framework to guide the disputing parties on the overall process. The literature review on the ADR developments and their effectiveness focused only on South Africa. This study provides a basis for using ADR effectively in the construction industry. The findings are of value for clients, contractors and consultants.

Keywords: Alternative dispute resolution, arbitration, adjudication, mediation, construction, South Africa

1. Introduction

Alternative dispute resolution (ADR) encompasses a range of procedures other than litigation which are designed to resolve conflicts. In the past few decades the use of ADR has become more prevalent within both international and domestic contracts. Alternative dispute resolution mechanisms in the construction industry have wide application and disputing parties' reasons for adopting ADR are many and varied. However, the main reasons are that the costs of litigation are prohibitive and that it takes a long time to settle disputes or come to a ruling hence the parties in dispute and their advisers are now considering alternative methods to resolve disputes. The alternative methods are a realistic alternative to litigation and are cheaper and quicker methods of dispute resolution which do not so easily lead to a breakdown in the working relationships between the parties.

Alternative dispute resolution techniques fall into two discrete types, i.e. those which seek to persuade the parties to settle and those that provide a decision. Where a decision is given then such a decision may have binding effect or may simply be a recommendation that the parties can accept or ignore. Recently a number of hybrid forms of ADR have emerged. For instance there has been a growth in med-arb, a process which incorporates both mediation and arbitration.

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The essence of ADR is to resolve conflict differences or disputes that exist between parties. The ADR process seeks to resolve these differences in two ways, namely:

- Where the ADR process provides the parties with a decision, the process is about establishing rights and obligations.
- Where the process is facilitative, then its purpose is about the acknowledgement and appreciation of differences.

The aim for the parties must be to establish the correct process in order to resolve the dispute. Construction disputes are fairly common, although they vary in their nature, size, and complexity (Barth, 1991).

A dispute within the construction industry covers a diverse range of issues that deserve to be addressed specifically and in depth. The construction industry is one that comprises a diversity of interests, professions and procedures which interact to create a completed project. All of those involved may share a common goal, but they inevitably have differing and often divergent purposes. In the quest to achieve their goal the chances or the likelihood of disagreement or disharmony are substantial (Gould, 1999).

If unresolved in time, construction disputes can become very expensive, considering the finances, personnel, time lost, and the opportunity costs. Quantifiable costs include hiring of attorneys, expert witnesses and the dispute resolution process itself. The less visible costs (e.g., company resources assigned to the dispute, lost business opportunities) and the intangible costs (such as damage to business relationships, potential value lost due to inefficient dispute resolution) are also considerable, although quite difficult or impossible to quantify.

2. Objectives of the Study

The research focused on the current development and application of ADR methods in the South African construction industry.

- To investigate the causes of disputes in the South African construction industry.

3. Literature Review

3.1. Dispute resolution in the construction industry

The construction industry has a long tradition of reliance on a dispute resolution process rather than formal litigation. Only recently some attempts have been made to involve dispute resolution practitioners and organisations in the construction industry in the mainstream of dispute resolution development. As a result of these separate developments, arbitration in the construction field reflects a more traditional approach. The highly complex and specialised nature of construction disputes has also contributed to the development of an arbitration practice peculiar to the construction industry. Standard-form contracts in the construction industry have recently begun to reflect an attempt to modernise and expedite dispute resolution practices. However, an increasing number of construction contracts unfortunately end in disputes that require the intervention of either the courts or of an arbitrator, mediator or adjudicator to achieve resolution. It is obvious that an attempt to design or select the most appropriate form of dispute resolution for a particular dispute would involve consideration of the advantages and disadvantages of all forms of dispute resolution, including litigation. The field of dispute resolution therefore covers a broad range of mechanisms and processes designed to assist parties in resolving differences creatively and effectively (Finsen and Butler, 1993).

Pretorius (1993: 133) refers to three major categories of dispute resolution, which are:

- Dispute resolution processes involving private decision-making by the parties themselves. This category would include negotiation and mediation.
- Dispute resolution processes involving private adjudication by third parties. Arbitration would fall into this category.
- Dispute resolution processes involving adjudication by public authority. This category would include administrative decision-making and formal litigation before the courts.

3.2. Causes of disputes in construction projects

There is a great deal of literature about the causes of conflict and disputes. Some writers refer to ‘causes’ of conflict, others to ‘sources’ ‘reasons’, or ‘triggers’.

The following are identified as causes of disagreements based on the literature survey (Botha, 2000):

- Misunderstandings usually occur because of poor communication.
- Values differ between people, professionals and skills.
- People often have unrealistic expectations. The client wants speedy completion and a quality building at a low price. The contractor may want more time, a more reasonable quality and maximum price.
- Emotions play a role, the ability to handle stress causes dispute. A person’s self-esteem (or lack of it) can also cause disputes. Factors under this heading include languages, dynamics, geography, childhood experiences, upbringing and religion.
- Education levels and both structured and unstructured learning can have an influence on conflict.
- There are many differences between projects. From one project to the next there are different building teams, different financiers and different designers.
- Not all people are equally skilled at visualising two-dimensional drawings in a three-dimensional way.
- Changes to plans, deadlines, payment dates, and so on, can cause disputes.
- It does not matter who or what is to blame for a delay. It could be the weather, a subcontractor, the bank or whoever. The mere fact that there is a delay could cause disputes.
- Parties often inadequately define quality. High quality may mean different things to a plasterer and to the project director or project manager. One must use objective standards to define materials and workmanship. One must precisely describe what one requires. A client may specify a much higher standard than what he really wants while wanting a lower price.
- A sub-contractor may misunderstand the actual requirements and may quote a lower price than other contractors may, then when he realises his mistake, dispute results.

4. Research Methodology

To assess the dispute resolution methods in the South African construction industry, the following specific methodology of this study based on the literature review and a questionnaire survey was employed to ensure a robust methodological design (Edwards and Holt, 2010).

5. Sample Technique

A total of 70 responded to the study interviewed, including construction consultants, contractors and clients in the Gauteng Province. The Province has a good population of consultants and contractors, and the researchers believe that they are representative of the population of interest. The researchers assumed that professional registered senior managers are the most likely to be involved in construction disputes since they handle more complex projects involving many parties, and the respondents were randomly selected from this group. Stoker (1985) cited by Strydom and De Vos (1998: 192) suggested that for a population size of 30, at least 24 (80%) ought to be the sample size.

6. Questionnaire Design

The questionnaire was designed to determine the effectiveness, causes and the application of dispute resolution methods in the construction industry. The questionnaire was divided into two main parts: Part A related to general information about the respondents and respondents were asked about their registration with professional bodies if any, their years of experience, age and the involvement in construction disputes; Part B included questions related to the potential causes of disputes, cost and time effectiveness of disputes, relationships between disputing parties, methods being used in resolving construction disputes, processes followed when declaring the dispute and the impacts of disputes. This was done using a qualitative approach.

7. Data Collection

Forty-five (45) questionnaires were issued to the respondents, which included the contractors, consultants and professionals who are involved in construction disputes. A total of 30 questionnaires were returned representing a 66% rate of return.

Sixty-five (65) respondents were also identified for interview sessions; the questions were sent in advance prior to the interview to give the respondents enough time to go through the questions and prepare for the interviews. Forty (40) interviews were successfully conducted representing a 61% response rate.

8. Research Findings and Results

8.1. Interviewees' years of experience in the construction industry

Table 1 represents the respondents' experience in terms of number of years; the majority of the respondents (42%) have between 6 to 10 years experience, followed by those with between 11 to 15 years experience (41%), and those who have between 21 and 25 years experience (10%). Lastly, those who have between 16 and 20 years experience, representing 7%.

Table 1: Respondents' experience in number of years

| 0 – 5 | | 6 – 10 | | 11 – 15 | | 16 – 20 | | 21 – 25 | |
|-------|---|--------|----|---------|----|---------|---|---------|----|
| No | % | No | % | No | % | No | % | No | % |
| | | 31 | 42 | 30 | 41 | 5 | 7 | 7 | 10 |

8.2. Response to the causes of disputes in the construction industry

The majority of the respondents noted that the following are the major causes of the disputes:

- Clients' failure or refusal to settle any claims brought on by the contractor
- Use of improperly or poorly drafted contracts
- Extension of time claims
- Variations
- Late completion
- Poor workmanship by the contractor and/or consultancy team
- Poor communication
- Use of incomplete designs during tender
- Under pricing of the tender
- Mismanagement of funds by contractors
- Poor planning by both professional team and contractor
- Under budget or estimate
- Poor record keeping
- Final accounts disagreements

9. Conclusion

The following conclusions can be drawn from the research:

- ADR is to a certain extent, effectively used in contracts in the construction industry.
- Mediation is the most frequently used method in resolving disputes in the construction industry.
- The majority of construction participants has a moderate knowledge of ADR methods and experiences the methods as not being flexible and somewhat too complex.
- Apart from the mediation, adjudication and arbitration, other forms of ADR are also used in the construction industry, such as the negotiation, med-arb, and reconciliation.
- The majority of respondents would prefer the inclusion of the adjudication as the priority in resolving dispute before arbitration.

10. References

- [1] Barth, B.W. (1991) An Investigation into the Suitability of Arbitration as a Dispute Settling Mechanism in the Construction Industry. Unpublished master's research report. University of the Witwatersrand, Johannesburg, South Africa.
- [2] Botha, H. (2000) *Conflict in the Construction Industry*. Bellstone Training (International) Limited, London.
- [3] Edwards, D.J. and Holt, G.D. (2010) The case for '3D triangulation' when applied to construction management research. *Construction Innovation*, 10(1), 25-41.
- [4] Fiadjoe, A.K. (2004) *Alternative Dispute Resolution: A Development World Perspective*. Cavendish Publishing Limited. pp 114.
- [5] Finsen, E. and Butler, D. (1993) *Arbitration in South African Law and Practice*. Juta and Company Ltd., Johannesburg, South Africa.
- [6] Finsen, E. (2005) *The Building Contract, a Commentary on the JBCC Agreements*. Juta and Company Ltd., Cape Town, South Africa.
- [7] Gould, N. (1999) Dispute resolution in the United Kingdom construction industry - processes, perceptions and predictions. *The International Construction Law Review*, 16(4), 574 – 587.
- [8] Pretorius, P. (1993) *Dispute Resolution*. Juta & Co. Ltd., Cape Town, South Africa.
- [9] Strydom, H. and De Vos, A.S. (1998) Sampling and sampling methods. In: A.S. De Vos (Ed.) *Research at Grass Roots: A Primer for the Caring Profession*. Van Schaik Publishers, Pretoria, South Africa.