Adjudication of disputes in the construction industry

by Marthinus J Maritz

Until recently, the processes of mediation and arbitration were the main alternatives for settling construction disputes in South Africa. However, since the introduction in the early 1990s of the adjudication process in international construction contracts, contractual adjudication is slowly being introduced into the construction industry.

This article provides an overview of the development of adjudication as an alternative dispute resolution process (ADR) in South Africa and its effectiveness in solving disputes in the local construction industry. It also indicates to what extent adjudication has been used since its introduction into the construction agreements currently in use in South Africa.

Construction disputes are well served by mechanisms that are speedy, cost-effective and binding. Such mechanisms should be conducted by an independent third party and should be undertaken by a person (or group of people) chosen by the parties and with the required legal/technical knowledge or who are able to acquire them. Such mechanisms should be able to hear any matter, should be capable of becoming final and enforceable, and should not interfere with the progress of the works.

The White Paper on Creating an Environment for Reconstruction Growth and Development in the Construction Industry (1999) argues that the conventional mechanisms and procedures for final dispute resolution (normally arbitration or litigation) are both costly and time-consuming. It further states that small and emerging contractors are disadvantaged – even imperilled – in the event of a major dispute. The paper advocates the use of ADR mechanisms on contracts and recommends that the report of Sir Michael Latham, *Constructing the team*, be used as the point of departure in this regard (CIDB, 2003).

Following the Latham report, the UK Government was persuaded that primary legislation was required to give all parties to construction contracts a statutory right to have disputes resolved, in the first instance, by adjudication, which was to be a rapid and relatively inexpensive process in all cases. This legislation, the Housing Grants, Construction and Regeneration Act, 1996, is now in force in the UK and parties to construction contracts are allowed to refer a dispute for adjudication at any time.

Similar legislation has been adopted in parts of Australia, New Zealand, Singapore and Hong Kong. The World Bank is also advocating that such procedures be used on projects it funds.

The Construction Industry Development Board (CIDB) took the lead to officially introduce adjudication on construction contracts in South Africa and published a Procurement Practice Guide in 2003. This document dealt, inter alia, with the implementation of adjudication and advocated that "adjudication should be applied to all categories of construction contracts, namely engineering and construction works, services and supplies, at both prime and subcontract level, and should be a mandatory requirement for the settlement of disputes prior to the completion of the contract."

Adjudication has now found its way into most of the major construction agreements in South Africa. There are differences between the ways in which the process is applied in the UK and in South Africa. In the UK, adjudication is a creature of legislation. It is therefore a substantially similar process, regardless of whichever of the many available construction agreements is applicable. In South Africa, it is adopted by agreement between the parties, and its nature may vary depending on the applicable agreement.

Adjudication is but one of a number of recognised ADR methods used in resolving disputes in the construction industry. Others methods include mediation, conciliation, early neutral evaluation, mini trial, expert determination and arbitration. This article limits its discussion and comparison to only three of the aforementioned ADR methods: adjudication, mediation and arbitration.

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Description of terms

The *adjudicator* is a third-party intermediary appointed to resolve a dispute between the disputants. The decision of the adjudicator is binding and final, unless it is later reviewed by either arbitration or court proceedings, whichever the parties selected at the time of formalising the contract. Adjudication is intended to be a condition precedent to either arbitration or litigation.

The *mediator* assists the disputants to generate options and foster an understanding of their respective positions and to manage emotions. Although the mediator controls the process, he/she does not impose any resolution or opinion on the merits of the case, promoting a win/win situation, leaving the disputants themselves to control the outcome. The process is flexible, private and confidential with the legal rights of the parties protected when no agreement has been reached.

The *arbitrator* has the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of disputes raised in the proceedings including the matter of costs. All powers and functions exercised by the arbitrator shall be in accordance with the provisions of the Arbitration Act of 1965. The decision of the arbitrator is legally binding with the outcome being one of a win/lose situation and there is often no provision for appeal to a court of law.

What is adjudication really?

The Procurement Practice Guide of the CIDB defines adjudication as "… an accelerated and cost-effective form of dispute resolution that, unlike other means of resolving disputes that involve a third party intermediary, results in an outcome that is a decision by a third party, which is binding on the parties in the dispute."

However, adjudication is often defined by reference to what it is not. Adjudication is not arbitration or litigation, nor is adjudication a decision by the engineer/project manager. The adjudicator is completely independent and is paid by both parties. In South Africa, adjudication is a creature of contract.

Claims for money?

Opinion varies as to whether adjudication should be limited to a claim for payment only and should exclude any dispute arising under the contract (see, for example, Kennedy-Grant, 2005, Lloyd, 2005 and Bayley, 2005). Certain legislation, in particular that of New South Wales (NSW) in Australia, is quite narrow in its application of adjudication and is limited only to matters concerning payment. The UK legislation, on the other hand, provides for all matters in a dispute to be referred to adjudication and has been used in many non-payment issues, as it does not exclude disputes regarding matters such as interpretation of contract, quality of work or extension of time being resolved before they become payment disputes.

Maritz (2007), in his investigation into the utilisation of adjudication in the South African construction industry, posed the question to a selected target population made up of individuals who regularly deal with construction contracts and dispute resolution matters. The respondents were divided in their opinion, as is illustrated by the following comment by one of the respondents: "Adjudication is not a process that will be effective on most contractual disputes in South Africa. This process is only suitable for larger projects with sophisticated contractors and subcontractors."

Adjudication as the mandatory mode of dispute resolution

Construction contracts must be specific as to whether adjudication should be the mandatory mode or the default provision for resolving disagreements. One can argue, however, that the proper time to decide whether a dispute should be referred to adjudication or to arbitration or to any other ADR process is at the time that the dispute has arisen. The proper person to make this decision is the person who declares the dispute, because he is seeking relief and he should know which process would be the better option.

During the course of the contract, the dispute will probably be about payment and the contractor will probably opt for adjudication, but at the end of the contract, where the dispute may be about the final account, he will prefer finality over speed and rather opt for arbitration.

Conclusion

Despite adjudication being in place in the locally developed construction agreements in South Africa for the past four years, the level of knowledge and use of the process remain low. Experience in other countries that have introduced adjudication has shown that adjudication without the statutory force is not likely to be effective. Enforcement of the adjudicator's decision is critical to the success of adjudication. Before South Africa introduces an act similar to acts in the UK, New Zealand and Singapore, adjudication will remain largely ineffective and, therefore, underutilised locally.

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