ADR Practice in the construction industry: a futuristic perspective

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Abstract

Research suggests that the practice of Alternate Dispute Resolution (ADR) is successfully implemented in the South African Construction Industry however; research also indicates that parties seldom negotiate their own settlement and that decisions are made for them. This study records the current situation relating to ADR practice in the South African construction industry and projects possible future trends based on the evolution of the ADR process in the industry. A literature review was conducted on standard ADR practice (as practised internationally) after which an empirical study employed both questionnaires and interviews to determine the current situation in the industry. A comparative analysis was conducted in order to determine the relationship between standard and current practice in the industry. The comparative analysis also serves to identify ADR trends in the industry which may serve as predictors and provide a futuristic perspective to the development of ADR in the South African construction industry. Dispute resolution is an important element in the management of projects which in turn is dependent on the effective application of ADR.

Keywords: Alternate Dispute Resolution, ADR, construction industry, current practice, future trends.

1. Introduction

Arbitration has been used as a means of Alternate Dispute Resolution (ADR) since the days of Jan van Riebeek and was based on Roman-Dutch law. The present South African Arbitration Act 42 of 1965 and contract documentation are based on English Law. Mediation and conciliation in South Africa and the UK are in some respects applied in a different manner to international standard practice. In standard mediation practice, the mediator is not required to recommend a solution to the dispute, but in the construction industry it is required of him. The application of conciliation is also reversed (Butler & Finsen, 1993: p10-11).

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Dispute resolution in the construction industry is different due to the use of unique adjudicative methods whereby judgments can be made with non-binding decisions which are characterised with consensual and control features (Finsen, 2005: pp222-223). It is important to note that the consensual nature of arbitration places it in the ADR context (Pretorius, 1993: p176; JBCC PBA, 2007: pp30-31).

Mediation was introduced to the South African construction industry in 1976 as an alternative method of dispute resolution to the cost and time consuming method of arbitration. The Joint Study Committee issued a practice note with the intention of saving costs and time in the resolution of disputes. However, it was submitted that should parties be dissatisfied with the outcomes, they were still entitled to submit to arbitration (Quail, 1978: p165). Adjudication was introduced to the South African construction industry as an ADR method which requires expert determination and was therefore included in the Joint Building Contracts Committee Principal Building Agreement (JBCC PBA) Series 2000 4th Edition (2004: p30). This approach took effect after the change to adjudication, adopted from the Latham Report in the United Kingdom (Scott & Markram, 2004: p1). Adjudication is applied as a dispute resolution method when the parties require a decision to be made for them and this decision is provisionally binding unless it is overturned in a subsequent arbitration (Finsen, 2005: pp222-223).

Agent resolution was included in the PBA of 1991 Dispute Clause 37 which was recommended by the JBCC (1991: pp21). Agent resolution as a method of dispute resolution was identified in the Association of South African Quantity Surveyors (ASAQS) 1981 Practice Manual under the Agreement and Schedule of Conditions of Building Contracts (1981: p17). However, due to its popularity in practice (ASAQS, 1981:p17; Verster & van Zyl, 2009: p7; JBCC PBA, 1991: p21) agent resolution was included in this study. Although conciliation is not included as a method of dispute resolution in the JBCC Contract documentation, it may suffice as a method of informal dispute resolution as required in Clause 40.2 in the JBCC PBA (2007: pp30-31).

The similarities that exist between arbitration, the oldest method of ADR, and mediation, may be appreciated because new methods were developed for the purpose of speeding up the arbitration procedure so as to provide a more informal and cost-effective way of resolving disputes most suited to the industry (Butler & Finsen, 1993: p8).

Having adopted a process which is exclusive to ADR practice in the South African construction industry, the context in which the methods are applied (which originally stem from arbitration and have overlapping similarities) may vary, and the application may prove to be somewhat confusing when compared to standard practice as practiced internationally.

2. Current ADR practice in the South African construction industry

The ADR process is intended to give parties control and responsibility for the outcome (Bevan, 1992:p18) which ultimately produces advantages and is referred to as the Four C's. These advantages which constitute the features of the ADR context apply to the non-adjudicative methods of ADR and are as follows:

- Consensus
- Continuity
- Control
- Confidentiality. These features produce effective outcomes (Loots, 1991: pp8-13; Verster, 2006: p13).

Adjudication now takes precedence to arbitration in the dispute clauses of the following contracts: General Conditions of Contract for Works of Civil Engineering Construction (GCC) (2010:pp68-71), the New Engineering and Construction 3 (NEC3) (2005: pp28-33) and the International Federation for Consulting Engineers (FIDIC) (1999: pp66-70). Adjudication in the engineering discipline follows a different process in the form of Dispute Adjudication Boards (DAB) (Lalla & Ehrlich, 2012: online) which is supported by the FIDIC (1999), GCC (2010) and the NEC, (2005) contracts, whereas in the building industry, adjudication is supported by the JBCC PBA (2007: pp30-31). The South African Institute of Architects (SAIA) generally practise adjudication according to the JBCC PBA Dispute Clause 40 (The Cape Institute for Architecture, 2010: online). The DABs follow much the same process however; the establishment of the board differs where three adjudicators are appointed to resolve the dispute. The process relies on the expertise of engineers (Owen, 2003: p25).

Researched authors are of the opinion that there is a growing preference for adjudication in the construction industry and courses have been developed in order to promote the practice of adjudication (Alusani, 2012: online). Maritz (2009: online) is of the opinion that adjudication will be underutilised without statutory intervention however; the (Construction Industry Development Board (cidb) promotes adjudication as a rapid and cost effective method (cidb, 2012: online).

Similar to this process is the method of expert determination. With adjudication, a dispute is referred to an expert rather than to litigation, where a judge may base his decision on law, rather than technical issues. Expert determination is also based on rules (What is ADR, 2010: online). This suggests that adjudication in the JBCC PBA (2004) was based on the principles of expert determination. In view of the above, DABs are based on the same principles and may involve more experts which according to Swart, (2012: personal communication), tends to generate expenses and may be suited to larger projects. Mediation has been identified as a preferred method of ADR however; the application of mediation in the South African construction industry has been questioned. Professionals are appointed as mediators due to their expert knowledge and the mediation process is often expedited to suit the hurried nature of the construction industry. As such, mediators are relying on inherent ADR communication skills and making decisions for the parties (Povey, 2005: pp6).

Conciliation is the psychological component of mediation where the neutral third party will attempt to create an atmosphere of trust and co-operation which is conducive to constructive negotiation. The aim of conciliation is to correct perceptions, reduce fears and improve communication in order to relax parties and guide them into conflict-free negotiations and

bargaining. Conciliation also offers parties the opportunity to determine their own end results. Being a primary element of mediation, conciliation is applied with the intention of preparing the parties psychologically to enter into the extended process of mediation (Moore, 1986: pp4-6). As such conciliation may serve as a preventative measure against disputes developing on site.

The relief of court congestion has been addressed by the Department of Justice and Constitutional Development in the Civil Justice Reform Programme (CJRP) (2012: pp14-20) by simplifying lengthy and complex court processes and implementing ADR in the form of mandatory mediation in order to settle out of court. The intention is to implement these court based mediation rules gradually commencing in 2012. However, Joubert and Jacobs (2012) are of the opinion that for this process to be successful, the voluntary process of mediation would be considered an obstacle (online).

3. The standard ADR process compared to current practice

Table 1 compares the standard practice of mediation to current practice as adopted in the South African construction industry. The table is divided into two columns; the left column is an illustration by Moore (1986) of the standard mediation process in a detailed description which works through set stages. It is important to note that the process may be somewhat tapered to suit the hybrid type of ADR practiced in the South African construction industry, which is based on the conclusions of Povey's (2005:p6) research. The reader may find that the stages relating to current practice have been adjusted or eliminated to more accurately reflect the situation in the industry. Due to the possibility of the lengthy stages being questioned in regard to the construction industry, the process was adjusted to accommodate the trend to expedite the mediation process.

Table 1: The process of standard practice of mediation compared to current mediation practice

Standard practice of the mediation process	**Current mediation practice**
Stage 1: Initial contacts with the parties • Making initial contacts with the parties • Building credibility • Educating the parties about the process and selecting approaches	Stage 1: The dispute is reported according to JBCC PBA, 2007 Dispute Clause 40

Stage 3: Collecting and analysing background information • Collecting and analysing relevant data, dynamics, and substance of a conflict	Stage 3: The principal agent has all the information at hand
Stage 6: Beginning the mediation session • Opening negotiation between the parties • Establishing an open and positive tone • Assisting the parties in venting emotions • Assisting the parties in exploring commitments, salience and influence	Stage 6: Beginning the mediation session • Opening negotiation between the parties • Establishing the problem • Facilitator offers an opinion for a settlement
Stage 9 Generating options for settlement • Generating options using either positional or interest-based bargaining	
Stage 10: Assessing options for settlement • Reviewing the interests of the parties • Assessing how interests can be met by available options • Assessing the costs and benefits of selecting options	
Stage 11: Final bargaining • Reaching agreement through either incremental convergence of positions, final leaps to package settlements, development of a consensual formula, or establishment of a procedural means to reach a substantive agreement	
Stage 12: Achieving formal settlement • Identifying procedural steps to operationalise the agreement • Establishing an evaluation and monitoring procedure • Formalising the settlement and creating an enforcement and commitment mechanism	Stage 12: Achieving formal settlement

Source: (Adapted from Moore, 1986: p32; Povey, 2005: pp2-7).

Stages 2, 4 and 8 regarding the strategy, design and hidden interests were eliminated due to the existing involvement of the professional fulfilling the role of principal agent or project manager. In standard practice, mediation may be conducted by a natural person however; in the construction, industry mediation is invariably conducted by an expert.The hybrid form of mediation practice to suit the needs of the fast track nature of the industry is illustrated.

4. Research methodology

A literature review was conducted to identify the current trends of ADR practice in the South African construction industry in order to compare these with international standard practice. The research followed a mixed methods approach gathering qualitative and quantitative data. A questionnaire survey was conducted to determine the preference for the methods of ADR and how important the respondents consider these methods to be, to what extent conciliation will prevent differences developing into disputes and the application of ADR. In addition to this, the respondents were requested to give their opinion of current practice in the industry. One hundred questionnaires were distributed with a 45% response. Interviews were also conducted to determine the current situation in the industry. The results of the data analysis are addressed in the findings.

5. Findings

The evaluative process of mediation is implemented successfully in so far as disputes are being settled however; the qualitative data analysis suggests that the facilitative process is lacking. The quantitative data suggests that professionals in the construction industry are in favour of applying ADR which produces the advantages relating to the Four C's. Although respondents rated themselves as knowledgeable of the process, the qualitative data indicates that the psychological component is being disregarded by professionals. The qualitative data contradicts the quantitative data in so far as professionals have indicated that they do not have "the time to waste" on the psychological needs of the parties because they have "a business to run". A statement by a respondent such as "I make the decision for the parties and tell them that this is how the dispute will be resolved" suggests that an autocratic approach tends to be used in the resolution of disputes. This suggests that professionals are aware of the requirements for effective facilitation and have limited time available for implementation.

Figure 1 illustrates the quantitative data relating to the effectiveness and the satisfactory end results experienced by the respondents. This supports the notion that the basic fundamentals are in place.

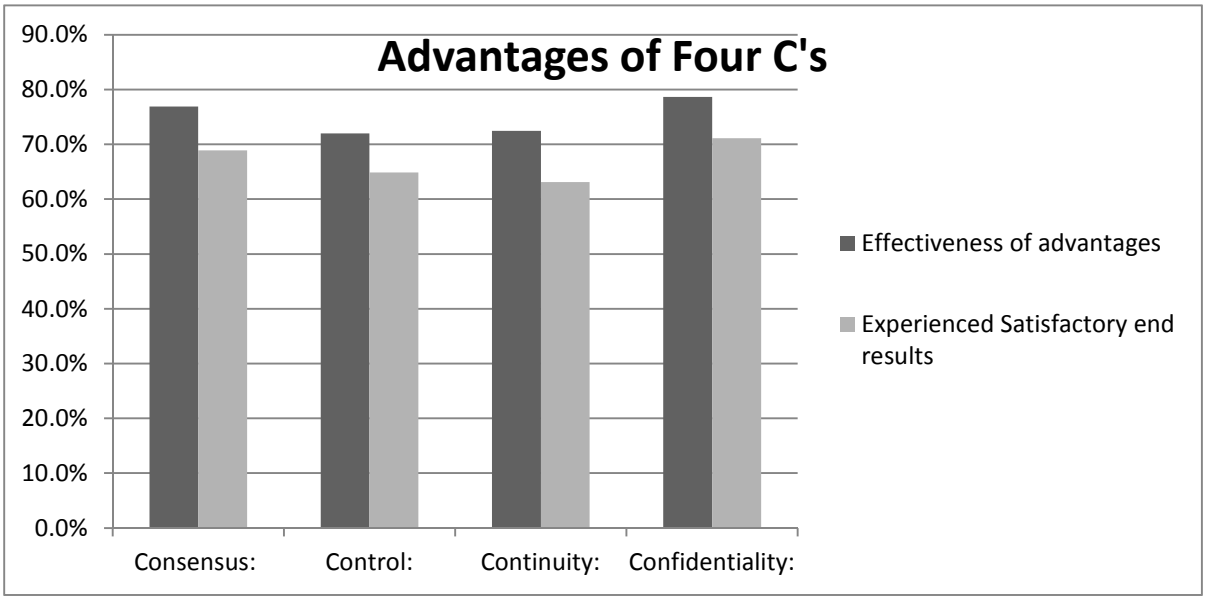
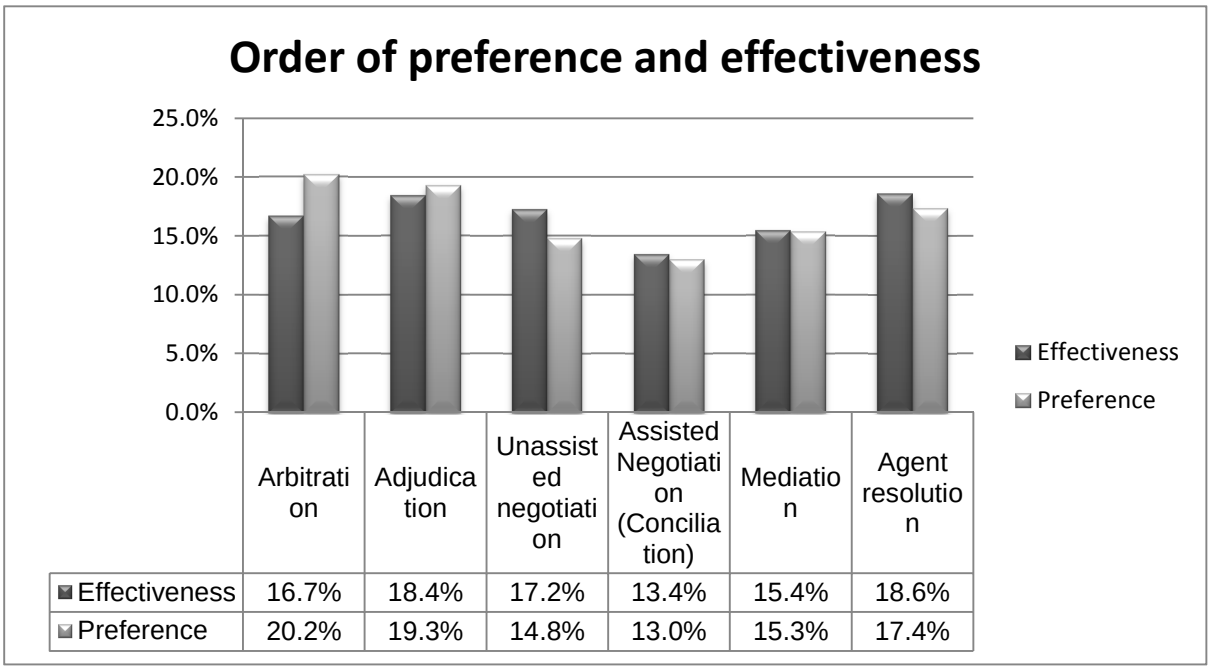


Figure 1: Advantages of the Four C's

Secondary data indicates that there is a preference for mediation however; according to the data analysis, the trend is changing towards adjudication. This is also supported by the literature review. Arbitration was also identified as a preferred method, which suggests that it holds its stance as the support system to ADR. Although DAB's are considered to be effective, the cost implications on smaller projects limit the use of this method.

Figure 2 depicts the order of preference for the various ADR methods and the respondents' opinion on their effectiveness. Respondents prefer arbitration closely followed by adjudication. Agent resolution is considered the most effective method with a rating of 18.6% and conciliation the least with 13.4%.



	Arbitration	Adjudication	Unassisted negotiation	Assisted Negotiation (Conciliation)	Mediation	Agent resolution
Effectiveness	16.7%	18.4%	17.2%	13.4%	15.4%	18.6%
Preference	20.2%	19.3%	14.8%	13.0%	15.3%	17.4%

Figure 2: Order of preference and effectiveness

Contrary to the findings of the order of effectiveness and preferences as depicted in Figure 2, Figure 3 indicates that respondents are of the opinion that conciliation will prevent differences developing on site to the extent of 68%.The respondents were divided into age groups to determine at which point the application of conciliation is considered important in preventing differences occurring on site. The advantages of conciliation are realised with experience. Although agent resolution is not included in the JBCC PBA (2007) Dispute Clause 40, it may be related to conciliation in so far as these skills are used to apply the method (pp30-31). As such, this highlights the importance of conciliation on site.

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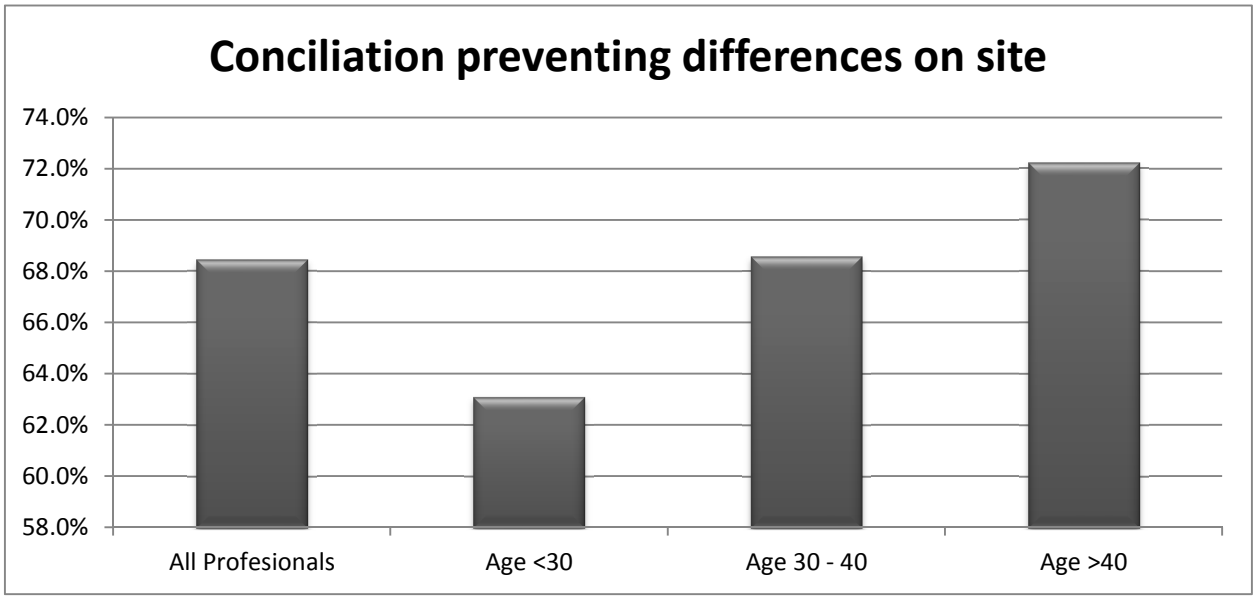

Figure 3: Conciliation preventing differences on site

6. Discussion

ADR practice has evolved to suit the needs of the industry and this has led to a form of practice which differs from standard mediation practice as identified in the literature review. Having identified the current situation in the industry the question is, what future events are likely to influence current trends?

Professionals in the construction industry have practiced ADR to suit the needs of the industry since the original introduction to mediation. As depicted in the comparison of standard with current mediation practice, the hasty nature of the construction industry lends itself to expediting the resolution of disputes rather than applying ADR according to the identified requirements. Measures may need to be taken to encourage professionals to apply the mediation rules in regard to the application of conciliation as an element of mediation.

Mandatory mediation and adjudication may have a negative impact on time and cost goals as opposed to the use of the expertise of the professional on site. The Department of Justice is currently systematically introducing mandatory mediation and the changing trend toward adjudication suggests that the intention is to follow suit. Although the current voluntary process is considered a hindrance, the construction industry has a history of applying ADR to suit the needs of the industry. This suggests that the construction industry will in all probability continue practice to suit their needs. The opinion of professionals in regard to the focus of adjudication (with possible statutory intervention) may require further research. However, mandatory mediation may present a challenge in a fast track industry.

7. Conclusion

From the introduction of mediation dating back to 1976, the applications of the ADR methods have been adapted to suit the needs of the industry. As such, it is concluded that although ADR practice may be facing challenges in the future and the evolutionary trends remain

constant, the hybrid form of ADR practice may in all probability continue unless the change is forced on professionals in the form of regulations. The consensual basis of ADR in the dispute clauses of the various contracts is supported by the industry and professionals are aware of the advantages. However; the application of conciliation and the realisation of the importance of settling differences on site before a dispute develops are lacking.

The consensual approach to ADR in the South African construction industry is effective without statutory intervention in so far as it gives contracting parties the opportunity to use the method of dispute resolution best suited to their needs.

8. Recommendations

Despite the implementation of mandatory mediation and the probability of statutory involvement in adjudication, it is recommended that more emphasis be placed on the advantages of and subsequent implementation of effective conciliation for the successful completion of projects

It is further recommended that institutions may consider providing opportunities for professionals in the industry to update their knowledge of ADR in the form of Continuous Professional Development and that emphasis should be placed on conciliation and the changing trends which are taking place.

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