

Dispute Resolution alternatives: Problems, Preference and Process

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Abstract:

Purpose of the paper: This paper serves to identify some professionals' opinions of various dispute resolution methods, the problems related to project communication which may cause differences and disputes in respect of construction projects and suggested processes.

Methodology/Approach: Two studies were conducted. A case study (Study 1) was undertaken with 10 construction professionals who worked on a large shopping centre development project, which experienced problems with communication and disputes. This study enabled the identification of communication problems that may lead to disputes in answering problems, preference and process questions.

Study 2 was a follow-up to previous studies. Part of this study was also conducted to further test opinions regarding dispute resolution processes and preferences as well as the reasons for selecting Alternate Dispute Resolution (ADR) methods. A captured respondent group of 26 quantity surveyors were requested to respond. The response rate was 100%.

These studies enabled the researchers to identify communication problems, preferences as well as methods and procedures that may assist project teams in resolving disputes in an amicable manner. Various dispute resolution methods were analysed and reviewed to determine problems, processes and preferences related to dispute generating issues and Alternative Dispute Resolution methods.

Results: Results enabled the researchers to identify an approach to the methods that may be used to influence effective dispute resolution between clients and contractors. The studies also identified communication problems and elements of good dispute resolution processes and strategies. Structured communication management and continuing interaction are basic elements to avoid disputes; however, the implementation of a tested dispute resolution method and process is important.

Value: The results of this study may assist professionals and contractors by enabling them to identify problems and to select the most appropriate processes and forms of dispute resolution methods. These processes or forms of dispute resolution methods should be agreed upon in cases where differences and disputes arise and where the settlement of these disputes has to be anticipated.

Key words: Claims, Communication, Construction Industry, Disputes, Professions.

1 Introduction

The beloved South African attorney, politician and writer, C.J. Langenhoven, quipped a century ago “Litigate for a jacket, but keep the trousers ready for the legal costs”, admitting then that the litigation route is a costly process and should be avoided if possible (Translation from Scanell, 1993:49).

It is proposed that a closer look at Alternative Dispute Resolution methods (ADR) should be considered. They are less adversarial, time consuming and costly, and may become more valuable (Finsen, 2005:221-222).

The objectives of this study are to firstly identify some dispute resolution problems and then to analyse ADR methods in use and investigate the preferences in order to understand which processes and methods may be used to resolve construction disputes.

2 The goals of claims and dispute resolution

The goals of claims and dispute resolution are firstly to establish the right of any party to submit a claim, and secondly to enable the other party to consider the claim in terms of its validity, contractual terms and possible outcome (Verster, 2006; Chappell, Powell-Smith & Sims, 2005:3).

Lodging or considering a claim does not mean that a dispute exists, but should the rejection of a claim occur, or agreement not be reached, or a different interpretation of a claim or opinion exist, one has to realise that a dispute may then be lodged. Dispute resolution should then assist the parties in resolving such an impasse in a cost effective, satisfactory and timeous manner (Verster, 2006).

An alternative dispute resolution method, like mediation was developed for various reasons, but mostly because the traditional processes, for instance litigation, were seen to be less favourable for the following reasons:

- Cost – Attorneys, senior council and expert witnesses, all contribute to heavy costs being incurred by both parties;
- Time – long waiting time for court dates where cases were often postponed for on-site visits, calling for expert witnesses, etc.;
- Most magistrates or judges are not specialists in the field of construction; and
- The outcomes often cause more damage.

(Finsen, 2005:221-222; McKenzie & McKenzie, 2009:251-254; Mackie, 1991:66).

3 The processes: Alternate Dispute Resolution Methods

The following are some of the ADR methods used in the construction industry, all having the common goal to resolve disputes voluntarily and initiated by the parties themselves:

- Agent resolution;
- Informal discussion;
- Negotiation;
- Mediation;
- Conciliation;
- The mini trial;
- Engineering expert assessment;
- Adjudication;
- Dispute Review Board;

- Partnering; and
- Dispute Resolution Advisor System (Tiruneh, Verster & Kotzé, 2007; Verster, Ramabodu & Van Zyl, 2010).

3.1 Choice of ADR Methods

For the purpose of this paper, the following five methods were investigated:

- Agent resolution;
- Adjudication;
- Conciliation;
- Mediation; and
- Arbitration.

The various ADR methods are briefly discussed to show the background of the elements and methods covered by the surveys and what was understood by each method under consideration.

3.2 Agent Resolution (expert resolution)

Traditionally, in the South African context, agent resolution (usually the architect) was the first stage towards resolving differences and disputes. The resolution by this agent was final and binding unless disputed within an agreed period (Quail, 1978:11-12, 166; Finsen, 2005:32-33). In terms of the Joint Building Contracts Committee (JBCC) (2004:30), the principle agent shall give a decision, on request by the contractor, should there be any disagreement between the parties. Such a decision shall be final and binding unless timeously disputed. This clause has however been removed in the latest editions of JBCC Series 2000 (JBCC, 2007:30)

3.3 Adjudication

Adjudication is an accelerated form of dispute resolution in which a neutral, impartial and independent third party deals with the dispute as an expert and not as an arbitrator, and whose determination is binding unless and until invalidated or overturned by an arbitration award (Hibberd & Newman, 2001). The adjudicator shall not advise the parties or their representatives regarding any aspect of the agreement in respect of which he has been appointed other than in accordance with stated rules (JBCC, 2005: cl. 1-7)

The adjudicator's written determination of the dispute shall:

- be delivered to the parties, and
- outline reasons for his decisions (JBCC, 2005, cl. 6 -7).
- The decision is final and binding until and unless reversed by an arbitrator (JBCC, 2007:30)

3.4 Conciliation

Conciliation involves a process of bringing disputing parties together in a forum to investigate the problem and assist the parties to formulate their own solutions; the conciliators may also be requested to formulate their own opinion.

The parties decide who the conciliator will be. The conciliator should, however, be a person with good communication skills and relevant knowledge (Loots, 1991:8-13).

3.5 Mediation

Mediation means different things to different people, but in the construction industry, it usually denotes a procedure in which a neutral third party seeks to resolve a dispute between contracting parties through mutual agreement, by conducting an enquiry, similar to arbitration, but less formal and by giving a non-binding opinion. The parties represent themselves without calling in legal professionals. The mediator should know the details of the dispute and should give each party the opportunity to state their case. The mediator should decide on the best procedure, based on circumstances (Eilenberg, 2002; Finsen, 2005:230-232; Hibberd & Newman, 2001; McKenzie & McKenzie, 2009:174; Quail, 1978:11-12).

Quantity surveyors often perform mediation tasks for clients or other parties, be it informal as a quantity surveyor, or a formal mediator by appointment. However, in terms of many contracts, JBCC, the parties shall agree on the appointment of a mediator and meet with the mediator in an effort to reach a settlement. If a settlement is reached, the mediator shall record such an agreement which shall become binding on the parties on the signing thereof (JBCC, 2007:31).

3.6 Arbitration

In some countries, arbitration is a process provided for by an act of law, adopted by parties through mutual agreement, stipulating that they will submit any dispute that may arise between them to the impartial judgement of some third party of their choice and that the award by this impartial person will be final and binding. Arbitration is not a new process; in fact, it was known to the Romans, used by the Dutch and English in the days of colonial expansion and is currently widely used in the construction industry and further afield (Finsen, 1999: 203-204).

Binnington (2005:49-50) suggests approaching an arbitrator rather than a lawyer. He further mentions the importance of securing a competent arbitrator, one well acquainted with the process of arbitration.

In South Africa, arbitration is regulated by an act of parliament (South Africa 1969, Act 42).

Arbitration is a more formal process than other dispute-resolution processes mentioned earlier, but arbitration has many advantages. Some of these are:

- Expert knowledge of a selected arbitrator;
- Possible savings in legal representation costs;
- Flexibility of the process;
- The decision is final and binding;
- Time and money are saved; and
- Arbitration is a private matter (Butler & Finsen, 1999; Eilenberg, 2002; Finsen, 2005:216-217; McKenzie & McKenzie, 2009:235-236).

Arbitration is sometimes also criticised as being only marginally quicker than litigation, especially where FIDIC documents are used (Binnington, 2005:49-50).

4 The studies: Problems and Preferences

Two different studies related to communication, problems and dispute resolution methods were undertaken by the University of the Free State and evaluated to identify problems related to communication and disputes and to identify construction professionals' opinions of various processes and methods available to solve these problems. These studies followed previous surveys in respect of the same problems, but were also aimed at understanding the problems related to communication that lead to relationship disruptions and disputes.

4.1 Study 1: Case study related to communication problems

Study 1 was a case study conducted with 10 quantity surveyors. The case study project (shopping centre) investigated was not unique in respect of problems related to communication, communication instruments, claims and counter claims, and differences of opinion. Due to many communication problems, differences, claims and disputes related to the project, it was however seen as a good example to investigate.

The original contract was concluded between the main contractor, an international company, and a client who operates throughout South Africa. The amount involved was about ZAR500 million. This

amount was based on the provisional bills of quantities method, of which about 50% of costs were for building and structural work and 50% for specialist installations included in the contract sum as provisional sums. A project manager was appointed after the production process commenced and communication systems were largely changed by him. Many sub- and direct contracts had to be concluded with specialists. The complexity of many contracts and changes in communication systems added to the difficulties.

The research project aimed at analysing the opinions and perceived frustrations of the quantity surveyors who, on behalf of the client, had to develop tender and contract documents, cost reports, notifications, payment valuations and general cost and cost planning communications during the design and construction process.

The 10 quantity surveyors who were involved in the project in various capacities were interviewed, and responded to a specific questionnaire related to the main aspects that were identified as quantity surveying elements. These aspects are: communication instruments (13 questions) and the effectiveness of these instruments (8 questions).

The responses to the questions enabled the research group to identify the most serious problems and suggested solutions. For this paper the most serious problems are identified.

Table 1 shows the identified communication instruments, related to this project, that were considered as the most serious problem areas.

Table 1: Results in respect of some identified instruments used in the case study

Source: University of the Free State, 2007. (Ratings: 1= low, 3= intermediate, 5 = high)

OPINIONS ON COMMUNICATION INSTRUMENTS USED	Average Result 1-5	%
• Employer's instruction	1.6	34%
• Packages (identification of work packages by project manager)	2.1	42%
• Claims communication	2.4	48%

The 10 respondents' opinions (100% response) on the communication instruments, used during the project, were tested (on a scale of 1 = poor and 5 = excellent).

It is clear that the employer's instructions and the identification of packages (tenant installations, refuse removal, shop-fronts, etc.) lead to disruption and eventual disputes linked to pricing, delays, uncertainty and frustration. Notification of claims was also, according to the survey, not managed well and timeously.

Table 2 shows the results in respect of general communication elements. It is also clear that the following communication processes performed below average in respect of expectations of quality procedures, and thus also influences effective management and claims communication.

Table 2: Results in respect of all general communication elements

Source: University of the Free State, 2007. (Ratings: 1= low, 3= intermediate, 5 = high)

COMMUNICATION ELEMENT STATEMENTS	Average Result %
• Drawing distribution was managed well and on time	46%
• Professional team had an effective relationship within the team	48%
• The Project manager's communication was effective and well managed	44%
• Owner/professional team relationship was managed effectively	32%
• Time and programming was managed well	34%
• Budget was clear and met the owner's strategy	44%
• Professional agents empowered to do their work well	40%

The respondents were clear on their opinions related to the effectiveness and quality of general communication in respect of the specific project and the problems identified. (Tables 1 and 2). The overall opinion was that these problems were not identified early and managed well, leading to disputes.

Clear problems were thus identified. The elements that stand out in respect of communication disruptions are:

- Site, employers and contract instructions;
- Identification of work packages by project managers;
- Drawing distribution and design availability;
- Professional teams' relationships;
- Project Manager's project communication;
- Owner / professional team relationships and empowerment;

- Time and programme management was not done well; and
- Strategy of budget and scope management.

The current situation regarding the project is that the final account cannot be settled and many claims and resolutions are outstanding. Many claims for delays are not resolved. The above-mentioned communication disruptions and problems influenced communications negatively. A clear communication strategy was absent and this contributed further towards the unacceptable state of affairs. These results show not only the importance and need for a structured communication process to avoid disputes, but also a model to deal with disputes once disputes are evident. This model should enable stakeholders to identify problem areas early, manage these problems through a tested process and taking the preference of the parties into account.

4.3 Study 2: Quantity Surveyors and ADR reference

Study 2, conducted among 26 quantity surveyors, aimed at establishing the preference rating of various dispute resolution methods (processes), their opinions in respect of the reason why a specific method is selected, and the success rate of the methods actually used. All responded, reflecting a 100 % response.

Table 3 shows the preference rating of respondents related to the tested dispute resolution methods.

Table 3: Preferred dispute resolution methods (1 = Not preferred, 5 = most preferable)

Preferred dispute resolution methods	Quantity Surveyors average	Previous study (2006)
• Resolution by Principal agent	4.39	4.3
• Conciliation	3.88	3.4
• Mediation	3.86	4.0
• Adjudication	3.82	3.2
• Arbitration	3.10	3.0
• Litigation	2.00	-

The responses indicate that the processes allowing for communication and early solutions are preferred, and that it should be done by people who are closely linked to the project. Resolution in terms of negotiations by Quantity Surveyor / Principal Agent, are seen as the most preferred method. This study is fairly consistent with previous studies, although previously mediation was ranked higher and also received a better average score.

4.4 Study 2: Reasons for selecting an ADR method

This study was also conducted to show the reasons why an ADR method was selected. The reason for this study was also to identify the reasons linked to the preference of methods and by doing so, to enable parties to select the best claims and dispute resolution communication procedure.

Table 4 shows the reasons for choosing a specific ADR method

Table 4: Reasons why method is preferred: percentage average allocated

Reasons	Percentage
Control	86%
Cost effective	85%
Time effective	84%
Consensus	84%
Satisfactory end result	82%
Continuity	82%
Confidentiality	82%

Percentages allocated to the reasons why a specific ADR method should be used are important and consistent. Although control and cost effectiveness received the highest percentage from the respondents, the results show little difference of opinion, and all the reasons should be seen as important, leaving the selection of a most beneficial method to the parties concerned.

5 Findings

The results show the importance of quality and effective communication instruments, and also that these should be well managed to avoid communication problems, disruptions and disputes.

The most serious problems in respect of communication that may lead to disputes were identified. In the study the following problems were seen as very serious.

- Employer's instructions;
- Employer/professional team relationship;
- Mismanagement of time and programming; and
- Professional agents' non-empowerment.

It is evident from this study that the professionals prefer the following ADR methods. The studies related to preferences show a consistent result.

- Agent resolution/negotiation type of process;
- Conciliation;
- Mediation; and
- Adjudication.

The above- mentioned results suggest that dispute resolution methods and the selection of a method could possibly address the above-mentioned reasons why some ADR methods are preferred, or at least a combination of the reasons, to ensure the risk and interests of the parties are taken into account and managed well. Resolution methods that do not address these issues should be avoided.

6 Conclusion

The studies had the objective of identifying the most serious problems related to communications that may lead to disputes and the extent to which various dispute resolution methods are preferred and used in South Africa, as well as the perceived reasons why an ADR method should be used. According to the majority of the respondents, ADR methods are preferred to traditional litigation to solve disputes. Of the various types of ADR methods that respondents were involved in, mediation, negotiation type methods and expert (agent) resolution stood out as the most preferred methods. Respondents also identified the reasons why they prefer ADR to traditional methods. The selection was mostly motivated by control by the parties and time- and cost-effectiveness. The case study showed that bad communication and communication instruments may lead to disruption and disputes. The management of communication is therefore fundamental to avoiding disputes.

7. Recommendations

7.1 Problems

Important problems were identified and it is thus recommended that the possible occurrence of these problem areas should receive special attention. This will lead to better communication, less disruption, lower costs and a decline in the number of disputes. A dispute resolution with strong supporting communication enhancing procedure is recommended.

7.2 Preferences

If the strong preferences for specific ADR methods are considered, it is clear that these methods should form part of the contractual and communication arrangements. It is thus specifically recommended that contracts should include clauses that allow continuous communication to avoid disputes and include methods that will enhance the settlement of differences rather than an early formalised dispute resolution process in a court-type situation.

7.3 Processes

The reasons why a specific ADR method is selected should be considered to lead parties to a contract to design a communication, claims and dispute resolution procedure that best suit their needs and that will be effectively communicated and managed by their professional teams.

The following organogram (Figure 1) reflects a provisional proposed model that shows the relationship and link between the three P's; namely problems, preferences and processes.

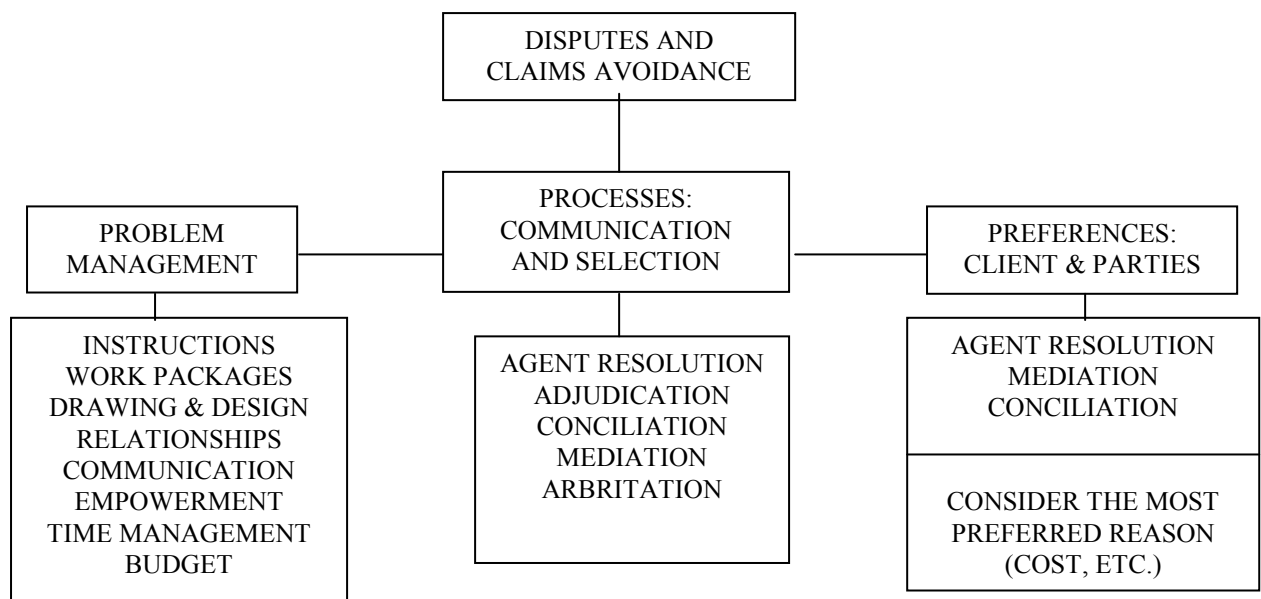


Figure 1: Proposed Model

The aim of the proposed model is to assist parties to a contract to seek a procedure that best suit their needs, but that will also take the problems that may become evident during the construction process, based on past experience, into account and to select the best ADR method applicable to them.

An approach to enhance communication and a management and contractual system that identifies problems early and that helps with the selection of an applicable process based on business principles preferred by the parties is thus proposed. The above-mentioned model therefore shows a recommendation in respect of these considerations.

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