

MDA CONSULTING



FIRST AID FOR CONTRACTS

Eighth Edition

Prevention is Cheaper than Cure

August 2016

GENERAL: THE TWO A'S IN ADR – ADJUDICATION AND ARBITRATION



+ Author: Taryn van Deventer

We have heard a lot about the new Construction Regulations published by the Construction Industry Development Board (“CIDB”) and certainly there has been many an article or commentary published on the regulations.

As the rumour mill turns however, we hear that the regulations have come under scrutiny by the Department of Justice (which was asked to provide comment thereon by the Department of Public Works) and that the process of promulgation has been somewhat

stalled.

But, that is not what this article seeks to address.

The purpose of this article (whilst some may say it is perhaps pro-promulgation propaganda) is really to have a look at the differences between adjudication and arbitration as dispute resolution mechanisms, and examine why adjudication (and the Regulations by creating statutory adjudication) is really a positive and forward thinking manner in which to resolve disputes, more specifically in the current economic climate.

The Comparison

Arbitration

Arbitration is a very similar process as litigating out of the High Court but is governed by the Arbitration Act No. 42 of 1965. It is used by parties to manage the court process themselves rather than being before a Judge, meaning the parties have more autonomy and control of the process. There are a number of administrative bodies, such as the Association of Arbitrators and the Arbitration Foundation of South Africa who not only appoint arbitrators on application by a party but also publish rules on how to administer the process.

The parties to the arbitration exchange high level pleadings, attend to the discovery of documentary evidence, lead oral witness testimony, appoint advocates to run the hearing and to examine the witnesses before an arbitrator and the strict rules of evidence apply. All in all, the process is largely adversarial and the arbitrator’s decision is usually final and binding and may be made an order of court by either party.

Adjudication

Adjudication is a relatively new concept in South Africa and whilst it is included in our standard form construction contracts and is promoted by the CIDB, we still find a lot of the employer bodies amending the special conditions of the standard forms, or creating bespoke agreements, which exclude the option of adjudication. Adjudication to those who come from a strictly legal background, is a very rough and ready form of dispute resolution. There are very short time frames for “pleading”,

there are no rules of evidence, there is often no hearing and the matter is usually decided on the papers and therefore there is no witness testimony, cross examination or oral evidence. Often adjudication is used as the first instance of dispute resolution as it is viewed as interim or not fully binding until such time as the period within which to dispute the decision (usually 28 days) has passed.

A summary of the two for ease of reference:

	Adjudication	Arbitration
Time frames	Much shorter than arbitration. Time frames prescribed by the contract.	May extend over a long period. Time frames agreed by the parties.
Costs	Lower than arbitration.	Higher costs
Confidentiality	Private but may become public if an award is enforced through the Court as court papers are public documents.	Private.

A summary of the two for ease of reference: cont.

	Adjudication	Arbitration
Formal process	Very informal, strict rules of evidence do not apply but procedural rules may be imposed.	More formal, rules of evidence apply, procedural rules may be imposed.
Hearing	May be decided on the papers. It is within the discretion of the adjudicator to call for a hearing or up to the parties to agree to it. Usually matters of interpretation are decided on the papers but it is good practice to hold a hearing should there be a dispute of fact.	The general rule being similar to litigation that where there is a dispute of fact a hearing will be held.
Witnesses being called & cross examination	No	Yes
Discovery of documents	No	Yes
Expert witnesses required	Not as a rule but expert or forensic planners are often used.	Generally required in construction disputes.
Briefing counsel (advocates)	Optional but advisable in instances where a hearing is held.	Yes
Final and Binding	Binding unless or until overturned in arbitration or court. Strict time frames within which to dispute the decision however.	Immediately binding. The decision may be subject to appeal if the parties so agree.
The next step in the dispute process	Arbitration or Court	Potentially no next step unless the parties agree to an appeal in the arbitration agreement.

The attractive option

So if adjudication isn't final, doesn't always cater for a hearing and the dispute may well end up in arbitration (if a party files the prerequisite notice of dissatisfaction in the time frame required), then why bother with it? Is it really an attractive option?

The answer to the above questions is one rooted in the practicalities of a construction contract as

well as the economic climate we find ourselves in.

In a construction contract cash flow is king, without positive cash flow across projects taken on (or a balance or some sort whereby one project can fund another) contractors may find themselves staring down the business rescue barrel or worse off facing liquidation and the smaller subcontractors don't have the ability to "bank roll" a job like some of their bigger counterparts.

This is really where adjudication comes to the assistance of the contractor, whilst it may not provide a long term solution, and the parties may end up in arbitration in any event, but what it does is provides the contractor with a speedy solution that the contractor can initiate without too much time and expense on legal fees (the longer the clock ticks the higher the legal bill), that is immediately enforceable as a payment under the contract in question and the contractor is entitled to payment regardless of whether or not the counterparty wishes to dispute the ruling by way of arbitration.

Whilst adjudication is an interim solution to what may end up a longer battle, it does for the contractor that which is vital it allows cash flow to resume and the project to continue without the fear of liquidity issues.

Everyone wins

Whilst adjudication arguably assists the contractor to a greater extent than the employer, it must be borne in mind that it also allows a project to continue and assists with the ventilation of issues which may not be appropriate for a drawn out arbitration process when weighing up the quantum.

It really provides both parties with a solution far more beneficial than our other alternative dispute resolution methods that we see in contracts (such as mediation or the meeting of executives to resolve a dispute).