

**Dispute resolution under the general conditions of contract
2010**

by

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Abstract

In the light of the nature of the construction industry and the fact that it is often burdened with disputes arising from the contract, appropriate and unique alternative dispute resolution procedures are indispensable for disputes to be resolved quickly, efficiently and effectively. Section 34 of the *Constitution of the Republic of South Africa*, 1996 provides for the right to have disputes resolved by means of a public hearing before a court, alternatively, where appropriate, by means of an independent, impartial forum. Arbitration, mediation, conciliation and adjudication, to name but a few, are alternative methods used in resolving South African construction disputes. Some of these alternative dispute resolution (ADR) methods are provided for in the Construction Industry Development Board recommended standard contracts. This study entails an analysis of the ADR methods in construction agreements with specific reference to the General Conditions of Contract for Construction Works 2010 (GCC 2010) and a comparison thereof with the English position. The application of the recommended ADR methods in the South African construction industry, especially adjudication, faces many challenges. There is no certainty as to the definition nor the procedure to be followed in the use thereof. The study concluded that there is a definite need for the contract to be reviewed, in particular the dispute resolution clause. The introduction of on-line dispute resolution was also recommended. This will contribute towards efficient, effective and expedient dispute resolution that is required due to the nature and role of the construction industry in a country's economy. There is also a definite need for legislation to be implemented which will assist in clarifying as well as regulating the adjudication procedure as used in the South African construction industry.

Key words: GCC 2010; ADR; arbitration; mediation; adjudication; construction contracts

Opsomming

Gegewe die aard van die konstruksiebedryf, asook die feit dat dit dikwels met geskille voortspruitend uit kontrakte belas is, is gepaste en unieke alternatiewe geskilbeslegtingsprosedures onontbeerlik vir geskille om vinnig, doeltreffend en effektief opgelos te word. Artikel 34 van die *Grondwet van die Republiek van Suid-Afrika*, 1996 maak voorsiening vir die reg om geskille wat deur die toepassing van die reg besleg kan word, in 'n billike openbare verhoor voor 'n hof beslis moet word of, waar gepas is, 'n ander onafhanklike en onpartydige tribunaal of forum. Arbitrasie, bemiddeling/mediasie, konsiliarie en beoordeling, om 'n paar te noem, is alternatiewe metodes wat gebruik word, om Suid-Afrikaanse konstruksie geskille op te los. Die '*Construction Industry Development Board*' se standaard kontrakte maak vir sekere van hierdie alternatiewe geskilbeslegtingsmetodes (ADR) voorsiening by wyse van 'n aanbeveling. Hierdie studie behels 'n ontleding van die ADR-metodes in konstruksie ooreenkomste, met spesifieke verwysing na die '*General Conditions of Contract for Construction Works 2010 (GCC 2010)*'. 'n Vergelyking van die ADR-metodes sal daarna met die Engelse posisie getref word. Die toepassing van die voorgestelde ADR metodes in die Suid-Afrikaanse konstruksiebedryf, veral beoordeling, staar baie uitdagings, deurdat daar geen sekerheid oor die definisie en die prosedure wat gevvolg moet word bestaan nie. Die studie het bevind dat daar 'n besliste behoefté is om die kontrak, sowel as die dispuum resolusie klousule te hersien. Die bekendstelling van '*on-line*' dispuum resolusie is ook aanbeveel. Dié sal bydra tot doeltreffende, effektiewe en wenslike dispuum resolusie, wat as gevvolg van die aard en rol van die konstruksiebedryf in 'n land se ekonomie, benodig word. Daar is ook 'n definitiewe behoefté om wetgewing te implementeer wat sal help om die beoordelingsprosedure en -proses te verduidelik, sowel as om die gebruik daarvan in die Suid-Afrikaanse konstruksiebedryf te reguleer.

Sleutelwoorde: GCC 2010; ADR; arbitrasie; mediasie; beoordeling; konstruksie kontrakte.

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List of Abbreviations

AB	Adjudication Board
ADR	Alternative / Amicable / Appropriate Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CIDB	Construction Industry Development Board
FIDIC	French acronym for International Federation of Consulting Engineers
GCC	General Conditions of Contract for Construction Works
ICE	Institute of Civil Engineers
JBCC	Joint Building Committee Contract
NEC	New Engineering Contract
SAICE	South African Institute of Civil Engineers
TCC	Technology and Construction Contract
UNCITRAL	United Nations Commission on International Trade Law

Chapter 1

Introduction

Construction law spreads across a vast spectrum of legal disciplines. It is interrelated with many areas of the law for example contracts, delicts, company and enterprise law as well as conflicts of law to name but a few. The one relevant discipline of particular importance, especially to this study, is the law of contract. The terms and definitions found in construction contracts are of great importance in that they govern the agreement of the contracting parties, attempt to eliminate ambiguity and provide a framework for the resolution of contractual disputes arising therefrom.¹ South Africa is no exception. South African construction law is largely governed by the agreement between the parties.

Historically the South African construction industry utilised numerous contracts which contained a wide variety of terms. Contractors were required to enter into contracts that were ambiguous and complex as well as unduly one-sided, with the contractor having to accept almost all the risk in terms thereof. Huge disarray in contract management and dispute resolution were some of the repercussions. A further factor contributing to the disarray in the construction industry was that there were hardly any regulatory provisions pertaining to dispute resolution or the construction industry itself. This to a large extent is still the current position in the South African construction industry.²

During 2000 the *Construction Industry Development Board Act*³ was published. It established a regulatory statutory body known as the Construction Industry Development Board (CIDB). One of the objectives of the CIDB is to simplify and formalise the contracts that are to be utilised in

1 LAWSA 2(1) 2nd ed par 457; <http://definitions.uslegal.com/c/construction-contracts/>.

2 McKenzie *Law of Building and Engineering Contracts* 1; Loots *Construction Law*; Bateman GH The ICcheme International Forms of Contract *Construction Law Journal* 2011 Vol 27 No3 180.

3 38 of 2000. Hereafter referred to as the *CIDB Act*.

the construction industry.⁴ Other important objectives are to ensure that best practices in the construction industry are established to promote the uniform application of policies pertaining to the construction industry;⁵ best practices that promote social and economic objectives on a national level⁶ as well as providing leadership to construction industry stakeholders so as to stimulate ‘sustainable growth, reform and improvement of the construction sector’.⁷ The CIDB identified four main standard forms of contracts that are recommended for use in the industry.⁸ They are the Joint Building Committee Contract, the General Conditions of Contract for Construction Works 2004 (which has now been revised and is known as the General Conditions of Contract for Construction Works 2010 (GCC 2010)) and the New Engineering Contract 3 (NEC3). The last contract recommended by the CIDB is the FIDIC (a French acronym for the International Federation of Consulting Engineers) general conditions of contract.⁹ For the purposes of this study, focus will be placed on the GCC 2010.¹⁰

In the light of the nature of the construction industry and the fact that it is often burdened with disputes arising from the contract,¹¹ appropriate and unique alternative dispute resolution procedures are indispensable for disputes to be resolved quickly, efficiently and effectively.¹² The South African Constitution¹³ makes provision therefore in terms of section 34 by granting parties the right to have their dispute resolved by means of a

4 Section 4(f) *CIDB Act*.

5 Section 4(i) *CIDB Act*.

6 Section 4 (c) (v) *CIDB Act*.

7 Section 4 (a) & (b) *CIDB Act*.

8 The CIDB does not have the power to prescribe the content of the standard form of agreements. It can however, make recommendations. In practice the recommended standard form agreements are utilized in the industry.

9 *CIDB Construction Procurement Best Practice Guideline #C2 page 2*.

10 The reason for using this agreement is that it is the most commonly used in the industry.

11 Maritz T Investigation into Adjudication *Essays Innovate 3 2009* 78.

12 The disputes usually relate to technical aspects and can cause delays and have cost implications. This is not an ideal situation to be faced with in a construction project, as time is of the essence and parties need to preserve their working relationship during at least the duration of the contract so that the goals and objectives of the construction project may be reached.

13 *Constitution of the Republic of South Africa, 1996*.

public hearing before a court alternatively where appropriate by means of another independent, impartial forum.¹⁴ Arbitration, mediation, conciliation and adjudication,¹⁵ to name but a few, are alternative methods used in resolving South African construction disputes. Some of these are provided for in the CIDB recommended standard contracts.¹⁶ The English construction industry introduced adjudication, by means of legislation¹⁷, as its preferred alternative dispute resolution (ADR) method in the early 1990's.

This study entails an analysis of the ADR methods in construction agreements with specific reference to the General Conditions of Contract for construction works 2010 and a comparison thereof with the English position. The purpose of the study is to determine if the ADR methods provided for in the GCC 2010 are appropriate and how they can be improved.

A comparative study will be done between the South African position in terms of the GCC 2010 and the statutory adjudication measures used in England with regard to the resolution of disputes in the construction industry. There are various reasons for choosing the English law. England is seen as one of the forerunners in developing different dispute resolution methods; especially in the construction industry. Not only have the English developed new methods of resolving construction disputes, but they are also successful in the implementation of the different dispute resolution methods. The English legislation, more specifically the HGRC, has

14 There has been great debate as to whether section 34 of the Constitution restricts a party's right to contractual freedom and whether ADR methods limit the parties' rights to resolve a matter. The court's found in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (5) BCLR 503 (SCA), that section 34 is applicable to private disputes and there is nothing preventing contracting parties from consensually agreeing to resolve their dispute amicably and fairly by means of other forums. This section is of relevance in that it allows for parties to agree to alternative methods of resolving a dispute. Where applicable the Constitutional provision shall be applied and / or discussed to the central research topic.

15 Adjudication has various definitions. Further discussion will be provided in the chapters to follow.

16 GCC, FIDIC, JBCC and NEC3.

17 Statutory adjudication is enforced in England in terms of s108 of the *Housing Grants, Construction and Regeneration Act 1996 (HGCR)*.

influenced many other countries with regard to the use of ADR in resolving disputes in their construction industries. Examples are Germany,¹⁸ New Zealand, Northern Ireland and Australia.¹⁹

There is a scarcity of legal sources relating to the South African construction industry, in particular the GCC.²⁰ There is no legislation that regulates the terms and conditions of contract in the engineering and construction field.²¹ Furthermore, there are limited court decisions, scholarly research and legal articles that have been written on the topic of this study. The primary sources of reference will be industry related. However, there are numerous sources available in the field of ADR.

Chapter 1 provides the background to the research question posed. Chapter 2 provides a general discussion of alternative dispute resolution. Chapters 3 and 4 discuss the South African position in respect of the GCC 2010 and the statutory adjudication measures used in the resolution of disputes in the English construction industry respectively. A comparative analysis of the two aforementioned systems forms the content of Chapter 5. Chapter 6 concludes the study by furnishing recommendations whilst answering the research question.

18 Harbst R Adjudication on the rise in Germany *Construction Law Journal* 2010 Vol 26 No 8 698.

19 *New Zealand Construction Contracts Act* 2002 No 46, *Construction Contracts Act* 2004 (Western Australia).

20 The leading authors on the GCC are PC Loots, T Maritz, W Claasen.

21 The *CIDB Act* regulates the CIDB which has limited regulatory functions and therefore predominantly makes no more than recommendations.

Chapter 2

Alternative dispute resolution

2.1 *Introduction*

At times disputes involve specialised and/or technical elements. They may also involve reputational issues and/or trade secrets.²² As a result the parties may not wish to have their disputes aired in the public domain.²³ To add to this dilemma, resolving disputes by means of litigation was, and still is an adversarial process which ruins relationships, is rights based and is costly and lengthy. In addition the outcome is often unpredictable.²⁴ In addition to this, there is no guarantee that the presiding officer will be best equipped to deliberate on the matter.²⁵ Therefore over time society has sought other mechanisms of resolving disputes between parties rather than litigation.²⁶ These alternative methods have become commonly known as alternative (amicable and/or appropriate) dispute resolution methods²⁷ (hereafter ADR).

2.2 *Alternative dispute resolution*

According to Trollip, ADR is a process involving an independent third party to aid in the settlement of disputes outside the formal procedures followed

22 Ramsden P *Law of Arbitration* 1.

23 Brand J, Steadman F & Todd C *Commercial Mediation* 14.

Ramsden P *Law of Arbitration* 1.

24 Brand J, Steadman F & Todd C *Commercial Mediation* 14.

Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 88; Rao PC & Sheffield W *ADR* 82; Ramsden P *Law of Arbitration* 1.

25 Ramsden P *Law of Arbitration* 1; Rao PC & Sheffield W *ADR* 82.

26 Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 88; Ramsden P *Law of Arbitration* 1.

27 Trollip AT *ADR*; Goldsmith J, Pointon G, Ingen-housz A eds *ADR in Business* 6. A further acronym that is used in respect of resolving disputes by other means is EDR. EDR stands for early dispute resolution or effective dispute resolution. This method of resolving disputes will assist in resolving disputes at an earlier stage, with the aid of good contract management skills so as to avoid a dispute arising later alternatively resolving the dispute in an effective manner thus helping reduce costs, preserving the relationships between the parties and allowing the contract to continue. See further Goldsmith J, Pointon G, Ingen-housz A eds *ADR in Business* 6 – 7.

by the courts.²⁸ This definition is supported by Pretorius, who is of the view that ADR encompasses all forms of dispute resolution with the exception of litigation.²⁹ Pretorius is also of the opinion that ADR allows for the resolution of conflict and disputes by means of a process tailored for that particular conflict or dispute.³⁰ Those who promote ADR have indicated that the main goal of ADR is not to replace adversarial litigation but rather to provide a wide range of mechanisms and processes to parties to resolve their dispute.³¹ In the light hereof many ADR practitioners prefer the acronym to refer to appropriate dispute resolution.³²

2.2.1 Characteristics of ADR

ADR usually has important attributes. These are cost effectiveness, confidentiality, expediency,³³ the preservation of relationships, less formality, sometimes a less rights based approach,³⁴ and often the involvement of an independent, neutral third party.³⁵ The entire process is voluntarily entered into, even though the procedure may be contractually or statutorily³⁶ provided for.³⁷ The ADR method may be tailored to meet the

28 Trollip AT *ADR* 7; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 89.

29 Pretorius P *Dispute Resolution* 1.

30 Pretorius P *Dispute Resolution* 1.

31 Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 89; Pretorius P *Dispute Resolution* 1. Pretorius has listed 4 goals of ADR namely that ADR relieves court congestion and prevents undue delay and costs; it enhances community development in the process of dispute resolution; it facilitates access to justice and it provides for more effective dispute resolution. [See further Pretorius P *Dispute Resolution* 2].

32 Pretorius P *Dispute Resolution* 1.

33 The speed with which disputes are resolved by means of ADR has always been one of the main attractions of ADR. However, today this cannot be said about arbitration. Certain matters resolved by means of ADR take a long time, if not longer than the process of litigation and thus become quite costly.[See further Kopel S *Guide to Business Law* 5ed 59]; Cheung S & H CH Suen A Multi-attribute Model *Construction Management & Economics* 2002 Vol 20 No 7 561.

34 A resolution is sought in the interest of all parties rather than only determining the parties' rights. See further Goldsmith J, Pointon G, Ingen-housz A eds *ADR in Business* 9.

35 He/she is often someone with expertise in the field of the dispute which is not always the case with a presiding officer in a court of law.

36 An example of this is s108 of the *Housing Grants, Regeneration and Construction Act* 1996.

37 Pretorius P *Dispute Resolution* 6; Loots PC *Construction Law* 796.

unique requirements of each case.³⁸ The procedure is more flexible and less formal than court proceedings.³⁹

A further argument in favour of ADR is that ADR may be applied in any area of life so as to settle disputes of any nature, such as commercial, family, engineering and construction disputes.⁴⁰ Such disputes at times involve large sums of money as well as complex factual and legal matters and as such cannot be resolved in a mundane manner.⁴¹ ADR can often assist the parties involved in such complex disputes to settle or alternatively to at least narrow down the issues involved. Furthermore, ADR may be extremely beneficial in instances where there is an ongoing business or personal relationship between the disputants, where confidentiality is required and/or where economic or other pressures favour an early settlement.⁴²

ADR has not always been positively received by all in the legal fraternity. Criticism that has been levied against the practice ADR is that it lacks the legitimacy of authoritative judicial decisions as well as that it may seem to stifle the development of law and precedent in certain areas of the law.⁴³ According to Reynolds the failure of the so called new culture⁴⁴ can be

38 Judin M Alternative Dispute Resolution *De Rebus* June 2010 24; Trollip AT ADR 7,11. This point is further illustrated in the *Arbitration Act* 42 of 1965 which states that the parties may decide on the rules and procedures that apply to the proceedings as long as they fall within the parameters of the Act.

39 Kopel S *Guide to Business Law* 5ed 59; Trollip AT ADR 1; Pretorius P *Dispute Resolution* 7.

40 Trollip AT ADR 8; Those engaged in family law matters are, in terms of the *Children's Act* and naturally as a result of the *Brownlee v Brownlee* case, required to attempt to resolve their disputes before proceeding to court; the courts are also following suit in that the rules prescribe for the parties to attempt to resolve their disputes amicably before proceeding to trial.

41 Rao PC & Sheffield W ADR 316; Trollip AT ADR 13.

42 Judin M Alternative dispute resolution *De Rebus* June 2010 24; Trollip AT ADR 12. Companies do not wish to be known as 'contentious' contracting partners as their reputation in the business world is of importance. Confidentiality is therefore one of the primary motives for their preferring ADR. [Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 88]. Rao PC & Sheffield ADR 318.

43 Trollip AT ADR 17 – 18; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 104 - 105.

44 The 'new culture' has to do with the referral of matters to ADR as opposed to referring matters to litigation. Reynolds critically discusses the debate on ADR and civil justice. He starts his article by defining justice in the procedural form as well as substantive justice. He is of the opinion that one achieves procedural

attributed to the fact that no one has reconciled the competing cultures of ADR and litigation in the context of what may be learnt from legal history.⁴⁵

Furthermore, in matters concerning large sums of money, which often occurs in the construction and commercial sectors, it is not a simple process to resolve differences between the disputing parties.⁴⁶

The judicial approach to resolving disputes is rights based.⁴⁷ The parties' respective cases are usually presented to the presiding officer by means of their legal representatives.⁴⁸ The result is that the parties themselves are kept at a distance from the presiding officer as well as from each other.⁴⁹

The presiding officer resolves the dispute in terms of what is prescribed by the law applicable to the dispute. The outcome often results in a win-lose situation.⁵⁰ ADR differs from this approach.

ADR is usually an interest based approach⁵¹ and therefore focuses on achieving a win-win situation upon the settlement of the dispute. By doing this it preserves the relationship between the parties. It also ensures that both sides benefit from the outcome and allows the contract to continue.⁵²

justice by implementing effective and efficient processes within a reasonable time. He is further of the opinion that substantive justice is attained with the correct interpretation of the law. Reynolds proceeds to compare mediation and negotiation to litigation. He also expands on the concept of official referees through the pre and post war periods. Reynolds places great emphasis on the utilisation of an official in the role of a third party so as to resolve matters by means of settlement; failing which the official would be in a better position to assess the facts in dispute and would have a better understanding of the matter. This method is thus seen as a time and cost saving measure. See further Reynolds M Crossing the Rubicon *Construction Law Journal* 2010 Vol 26 No 2 77.

45 Reynolds M Crossing the Rubicon *Construction Law Journal* 2010 Vol 26 No 2 77.

46 Stipanavich TJ & Matthews WL At the cutting edge: conflict avoidance *Construction Management & Economics* 1997 Vol 15 506; Reynolds M Crossing the Rubicon *Construction Law Journal* 2010 Vol 26 No 2 78.

47 Brand J, Steadman F & Todd C *Commercial Mediation* 14.

48 The parties may represent themselves but this is the exception.

49 Rao PC & Sheffield W *ADR* 82.

50 Brand J, Steadman F & Todd C *Commercial Mediation* 14; Rao PC & Sheffield W *ADR* 82.

51 Rao PC & Sheffield W *ADR* 82; Brand J, Steadman F & Todd C *Commercial Mediation* 14; Macfarlane J ed *Rethinking Disputes* 8,11.

52 Rao PC & Sheffield W *ADR* 83.

According to Pretorius there are three categories of dispute resolution.⁵³ The first is whereby parties resolve the dispute amongst themselves without the assistance of a third party.⁵⁴ An example of this category is negotiation.⁵⁵ The second category is whereby the assistance of a third party is sought to assist the parties to settle their dispute.⁵⁶ The third party does not provide recommendations nor make an award. The third party purely assists the parties in reaching their own settlement. An example hereof is mediation.⁵⁷ The last category is whereby the third party is approached for assistance to resolve the dispute and make a ruling.⁵⁸ Arbitration is an example hereof.⁵⁹ This last category can be subdivided into instances where the ruling is final and binding⁶⁰ and instances where the ruling is only provisionally binding⁶¹ and further steps may be taken. This third category can be referred to as forms of adjudication in the ADR sphere.

Disputes that arise in the construction industry usually involve a diverse range of issues due to the technical and complex nature of the industry itself.⁶² Preference is given to resolving disputes outside of the court and by means of ADR. This is because the presiding officer may not necessarily have the technical expertise to resolve the dispute; the costly and lengthy process that litigation has become; confidentiality and the need to preserve the business relationship between the parties.⁶³

53 Pretorius P *Dispute Resolution* 3.

54 Pretorius P *Dispute Resolution* 3; Loots PC *Construction Law* 796.

55 A brief discussion will follow in chapter 2.3.1; Pretorius P *Dispute Resolution* 4.

56 Loots PC *Construction Law* 796; Pretorius P *Dispute Resolution* 3.

57 A brief discussion will follow in chapter 2.3.2; Pretorius P *Dispute Resolution* 4.

58 Pretorius P *Dispute Resolution* 3; Loots PC *Construction Law* 796.

59 A brief discussion shall follow in chapter 2.3.4; Pretorius P *Dispute Resolution* 4.

60 Arbitration is an example hereof.

61 The finding of the engineer in construction agreements is an example hereof. The finding is provisionally binding and any party may, within a specific period of time, reject the finding and take the dispute to litigation or another form of ADR.

62 Bvumbe C & Thwala DW Exploratory study of dispute resolution methods 2011 32; Rao PC & Sheffield W *ADR* 316.

63 Loots PC *Construction Law* 1007; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 88; Rao PC & Sheffield W *ADR* 82; Ramsden P *Law of Arbitration* 1.

2.3 ADR methods commonly used in the construction industry

There are various forms of ADR, such as negotiation, mediation, conciliation, arbitration, the use of a facilitator, a referee, an ombudsperson, or a dispute review board, for instance. The nature of ADR depends on the agreement between the parties and the selection of the process and method, or the combination of processes and methods, rests entirely with the parties. There is no *numerus clausus* of ADR. Through the years certain standard forms of ADR have evolved, each with their own characteristics. The ADR methods most commonly used in the construction industry will be discussed. They are negotiation, mediation, conciliation, early neutral evaluation, mini-trial adjudication and arbitration.⁶⁴

2.3.1 Negotiation

Negotiation is a process whereby parties attempt to personally reach a settlement without the use of an independent third party.⁶⁵ Parties enter into negotiation voluntarily, thus requiring the co-operation of both parties so as to achieve a win-win solution.⁶⁶ The settlement reached between the parties is achieved of their own free will.⁶⁷ This settlement is usually recorded in a written agreement between the parties.⁶⁸

64 Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 433; Cheung S & H CH Suen A multi-attribute model *Construction Management & Economics* 2002 Vol 20 No 7 561.

65 Ramsden P *Law of Arbitration* 2; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 433; Pretorius P *Dispute Resolution* 4.

66 Edwin CHW & Henry SCH Disputes & dispute resolution systems *Journal of Professional Issues in Engineering Education & Practice* 2005 Vol 132 No 2 141; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 430.

67 Ramsden P *The Law of Arbitration* 2; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 433; Pretorius P *Dispute Resolution* 4.

68 Ramsden P *The Law of Arbitration* 3.

Negotiation is one of the most commonly used methods to resolve any dispute.⁶⁹ It is an informal ADR method used as a pre-emptive measure in an attempt to avoid a fully fledged dispute between the parties.⁷⁰ Negotiation is the most economical ADR method used. It is expedient, unstructured, and a voluntary process available to parties that often preserves their working relationship.⁷¹

However, negotiation is not always successful in ending disputes between the parties.⁷² This is often because of the parties being too subjective by being emotionally involved, due to a power imbalance, or as a result of a lack of knowledge and similar factors. Other ADR methods can be utilised when there is a dead lock between the parties.⁷³ The parties can then agree to seek the assistance of a third party in order to settle their dispute. These ADR methods, where a third party is involved, are usually mediation, conciliation alternatively arbitration.⁷⁴

2.3.2 *Early neutral evaluation (ENE)*⁷⁵

ENE is a preliminary assessment of evidence, facts and legal merits by an impartial third party which is generally conducted in a confidential

69 Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 92; She LY “Factors which impact upon the selection of dispute resolution methods” 85; Cheung S & H CH Suen A multi-attribute model *Construction Management & Economics* 2002 Vol 20 No 7 562.

70 S Cheung & H CH Suen A multi-attribute utility model *Construction Management & Economics* 2002 Vol 20 557; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 430.

71 Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 430.

72 Pretorius P *Dispute Resolution* 37.

73 Pretorius P *Dispute Resolution* 38.

74 Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 430; Pretorius P *Dispute Resolution* 40.

75 The ENE was a process originally used by the courts with the main objective of reducing costs in the litigation process. The ENE process was so successful that it is now also used outside of litigation. [See further Gaitskell R ed *Engineers' Dispute Resolution Handbook* 115]. This ADR method has great similarity with the currently prescribed pre-trial conference in the South African court rules as well as the mini-trial method.

manner.⁷⁶ ENE has three distinctive components being that it is a process done early on in the dispute resolution process by a neutral, impartial third party, usually an expert, who evaluates the evidence and furnishes a recommendation as to the outcome.⁷⁷

According to the Centre for Effective Dispute Resolution, the ENE is a process that is designed to serve as a basis for more fruitful negotiations by encouraging direct communication between the parties or, at the very least, to assist the parties in avoiding unnecessary stages in the litigation process by helping to clarify key issues whether legal or factual.⁷⁸

This method is best used when the disputes involve factual and/or technical elements that require the use of an expert's evaluation.⁷⁹ These are often the characteristics of disputes arising in the construction industry which is why the method is suited for the resolution of certain construction disputes.

2.3.3 *Mediation*

Mediation is an ADR method often used by the parties in a conflict. It is a process whereby the parties voluntarily invite an impartial, neutral third party, known as the mediator, to assist them in reaching an amicable settlement.⁸⁰ Mediation may take place only if there is a mutual agreement between the parties to enter into mediation proceedings.⁸¹ The parties must be genuinely willing to search for solutions as well as to give and take

76 Treacy TB Use of alternative dispute resolution *Journal of Management in Engineering* 1995 Vol 11 No 1 59; Harmon KMJ Resolution of construction disputes *Leadership and Management in Engineering* October 2003 195; Gaitskell R ed *Engineers' Dispute Resolution Handbook* 115.

77 Gaitskell R ed *Engineers' Dispute Resolution Handbook* 115.

78 Centre for Effective Dispute Resolution Notes; Gaitskell R ed *Engineers' Dispute Resolution Handbook* 116.

79 Gaitskell R ed *Engineers' Dispute Resolution Handbook* 117.

80 Brand J, Steadman F & Todd C *Commercial Mediation* 9,45; Ramsden P *The Law of Arbitration* 2; Pretorius P *Dispute Resolution* 39,114; Loots PC *Construction Law* 797; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 Vol 19 No 4 430.

81 Ramsden P *The Law of Arbitration* 2.

in order to reach a settlement.⁸² Therefore mediation is a voluntary process from its launch until and including its termination.⁸³

Mediation is usually commenced by means of a written agreement, known as a mediation agreement entered into between the parties. The mediation agreement entails the agreement to mediate, the practicalities of the mediation about to be entered into such as the appointment of the mediator, the time frame within which a settlement must be reached, the procedure within which the mediation must take place, and similar aspects.⁸⁴ The powers of the mediator are granted to him/her in terms of the mediation agreement.⁸⁵

Usually it is not the role of the mediator to adjudicate on the dispute. The mediator does not have the authority to render a decision as all decision-making powers remain with the parties.⁸⁶ It is therefore said that the success of mediation is dependent on its fairness as well as on the bargaining powers of the parties during the mediation.⁸⁷ The mediator may suggest how best to resolve the dispute between the parties. The parties are not bound by any of the solutions proposed by the mediator.⁸⁸ The mediator's primary role is to narrow down the issues and guide the parties so as to assist them to focus on their objectives whilst amicably resolving the dispute.⁸⁹

82 Loots PC *Construction Law* 797.

83 Pretorius P *Dispute Resolution* 4.

84 Ramsden P *The Law of Arbitration* 2.

85 Cheung S & H CH Suen A multi-attribute model *Construction Management & Economics* 2002 Vol 20 No 7 562.

86 Butler D & Finsen E *Arbitration in South Africa* 10.

87 Bollen et al Why are subordinates less satisfied with mediation? *Negotiation Journal* 2010 Vol 26 No 4 420; Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Practice* 2012 Vol 19 No 4 40; Boulle L & Rycroft A *Mediation* 69.

88 Chong H & Zin RM Selection of dispute resolution methods *Engineering, Construction & Architectural Management* 2012 19 (4) 430; Harmon K M J The effective mediator *Journal of Professional Issues in Engineering Education & Practice* 2006 Vol 132 No 4 328.

89 Harmon K M J The effective mediator *Journal of Professional Issues in Engineering Education & Practice* 2006 Vol 132 No 4 328; Cheung S & H CH Suen A multi-attribute model *Construction Management & Economics* 2002 Vol 20 No 7 562.

The outcome of a successful mediation is the amicable resolution of a dispute. The settlement reached is usually contained in a settlement agreement signed by both parties.⁹⁰ This signed agreement becomes legally binding on the parties.⁹¹ The desired outcome of mediation is a ‘win-win settlement’.⁹² Reaching this stage is facilitated by the fact that mediation is an interest based approach for resolving disputes as opposed to a rights based approach such as that assumed in litigation.⁹³

There are various ways in which the mediation process may be terminated. Firstly the parties may have reached a settlement. Secondly the time-frame stipulated in the mediation agreement may have expired. Thirdly the mediator may be of the opinion that there is no possibility of reaching a settlement. Lastly one party has notified all concerned that it wishes to terminate the mediation proceedings.⁹⁴

In South Africa mediation is not regulated by means of statute.⁹⁵ It has over the years found judicial support in South Africa.⁹⁶ The South African court rules provide for pre-trial procedures wherein parties must consider the use of mediation as a means of resolving their dispute.⁹⁷ However the

90 Ramsden P *The Law of Arbitration* 3

91 Ramsden P *The Law of Arbitration* 3.

92 Yingying Q Logrolling ‘win-win’ settlement *Thesis* i.

93 Ramsden P *The Law of Arbitration* 3.

94 Ramsden P *The Law of Arbitration* 3.

95 Brand J, Steadman F & Todd C *Commercial Mediation* 10. See the UNCITRAL Model Law on Commercial Conciliation which could easily be adopted in South Africa thereby bringing certainty to the field of mediation. The Model Law uses the term conciliation interchangeably with mediation.

96 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); The Constitutional Court reiterated the importance of mediation when it encouraged the parties to mediate in the matter of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC). The Constitutional Court then endorsed the agreement reached in mediation in its judgment. Mediation also found favour in the commercial sector when the Institute of Directors enacted its Code on Corporate Governance. Paragraph 84 thereof states that:

mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved.

According to Brand J, Steadman F & Todd C the introduction of the aforementioned code as well as section 166 of the new *Companies Act* 71 of 2008 will provide mediation in South Africa with ‘major impetus’. [See further Brand J, Steadman F & Todd C *Commercial Mediation* 7.]

97 Rule 37 High Court Rules; section 54 of the *Magistrates Court Act*.

current court rules are not utilised to their full potential.⁹⁸ The outcome hereof is the introduction of court referred mediation.⁹⁹ Draft mediation rules¹⁰⁰ were established for use in court referred mediation and will shortly be introduced in various courts as part of a pilot project.¹⁰¹

There has been an increase in the use of mediation over the years, especially in the construction sector.¹⁰² It used in the construction industry not only as an attempt to reduce the financial costs pertaining to the resolution of disputes. It can also be more generally beneficial in resolving disputes in the construction industry as it is an informal method of resolving disputes where the control of the proceedings, more importantly the outcome, lies with the parties. The fairness, privacy and confidentiality of the dispute resolution process is also beneficial to the construction industry as it ensures that there is a balance of powers between the parties during the dispute resolution process and because it avoids the possibility of having their reputations tarnished in public. Mediation is a flexible ADR method which helps in reducing the huge risks that are often associated with construction disputes.¹⁰³

The disadvantage of using this method at times is that settlement of the dispute is not always guaranteed. This is not beneficial to the construction

98 This point was clearly demonstrated in the matter of *MB v NB* 2010 (3) SA 220 (GSJ) where the senior magistrate directed court-referred mediation; Brand J, Steadman F & Todd C *Commercial Mediation* 9,45.

99 Brand J, Steadman F & Todd C *Commercial Mediation* 9,45.

100 As established by the South African Rules Board on the 19th of November 2011.

101 The pilot project was due to be implemented during the course of 2012. At this stage it would seem that there is a possibility that the pilot project will commence only in 2013. [Brand J, Steadman F & Todd C *Commercial Mediation* 45].

England is also in the process of implementing a pilot project in respect of court annexed mediation which is referred to as the mediation scheme in the court of appeal. The scheme stipulates that matters pertaining to contractual claims, personal injury claims and clinical negligence claims of a value less than £100 000 are automatically referred for mediation unless the judge feels that mediation will not be suitable. [Hyde J Educate, don't mandate: Jackson on mediation. Law Society Gazette <http://www.lawgazette.co.uk/news/educate-don-t-mandate-jackson-mediation-date-of-use-19/03/2012.htm>].

102 Loots PC *Construction Law* 1011.

103 McCartney P, Dain A Is construction mediation changing *Construction Law Journal* 2010 Vol 26 No 7 505. This point is illustrated in the matter *Multiplex Constructions (UK) v Cleveland Bridge UK Ltd* 2006 EWHC 1341 QBD (TCC); 2008 EWHC 2220 QBD (TCC).

industry as due to its very nature a solution to the dispute is required in the shortest space of time possible. If no settlement is reached another method of dispute resolution must be used, which provides further delays which cannot always be accommodated because time is usually of the essence in construction projects.

However, it would seem that the term ‘mediation’ has not been consistently used in the English and South African construction industries. The term ‘mediation’ is often used interchangeably with the term ‘conciliation’.¹⁰⁴

2.3.4 Conciliation

Conciliation is a voluntary process entered into between disputing parties. It is defined as a structured negotiation process, involving an impartial third party, known as the conciliator.¹⁰⁵ The parties taking part in conciliation enter into a conciliation agreement at the commencement of the proceedings.

There is no set procedure within which to conduct conciliation. The conciliator is to conduct the process in such a way so as to ensure that relevant information is rendered, the relevant issues are determined and any attempts to delay the proceedings are resisted. The conciliator should attempt to follow a more flexible approach rather than a formal approach such as that prescribed by other ADR methods such as arbitration. In practice the claimant often provides a concise written statement within which the following is stipulated: the disputed issues, the claimant’s view thereon as well as the claimed amount. The responding party replies thereto with its own brief statement. The equivalent of a discovery bundle, as used in civil litigation, is often furnished to the conciliator so that all relevant information is before him/her.¹⁰⁶

104 Loots PC *Construction Law* 1011.

105 Pretorius P *Dispute Resolution* 4; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 95.

106 Rao PC & Sheffield W *ADR* 327.

Should the parties reach an agreement, it will be final and binding. However, should no agreement be reached between the parties, the conciliator will issue a formal recommendation to the parties regarding the settlement of the dispute.¹⁰⁷

The term ‘conciliation’ is often used interchangeably with ‘mediation’,¹⁰⁸ due to the fact that the respective procedures are similar.¹⁰⁹ Both mediation and conciliation originate in terms of an agreement between the parties. A neutral third party is appointed in terms of the agreement to assist with the conducting of settlement negotiations. A further similarity is that the entire process is flexible. The last similarity is that the entire process is dependent on the continued willingness of the parties to participate therein.¹¹⁰ Although it cannot be stated that this is generally accepted, for our purposes, the difference between the two methods could be described as the fact that a conciliator may make formal recommendations at the conclusion of the conciliation proceedings as to how the dispute should be resolved.

It has been noted that parties prefer mediation or conciliation as either one of these is generally more effective in the resolution of a dispute than arbitration and/or litigation. This is because the outcome reached is usually more acceptable to the parties as it is interest based rather than rights based¹¹¹ and because the process is not being so protracted and taxing as in the case of litigation.¹¹²

107 Pretorius P *Dispute Resolution 4*; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 96.

108 Ramsden P *The Law of Arbitration 2*; Loot PC *Construction Law* 1011.

109 Loots PC *Construction Law* 1011.

110 Loots PC *Construction Law* 1012.

111 A win-win situation is sought as opposed to a win-lose situation in the case of a rights based approach.

112 Rao PC & Sheffield W *ADR* 320.

2.3.5 Mini-trial

The mini-trial is seen as a hybrid ADR method, combining the flexibility of ADR as well as the structure of litigation.¹¹³ According to Ramsden, a mini-trial can be defined as a structured form of adjudication where the parties are afforded the opportunity to present their arguments either to a panel or to a neutral third party only.¹¹⁴ The panel can comprise of an authorised senior official of each party and a neutral third party or only of neutral third parties.¹¹⁵ A panel is often used to ensure that the different kinds of expertise necessary for the resolution of the dispute are available. A panel could for instance comprise of a lawyer, an engineer and an auditor or any combination thereof or of any other experts. The most common form of mini-trial in the construction industry is where the panel comprises of an authorised senior official of each party and a neutral third party.¹¹⁶ A mini-trial is a voluntary process; either party may withdraw at any time.¹¹⁷

According to Trollip a mini-trial may be defined as a:

voluntary, expedited and non-judicial process, whereby the lawyers acting for the parties to a dispute present an abbreviated version of their respective client's cases to a panel consisting of a senior executive of each party, and (optionally) a neutral expert.¹¹⁸

In order to commence a mini-trial the parties' consensus thereto is required. This decision taken by the parties is usually reduced to writing and becomes known as the mini-trial agreement.¹¹⁹

113 Harmon KMJ Resolution of construction disputes *Leadership & Management in Engineering* October 2003 194; Ramsden P *The Law of Arbitration* 3.

114 Ramsden P *The Law of Arbitration* 4; Harmon KMJ Resolution of construction disputes *Leadership & Management in Engineering* October 2003 194.

115 Harmon KMJ Resolution of construction disputes *Leadership & Management in Engineering* October 2003 194; <http://www.hg.org/article.asp?id=7747>

116 <http://www.hg.org/article.asp?id=7747>.

117 This withdrawal will not prejudice the party's position in subsequent arbitration or litigation proceedings. See further Loots PC *Construction Law* 1063.

118 Trollip AT *ADR* 61, 62.

119 The basic principles applicable in arbitration agreements are suited to mini-trial contracts. One of the benefits of this contract can be found in the clause that parties may choose to insert, stipulating that nothing discussed and/or documents produced during the mini-trial may not be used in litigation. See further Rao PC & Sheffield W *ADR* 308.

When the panel consists of one official from each party and a neutral, the parties may decide on how to use the neutral third party as part of the panel.¹²⁰ The neutral may take an advisory role by providing the senior officials with a non-binding opinion.¹²¹ The alternative role that the neutral may take is to act as the chairman of the proceedings. The role of the neutral is thus determined by the parties themselves in the mini-trial agreement.¹²²

The parties present an abbreviated summary of their case to the panel.¹²³ The senior officials usually have the necessary authority to settle the dispute.¹²⁴ After the evidence has been presented, the officials seek to negotiate a settlement, ‘with or without the assistance of the third party’.¹²⁵ If the senior officials fail to reach a settlement without the assistance of the neutral, the neutral third party proceeds to take the role of mediator. By doing so, the neutral facilitates discussions between the parties in an attempt to adduce settlement.¹²⁶ If the parties are unable to reach a settlement, the neutral is then required to make a non-binding decision. Thereafter the representatives meet again in order to negotiate a settlement.¹²⁷

The main objective of a mini-trial is to promote dialogue between the parties in respect of the strengths and weaknesses of their respective cases. One of its unique characteristics is that it is

the transformation of a typical contentious legal dispute into a business-type problem for business executives to resolve. It is the only ADR procedure in which the principals (the decision makers)

120 Loots PC *Construction Law* 797.

121 Should this be case, the senior officials will take the non-binding opinion into consideration and meet again to try and settle the dispute.

122 Loots PC *Construction Law* 1063.

123 Harmon KMJ Resolution of construction disputes *Leadership & Management in Engineering* October 2003 194.

124 Loots PC *Construction Law* 1063.

125 Pretorius P *Dispute Resolution* 4; Judin M Alternative dispute resolution mini-trial can unlock gridlock *De Rebus* June 2010 25,26.

126 Ramsden P *The Law of Arbitration* 4.

127 Ramsden P *The Law of Arbitration* 5.

become more active and more dominant players, with counsel often relegated to a lesser role.¹²⁸

According to Brown and Simanowitz a mini-trial is an ideal method of resolving complex disputes as it allows representatives to have full insight into the resources and efforts that will be required should no settlement be reached.¹²⁹ Various advantages may be derived from utilising a mini-trial. Firstly the parties are always involved in the decision making process and therefore the decision reached will be interest based. Secondly the confidentiality of the dispute is achieved. There is a considerable amount of time saving as well as cost saving in comparison with arbitration and/or litigation.¹³⁰ Lastly, should the parties not be able to reach a settlement, the neutral may be approached and asked for an opinion.¹³¹

A mini-trial can be beneficial to resolving the disputes in the construction industry in certain ways. Firstly it involves senior officials who have the authority to make decisions in respect of the settlement of issues in dispute. The parties are also in a position to decide on what the strength of the case is in light of the fact that all strengths and weaknesses are exposed. A mini-trial is a speedy affair and speed is required when resolving construction disputes. A mini-trial also allows parties in a position to easily ascertain as to whether it will be worthwhile financially to take the matter further, should there be no resolution to the dispute.

128 Judin M Alternative dispute resolution mini-trial can unlock gridlock *De Rebus* June 2010 24. According to Ramsden a mini-trial is defined as:

‘a structured form of adjudication in which the parties are given the opportunity to present their legal arguments briefly. The parties or their legal counsel present an abbreviated version of their case to the adjudicator or neutral. Thereafter representatives of each party meet confidentially and attempt to negotiate a settlement. Should the negotiations be unsuccessful the adjudicator is required to make a nonbinding adjudication. Following the nonbinding adjudication, the representatives meet for the second time to negotiate. This time they are influenced by the nonbinding adjudication and should have a more objective sense of the strength or weakness of their case. If a compromise or settlement is not reached in the negotiations then the complainant can refer the dispute to arbitration.’ [See further Ramsden *The Law of Arbitration* 4-5].

129 Brown H, Simanowitz A Alternative Dispute Resolution and Mediation *Quality in Healthcare* 1995 Vol 4 155.

130 The time frame must be regulated in the agreement in order for this advantage to be achieved. Loots PC *Construction law* 1063.

131 Loots PC *Construction law* 1064.

However, this ADR method has been met with criticism and scepticism because it relies on the possibility that both parties must be willing to settle the dispute ‘peacefully’ without getting involved in the usual adversarial proceedings. An example of the misuse of the mini-trial would be the use of the documentation provided in preparation for a real trial.¹³² A mini-trial requires a considerable amount of preparation by legal representatives and it may also be adversarial because it involves lawyers. It may therefore be a costly and time-consuming method of attempting to resolve a dispute when compared with negotiation and mediation¹³³ and may therefore, not always be the best choice for resolving construction disputes as time and money are two important components of the construction industry.

2.3.6 *Adjudication*

The generally accepted definition of adjudication, according to the Law Dictionary.com, is ‘the final judgment in a legal proceeding; the act of pronouncing judgment based on the evidence presented.’¹³⁴ According to the Merriam-Webster dictionary, adjudication means ‘the act or process of adjudicating’.¹³⁵ If one refers to the meaning of adjudicate it means ‘to settle judicially’.¹³⁶ From the aforementioned definitions it is clear that adjudication may be seen as an adversarial method of resolving a dispute.

However, the term adjudication has been adopted by the construction industry as a formal ADR method of resolving disputes arising therein. The most commonly accepted definition of adjudication in the construction industry is

accelerated and cost effective for dispute resolution that, unlike other means of resolving disputes involving a third party

132 Rao PC & Sheffield W *ADR* 307.

133 Loots PC *Construction Law* 1064.

134 www.thelawdictionary.com/adjudication.

135 www.merriam-webster.com/dictionary/adjudication.

136 www.merriam-webster.com/adjudicate.

intermediary, the outcome is a decision by a third party which is binding on the parties in the dispute and is final and binding unless and until reviewed by either arbitration or litigation.¹³⁷

The acceptance of this method of ADR known as adjudication has also found acceptance by leading experts of ADR. This acceptance may also be found internationally in statutes.¹³⁸

Adjudication arises in one of two ways; either contractually or in terms of a statute. When the construction contract makes provision for the dispute to be resolved by means of adjudication, this takes the form of contractual adjudication. This is the adjudication method currently utilised in the South African construction industry.¹³⁹ The procedure to be followed when implementing adjudication should be detailed and agreed to in the adjudication contract. When there is legislation providing for the dispute to be resolved by means of adjudication, it is known as statutory adjudication. This is the method currently used in the English construction industry.

Whether adjudication arises as a result of contract or statute, certain principles of adjudication remain the same. Firstly, the process is always commenced by means of written notification containing all of the necessary information. The notice must be given within the prescribed time frame; failing which the aggrieved party forfeits its right to resolve its dispute. Each party is given a reasonable opportunity to state its case. This results in an informed decision being rendered quickly.¹⁴⁰ Furthermore, the decision remains binding on the parties until subsequent arbitration or litigation takes place.¹⁴¹

137 CIDB *Best Practices Guideline #C3 1*.

138 Examples hereof are the HGRC, *New Zealand Construction Contracts Act 2002 No 46, Construction Contracts Act 2004* (Western Australia).

139 Focus shall be placed solely on the adjudication procedure as provided for in the GCC 2010 as well as that found in the CIDB Adjudication guidelines as found in the CIDB best practice guidelines #C3.

140 Markram H Alternative dispute resolution <http://www.markraminc.co.za>. The 42 day period includes the time frame for the appointment of the adjudicator as well as the 28 day period wherein which the adjudicator has to render his/her decision.

141 Dennys N et al *Hudson's Building & Engineering Contracts* 12 ed 1376 – 1377.

The procedure to be followed is relatively simple. Firstly, the dissatisfied party must furnish a written notice to the other contracting party advising of its intention to refer the dispute for adjudication. The matter is then referred to the independent third party known as the adjudicator. The parties are given the opportunity to present their case, so to speak, to the adjudicator. Thereafter the adjudicator has to deliver his/her award within 28 days.¹⁴² The adjudicator's award is temporarily binding on the parties, unless arbitration or court proceedings are instituted. Should the aforesaid be the position then the adjudicator's decision will remain binding on the parties pending the outcome of the arbitration and/or litigation.¹⁴³ The parties however, may not proceed to arbitration and/or litigation until the 'cooling down' period has expired. This is 28 days after the adjudicator has made the award.

The role of the adjudicator is relatively cast in stone. The role is defined in the adjudication agreement signed by the parties at the commencement of the adjudication. The adjudicator is to be impartial; must deal only with the subject matter at hand, and must provide written reasons for his/her decision. The adjudicator is under no circumstances to undertake his/her duties as though he/she is an arbitrator.¹⁴⁴

The main benefits of adjudication are that it is an expedient manner in which to resolve a dispute and that the award made is binding on the parties and immediately implemented.¹⁴⁵ The outcome hereof is that the

142 28 days has become the common industry standard practice in respect of this time frame.

143 Dennys N et al *Hudson's Building & Engineering Contracts* 12 ed 1375 – 1376.

144 Adjudication and arbitration share a basic characteristic namely, that the parties submit their dispute(s) to a third party for a decision which is binding on the parties. Although the two ADR methods share a basic characteristic they do differ. The difference lies in the protection of the adjudicator's decision. The parties have the right to review an arbitrator's award in terms of the Arbitration Act (whether the South African or the UK Act). The parties do not have the right to appeal an adjudicator's award either in terms of statute or contract. The only effective remedy is to resist the enforcement thereof. See further Dennys N et al *Hudson's Building and Engineering Contracts* 12 ed 1376.

145 CIDB *Best Practices Guideline C3.2*. According to Ennis the benefits of adjudication are that it is an ADR method available as a right, the matter is dealt with quickly as the decision being furnished is done so within twenty-eight days and it is 'lawyer-lite' and as such there is an associated cost savings. The

construction works continue without delay. This ADR mechanism is also seen as a less disruptive means of resolving the dispute(s) between the parties allowing the parties' business relationship to continue and allowing them to meet their obligations, whilst resolving their dispute. In the context of the construction industry this would mean that the disputes between the parties can be resolved whilst the works¹⁴⁶ are in progress.

2.3.7 Arbitration

Arbitration can be defined as a process whereby the parties present their evidence to an independent third party, namely the arbitrator, who thereafter makes a binding award.¹⁴⁷ The process followed may be dealt with in exactly the same manner as a trial, with the exception that the process may be somewhat more informal and may be modified as agreed between the parties.¹⁴⁸ The parties have to agree in writing to validly refer the dispute for arbitration.¹⁴⁹

Arbitration has become one of the most common choices amongst the alternative methods of resolving disputes, especially disputes arising in terms of written contracts.¹⁵⁰ The reason for the preference is a preference to its strongest characteristic namely, that the arbitrator's decision is final and binding¹⁵¹ which is not true of mediation, negotiation, conciliation,

disadvantages are that it is seen as a rough and ready means of justice as the time frame of twenty-eight days is a bit tight in respect of complex matters as well as that there is an inability to recover the costs associated therewith.[See further Ennis C Arbitration of Disputes in UK Construction Projects *Construction Law Journal* 2012 Vol 28 No 8 585, 587].

146 There are various elements to the term 'works'. In terms of clause 1.1.1.33 of the GCC 2010 works is defined as *the permanent works together with such temporary works as may be necessary for the execution of the Works*. Permanent Works is defined in clause 1.1.1.22 as *the permanent works to be constructed in accordance with the contract* and temporary works is defined in clause 1.1.1.32 as *the temporary works required for or in connection with the execution of the permanent works and shall include items which are not intended to be permanent or to form part of the permanent works*.

147 Pretorius P *Dispute Resolution* 5.

148 Ramsden P *The Law of Arbitration* 5; Trollip ADR 21.

149 Trollip AT ADR 21. Preamble *Arbitration Act* 42 of 1965, as amended.

150 Ramsden P *The Law of Arbitration* 5.

151 Pretorius P *Dispute Resolution* 5. Pretorius stipulates further that it may be binding either in terms of the agreement or by operation of law.

'adjudication' or other forms of ADR. The disadvantage associated with this method is that it mirrors that of the litigation process and it has become expensive due to the costs associated to arbitration proceedings such as costs of the venue and the arbitrator.¹⁵²

It is important to note that arbitration is the only ADR method regulated by statute in South Africa¹⁵³. The South African Law Commission in July 1998 recommended in their report¹⁵⁴ that the Act needed to be repealed and a new Act be promulgated. It is astonishing to think that the commission made the recommendation over 14 years ago and to date nothing has been done.

2.4 Conclusion

Dispute resolution is a field of study and practice concerning the choice, design and application of a procedure that best deals with a certain conflict or dispute, the resolution of dispute being designed to incorporate and satisfy the requirements of all the parties concerned.¹⁵⁵ Disputes arising in the construction industry usually involve a diverse range of issues due to the technical and complex nature of construction disputes.¹⁵⁶ The traditional legal process is not always best suited to large scale disputes.¹⁵⁷ Taking the adversarial route to resolving the disputes would result in a win-lose situation, as such processes are rights based. Therefore, preference is given to resolving the disputes outside of the court and by means of ADR.¹⁵⁸ The outcome of using ADR is generally a win-win settlement in the light of the fact that the ADR procedure is interest based.

152 Ennis C Arbitration of Disputes in UK Construction Projects *Construction Law Journal* 2012 Vol 28 No 8.

153 *Arbitration Act* 42 of 1965.

154 SA Law Commission Report July 1998 *Arbitration: An International Arbitration Act for SA*.

155 Judin M Alternative dispute resolution *De Rebus* June 2010 24; Pretorius P *Dispute Resolution* 1.

156 Bvumbe C & Thwala DW Exploratory Study of Dispute Resolution Methods 2011 32; Rao PC & Sheffield W *ADR* 316.

157 Loots PC *Construction Law* 693.

158 Loots PC *Construction Law* 1007.

The construction industry has a great influence on the growth of the national economy in that it contributes to social as well as economic development. It is therefore important that any disputes that arise are dealt with in a cost effective and expedient manner that ensures fairness, confidentiality and privacy. ADR is suited to addressing these needs as the outcome of ADR is usually a win-win solution.

Chapter 3

The South African Position: GCC 2010

3.1 *Introduction*

Construction disputes are quite diverse due to the diverse nature of the construction industry. In the light of the fact that there are different professions and industries involved who have to work together in order to complete a project it is obvious that disagreements on a wide range of aspects can occur. However, it is imperative that the disputes be resolved as expeditiously as possible as the costs in resolving the dispute involve not only the quantifiable costs (being the costs such as attorney's fees and so forth) but also the intangible and less visible costs such as the loss of income to the company, the loss of business opportunities and damage caused to business relationships.¹⁵⁹ As a result ADR has found favour in the South African construction industry.

Many of the contractual terms found in South African construction contracts are based upon the English contract commonly known as the Institute of Civil Engineers Conditions of Contract. This agreement is still utilised in England.¹⁶⁰ As previously stated, various construction contracts were used in the South African construction industry by the contracting parties. For the purposes of this study, emphasis will be placed only on the development of the GCC, in particular the dispute resolution clause. The historical position of dispute resolution provided for in the GCC before and

159 Bvumbwe C & Thwala DW Exploratory Study of Dispute Resolution Methods 32.

160 This agreement belonged to the ICE up until August 2011. However, in August 2011 the ICE conditions of contract were replaced by the Infrastructure Conditions of Contract. The Infrastructure Conditions are said to have retained most of its predecessor's contents with one or two minor changes. The ICE will still offer its dispute resolution services to those who are still in the process of completing their projects in terms of the ICE. Various reasons have been furnished by the ICE for this drastic move such as that the NEC3 promotes timeous project delivery, projects remain within the prescribed budget, the promoting of a more collaborative approach between all the parties concerned is promoted etc. See <http://www.ice.org.uk/News-Public-Affairs/ICE-withdraws-from-ICE-Conditions-of-Contract>. Loots PC *Engineering and Construction Law* 4.

after the introduction of the CIDB will be described at the commencement of the chapter. A detailed discussion of the dispute resolution procedure as prescribed in terms of the GCC 2010 will be provided in the remainder of the chapter.

3.2 *Historical position before the CIDB*

3.2.1 *GCC 1982*

The first edition of the GCC was the GCC 1982. The dispute resolution procedure was contained in clause 69 thereof. This contract provided for a ‘three tier procedure’¹⁶¹ for the settlement of any disputes that arose in terms thereof. Clause 69 of the GCC 1982 stipulated that the dispute was first to be referred to the appointed engineer for a written ruling. The ruling was considered final and binding upon the parties.¹⁶² Clause 69(2) allowed the parties to ‘mediate’ should either of them have been dissatisfied with the ruling and/or if the engineer failed to furnish his ruling within 45 days of receipt of dispute. The appointed ‘mediator’ had a reasonable period within which to express his opinion in respect of the matter at hand. The opinion was final and binding upon the parties until ‘otherwise ordered in arbitration proceedings...or court proceedings...’.¹⁶³ Clause 69 further stipulated that if either party was dissatisfied with the ‘mediator’s’ opinion it could have, within 28 days of receiving the ‘mediator’s’ opinion, referred the matter to arbitration alternatively could have furnished the other party with written notice that court proceedings would be instituted.

161 Loots *Engineering and Construction Law* 341. This may be seen as a form of ENE although the aspect of neutrality is suspect. In practice this was only effective with simple and more technical disputes.

162 Clause 69 of GCC 1982; Loots *Engineering & Construction Law* 337; The contract stated that the ruling was final and binding. However, it is clear that in light of the fact that a dissatisfied party could refer it to mediation means that the ruling was in fact provisionally binding upon the parties.

163 Clause 69 of GCC 1982; Loots *Engineering and Construction Law* 339.

3.2.2 Critique in respect of GCC 1982

It is clear from this brief overview of the GCC 1982 that there are flaws with its prescribed dispute settlement procedure. The first step taken to resolve a dispute between the parties is the referral of the dispute by either the employer or contractor to the engineer. The aforementioned engineer is the appointed engineer of the project; ie the employer's agent. One of the fundamental characteristics of ADR is the objectivity and impartiality of the third party. In terms of the first tier of the three tier prescribed procedure, the required objectivity of the impartial party does not exist. The reason for this is that the third party is directly involved with the project and could possibly be the origin of the dispute. Furthermore the third party is employed by one of the parties, a fact which compromises his impartiality.

The second tier deals with the position where a party is dissatisfied with the ruling or the engineer failed to furnish his ruling within the prescribed period of 45 days. Should either situation present itself then the dispute may be referred for 'mediation'.¹⁶⁴ The 'mediator' then has 28 days within which to furnish his/her recommendations.

The second tier presents its own problems. The greatest problem therein is the incorrect usage of terminology which is contradictory to the commonly accepted ADR methods of mediation and conciliation. This creates uncertainty as to which method is being used. Albeit that ADR methods may be adopted to suit the needs of the parties, the essence of the method used is important as the manner within which the outcome is achieved differs. This lack of uniformity and uncertainty leads to the parties applying their own interpretation of the methods which confusion contributes to the delay in resolving the dispute and possibly creates another one. As stated in Chapter 2, a mediator enables discussions

¹⁶⁴ This sort of mediation is not the same as traditional mediation as understood by Brand J, Steadman F & Todd C in *Commercial Mediation* as the mediator in this instance also gives a ruling.

between the parties, in a dispute, with the aim of guiding them to an amicable settlement. If there is a breakdown in discussions and it is clear that a settlement cannot be reached, the mediation process comes to an end. Conciliation on the other hand is a structured negotiation process which is similar to that of mediation. However, the greatest difference between the two ADR methods is that at the conciliator makes non-binding recommendations on how best to resolve the dispute at hand. Therefore, albeit that the ADR method referred to is mediation, it is in fact closer to conciliation.¹⁶⁵ Mediation can play a substantial role in improving the tension in the industry in respect of the preservation of the working relationships between the parties whilst simultaneously producing an amicable solution to the dispute. Therefore in order to achieve the aforementioned, it is imperative that mediation is practiced according to the basic principles and objectives that underlie the mediation process.¹⁶⁶

A further problem presented is the time frames referred to. The first period is the 45 days in which the engineer is to give his ruling. This is an extremely long period of time considering that the engineer is supposed to have the expertise and technical knowledge of the subject matter that became a referred dispute. Therefore, this insight ought to allow him to furnish an answer in a much shorter space of time than 45 days. This situation is then exacerbated by the further the fact that the ‘mediator’ is then given a further 28 day period within which to provide recommendations. In total this amounts to 73 days, which excludes the time necessary for the appointment of the ‘mediator’; which is not provided for in the contract, nor any meetings that are held by the ‘mediator’ in an attempt to assist settlement between the parties. The time periods applicable to the different stages of the dispute resolution procedure are protracted. The stipulated procedure is lengthy and defeats the purposes of ADR as ADR is supposed to be a speedy way of resolving disputes.

165 For further discussions refer to chapter 2.3.2 and 2.3.3 above.

166 Povey Mediation Practice *Acta Structilia* 2006 Vol 13 61.

Delay is damaging in this industry which works to set deadlines; a failure to meet can have financial implications such as the imposition of penalties.

The last tier allows for arbitration and/or litigation. This could only take place 28 days after having received the ‘mediator’s’ recommendations. If the aggrieved party wished to arbitrate, it could do so without furnishing notice to the other party of its intention to do so. However, if the aggrieved party wished to litigate, it had to first notify its opposing party, in writing, of its intention. This tier presents its own set of flaws. Arbitration is required to occur on a voluntary basis between the parties. Judging from the content of this clause, the voluntary element seems to be missing because the parties do not do so on a voluntary basis.

The inadequacy of this dispute resolution process was emphasised by Loots when he aptly stated that the ‘three tier procedure’ for settling disputes

is in certain cases unsuited to the parties’ requirements whether they have been drafted without any recognition of the profound legal difficulties to which it may give rise when proceedings in the courts seem desirable rather than arbitration or vice – versa once the contract has been entered into, or when there seems to be no dispute, and also without regard to the fact that in the great majority of cases the reference to the engineer is little more than an irritating and time wasting formality, since his decision is likely to be a foregone conclusion, having previously been indicated to the contractor or employer when the claim was first advanced and the dispute arose.¹⁶⁷

It is clear from the contents of clause 69 of GCC 1982 that the dispute resolution procedure provided for does not truly comply with the main purpose of ADR. The procedure provided for is primarily rights based as opposed to interest based. As a result the outcome is often a win-lose situation. ADR on the other hand often has the desired outcome of a win-win situation and is non-adversarial in nature.

167 Loots *Engineering and Construction Law* 341.

To contribute to the problems experienced with the dispute resolution procedure, the industry was not, and is still not, regulated nor was there any prescribed standard forms of contract at that stage. The result was flawed dispute resolution procedures and methodology. The government decided to intervene in order to provide a solution to the disarray in the construction industry and the outcome of the intervention was the introduction of the *CIDB Act*.¹⁶⁸

3.3 The position after CIDB

The *CIDB Act* established a regulatory body known as the CIDB which has various objectives. The objectives of relevance for this study are the standardisation of the contracts used in the industry as well as its limited regulatory function.¹⁶⁹ There were 4 standardised contracts accepted by the CIDB of which the GCC is one.¹⁷⁰

In 1999 the CIDB observed that arbitration had become as time consuming and costly as litigation.¹⁷¹ Therefore an alternative, appropriate ADR method to arbitration had to be found that would be suitable for the South African construction industry. The CIDB commenced advocating adjudication in 2003 and as a result introduced adjudication as the preferred ADR method in the industry.¹⁷² Albeit that the CIDB introduced adjudication as its preferred method of ADR in the industry, this fact was not reflected in the updated version of the GCC, namely the GCC 2004.¹⁷³

168 The preamble of *CIDB Act*; Loots *Engineering and Construction Law* 341.

169 The preamble of *CIDB Act*. The CIDB has to ensure that it continuously promotes the best practices available in all facets of the construction industry; maintains up to date registers of contractors and projects attended to in terms of public tenders and that the institution which received any powers in order to execute a particular function of the CIDB do so. An example of the last these objectives is the fact that SAICE was tasked with the updating of the conditions of the GCC contract.

170 The other 3 are the JBCC, FIDIC and NEC.

171 Maritz & Maiketso "What are the requirements for SA construction industry to fully utilize adjudication?" *RICS Conference Proceedings* 1557.

172 CIDB Adjudication Best Practice Guideline; Clause 10.7.1 GCC 2010; Pro forma contract data appendix 2 GCC 2010 second edition.

173 SAICE is tasked with the updating of the GCC. It is important to note that at no stage during the updating process, present nor past, was there assistance sought from the legal fraternity. This is fully demonstrated in the *SAICE Management Guide* 2010 iii – iv and the GCC 2010 iii – iv.

3.3.1 GCC 2004¹⁷⁴

Disputes that arose in terms of the GCC 2004 were dealt with in accordance with clauses 57 and 58 thereof. The clauses were known as the notice of disagreement and settlement of disputes respectively. The GCC 2004 retained its predecessor's three tier approach in respect of the resolution of disputes. It did not address all of the problems of the previous version of the GCC 2004.

The updated dispute resolution clauses did not resolve the lack of impartiality element as found in its predecessor. The parties must still refer their disagreement to the appointed engineer for consideration.¹⁷⁵ The said engineer also fulfilled the role of the employer's agent.¹⁷⁶ Suspicion is therefore raised as to the ability of the engineer to remain objective and impartial.

What did change in the GCC 2004 was the time frame afforded to the engineer in order to furnish the parties with his/her ruling. The time frame was changed from 45 to 28 days.¹⁷⁷ This reduction in time somewhat eliminated the protracted process of resolving the disagreement. However, the point remains that the appointed engineer had the knowledge and technical expertise to resolve the disagreement within a much shorter time. This is also especially so in the light of the fact that the engineer had first-hand knowledge of the disagreement in due to the fact that he/she was the appointed engineer of the project.

Further changes that were introduced in the GCC 2004 were the inclusion of the time-bar provision¹⁷⁸ and the submission of a dispute notice.¹⁷⁹ A

174 Clauses of relevance are clause 57 & 58 contained therein. Refer to Addendum 1 annexed hereto.

175 Clause 57 GCC 2004. Refer to Addendum 1 annexed hereto.

176 Clause 1.1.5 GCC 2004.

177 Clause 57.2 of GCC 2004. Refer to Addendum 1 annexed hereto.

178 Clause 58.1.2 of GCC 2004. Refer to Addendum 1 annexed hereto.

179 Clause 58.1.2 of GCC 2004. Refer to Addendum 1 annexed hereto.

dispute notice was not defined in the GCC 2004. Clause 58.1.2 reads as follows:

If the Engineer fails to give his ruling according to clause 48.5 or 57.2, the Contractor shall have the right to submit his claim or disagreement as a Dispute Notice within 28 days after the ruling should have been given. If the Contractor fails to do so within 28 days, the Employer shall be discharged from all liability in connection with the claim or disagreement.¹⁸⁰

However, upon reading the clause, one can only assume that it means the submission of the contractor's claim or disagreement in a written document. The written document is seen as the dispute notice.

The dispute notice was a prerequisite for the referring of the party's dissatisfaction with the engineer's ruling; alternatively in the instance where the engineer failed to furnish his/her ruling within the prescribed time frame.¹⁸¹ The aggrieved party had 28 days within which to furnish the written dispute notice; failing which the party lost its right to dispute the ruling.¹⁸² The latter was also a new introduction to the GCC 2004. The result of this provision was that the employer was released from all liability in respect of the dispute if the contractor failed to follow each element of the provisions contained in clause 58.1.2 of the GCC 2004.

The dispute notice was used as a precursor for the next tier in the dispute resolution process. Therefore, the initial referral of the disagreement was mandatory before any ADR method could be used to resolve the dispute. This is illustrated in clauses 58.1.4 and 58.1.5 of GCC 2004.

The second tier of the dispute resolution procedure also differed from the GCC predecessors in that the parties were now provided with a choice

180 Refer to Addendum 1 annexed hereto.

181 Clause 58.1.2. of GCC 2004. Refer to Addendum 1 annexed hereto.

182 Clause 58.1.2 of GCC 2004. Refer to Addendum 1 annexed hereto.

between ‘mediation’ and adjudication. This choice was dependent on what dispute resolution procedure the contract data¹⁸³ provided for.¹⁸⁴

Clause 58.2 of GCC 2004 provided rigid guidelines in respect of the ‘mediation’ procedure, such as when the ‘mediation’ was to take place; the disallowance of legal representation and it provided that the ‘mediator’s’ opinion was final and binding on the parties.¹⁸⁵ However, it also provided that the mediator’s ruling could be appealed by means of arbitration and/or litigation proceedings.¹⁸⁶ This confusion may be sought to suggest why great importance is placed on having unambiguous, clearly drafted conditions in a contract.

The second ADR option that was provided for in the second tier as found in clause 58.3 was adjudication. The clause read as follows:

- 58.3 If the Contract Data does not provide for dispute resolution by mediation:
 - 58.3.1 Adjudication shall be conducted in accordance with the addition of the Construction Industry Development Board’s adjudication procedure current at the date of issue of the Dispute Notice
 - 58.3.2 The Adjudicator shall be appointed in terms of the Adjudicator’s agreement found in the Construction Industry Development Board’s adjudication procedure.
 - 58.3.3 Save if otherwise stated in the Contract Data, the party, which raises the dispute, shall select 3 adjudicators from the panel of adjudicators published by the South African Institution of Civil Engineering, determine their hourly fees and confirm that these adjudicators are available to adjudicate the dispute in question. The other party shall then select within 7 days one of the three nominated adjudicators, failing which the President for the time being of the South African Institution of Civil Engineering shall nominate an adjudicator.¹⁸⁷

183 In terms of clause 1 of the GCC 2004 & GCC 2010, contract data is defined as:
Specific data which, together with these General Conditions of Contract,
collectively describe the risks, liabilities and obligations of the contracting parties
and the procedures for the administration of the contract.

184 Clause 58.1 of GCC 2004; Refer to Addendum 1 annexed hereto.

185 Clause 58.2 of GCC 2004; Refer to Addendum 1 annexed hereto. It is once again important to highlight that the term mediation and conciliation are used interchangeably. For further discussions refer to chapter 2.3.2 & 2.3.3 and chapter 3.2.2 above.

186 Clause 58.2.7 of GCC 2004; Refer to Addendum 1 annexed hereto.

187 Refer to Addendum 1 annexed hereto.

The procedure provided must take place in terms of the CIDB's adjudication procedure. The aforementioned procedure may be found in the CIDB Best Practice Guidelines #C3. These guidelines provide for the general principles applicable to the adjudication procedure. For example they provide for the powers granted to the adjudicator; the fact that the adjudication must take place within the time frame as provided for in the adjudication agreement as signed between the parties; amongst others.¹⁸⁸ The guidelines also re-iterate certain basic principles as found in ADR methods namely the impartiality of the adjudicator and the expediency of the process.¹⁸⁹

188 CIDB *Best Practice Guidelines* #C3 a, n and p 3 – 4. Further principles as found therein are as follows:

- b) There shall be no restriction on the issues arising from, or in connection with, the contract capable of being referred to adjudication.
- c) Adjudicators shall settle the dispute as independent adjudicator and not as arbitrator. Their decision must be enforceable as a matter of contractual obligation between the parties and not as an arbitral award.
- d) Adjudicators must answer the question(s) put to them, provide written reasons for their decisions, base their decisions on the subject of the dispute and only the dispute at hand and should avoid the conducting of hearings to resolve the disputes.
- e) Adjudication must be conducted with no bias or apparent bias i.e in a manner which favours or seems to favour one party in a manner which is seen as supporting one party to the detriment of another. The adjudicator shall be impartial, act independently and not have, or appear to have, a personal relationship with any of the parties or an interest in the outcome of the adjudication.
- f) Each party shall be given a reasonable opportunity to state his case without a hearing, i.e. he shall have a reasonable opportunity of presenting his case, know what the case against him is and be in possession of all the evidence and information adduced against it or obtained by the adjudicator.
- g) The adjudicator shall, as a general rule, communicate in writing simultaneously with both parties, not offer advice, not accept telephone calls from the parties, not argue the case for one of the parties, ensure that any information which is relied upon is known to both parties and that each party has had an opportunity to respond to information.
- h) The party requesting adjudication shall submit the dispute for resolution within the time period specified in the contract becoming aware of it, failing which that party forfeits the right to dispute the matter.
- i) The decision of the adjudicator shall be implemented immediately, whether or not the dispute is to be referred for final resolution to arbitration or litigation.
- j) The adjudicator shall have the right, after notifying the parties, to retain legal and technical experts to assist in areas in which the adjudicator does not possess the necessary expertise.
- k) The adjudicator may be named in the contract or appointed by agreement between the parties by means of procedure agreed to at the time of signing of the contract.
- l) The adjudicator shall comply with the rules of adjudication provided for in the contract, and in the agreement covering the adjudicator's appointment, but in all other aspects may determine the procedures and conduct of the adjudication, save for the conducting of hearings where this is unavoidable.
- m) Submissions by the parties to the adjudicator shall be in writing.

189 Refer to chapter 2 above.

In the instance of the GCC 2004, the contract allowed for the parties to refer the dispute for arbitration and/or court proceedings.¹⁹⁰ This comprised the last tier of the dispute resolution procedure provided for therein. The application of either of the aforementioned dispute resolution measures was dependent on the procedures provided for in the contract data.¹⁹¹

This version of the GCC elaborated somewhat more on the topic of dispute resolution than its predecessors even though the essence of the dispute resolution clauses remained relatively similar. It is evident from the content of clause 58 that the drafters of the GCC 2004 attempted to promote the amicable resolution of disputes by methods other than arbitration. The GCC 2004 placed greater emphasis on the method of ‘mediation’. This is illustrated by the lengthy and comprehensive clause that provided for the procedures to be followed in applying that method.¹⁹² This can be attributed to the fact that the ‘mediator’s’ awards were considered final and binding on the parties despite the fact that the dissatisfied party could refer the dispute to arbitration or litigation after having received the ‘mediator’s’ ruling.¹⁹³ A further reason for the inclination to keep using the prescribed mediation and/or arbitration ADR methods was due to the fact that adjudication, although it was provided for in the GCC 2004, was relatively unknown in South Africa, more specifically in the South African construction industry.

Despite the introduction of adjudication into the construction industry, most parties still preferred to resolve their disputes by means of arbitration and/or litigation.¹⁹⁴ Maritz believes that the reasons for this are that the

190 Clause 58.4 & 58.5 of GCC 2004 respectively.

191 Clause 58.4 & 58.5 of GCC 2004 respectively.

192 Clause 58.2 & 58.4 of GCC 2004 respectively.

193 As stated previously it is not possible that the ‘mediator’s’ ruling could be considered final and binding in light of the fact that there was still the possibility of using arbitration and/or litigation after having received the aforementioned ruling. It is therefore clear that the ruling is in fact provisionally binding and is further illustrative of the fact that the clauses were contradictory and ambiguous.

194 Maritz & Maiketso “What are the requirements for the Construction Industry to fully utilize Adjudication?” RICS Conference Proceedings.

role players within the industry were not educated in, or trained in adjudication and therefore did not understand the process. This position has not really changed.¹⁹⁵

3.4 The current position

As time passed, the industry naturally evolved due to various factors for example revised procurement rules, new emerging role players and the different ADR forms.¹⁹⁶

The South African Institute of Civil Engineering (SAICE) has been tasked with the regular updating of the GCC so that it complies with the main objectives of the *CIDB Act*.¹⁹⁷ This resulted in the 2010 edition of the GCC. The main objective of the GCC 2010 is said to provide for efficient, equitable, fair, economic and transparent contract administrative procedures and the allocation of risks.¹⁹⁸

The one area of the GCC 2010 (the contract) that has been subject to redrafting, which is of relevance to this study, is the manner in which disputes arising in terms of the contract are to be resolved. A guide known as the SAICE Management Guide to the GCC 2010 (Management Guide) was drafted in conjunction with the contract. This new guide is supposed to assist with the interpretation of the GCC 2010 as well as to provide guidance to all concerned so as to reduce the number of claims and

195 Maritz & Maiketso "What are the requirements for the Construction Industry to fully utilize Adjudication?" RICS Conference Proceedings.

196 Claasen W GCC 2010 *Civil Engineering* July 2010 18. An inter-ministerial task team was established in order to achieve and promote good governance and in the belief that institutional reform was necessary. The one area that required attention was the uniformity in policies and the procedures of contracts. The team looked at the procedure followed regarding claim and dispute resolutions and proposed that role players are to try and take all steps possible in order to avoid conflict whilst making provision for a predetermined, quick, impartial ADR procedure in the event that a dispute does arise. [See further Green Paper on Public Sector Procurement Reform in South Africa April 1997].

197 Refer to chapter 1 above.

198 SAICE *Management Guide* 3. These objectives are therefore said to be in compliance with the guidelines provided for by the inter-ministerial task team in respect of the development of the construction industry. [See further Green Paper on Public Sector Procurement Reform in South Africa April 1997].

disputes arising in terms of the GCC 2010.¹⁹⁹ The guide in certain instances is said to supplement the contract and in other instances said to facilitate the interpretation and implementation thereof; which seems to be somewhat contradictory. In terms of contract law the contract is the only document reflecting the parties' intention and no extrinsic evidence can be introduced to prove what the intention of the parties was at the time of the agreement. This may be found in the Parol evidence rule which provides that:

Where the parties intended their agreement to be fully and finally embodied in writing, evidence to contradict, vary, add to or subtract from the terms of the writing is inadmissible.²⁰⁰

The procedure for the settlement of disputes may be found in clause 10 of the contract.²⁰¹ Clause 10 is divided into sections that deal with the contractor's claim, dissatisfaction claim, dispute notice and lastly 'amicable' settlement resolution of the dispute. Each subdivision will be discussed separately hereunder.

The point of departure is first to distinguish between a claim and a dispute. The importance hereof is to ensure that the correct procedure is followed as prescribed in terms of the contract. The contract does not define the terms claim and dispute. In the light hereof reference must be made to the management guide. According to the Management Guide a claim is defined as a written demand made by a contracting party seeking relief in terms of the provisions of the contract.²⁰² This is similar to the Oxford Dictionary's definition of a claim. The Oxford Dictionary defines a claim as a 'request or demand'.²⁰³ The reference dictionary defines a claim as an assertion of one's rights to something.²⁰⁴ This definition would seem to be more appropriate in the context of the GCC 2010 as the contractor is asserting its rights to something in terms of the contract.

199 SAICE *Management Guide* iii-iv; 127.

200 Hutchison *et al* *Law of Contracts* 2ed 257-258.

201 Clause 10 of the GCC 2010. Refer to Addendum 2 annexed hereto.

202 SAICE *Management Guide* 114.

203 www.oxforddictionaries.com/definition/english/claim.

204 www.dictionary.reference.com/browse/claim.

A dispute, on the other hand, takes place when the contracting parties are unable to agree on the settlement of a claim and the assistance of a third party is required to assist with the resolution thereof.²⁰⁵ This is what happens in the event that a claim remains unresolved and therefore a different approach is taken to resolve the conflict.

3.4.1 *Similarities with GCC predecessors*

3.4.1.1 The impartiality and objectivity of the third party

In terms of clauses 10.1 and 10.2 of the contract the appointed engineer is tasked with providing a ruling in respect of the claim; whether it is the contractor's claim and/or a dissatisfaction claim.²⁰⁶ The appointed engineer is the employer's agent.²⁰⁷

The engineer is once again placed in the position of a decision maker. One can only assume that these steps have been included as dispute preventative measures similar to that as found in ENE for example.²⁰⁸ However, how successful can this be if the person making the final decision is the employer's agent? Once again we ask how capable the engineer is of remaining impartial. This point is corroborated by the engineering fraternity itself.²⁰⁹ By their own admission an engineer, in certain instances, does allow himself/herself to be influenced by the employer.²¹⁰ Therefore it is clear that it is not in the best interests of the parties that the engineer resolves any disputes pertaining to dissatisfaction claims and/or disputes arising between the parties.

205 SAICE Management Guide 114.

206 A dissatisfaction claim is not defined in the contract. However, upon reading clause 10.2 it would seem that a dissatisfaction claim is a claim to a right as contained in the contract that is not encompassed in the contents of clause 10.1 of the GCC 2010. Refer to clause 10.2 of the GCC 2010 as contained in Addendum 2 annexed hereto.

207 Clause 1.1.1.16 of GCC 2010.

208 SAICE Management Guide 121. Refer to chapter 2 above.

209 SAICE Management Guide 121.

210 SAICE Management Guide 120.

3.4.1.2 The 28 day time frame

At each stage of the resolution of claims and/or a dispute process, the respective party (the third party, the employer or the contractor) has 28 days in which to take the next required step in the process.²¹¹

3.4.1.3 The time-bar provision

This may be found in clause 10.1, 10.2 and 10.3.1.5. If the aggrieved party fails to comply with the stipulated 28 day time frame, it loses its right to refer the dispute. The result hereof is that the aggrieved party loses its right to deal with the claim or dispute²¹² by any means whatsoever; even by means of ADR or litigation. This means that the ‘opposing’ party is released from any liability pertaining to the claim and/or dispute.

3.4.1.4 The dispute notice

The written notice that the parties deliver to each other in respect of any dispute arising in terms of the contract is referred to as a dispute notice.²¹³ It remains a requirement in the contract that a dispute notice must first be delivered before any steps may be taken in order to proceed to the chosen method of resolving a dispute.²¹⁴

On face value it would seem that the resolution of any dispute may be commenced by means of a dispute notice. However, if one refers to clause 10.1, there are certain instances where the engineer must first be approached to furnish a ruling thereon and only thereafter may a dispute notice be delivered. This is contradictory to the contents of clause 10.3 of

211 This may be found throughout clause 10. Refer to Addendum 2 annexed hereto.

212 Whichever term is applicable at that stage of the process.

213 Clause 10.3.1 of GCC 2010. Refer to Addendum 2 annexed hereto.

214 Clause 10.3.5 of GCC 2010. Refer to Addendum 2 annexed hereto.

the contract, which states that any dispute may immediately be referred to amicable settlement for resolution which may occur only after a dispute notice has been delivered.

However, there are substantial differences between the dispute resolution clauses of the GCC 2004 and GCC 2010.

3.4.2 The new ‘improvements’ of the dispute clauses as contained in GCC 2010

3.4.2.1 The engineer’s ruling

The engineer’s ruling is no longer considered final and binding. Clause 10.3.3 of the contract states that

the ruling shall be in full force and carried into effect unless and until otherwise agreed by both parties, or in terms of an adjudication decision, or arbitration award or court judgment.²¹⁵

Although the words final and binding are not used it is clear from the clause that the ruling is temporarily binding on the parties until the stipulated events take place. This is an improvement on the GCC predecessors, in that the contract stated that the ruling was final and binding but in actual fact was only provisionally binding as the dispute could have been referred to mediation and/or adjudication if a party was dissatisfied with the ruling given. The wording of the GCC in this regard is clear and unambiguous and clearly provides for the next step, should the parties disagree with the engineer’s ruling.

The lodging of a dissatisfaction claim is optional. SAICE believes that the lodgement of a dissatisfaction claim is more favourable to the parties due to the fact that the engineer is able to make a ‘well-considered ruling’²¹⁶ which

²¹⁵ Clause 10.3.3 of GCC 2010. Refer to Addendum 2 annexed hereto.

²¹⁶ SAICE Management Guide.

may be implemented with immediate effect unlike the resolution of a dispute by adjudication which is seen as expensive and time-consuming.²¹⁷

3.4.2.2 Provision for amicable settlement

Clause 10.4 of the GCC 2010 reads as follows:

10.4 Amicable settlement

10.4.1 The parties may at any time, without prejudice to any other proceedings, agree to settle any claim or any dispute amicably with the help of an impartial third party. Amicable settlement may include any settlement technique as agreed by the parties.

10.4.2 If the other party rejects the invitation to amicable settlement in writing or does not respond in writing to the invitation within 14 days, or amicable settlement is unsuccessful, referral to adjudication shall follow immediately, provide that, if amicable settlement failed subsequent to adjudication, the dispute shall be resolved by arbitration or court proceedings, whichever is applicable in terms of the Contract.

10.4.3 Amicable settlement shall become final and binding on the parties only to the extent that it is correctly recorded as being agreed by the parties.

10.4.4 Save for the reference to any portion of any settlement or decision which has been agreed to be final and binding on the parties, no reference shall be made by or on behalf of either party in any subsequent adjudication, arbitration or court proceedings, to any outcome of an amicable settlement, or to any submission, statement or admission made in the course of amicable settlement.²¹⁸

The GCC 2010 does not furnish a definition of amicable settlement. However, it does recognise that the parties may agree to resolve a dispute amicably with the assistance of an impartial third party.²¹⁹ The contract does not dictate a specific amicable settlement method that must be used in order to resolve the dispute thereby allowing the parties to use any ADR method of their choice provided that they are in agreement thereto.²²⁰

217 SAICE Management Guide.

218 Refer to Addendum 2 annexed hereto.

219 Clause 10.4.1 of GCC 2010.

220 It would seem that amicable settlement is encouraged and that the parties are free to choose their own ADR method. If one has reference to the Management Guide, this position is reflected differently. The Management Guide states that it is recommended that the GCC 2010 Amicable Settlement Procedures be used in order to provide structure to the dispute resolution process; namely negotiation, mediation, conciliation, mini-trial and expert evidence. The contract, however, makes no reference to the GCC 2010 Amicable Settlement Procedures.

Clause 10.4.2 provides for the steps that must be taken if amicable settlement is unsuccessful. The options are adjudication (depending on whether ADR took place before or after adjudication), arbitration and/or litigation, whichever is applicable in terms of the contract. What is interesting to note is that the adjudication, arbitration and/or litigation provisions are not dependent on what the contract provides for but rather on what the contract data provides for. One would imagine that the Management Guide could be of assistance in this regard as its main purpose is to assist individuals with the interpretation and implementation of the provisions of the contract.²²¹ The Management Guide is silent in this regard. On this basis clause 10.4.2 is superfluous.

Clause 10.4 creates the impression that any claim or dispute may be resolved by means of amicable settlement. This is contradictory to clause 10.1 which provides that certain claims made by the contractor must first be referred to the engineer before further steps may be taken. This also contradicts the requirement of the dispute notice and the time-bar clause as contained in clause 10.3.

Clause 10.4.2 provides for an ‘invitation to amicable settlement’.²²² The party wishing to utilise an alternative means of resolving the dispute must send an invitation to the other party to participate. If no response is received to the invitation, within 14 days, this is taken to mean that the suggestion of amicable settlement is rejected. The claim or dispute²²³ is then immediately referred either to the engineer or for adjudication, arbitration or litigation.²²⁴ This is contradictory to the requirement as contained in clause 10.3 that a dispute must first exist before the parties may implement the procedure provided for in clause 104.²²⁵ The response time of 14 days to the invitation asking for the party to participate in ADR

221 SAICE Management Guide 127.

222 Refer to Addendum 2 annexed hereto.

223 Whichever is applicable at that stage of the process.

224 Clause 10.4.2 of GCC 2010. Refer to Addendum 2 annexed hereto.

225 Clause 10.3 of GCC 2010. Refer to Addendum 2 annexed hereto.

proceedings is lengthy considering the repercussions of every unnecessary delay that occurs on a construction project.

3.4.2.3 Adjudication

As previously stated, the South Africa construction industry practises adjudication in the form of contractual adjudication. If one has reference to the CIDB best practice guidelines one will note that the guidelines conform to the generally acceptable practices in the implementation of adjudication.²²⁶ This is due to the CIDB having based its adjudication procedure on that developed by the ICE in England which is known as the ICE Adjudication Procedure 1997. The CIDB simply removed the reference to the HGRC and retained the remainder of the contents. However, the clause referring to adjudication in the GCC 2010 differs from the aforementioned, as may be seen in the discussion that follows.

3.4.3 Clause 10.5: Adjudication

Clause 10.5 allows for two forms of contractual adjudication known as standing adjudication and ad-hoc adjudication. The GCC 2010 does not elaborate or clearly define the two methods of adjudication contained therein. In order to obtain clarity one must refer to the GCC 2010 adjudication board rules.²²⁷

3.4.3.1 Standing adjudication

Standing adjudication is used if the contract data makes provision for it. If this is the case the parties will appoint the member(s) of the AB within 56

226 Refer to footnote 186 above.

227 According to Rule 1 of the GCC 2010 Adjudication Board Rules an adjudication board is defined as a tribunal that will provide a decision on a dispute that arises between the contracting parties. The AB comprises of between one and three members of which said individuals are members on a SAICE panel of standing adjudication members.

days of the contract commencement date. This method refers to an AB appointed at the onset of the contract and will remain in effect for the duration of the contract.

The GCC 2010 AB rules place certain obligations on the contractor and the employer.²²⁸ Besides the general administrative duties, the one of utmost importance is the duty placed on the parties to keep the AB updated on any claim and/or dispute that arises. Over and above these updates, the contractor and the employer also have the duty to inform the AB of possible circumstances that could possibly lead to future claims or dissatisfaction.²²⁹ By continuously keeping the AB updated about any claims and/or possible future disputes, this method seems to be an early dispute resolution method and should thus assist in a reduction in the number of disputes that arise.

If the disagreement becomes a dispute then the parties refer the dispute to standing adjudication in terms of clause 10.3.2 of GCC 2010.²³⁰ This referral must be done within 28 days from the date of the event. Failure to do so will result in adjudication no longer being applicable and the other party is discharged from any liability in respect of that particular dispute.²³¹ Should the party comply with the 28 day time period, the AB is obliged to furnish a decision within 28 days of the conclusion of the hearing alternatively 28 days from the receipt of the last document submitted.²³²

According to the GCC 2010 AB Rules, this method assists with the reduction of the number of claims that become disputes needing to be resolved. This reduction is achieved by the regular meetings that would be held in terms of the schedule drafted at the commencement of the contract and the continuous involvement of the AB. This method, if used correctly, can be a very good early dispute resolution method in that the AB meets

228 GCC 2010 AB Rules: Rule 5.2.

229 GCC 2010 AB Rules: Rule 5.

230 Refer to Addendum 2 annexed hereto.

231 GCC 2010 AB Rules: Rule 5.4.

232 GCC 2010 AB Rules: Rule 7.1.

with the parties regularly, providing their opinion so as to resolve differences as and when they arise. The additional benefit is that the parties are obliged, in terms of the AB Rules, to keep the standing AB updated in respect of all facets of the construction project from the smaller issues to the larger more technical and complicated issues. This in turn should help the standing AB to reach a decision in a much shorter space of time in respect a dispute that arises, thus keeping in line with the notion that adjudication is the expedient furnishing of a decision. Whilst this method may be commended for its attempt to avoid disputes from arising, it does contain a few problems, such as the cost element and the time periods.

As stated above the parties have 28 days within which to furnish the notice of dispute to the AB. From that point on the GCC 2010 AB rules are silent as to how long the procedure is to take in order to reach finality. The only time limit imposed on the AB is that it is to furnish its decision within 28 days from the date of receipt of the last document or from the conclusion of a hearing that took place. Considering that the standing AB is said to be permanently up to date with the developments of the project including those of any dissatisfaction and or dispute as well as to be in possession of all relevant documents, why then is there this protracted time frame? Technically the AB would not need to host a lengthy hearing or may not need to host a hearing at all as it has documented all events throughout the project. Furthermore, there is no reason why the standing AB has to take 28 days in order to make a decision as the member(s) of the AB are said to be in the privileged position of being in possession of the events that have taken place in the project, a fact which should assist in reaching a decision in a much shorter time frame. Another area of concern is the cost element applicable thereto. If the standing AB comprises of 3 members, then it is three professionals' fees that need to be paid for in respect of every site meeting held, the perusal of all documentation by all 3 members and more importantly the entire adjudication process. This will amount to a substantial amount which is exorbitant especially in low value matters; notwithstanding the fact that the three members may not be in agreement

with each other's decision which results in a dead lock. Extra time and money would be required in order for the deadlock to be broken and a decision taken. If there were to be only one member on the AB the costs might be somewhat lower, but there would still be the professional's fees in respect of every step that is taken throughout the entire contract as well as in the adjudication procedure which can once again be seen as prejudicial to the parties in a less complicated and/or lower valued dispute.

This method could possibly be successful if it were utilised in the correct manner, that being in a dispute preventative manner, and if the time frames were reduced so as to ensure expediency. AS things stand at the moment, it is not feasible due to the cost implications and protracted time frames provided.

Should the contract data not make provision for standing adjudication then ad-hoc adjudication is used.

3.4.3.2 Ad-hoc adjudication

In terms of Rule 1 of the GCC 2010 AB Rules, ad-hoc adjudication is conducted by an AB²³³ that is appointed in order to consider a particular dispute that has arisen.

The time frames applicable to this procedure are as follows. The referring party has 28 days within which to give notice of adjudication; failing which adjudication shall no longer be applicable and the party may no longer proceed with other measures so as to resolve the dispute. Secondly the referring party has 7 days from the receipt of the list of adjudicators that have confirmed their availability to furnish the other party with a

233 In this instance the referring party is obliged to choose a minimum of three individuals, who are members of SAICE's panel of ad-hoc adjudicators. The opposing party will then have seven days within which to choose one or three members from the list as provided by the referring party. The number of members required for the AB will be dependent on what is prescribed for in the contract data.

recommended list of adjudicators. The opposing party will have 7 days within which to confirm its choice of adjudicators. The referring party has 14 days after the receipt of the confirmation of appointment to refer the dispute to the AB. The opposing party then has 14 days from receipt of the notice to reply thereto. Upon receipt thereof the AB has 28 days within which to furnish a decision. Therefore the approximate amount of days taken to resolve the dispute, without any extensions that may have been asked for is 91. Some might say that this is a short period of time but considering the nature of the industry and the need for a quick, inexpensive ADR method, this does not meet the purpose it was set out to achieve.²³⁴

3.5 Conclusion

The GCC 2010 takes a somewhat different approach to resolving claims and/or disputes between the parties in comparison with its predecessors. According to Claasen, the contractual conditions contained in the GCC 2010 are clearer.²³⁵ Claasen is further of the opinion that the GCC 2010 provides a logical procedure for the resolution of disputes so as to prevent differences becoming claims, which if unresolved then become disputes.²³⁶ Claasen is further of the opinion that in instances where disputes do arise, the GCC 2010 provides for a quick resolution thereof by means of an impartial third party.²³⁷

According to SAICE the requirement of having to provide for a quick, efficient and impartial ADR procedure is facilitated by 5 elements. The first element is reflected in the contract data, which reflects whether the employer wishes to use standing adjudication or ad-hoc adjudication to resolve a dispute. The ad-hoc adjudication board is appointed to resolve a particular dispute after it has arisen.²³⁸ Standing adjudication is used with

234 The scope of ad-hoc adjudication is a procedure whereby a quick, inexpensive yet fair procedure is used in order to reach a fair settlement. See further GCC AB 2010 Rules: Rule 2.

235 Claasen W GCC 2010 *Civil Engineering News* July 2010.

236 Claasen W GCC 2010 *Civil Engineering News* July 2010.

237 Claasen W GCC 2010 *Civil Engineering News* July 2010.

238 SAICE Management Guide 114; GCC 2010 AB Rules.

the primary aim of trying to prevent claims from becoming disputes. This is said to be achieved by appointing the standing adjudication board at the commencement of the contract and having it remain in effect for the duration of the contract.²³⁹ The said AB is to be updated on a regular basis of all events, situations, claims and possible disputes that have taken place or are about to take place. According to SAICE if the standing adjudication board cannot prevent a claim from becoming a dispute, then the adjudication board is to make a decision in respect of the dispute. The decision is then contractually binding on the parties.²⁴⁰

The impression created by this element is that besides how the respective adjudication boards come into being, ie in terms of standing or ad-hoc adjudication procedures, only the standing adjudication board has the power to make a decision that will be contractually binding. This is not correct. The definition given to adjudication it states that the finding of the third party is binding on the parties ‘unless and until reviewed by either arbitration or litigation’.²⁴¹ In the light hereof both the standing adjudication board as well as the ad-hoc adjudication board have the power to make a decision that will be provisionally binding on the parties.

Stating that the decision is contractually binding implies that the parties have agreed in writing to the decision as furnished by the adjudication board. If the aforementioned is compared to the definition²⁴² of adjudication it would seem that the parties have forfeited their right to refer the decision to arbitration or litigation if dissatisfied with the decision. This is incorrect, as according to the definition the parties are entitled to refer the decision to arbitration or litigation. What can therefore be deduced from the statement that the decision is contractually binding is that the procedure of adjudication has been confused with that of arbitration as the arbitrator’s decision is binding on the parties and is made into a written agreement

239 GCC 2010 AB Rules.

240 SAICE Management Guide 114.

241 CIDB Best Practice Guide #C3 1.

242 The definition as provided by the construction industry. Refer to chapter 2 above.

between the parties.²⁴³ This also contradicts the provisions of the contract that follows the definition of adjudication; namely that the decision of the adjudicator is binding upon the parties until referred for arbitration or litigation.²⁴⁴

ADR is supposed to be a voluntarily entered into by both parties. This fact, as well as the contract data of the GCC 2010, gives the employer the right to decide upon which method of adjudication to use. Therefore, it is not voluntarily entered into by both parties.

The second element is the submission of a dispute to adjudication when the preliminary step to settle the claim is unsuccessful.²⁴⁵ This element is self-explanatory.

The agreement between the parties to have the dispute settled by means of amicable settlement where the assistance of an impartial third party is sought. This is considered the third element. SAICE proceeds to state that this is an ADR method eg expert procedure as opposed to adjudication. This is somewhat contrary to Maritz's opinion that adjudication has found favour in the South African construction industry.²⁴⁶

A compulsory 28 day cooling off period is provided for before the adjudicator's decision may be 'revised'. The term cooling off in the context of the GCC 2010 has been used in the literal sense of cooling off. It allows for the dissatisfied party to 'cool down' and decide later within the 28 day period if it wishes to proceed further with the matter. The 28 day cooling off period is too protracted. If one considers that consumers have a 5 day cooling off period, in terms of the *Consumer Protection Act*²⁴⁷ why then should a party be afforded such a lengthy cooling off period? The cooling off period is protracted and therefore delays matters unnecessarily. A

243 Refer to chapter 2 above.

244 Clause 10.5 of GCC 2010. Refer to Addendum 2 annexed hereto.

245 SAICE Management Guide 114.

246 Maritz & Maiketso "What are the requirements for SA construction industry to fully utilize adjudication?" RICS Conference Proceedings.

247 Act 68 of 2008.

shorter cooling off period would serve as ample time for a party to determine whether or not it would be worth its while to refer the matter to arbitration or litigation.

The final element to achieve an impartial ADR procedure, according to SAICE, is to agree to first try amicable settlement before referring the adjudication board's decision to arbitration or litigation should the decision be disputed. Whilst one can commend SAICE for promoting ADR, this last element is futile. The procedure that is followed in order to get to the point of an adjudication board is already inclusive of ADR. One could then only take it to mean that in this instance the parties referred the dispute to adjudication first. The contract alludes to a definition of amicable settlement in clause 10.4 which states that the parties may amicably settle a claim or dispute with the assistance of an impartial third party. This definition includes the process of adjudication as well as arbitration. However, the contents of the GCC 2010 do not indicate the latter. This point is further illustrated by the fact that the GCC 2010 Amicable Settlement Procedures provide only for negotiation, mediation, conciliation, and expertise procedures as well as a mini-trial.²⁴⁸ This is contradictory to the contents of clause 10.4 in that the clause allows the parties to choose their ADR method.

The South African construction industry seems to continuously use the traditional ADR methods available, such as mediation and negotiation, with the exception of arbitration due to arbitration having become a costly and lengthy affair.²⁴⁹

Can it truly be said that SAICE has achieved its goals of making the GCC conditions clearer and of providing a logical procedure in respect of dispute resolution? The answer is unfortunately no.

248 GCC 2010 Amicable Settlement Procedures Provision 1.

249 Refer to chapter 2 above.

The contract states that disputes are to be immediately referred to adjudication. This is contradictory to clause 10.1 which states that the contractor must first approach the engineer for a ruling in respect of its claim pertaining to those as encompassed in clause 10.1. Only thereafter may the contractor take the next step in the process, which is to furnish a dispute notice in order to have the dispute settled other than by means of what is constituted as ADR in the contract alternatively adjudication or arbitration if dissatisfied with the engineer's ruling.

An important element of ADR is the impartiality of the neutral third party. The impartiality of the appointed engineer is questionable in the light of the fact that the engineer is the employer's agent. This raises suspicion as to whether or not the engineer is able to remain objective and impartial when asked to resolve either a claim or a dispute.

The expediency element of ADR has definitely not been achieved. There is a time frame of 28 days applicable to most steps to be taken in the dispute resolution process; namely the referral of the claim to the engineer; the time within which the engineer may furnish his ruling; the referral of a dissatisfaction claim; the delivery of a dispute notice; the furnishing of the adjudicator's decision and cooling off period. The time frame of 14 days in respect of the invitation to settle by means of ADR and the lack of time frames applicable to the third party in order to acquire all relevant evidence either by means of oral or documented evidence aid in the delay in resolving a dispute.

The contract also does not stipulate if electronic measures may be used in respect of the delivery of the notices and/or documents needed to prove the parties' cases as well as documents presenting their cases. The use of email, fax or Skype could help expedite proceedings especially in less complex matters.

Furthermore the contract does not make a distinction between complex and simple matters on the basis of their technical or legal nature, or their

monetary value. This could be made by placing monetary values on the claims. For example, claims up to a value of one hundred thousand rand could be considered simple, or complexity of the matter could depend on the technical nature of the dispute, whether it is over a legal issue or not. This distinction would help in the choice of the ADR method in respect of that particular dispute as not all ADR methods are applicable to all types of disputes.

The definitions in the contract are either vague or non-existent. Examples of vague definitions are those of amicable settlement and dispute notice. There is no definition of adjudication.

In order to achieve the objectives that the drafters attempted to reach, amendments need to be made to the GCC 2010. These amendments are important in that they will aid in the reduction in the number of disputes arising as a result of different inferences being made drawn different interpretations are made in respect of the different clauses contained in the GCC 2010. A better provided for dispute resolution procedure would decrease the delay in the resolution of disputes arising in terms of the GCC 2010.

The construction industry forms an essential part of commerce, especially in a developing state such as South Africa. In the light of the fact that it is often burdened with disputes that arise in terms of the contract as well as its own unpredictable nature of the construction industry,²⁵⁰ it is imperative that the contract is managed in an efficient manner that any disputes arising in terms thereof are resolved expeditiously as well as in the most cost effective manner. The avoidance and expedient resolution of disputes are in the best interests of the contracting parties of construction agreements as it will inter alia assist in regulating the cash flow in a particular project, save costs, help preserve working relationships between the parties and expedite the completion of projects.

250 Maritz T Investigation into Adjudication *Essays innovate* 3 2009 78.

South Africa currently practises adjudication in the form of contractual adjudication in the construction industry. This approach differs from the English approach which provides for statutory adjudication in terms of the *HGCR*. This statute further regulates the construction industry in conjunction with the Scheme for Construction Contract as well as the *Local Democracy, Economic Development and Construction Act*.²⁵¹ South Africa, unfortunately, has not been so pro-active as to introduce legislation that regulates the construction industry let alone the contents of the contract and the resolution of disputes arising in terms thereof. Instead the CIDB based its adjudication procedure on that developed by the Institute of Civil Engineers (ICE) in the United Kingdom known as the Institute of Civil Engineers Adjudication Procedure 1997; and simply removed from it any reference to the *HGCR*.²⁵²

251 Act 2009.

252 CIDB *Best Practices Guide #C3 5.*

Chapter 4

Resolution of construction disputes in England

4.1 Introduction

It must be highlighted at this stage that the English construction industry had various problems that needed to be remedied, ranging from the contractual conditions, dispute resolution and contract management to payment. For purposes of this study focus shall only be placed on dispute resolution.

4.2 Historical position before HGCR

Historically there was huge disarray in the English construction industry as there was an imbalance of power between the main contractor and subcontractor in respect of contractual obligations as well as remedies to the breach thereof. This occurred to such an extent that there were numerous insolvencies of subcontractors due to the lack of payment and right of recourse of the subcontractor.²⁵³ The resolution of the disputes between the parties took place in terms of the ordinary methods used in the industry namely by referring the claim to the engineer for a ruling and thereafter by the use of mediation, arbitration or litigation.²⁵⁴ Adjudication existed but was not the primary method used in the resolution of disputes between the parties.

Historically adjudication was a procedure primarily used between the main contractor and sub-contractor so as to refine the issues around abatement and/or set-off pertaining to the claim a party had in respect of its entitlement

253 Uff J in Gaitskell R *Engineers' Dispute Resolution Handbook* v.

254 Dennys N *Hudson's Building & Engineering Contracts* 12ed 1375; Uff J in Gaitskell R *Engineers' Dispute Resolution Handbook* v.

to interim payments.²⁵⁵ Although the adjudication procedure was well known, it was not often used. The use of adjudication was strictly limited to the disputes pertaining to set-off by the main contractors and could only be utilised if the subcontractor acted within a 14 day period from date of set-off.²⁵⁶

The process of adjudication has always had strict limits applicable to it. The contractor had 4 weeks to notify the project manager, namely the engineer, of the dispute. The 4 weeks commenced running from the date the party became aware of the problem. Only after notifying the project manager, and waiting 2 weeks thereafter, was the contractor allowed to submit its dispute to the adjudicator for a decision. This process was also applicable to instances when the employer wished to raise a dispute. After the submission to the adjudicator, there was a further 4 week time frame wherein parties had to submit all relevant documentation and information required and upon receipt of this the adjudicator then had 4 weeks to furnish his decision.²⁵⁷ The enforcement of adjudicators' decisions and the resolution of disputes in the construction industry that were resolved by means of litigation were done so at the Technology and Construction Court.²⁵⁸

In 1993 Sir Michael Latham was tasked to define and address problems that in his opinion were not sufficiently dealt with in the English construction industry. His report, known as *Constructing the Team*, contained various recommendations as to what improvements could be made so as to

255 Originally adjudication made its appearance in the matter of *Gilbert Ash (Northern) Ltd v Modern Engineering Bristol* 1974 in light of the fact that the court highlighted that the contractual provisions contained therein were unfair towards the subcontractors due to the main contractor being entitled to deduct any sum agreed to be due to it from the subcontractor; Dennys N Hudson's *Building & Engineering Contracts* 12ed 1374-1375.

256 Redmond J *Adjudication in Construction Contracts* 5; Dennys N Hudson's *Building & Engineering Contracts* 12ed 1373.

257 These time frames could have been extended by agreement between the parties. Redmond J *Adjudication in Construction Contracts* 6.

258 Hereafter the TCC. The TCC is a court that deals only with technology and construction industry disputes.

resolve the problems being experienced within the industry.²⁵⁹ According to Latham, the main intention of the reform needed within the industry was to avoid the hold up of cash flow as far as possible.²⁶⁰ He made various recommendations as to how to achieve this goal. Only some of the recommendations are of relevance this study. One is that the parties should work together in order to reach the goals and benefits set.²⁶¹ He further recommended that win-win solutions to disputes should be found so as to allow for fair balance between the parties. This fair balance also needed to find its place in the contractual conditions, which conditions had to be included in the standard form contracts.²⁶² One of those contractual provisions was the provision for a speedy dispute resolution mechanism, and that adjudication should be the said chosen method.²⁶³ There was wide spread agreement with Latham's conclusions that the industry needed an improved method of dispute resolution.²⁶⁴

The dispute resolution system that was utilised in England at that stage was a concern not only for Sir Michael Latham but also for Lord Woolf, who was simultaneously performing a review of the court system in England. Lord Woolf was concerned with the costs related to resolving disputes as well as the concomitant delay. He ascertained that on average a matter resolved by means of litigation took 34 months with the costs element comprising of 158% of the claim if the claim amount was below £12 500 and 96% if the claim was between £12 500 and £25 000. Lord Woolf realised that if a claim amount for example was £200 000 the average costs in settling the matter amounted to £165 000.²⁶⁵

259 Redmond J *Adjudication in Construction Contracts* 1.

260 Latham *Constructing the Team* Par 9.13

261 Latham *Constructing the Team Forward*.

262 Latham Report *Constructing the Team*; Redmond J *Adjudication in Construction Contracts* 2.

263 Latham Report *Constructing the Team*; Redmond J *Adjudication in Construction Contracts* 2.

264 Redman J *Adjudication in Construction Contracts* 3.

265 Redman J *Adjudication in Construction Contracts* 2 – 3.

The result hereof was the introduction of the *Housing Grants, Construction and Regeneration Act*²⁶⁶ as well as the commencement of the ‘preparation of the draft Scheme for Construction Contracts, which was only enacted in March 1998. The purposes of the HGCR were widely recognised as the promotion of cash flow within the construction industry and to encourage parties to resolve their disputes at any given moment.²⁶⁷

4.3 The HGCR

The HGCR brought about fundamental changes to the English construction industry; particularly to the resolution of disputes. The HGCR introduced statutory adjudication, in terms of section 108 thereof;²⁶⁸ of which any party has a right, at any time, to refer a dispute for resolution by adjudication. This method entails that the dispute is referred to an impartial and independent third party who must make a ruling within 28 to 42 days, or longer if the extension is agreed to by the parties. Section 108 further stipulates the minimum provisions that must be contained in the construction contract. However, should any of the parties be dissatisfied with the adjudicator’s decision they may refer it to arbitration or to the court. The construction works continue pending the outcome of the arbitration or court proceedings.²⁶⁹ The outcome hereof is that all standard forms of contract used in the construction industry have been amended so as to include provisions that provide for adjudication.²⁷⁰

The aforementioned procedure also ‘implements the declared aim of the legislation to improve cash flow on construction projects through a policy of “pay now, argue later”’.

266 Act of 1996.

267 McClusky P et al *The Development of UK Statutory Adjudication 1*; Latham *Constructing the Team*.

268 Refer to Addendum 3 annexed hereto.

269 The English have a dedicated court known as the Technology and Construction Court (TCC) which was established to attend to construction disputes. The enforcement of the adjudicator’s decision forms part of this court’s jurisdiction.

270 Coulson P *Construction Adjudication* 2ed 149.

The benefits that have accrued as a result of the Act are numerous. Adjudication is therefore mandatory interim step that is to be taken before referring a dispute to arbitration or litigation. The parties have a right to refer their dispute to adjudication in terms of statute at any given time. There is no time bar imposed as to when the parties may refer the matter for adjudication. The Act provides for time frames applicable to each step of the dispute resolution process, and provides for the definition of a construction agreement, a dispute, and the delivery of a dispute notice. In other words the Act provides for the basic essentials that must be followed in respect of the dispute resolution procedure. All standard forms contracts were amended to include adjudication. However, the one thing that the Act does not make provision for is the definition of adjudication.

The Act also provides for instances whereby the contract does not make provision for adjudication, and a situation whereby the provisions do not meet the requirements as set out in the *HGCR* by providing a default position as found in the Scheme for Construction Contracts.²⁷¹ The Scheme for Construction Contracts provides for the same procedure as prescribed for in the Act which assists in ensuring consistent application of the method of adjudication.²⁷²

However, the one thing that neither the Act nor the Scheme for Construction Contracts provides for is the definition of adjudication; which absence poses a problem. Redmond has proceeded to provide a simple definition of adjudication, namely that it is a ‘system of dispute resolution that complies with the requirements of the Act.’²⁷³ He further criticises this definition by stating that it is not very informative despite that it may be said to be strictly correct.²⁷⁴

271 Statutory Instrument 1998 No 649 Construction, England and Wales known as the Scheme for Construction Contracts (England and Wales) Regulations 1998. Hereafter referred to as the Scheme. ; The incorporation of the provisions of the scheme to the contract will have the effect that they are considered implied terms of the contract concerned.

272 Scheme for Construction Contracts Part 1.

273 Redman J *Adjudication in Construction Contracts* 7.

274 Redman J *Adjudication in Construction Contracts* 7.

The first time that the TCC had to consider the adjudication provisions of the HGCR was in the matter of *Macob Civil Engineering v Morris Construction Ltd*.²⁷⁵ In this matter the defendant failed to comply with the adjudicator's decision and as such the plaintiff sought to enforce the decision.²⁷⁶ The question was raised was whether the adjudicator's decision was binding. The reason provided by the defendant for the failure to comply with the adjudicator's decision is that the adjudicator erred in his decision and therefore it is not binding. Judge Dyson ruled that the decision was in fact binding even if the adjudicator's decision was incorrect.

Judge Dyson provided his own opinion in respect of adjudication which simultaneously encapsulates the essence of adjudication. His opinion is as follows:

The intention of parliament under the Act was plain. It was to introduce a speedy mechanism for settling disputes and construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement... The timetable for adjudication is very tight... many would say unreasonably tight, and likely to result in injustice. Parliament must have been taken to be aware of this...It is clearly Parliament's intention that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes find it difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that the decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.²⁷⁷

Adjudication is therefore seen as an interim step in the dispute resolution process, its purpose being to provide a decision which is provisionally

275 [1999] BLR 93.

276 In this matter the dispute had been referred for adjudication in respect of monies due. The adjudicator awarded the plaintiff an amount of £360 000. The defendant refused to comply with the adjudicator's decision and as such the plaintiff approached the TCC for enforcement thereof by means of the summary judgment procedure. The defendant alleged that the adjudicator had erred in his ruling and therefore not binding.

277 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR par 13 – 14.

binding until the dispute is thereafter determined by arbitration or litigation or the parties agree thereto.²⁷⁸

The courts took, and still take, a robust approach to the enforcement of an adjudicator's decision. By doing so they make concessions to the possible imperfections of the adjudication process, unless the parties can prove that the adjudicator did not follow the rules of natural justice alternatively did not answer the question posed to it.²⁷⁹

Despite the introduction of the Act, the industry still encountered problems due to the Act only applying to written contracts as well as the fact that it did not make provision for the rectification of a clerical error found in an adjudicator's award. As a result, the ministry attended to investigate the situation so as to find solutions thereto and, with Latham's assistance²⁸⁰, came up with a solution which was the introduction of the *Local Democracy, Economic Development and Construction Act*.²⁸¹ The *LDED*C rectified the loop holes in the *HGCR* in that it the *HGCR* is now applicable to all construction contracts, written as well as oral,²⁸² and it now allows for the adjudicator to correct a clerical error in its decision.²⁸³

278 Coulson P *Construction Adjudication*; Dennys N *Hudson's Building & Engineering Contracts* 12ed 1375; Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR; Bouyges (UK)Ltd v Dahl-Jensen Ltd [2000] BLR; Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd [2003] EWCA.

279 Dennys N *Hudson's Building & Engineering Contracts* 12 ed1375; Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR; Bouyges (UK)Ltd v Dahl-Jensen Ltd [2000] BLR; Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd [2003] EWCA.

280 Latham report: Construction Review Group 2004.

281 2009. Hereafter referred to as *LDED*C.

282 This creates its own difficulty in that it must be established that there is a contract. An example hereof is in the matter of *Clark v ACT*. The court *a quo* found that although there was no complicated contract between the parties, a simple agreement existed whereby works would be done at a reasonable price. The court referred to it as a "contractual quantum meruit" (Connel K Plaiting & Nailing). However the court of appeal disagreed with the court *a quo*'s findings. This problem is due to the fact that the definition of construction contracts is wide in that so long as there is an agreement for construction operations to be carried out it constitutes a construction contract.

283 Sections 139 and 140 of *LDED*C.

4.4 Current position

It is important to emphasise at this stage that the procedure to resolve a claim is similar to that in the South African position in that the engineer has to be first approached for a ruling thereon. If a party is dissatisfied with the ruling, the claim thereafter becomes a dispute. The parties are thereafter free to resolve the dispute by any other ADR method before proceeding to arbitration or litigation. The process will be stipulated in respect of the content of the dispute resolution clause as provided for in the construction contract. The one step in the dispute resolution process that does not change is that of adjudication.

The English utilise two forms of adjudication namely statutory and contractual adjudication. However, statutory adjudication is the primary adjudication method used in the construction industry.

4.4.1 Statutory adjudication

The right to refer the matter to adjudication in this regard arises in terms of section 108 of *HGCR*. It is a prerequisite that a dispute must be in existence before using these methods of ADR. The parties must first give notice of intention to refer the dispute, appoint the adjudicator, and then the referral notice to the adjudicator.²⁸⁴ The contents of the referral notice encompasses the referral of the dispute to the adjudicator and what the dispute is about. The Act provides that a dispute may be referred to adjudication at any stage provide that the referral is done and the appointment of the adjudicator takes place within 7 days. The Act does not make provision for a time-bar clause. However, in practice the standard contracts have introduced a time-bar in that should the referral notice not be served within 28 days of the dispute arising, the party forfeits its rights to have the dispute dealt with at all.

284 Kirk P Part Three: The State of Adjudication.

The ICE introduced adjudication procedures that are followed in the industry in respect of all construction contracts with the exception of the NEC3 contracts.²⁸⁵ These procedures make provision for a simple procedure and a general procedure. The simple procedure applies to claims up to a value of £50 000, and only documents and such sources of information are used to prove a party's claim. No oral evidence is presented. The adjudicator's fees are limited to £3000. The remainder of the disputes are dealt with by means of the general procedure. By making this distinction and placing a financial limit on the simple procedure, the ICE allows for costs to be limited and keeps to the essence of adjudication, namely expediency and cost effectiveness. It also ensures that the adjudicator with the appropriate experience is appointed to deal with the dispute at hand. There are various adjudication rules available in respect of the application of adjudication such as TeCSA and CEDR for instance. Although the rules were established by different bodies that have established panels of experts designated to attend to the adjudication process, the rules in essence are all the same from one body to the next.

Benefit of adjudication by means of statute is that it ensures that the procedure is followed as well as regulated. This assists in ensuring consistency in the application thereof and aids in the realisation of the purpose of adjudication, which is that should be a quick and cost effective method of resolving disputes.²⁸⁶ The disadvantage is that it does not provide for the definition of adjudication. Furthermore as long as the contract contains provisions similar to that of the Act, then the remaining provisions are regulated by the contract, eg time frame etc., which may lead to inconsistencies with the application thereof, as well as the possibility of the process becoming prolonged and as a result costly. Furthermore, the Act does not clearly provide for distinct method to be used in delivering notices. One can therefore assume that any method, whether it be ordinary mail or by electronic mail, may be used. It would be more

285 The reason is that the NEC 3 provides for its own mandatory dispute resolution procedure.

286 McClusky P *et al* The Development of UK Statutory Adjudication.

beneficial to prescribe a method such as electronic mail to assist with administration of the process, as well as to make it possible to get on with the next step in the dispute resolution process.

4.4.2 Contractual adjudication

It is imperative that one considers the inter relation between the *HGCR*, the Scheme of Construction Contracts and the provisions in the contracts when dealing with contractual adjudication.

When a contract contains provisions relating to adjudication, the question to be asked is if the contractual provisions comply with section 108 of *HGCR*. There are two scenarios that may occur. Firstly, if it is determined that the provisions do not comply with section 108 of *HGCR*, or if the contract does not contain provisions pertaining to adjudication, the Scheme for Construction Contracts will apply.²⁸⁷ Secondly if it is determined that the contractual provisions do comply with section 108 of *HGCR* then the parties' rights and obligations in respect of adjudication are determined.

The parties may not contract out of the right created in terms of section 108 of *HGCR*. In light hereof certain judges have emphasised the fact that the contractual provisions must be at the forefront when the court is to consider the parties' rights and responsibilities.²⁸⁸ Therefore, it does not matter whether the contract contains additional provisions or terms that are somewhat different to those contained in the *HGCR*.²⁸⁹ What is of importance is that these additional and/or differing terms always contain the basic requirements as stipulated by the *HGCR*.²⁹⁰

An important point to note about contractual adjudication relates to the enforceability of an adjudicator's decision when any errors of law and fact were made by the adjudicator. The adjudicator's decision would be

287 Scheme for Construction Contracts; Coulson P *Construction Adjudication* 2ed 150.

288 *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC).

289 *Treasure and Sons Ltd v Dawes* [2008] BLR 24; *Linnett v Halliwell LLP* [2009]

BLR 312; Coulson P *Construction Adjudication* 2ed 150.

290 Coulson P *Construction Adjudication* 2ed 150.

considered unenforceable in a purely contractual adjudication. This position differs from statutory adjudication in that the adjudicator's decision may still be considered enforceable; depending on whether the adjudicator answered the correct questions or not. This was the view of the court in *Steve Domsalla (t/a Domsalla Building Services) Ltd v Kenneth Dyason* [2007] EWHC 1174 (TCC). This viewpoint results in difficulty with the enforcement of the adjudicator's decision as it would be dependent on the original basis of the adjudicator's appointment; ie in terms of statute or contract. It has been said that Judge Thornton had forgotten that statutory adjudication operates by inference of the Scheme of Construction Contracts into the construction contract.²⁹¹ However, in *Treasure and Sons Ltd v Dawes* for example, the court indicated that there should be no distinction drawn between the various types of adjudication when it comes to the enforcement of the adjudicator's decision. The reason is that adjudication is contractual in one way or another.²⁹² This approach seems to have found acceptance in the TCC.²⁹³

The implementation of the adjudication procedure in respect of contractual adjudication is the same as that found in statutory adjudication with the exception that the time frames and administrative areas thereof are determined by means of the construction contract. It is important to note that there is no great difference between the contractual and statutory adjudication methods beyond the obvious one that the right arises in terms of statute. That is so, but the process of adjudication is contractual in nature.

4.5 Conclusion

The Woolf and the Latham reports revolutionised the English construction industry. The HGCR was introduced as a result of these reports. The purpose of the aforementioned Act was to regulate the construction

291 Coulson P *Construction Adjudication* 2ed152.

292 *Treasure v Dawes* [2008] BLR 24 and *Linnett v Halliwell* [2009] EWHC 319 (TCC).

293 Coulson P *Construction Adjudication* 2ed 152.

industry in respect of various areas, especially the construction contracts and the resolution of disputes arising therefrom.

Section 108 not only provided a party with the right to refer a dispute to adjudication but also as to what the contract shall stipulate in that regard. The result of these provisions is that the process of adjudication is clearly set out, from beginning to end.

The English have so many positive attributes within their construction industry. The contracts are all required to include provisions ensuring that adjudication is the preferred method of resolving disputes. If they do not make the provision then the default procedure as contained in the Scheme for Construction Contracts is applicable.

The Act makes for provision for the calculation of the days as prescribed in the various sections. By providing this calculation it averts any arguments as to when the relevant time frames commenced in respect of that particular stage of the adjudication process.

The Act also makes provision for the service of notices. However, it does not specify as to which method is the preferred method. The Act does allow for the parties to agree amongst themselves as to what method would be considered appropriate as well as by any effective means. Unfortunately the Act does not define effective means.

A new statute applicable to the construction industry was subsequently introduced; namely the *LDEDCA*. The result hereof was that the *HGCR* is now applicable to all construction contracts not only written agreements. Furthermore the adjudicator is afforded the power to correct a clerical or typing error which occurred by accident.

Adjudication in England is being used for larger and smaller disputes and those of 'varying complexity'.²⁹⁴

294 Mouzer EJ in McCluskey E *et al* The Development of UK Statutory Adjudication 2.

Furthermore the English have a court that is dedicated to construction disputes known as the TCC. The TCC has taken a robust approach to the enforcement of the adjudicator's award. They will not change anything unless the question posed to the adjudicator for resolution was answered incorrectly alternatively the adjudicator did not follow the rules of natural justice. The court furthermore accommodates the court proceedings to allow for the making of an adjudicator's award an order of court. They follow the litigation process and apply the summary judgment application as technically there is no valid defence against it.

The fact that there is a dedicated court that deals specifically with the decisions of an adjudicator as well as construction disputes provides case law which allows for the development of adjudication; provides people in the industry with an understanding of the implementation of adjudication as well as the court's views thereon.

Furthermore all relevant parties in the construction industry from the minister to the industry representatives work in conjunction with each other on a continuous basis so as to ensure that there are continuous improvements within the best practices of the industry.

Albeit that the Act makes provision for the methods which may be used for the service of documents that do not form part of legal proceedings it does not clearly define effective means. More importantly the Act does not define the most important term that requires defining namely 'adjudication'. So whilst it may seem that the English have everything it would appear that there is still room for improvement.

Chapter 5

Comparison between the South African position of resolving construction disputes and that of the statutory method used in England

5.1 *Introduction*

As previously stated the South African construction law, specifically that which governs contracts between the parties, finds its origin in the English contract commonly known as the Institute of Civil Engineers Conditions. Not only did the law find its origin in the English contract but so too did the preferred manner within which to resolve disputes that arise in the construction industry. The disputes arising in the construction industry are primarily dealt with by means of ADR methods. The main ADR measures that are used are mediation, arbitration and adjudication.

The three tier approach in construction contracts for resolving disputes is still used in the South African and English construction industries today.²⁹⁵ This method can be beneficial in that it allows for structure and defines the process that needs to be followed in respect of resolving an issue, thereby providing clarity and certainty. That having been said, it must be remembered that such clarity and certainty will be maintained only by a contractual condition that is drafted in a clear and unambiguous manner.

5.2 *The first tier of the three tier process*

The first action in the three tier dispute resolution process is to approach the engineer for a ruling in respect of a claim that a party may have.²⁹⁶ The use of the engineer in resolving a claim may be seen as a dispute preventative method as there is no dispute at this stage between the parties. Instead one party is trying to assert its rights in terms of the

295 Refer to standard form contracts namely JBCC, FIDIC, GCC, JCT, ICE.

296 Refer to chapter 3 above and clause 10.1 & 10.2 of GCC 2010. Refer to Addendum 2 annexed hereto.

contract. This step is advantageous in that the engineer has the knowledge and expertise pertaining to the works necessary in order to be able to provide an informed ruling in respect of the claim, thereby possibly preventing a dispute from arising. However, this process does present its own set of problems, such as questionable impartiality of the engineer and the fact that there is no guarantee that a dispute will not be declared.

Objectivity and impartiality are cornerstones of ADR, and it is therefore imperative that the third party be impartial and objective when making a decision in respect of a claim.²⁹⁷ But questions may be raised as to the impartiality of the engineer due to the fact that the engineer is the employer's agent.²⁹⁸ This is so in respect of both the South African and English construction industries. The fact that the engineer acts as the employer's agent compromises his impartiality.²⁹⁹

It has become common practice in both the construction industries that a dispute must exist before the parties may proceed with any prescribed and/or recommended dispute resolution method.³⁰⁰ Once the dispute is declared the parties may only then proceed to resolve it by using the method as provided for example mediation, adjudication, arbitration or litigation.

5.3 *The second tier of the three tier process*

The second tier of the dispute resolution process comes into effect once a dispute has been declared. The GCC 2010 provides for the resolution of disputes by means of amicable settlement or adjudication³⁰¹ whilst the English at this stage are required to use adjudication.³⁰² It is important to note that albeit that the English do not discourage the use of other ADR

297 Refer to Chapter 2 above.

298 Refer to Chapter 3 above.

299 Refer to Chapter 3 above.

300 Clause 10.3 of GCC 2010. Refer to Addendum 2 annexed hereto. Section 108 HGCR and Chapter 4 above.

301 Clause 10.4 and 10.5 of GCC 2010. Refer to Addendum 2 annexed hereto.

302 Section 108 HGCR.

methods, their primary ADR method in resolving a construction dispute is adjudication.

The GCC 2010 allows for parties to choose between two methods at this stage of the dispute resolution process, namely amicable settlement or adjudication. Should the party wish to use amicable settlement, an invitation must first be sent to the other party requesting that it partake in the amicable settlement proceedings. This invitation can be seen as a method of confirming that both parties voluntarily enter into the amicable dispute resolution procedure. However, this can also be considered a delaying tactic by the parties in that the construction industry can ill afford to have an additional 14 day delay³⁰³ while a party decides if it wishes to settle the dispute in that manner. A shorter time frame would be more appropriate. The other problem encountered with the invitation is that the contract does not stipulate what the contents of the invitation should be. For example, should the invitation already suggest alternative ADR methods that the aggrieved party wishes to use in resolving the dispute or does that get decided only upon the acceptance to settle the matter amicably? Further information should be provided in the contract as to the contents of the invitation so as to avoid any unnecessary further delays in future.

However, the aggrieved party has a wide variety of options in respect of ADR methods available to it should it decide to use the amicable settlement procedure. The reason is that amicable settlement is widely defined in the GCC 2010 that it encompasses any form of ADR method.³⁰⁴ This choice is beneficial in that it allows the parties to select an ADR method that they are

303 Clause 10.4 of GCC 2010. Refer to Addendum 2 annexed hereto.

304 Although the parties have a choice, mediation is usually the ADR method chosen in resolving a construction dispute at this level. The English also provide for mediation as an option to resolve a construction dispute because of its cost effectiveness, its informality and more importantly its preservation of the balance of power between the parties and control that the parties have during the mediation process.

comfortable with and aids in setting the stage for amicability between the parties, as opposed to an adversarial atmosphere.

The other option available to the aggrieved party in the second tier of the GCC 2010 is that of contractual adjudication.³⁰⁵ The English construction industry uses primarily statutory adjudication to resolve their construction disputes.³⁰⁶

Adjudication is an ADR method predominantly used to resolve disputes within the construction industry. It is considered to be a quick and cost effective method of resolving a construction dispute with the assistance of an impartial third party within a prescribed period of time.³⁰⁷ The third party's decision is binding on the parties until and unless the parties proceed to arbitration or litigation.³⁰⁸

The English have legislation, known as the *HGCR*, allowing the parties to a construction dispute to refer their dispute to adjudication at any time. This is beneficial in that the parties now have a right of recourse that is regulated by statute.³⁰⁹ The result hereof is that all construction contracts must now make provision for the resolution of disputes by means of legislation. The *HGCR* provides for the right to refer a dispute to a dispute to adjudication at any time, for the time frames that need to be followed in respect of each step taken in the adjudication process, as well as the fact that the decision is binding unless the parties proceed to arbitration or litigation.³¹⁰ Therefore the legislation assists with the streamlining of the ADR process by limiting different interpretations and applications thereof thus maintaining the element speed. The streamlining of the process also aids in trying to ensure that the progress in the construction project is not haltered or delayed unnecessarily so that the goals and targets initially set are timeously achieved.

305 Clause 10.5 of GCC 2010; Refer to Addendum 2 annexed hereto.

306 Section 108 *HGCR*; refer to chapter 4 above.

307 28 days has become a commonly accepted time frame in this regard.

308 Refer to chapter 2 above.

309 Section 108 (1) *HGCR*.

310 Refer to Addendum 3 annexed hereto.

The *HGCR* also made provision for a default position, known as the Scheme for Construction Contracts, for instances whereby the construction contract does not provide for adjudication or the provisions thereof are contrary to legislation.³¹¹ The regulations contained in the Scheme for Construction Contracts are extended versions of the *HGCR*.³¹² The use of the Scheme will have the effect that the regulations as contained therein will be considered implied terms of the construction contract.³¹³ By providing for a default position, the English once again ensure that there is consistency within the construction industry. Subsequent to the introduction of the *HGCR* the English introduced further legislation known as the *LDEDCA Act* to rectify the shortcomings of the *HGCR*, in that the *HGCR* applies to all construction contracts, whether written or oral, and the adjudicator may now rectify any clerical error made in the his/her award.³¹⁴

Despite the fact that the English introduced legislation to address the shortcomings of the industry, they have failed to define what is meant by the term adjudication. Assumptions are made as to what the process is, based on the description provided of the procedure to be followed, namely that an impartial third party is to furnish a decision within a 28 day period, which decision is binding until taken to arbitration or litigation. Although that the South African construction industry does not have legislation regulating the contents of the construction contract or the dispute resolution to be followed, the CIDB has provided a definition for the procedure of adjudication.³¹⁵ This assists in establishing what the essence of the ADR method is, thus making it easier to achieve the desired outcome. In this instance it is to provide a decision within 28 days by using a quick and cost effective method which allows the construction project to continue without any unnecessary delays.

The adjudication process in South Africa is regulated by the contents of the construction contract; in this instance the GCC 2010. The GCC 2010

311 Refer to chapter 4.2 above.

312 Refer to chapter 4.2 above.

313 Refer to chapter 4.3 above.

314 Section 136 *LDEDCA Act*.

315 CIDB Best Practices Guidelines #C3.

makes provision for two forms of contractual adjudication namely standing adjudication and ad-hoc adjudication. The choice of adjudication method must be reflected at the commencement of the contract in the contract data; if not, then the ad-hoc adjudication method will be automatically applicable. The GCC 2010 does not clearly define adjudication nor set out the procedure to be followed. Instead the adjudication procedure is prescribed in terms of the GCC 2010 Adjudication Board Rules. The procedure as stipulated in the aforementioned rules is lengthy, can be costly if more than one adjudicator is appointed and at times unclear. This therefore defeats the purpose of adjudication, which is to be a quick and cost effective procedure.

To assist with the enforcement of adjudicators' awards as well as construction disputes, the English introduced a court known as the TCC that is dedicated to construction disputes. By having this legislative body the disputes are dealt with by experts in the legal as well as construction field. Further there is case law which allows for the development of adjudication as such, and gives one an idea as to the correct interpretation and application of the ADR method of adjudication method by means of judicial precedent. South Africa does not have a body that deals purely with construction disputes and therefore one will never truly know the true state of affairs of adjudication in South Africa.

There is no real difference between contractual adjudication and statutory adjudication. At face value it is obvious that the right to have a dispute resolved by means of statutory adjudication arises in terms of legislation. However, once that decision is taken it is then regulated in terms of a contract entered into between the parties. The procedure, costs, appointment and jurisdiction of adjudicator are all regulated by means of a contract which is independent to the primary agreement between the parties. Both in the case of statutory and contractual adjudication, the contents of the subsequent agreements are in terms of the guidelines as provided for by the respective professional and regulatory bodies.³¹⁶

316 SAICE and ICE respectively.

The English ICE has developed an adjudication procedure which is regularly updated. This adjudication procedure provides for 2 methods within which to resolve the dispute, namely by means of the simple procedure or the general procedure. The simple procedure refers to disputes that are less than £50 000 in value. The simple procedure also prescribes a specific procedure for the resolution of the dispute by means of the consultation of documentation only, and that the adjudicator's fees are capped at £3000. The general procedure applies to all other disputes and specifies the manner within which the adjudicator is to deal with the dispute. The procedure that SAICE and the CIDB have provided for the resolution of disputes is too complicated and once again in certain instances contradictory.³¹⁷ This is a general trend in the South African industry as the clauses of the GCC 2010 are ambiguous and vague and need to be redrafted.

5.4 *The last tier of the three tier process*

South Africa and England have statutes that regulate the ADR method of arbitration. The statutes are known as the *Arbitration Act* 42 of 1965, as amended, and the *Arbitration Act* 1996 respectively. Arbitration is defined as a process whereby the parties present their evidence to an independent third party, the arbitrator, who thereafter makes a binding award.³¹⁸

Arbitration was originally the preferred method of resolving disputes in both the English and South African construction industries. The reasons are to the fact that the arbitration process was quicker and cheaper than litigation and more importantly that the arbitrator's award is final and binding. However, arbitration has lost favour in the construction industries of both countries as the formal procedures are in place to facilitate arbitration proceedings which mirror those of litigation, and the costs associated with

317 Bvumbwe C & Thwala D Exploratory Study of Dispute Resolution Methods 35.

318 Pretorius P *Dispute Resolution* 5.

arbitration have escalated to such an extent that it defeats the purpose as an alternative means of resolving a dispute.³¹⁹

Both *Arbitration Acts* provide for the procedure of arbitration from the commencement of the proceedings to the possibilities of reviewing the arbitrator's award. As a result hereof the arbitration clauses contained in contracts are based on the relevant provisions of the statutes. A further positive is the availability of case law, which allows for the development of arbitration. The case law allows for the correct interpretation of the Acts as well as the arbitration clauses contained in contracts.

However, the English have once again been proactive in that they have revised their *Arbitration Act*. They have included the UNCITRAL model law into their Act. South Africa has not been so proactive. In 1998 the South African Law Commission recommended that the entire *Arbitration Act* be repealed and a new one be promulgated.³²⁰ To date this has yet to be done.

5.5 Conclusion

The greatest concerns with adjudication are the actual definition thereof and its scope. There are various definitions available, which multiplicity leads to different ways within which it is applied.³²¹ However, what remains consistent throughout all definitions is that adjudication is to be used as an interim expedient measure to resolve disputes with the hope of preserving the relationship between the parties as well as to ensure that there is no delay on the project.

The English construction industry has legislation that is industry specific.³²² The legislation specifies which essentials must be contained in the construction contract; ranging from payment provisions to dispute

319 Refer to chapter 2 above.

320 SA Law Commission Report 1998.

321 Refer to chapter 2 above.

322 HGCR, LDEDC Act & Scheme for Construction Contracts.

resolution procedure; namely adjudication. Should the contract not contain the required provisions pertaining to dispute resolution or the provisions that are in the contract do not conform to the statutory requirements then the default position, known as the Scheme for Construction Contracts, will be applicable.

The professional body, ICE, has developed an adjudication procedure that is applied in the English construction industry.³²³ This makes provision for a simple adjudication procedure and general adjudication procedure.³²⁴ The simple procedure assists with limiting the adjudicator's costs, but more importantly ensures that simple disputes are resolved as expeditiously as possible. The adjudicator judges the dispute by means of documentation only. Although the general adjudication procedure resolves matters as expeditiously as possible, it does allow for a more detailed process in which the adjudicator acquires the information needed in order to make a decision.

The South African position differs substantially from its English counterpart. The South African construction industry does not have legislation that regulates the industry, let alone the contents of the construction contract and the resolution of disputes. Although a flimsy dispute resolution procedure is provided for in the GCC 2010, the parties have a choice as to which method they wish to use to resolve their dispute. Although the CIDB has best practice guidelines³²⁵ these guidelines are outdated as well as complicated. Furthermore they do not provide for separate adjudication procedures in respect of simple disputes or complex disputes. Therefore there is no distinction between simple disputes as well as complex disputes unlike the English where a distinction is somewhat made in order to utilise an expedited process.

South Africa therefore has nothing regulating the construction contracts or the dispute resolution procedure in respect of resolving construction disputes. The introduction of legislation would greatly assist in regulating

323 ICE Adjudication Procedure 2011.

324 ICE Adjudication Procedure 2011.

325 For example CIDB *Best Practice Guidelines #C2 & C3*.

the ADR process as well as the contents of the contract and would provide for clarity regarding time frames and the definition of essential terms. It could also provision for a default position, similar to that of the Scheme of Construction Contracts in England, in the event that a construction contract does not make adequate provisions pertaining to the dispute resolution process. Another important benefit thereof to the South African construction industry would be that the legislation would be applicable to all construction contracts, such as the position in England,³²⁶ and not only the four recommended contracts.³²⁷ The South African construction industry could benefit from the introduction of legislation as well as refining the current ADR practice in the GCC 2010. This would bring into being an environment that would encourage teamwork in the industry, and would lead to consistency in the application of Clause 10 of the GCC 2010.

The limitation and or avoidance of delays in a construction project is of vital importance, as the repercussions of delay can be quite costly to the respective contracting parties, often involving the imposition of penalties of one kind or another. It is therefore important to deal with disputes in the most expedient and cost effective manner possible. Adjudication as practiced in the English construction industry achieves this. Adjudication as practiced in terms of the GCC 2010 unfortunately does not do so.

326 Section 108 HGCR, section 139 LDEDC Act.

327 JBCC, GCC 2010, NEC3 & FIDIC.

Chapter 6

Conclusions and recommendations

6.1 Conclusions

Conflicts between parties are inevitable. However the manner in which they are resolved is important as the outcome thereof can have various repercussions. Litigation has become a lengthy as well as costly process in order to resolve disputes.³²⁸ An adversarial approach to resolving disputes, such as litigation may not always be the best method to employ, in that it results in a win-lose situation, focusing on parties' rights as opposed to their interests. As a result society has started utilising alternative means of resolving disputes, which became known as ADR methods. Over the years ADR was introduced and accepted into different industries, the construction industry being one.

There are numerous ADR methods available such as negotiation, mediation, conciliation.³²⁹ There is a standing tradition of resolving disputes by means of ADR in the English as well as South African construction industries. Preference was given to ADR methods to resolve disputes in the construction industry due to the presiding officer not necessarily having the technical expertise to resolve the dispute, the preservation of the business relationships between the parties, confidentiality and costly and lengthy process that litigation has become. Further, the disputes are resolved in a shorter space of time, fairness is ensured and the outcome is generally a win-win solution.³³⁰ ADR became more prevalent and as such standard dispute resolution clauses were provided for in the standard forms of contract.³³¹

328 Refer to chapter 2.1 above.

329 Refer to chapter 2.3 above.

330 Loots PC *Construction Law* 1007; Sorsa K *Proactive Management & Proactive Business Law – A Handbook* 88; Rao PC & Sheffield W *ADR* 82; Ramsden P *Law of Arbitration* 1.

331 Bvumbwe C & Thwala D *Exploratory Study of Dispute Resolution* 35.

The GCC 2010 makes provision for the resolution of disputes in clause 10.³³² The first action taken in the dispute resolution process is to refer a claim to the engineer for a ruling.³³³ This step presents problems regarding the questionable impartiality of the engineer. However, it may also be beneficial in resolving certain issues for example variation orders. The next action is to resolve the dispute by means of amicable settlement or adjudication.³³⁴

Amicable settlement is not clearly defined in the contract thus allowing the parties to use any ADR method available. This can be beneficial in that parties may more freely enter into the process without feeling obliged to which would generally lead to a win-win outcome. The disadvantage hereof is that there is nothing regulating the procedure and as such can lead to lengthy delays and possibly resulting in financial implications in respect of the failure to reach set deadlines of the construction project.

Adjudication as it is currently utilised in the South African construction industry, specifically in terms of the GCC 2010, faces many challenges. Firstly the definition of adjudication in South Africa poses a problem. The commonly used definition is whereby a final judgment is given in a legal proceeding based on the evidence presented.³³⁵ Therefore, to adjudicate is to settle a matter judicially. These definitions contradict the one given to the ADR method of adjudication by the construction industry. The aforementioned definition is an accelerated and cost effective method of dispute resolution whereby the outcome of the third party is binding on the parties unless reviewed by arbitration or litigation.³³⁶

The application of adjudication further faces the challenge that the present adjudicators are predominantly experienced in other forms of dispute

332 Refer to Addendum 2 annexed hereto.

333 Refer to clause 10.1 & 10.2 of GCC 2010 in Addendum 2 annexed hereto.

334 Refer to Addendum 2 annexed hereto.

335 www.thelawdictionary.com/adjudication.

336 CIDB Best Practice Guideline #C3 1.

resolution and not necessarily in adjudication.³³⁷ The problem herewith is that the adjudication process will not be practiced in the manner within which it should be. The construction industry requires an independent, neutral third party who is preferably skilled in ADR procedures. It would also be beneficial if the third party possesses a particular knowledge and expertise of the construction industry (encompassing both the technical and legal aspects thereof).³³⁸

Adjudication as it is currently practiced in the South African construction industry is not feasible in that it is a lengthy and costly process.³³⁹ In light hereof the purpose of using adjudication as an ADR method is defeated as the essence thereof is to provide a decision in a short time frame as quickly and cost effectively as possible.

South Africa has no legislation regulating the construction contracts or the ADR methods used, with the exception of arbitration.³⁴⁰ The introduction of legislation to the South African construction industry could be beneficial as may be seen in the English position.

England is a good example of where legislation positively aids in the regulating of the construction industry. The English implemented the HGRC which provides for the *essentialia* of a construction contract. It further provides for the resolution of disputes in the construction industry by means of adjudication. The justification that has been provided for the state's intervention in this regard is that adjudication will contribute to a more balanced cash flow in construction projects which will enhance the

337 Maritz & Maiketso "What are the requirements for SA construction industry to fully utilize adjudication?" *R/ICS Conference proceedings* 1561 – 1562.

338 Trollip AT ADR 16.

339 De Oliveira M "Management of Construction Agreements in South Africa" *R/ICS Conference proceedings*.

340 *Arbitration Act* 42 of 1965, as amended. There is currently a pilot project in respect of court annexed mediation. Draft rules have been developed and once the rules have been promulgated, the ADR method of mediation will, to a certain extent, also be regulated by means of legislation. See further chapter 2.

overall performance of the construction industry.³⁴¹ This view point has been taken globally as may be evidenced by other states introducing same. Examples of this are New Zealand and Australia.³⁴² South Africa is not one of the states to have taken such initiative.³⁴³

The *HGCR* provides for the resolution of disputes arising in the construction industry by means of adjudication. Therefore this adjudication method is known as statutory adjudication. This right is also re-iterated in the Scheme for Construction Contracts and part 8 of the *LDEDC Act*. The *HGCR* furnishes the parties with the right to refer disputes for adjudication at any time.³⁴⁴ The *HGCR* also clearly stipulates the procedure that must be followed as well as the contractual provisions that must be contained in respect of adjudication.³⁴⁵ In other words the characteristics of adjudication must be encompassed in the construction contract; namely that it must be an expedient procedure thus resolving the dispute with the assistance of an adjudicator. The adjudicator is to furnish its decision within 28 days. The adjudicator's award may be made an order of court alternatively reviewed in England. This is done by referring the decision to the TCC.

In this study an analysis of the ADR methods in construction agreements with specific reference to the GCC 2010 was done and compared to the English position. The purpose thereof was to determine if the ADR methods provided in the GCC 2010 are appropriate and how they could be improved. It is clear that the GCC 2010 dispute resolution procedure needs to be reviewed as the ADR methods provided therein are somewhat inappropriate and need to be improved on. The following are a few recommendations on how this can be achieved.

341 Ndekugri & Rusell Disputing the existence of a dispute *International Journal of Law for the Built Environment* 2006 Vol 13 No 4.

342 *New Zealand Construction Contracts Act* 2002 No 46, *Construction Contracts Act* 2004.

343 De Oliveira M "Management of Construction Agreement in South Africa" *RICS Conference Proceedings*.

344 Section 108 (2) of the *HGCR*.

345 Section 108 of the *HGCR*.

6.2 Recommendations

6.2.1 The Contract

Disputes within the construction industry commonly arise as a result of differences in interpretation of the words used in the contract.³⁴⁶ This is due to a failure of clarity in the ‘technical understanding of such words’³⁴⁷ as well as the poorly drafted conditions. The GCC 2010 is no exception. The GCC 2010 needs to be reviewed; specifically clause 10. The clause should be drafted in a clear and unambiguous manner which would assist in eliminating discrepancies between clauses, conflicting interpretations and conflict in its implementations. This should lead to a reduction in the number of disputes and ensure that disputes are dealt with efficiently and expeditiously as possible which are important due to the nature of the construction industry. Further, the review of the contract would assist to achieve optimal output and to avoid documents, particularly disastrous contractual clauses, such as clause 10 of the GCC 2010, from taking place again and would further assist with the positive development of dispute resolution in the South African construction industry.

6.2.2 Legislation

The introduction of legislation that is unique and applicable to the South African construction industry would greatly assist in resolving the dilemma in the dispute resolution procedure in the construction industry. Legislation would assist in ensuring that the parties have a statutory right to refer the matter to adjudication. However, legislation must simultaneously regulate the procedure so as to truly achieve the true essence of adjudication as an ADR method in the construction industry.

The legislation would also have to clarify the definition of terms used in the industry such as dispute, amicable settlement as well as adjudication as

346 Loots P *Construction Law* 83.

347 Loots P *Construction Law* 83.

these are not being clearly defined in the standard form contracts; particularly the GCC 2010.

Another area that would have to be clearly defined would be in respect of what constitutes a simple dispute as against complex disputes. By introducing and defining the aforementioned concepts, it would assist in the implementation and development of specific dispute resolution procedures. The distinction could be made based on monetary value, technical or legal and possibly a combination thereof. Caution would have to be exercised with the designating a low value dispute a simple dispute, as there are instances where the low value dispute is of a relatively complex nature.

It would also be preferable for the legislation to stipulate the exact procedure to be followed when resorting to adjudication. This would include the appointment of the neutral, the time frames within which to do so; the procedure to be followed when implementing the procedure. The legislation should also provide that the adjudicator's decision is binding upon the parties until referred to arbitration or litigation. The statute would also make provision for allowing the adjudicator to amend a clerical error in respect of the decision given.

6.2.3 The applicable time frames

One of the purposes of ADR is to reach an amicable settlement between the parties within the shortest time possible.³⁴⁸ The time frame within which to resolve a dispute arising in terms of the GCC 2010 is protracted.³⁴⁹ In the light hereof certain of the applicable time frames should be shortened. It must be remembered that every day lost in a construction project has serious implications in that deadlines will not be met, with possible substantial financial implications.

348 Refer to chapter 2 above.

349 Refer to chapter 3 above.

6.2.4 The development of one ADR method to be used in the construction industry

The purpose of the introduction of adjudication as the prevailing ADR method was to resolve disputes as quickly as possible, thus ensuring that the relevant works continued. However, adjudication as prescribed for in the GCC 2010, and as practiced in the industry, does not achieve this. The development of one dedicated and effective ADR method to be used in the construction industry would assist in reducing delays in obtaining settlement as well as eliminating different interpretations of the method itself (such as in the case of adjudication). The method proposed is a combination of adjudication and early neutral evaluation.

This procedure would start with the referral of a claim to the engineer for a ruling thereon within a specified time frame. Yes, this method does present a problem in that the impartiality of the engineer is questionable, but it is a risk worth taking in the long run. It could be quite effective in the resolution of certain claims pertaining for example to variation orders, payment certificates as well as interpretation of drawings to that particular project, in that it could possibly resolve such a claim without it becoming a dispute. It would therefore be a dispute preventative measure as well as a method of ensuring that no unnecessary delays are experienced in respect of the project. Should a party be dissatisfied with the ruling or have a dispute arising from other areas of the contract, then the next step of the process should be taken namely, the appointment of an adjudicator that is experienced in respect of that type of particular dispute.

In order to obtain an expert one would have reference to the panel of adjudicators controlled by the CIDB, which is available on the CIDB's website. The construction industry requires an independent, neutral third party that is preferably skilled in ADR procedures. It would also be beneficial if the third party possesses a particular knowledge and expertise

of the construction industry (encompassing both the technical and legal aspects thereof.)³⁵⁰

The panel should be divided into categories, namely those that are experienced in respect of legal issues alternatively construction issues or those in the rare occasion required to be experienced in both fields. If the list were to be available on the CIDB website, the credentials of the individuals would be immediately apparent, including the seniority of the individual which will play a role in the cost factor and it will shorten the time frame that one would usually wait to be furnished with the said list. In order to select the correct adjudicator(s) a distinction at this stage needs to be made as to whether the dispute is simple or more complex so as to ensure that the correct procedure is followed in resolving the dispute.

Once the parties have selected a minimum of 3 individuals in the case of a simple dispute or a minimum of 6 in a complicated dispute, the parties should not have to wait longer than 2 days to receive confirmation of the prospective adjudicator(s)' availability. Immediately upon receipt of confirmation of their availability the aggrieved party instituting the process would submit a referral notice to the appointed adjudicator containing a summary of the dispute at hand. From here on the procedure followed would be dependent on whether it is classified as simple or complex. If the matter is considered simple then the parties are to furnish the adjudicator with all documentary evidence within a space of 14 days in order for the adjudicator to deliver a decision within a week thereafter. In this instance the adjudicator's fees would be capped to a specific amount which will be regulated by the fee tariff, as determined by the CIDB, which should not be more than 15% of the dispute amount. All correspondence must be sent via generally accepted and recognised electronic means and where necessary the adjudicator would hold a conference call by means of Skype, for example. The adjudication procedure would thus be shortened,

350 Trollip AT ADR 16.

resolving the matter as quickly and expeditiously as possible at a limited cost.

Should the matter be considered complex then a panel would be established to resolve the dispute. The panel would comprise of a legal expert, a construction expert and a negotiation expert who would chair the proceedings. If the panel consisted of experts in all fields pertaining to the dispute, it would be unnecessary to reach out to others for advice, thereby delaying the process further. The parties would present their respective cases to the panel in order for them to provide a decision thereon. Depending on the circumstances, including a negotiator on the panel would also allow for amicable settlement between the parties to occur where possible. The decision that the panel would furnish provide well founded reasons for why it was taken, be it in respect of a legal aspect or a construction aspect, thus helping the parties understand the reasoning that gave rise to it. This would influence the cooling off period in which the parties would decide whether they wished to take the dispute further or not, as they would easily be able to ascertain whether there were justifiable grounds for proceeding further based on the reasons provided.

The decision of the adjudicator(s) will be considered final and binding unless taken to arbitration or litigation.

The introduction of the procedure described above as the prevailing dispute resolution procedure in the construction industry would accomplish many purposes of ADR. Firstly, there is the element of an impartial individual(s) who would assist in resolving the dispute between the parties. The individual(s) would be a qualified expert in that particular domain, a fact which would increase the chances for a fair and good decision to be furnished. The resolution of the dispute would remain confidential, an important quality for companies, government departments and/or institutions reputations. The cost would also be limited as a fee structure would be in place and would be applicable to all construction disputes being resolved by this method, whether simple or complicated. Although

this method can be considered a hybrid of adversarial and non-adversarial methods, it would definitely achieve a more rights based outcome in that the parties' best interests would be taken into consideration by introducing the negotiation element into the process.

6.2.5 Online dispute resolution

The main characteristics of ADR are to make it possible for the parties to resolve a dispute amicably in the shortest and most cost effective way possible.³⁵¹ The introduction of electronic measures into the dispute resolution process would facilitate expediency and reduce costs. This would be in accordance with the purpose and characteristics of ADR. All relevant notices and documentation required should be allowed to be submitted by means of electronic email. Furthermore the use of electronic measures such as Skype should be used in order to reduce the amount of time spent travelling to meetings and presenting the case. The use of Skype would be more beneficial in disputes that are considered simple in nature, as opposed to complex matters. However, Skype could also be beneficial in a complicated matter where an expert in a particular area is not able to physically attend the hearing, perhaps because he/she is stationed overseas, for example. The use of Skype would assist in obtaining information without exorbitant cost implications.

6.2.6 Establishment of a dedicated construction dispute tribunal

England was successful in its endeavor's to establish a specific court to deal with primarily the resolution of construction disputes and the enforcement of adjudicators' decision. This court is known as the TCC. It consists of experienced, knowledgeable individuals that understand the workings of the construction industry. The TCC has taken a robust approach to the enforcement of the adjudicator's award. The judges do not interfere with an adjudicator's award unless the incorrect question was

351 Refer to chapter 2 above.

answered or the rules of natural justice were not complied with.³⁵² In an ideal world the establishment of a construction court would resolve most of the problems associated with the construction industry. It would resolve the lack of experience and expertise of those acting as third parties in ADR. Disputes would be resolved in a quick and cost effective manner. This would be achieved by having regulated time frames as well as regulated fee structures. The fee structures would be dependent on the value of the disputes and/or the complexity of the matters. The existence of such a court would also aid in ensuring that the decision made by the third party would be made an order of court in a shorter space of time, or that the review would be heard a lot sooner, as opposed to the delay contingent on using an ordinary court to hear the matter. That said, it would not be possible for a specific court to be established in South Africa due to a lack of funding and infrastructure. However, the introduction of a dedicated motion day in the regional courts would assist in expediting the enforcement of the adjudicator's decision or the review thereof. This method could easily be commenced in the South African courts.

The CIDB is under utilised in the South African construction industry. The CIDB should be tasked with the establishment of an adjudication branch in its nationwide centres that would regulate the dispute resolution procedure in the South African construction industry. They would provide a venue at a minimal fee in instances where a venue would be required in order to resolve a dispute; and would establish, monitor and update the panel of qualified adjudicators who could be approached to resolve simple and/or complex construction disputes. The result would be that a standard would be applied across the construction industry as to the dispute resolution process, ensuring consistency as well as avoiding any unnecessary delays in the dispute resolution procedure.

The construction industry has an indispensable role in a country's economy, having a direct impact on the public. It is therefore essential that

352 Refer to chapter 4 above.

the industry improves on its effectiveness and efficiency and thus inevitably enhance the environmental outcomes, safety, health, productivity.³⁵³ In light of this important role that the construction industry plays as well as the unique and dynamic nature of the industry, it is of utmost importance that business relationships are preserved and disputes are resolved as expeditiously and effectively as possible, outcomes which can be obtained by improving on the current contractual conditions contained in the standard form contracts especially in respect of dispute resolution. Therefore, the South African construction industry needs to review its current dispute resolution process especially that as provided for in the GCC 2010.

353 *CIDB Act.*

Addendum 1 Clause 57 & 58 of GCC 2004

57. Notice of disagreement

57.1 In respect of any matter not required to be dealt with in terms of Clauses 48 or 58.7, the Contractor shall have the right by written notice with supporting particulars to the Engineer³⁵⁴ to require him to consider any disagreement which he raises with the Engineer provided that the said written notice shall be given within 28 days after the cause of disagreement has arisen.

57.2 The Engineer shall, within 28 days after the Contractor has delivered his disagreement, give effect to Clause 2.2 and give his ruling on the disagreement in writing to the Employer and the Contractor, referring specifically to this clause.

58. Settlement of Disputes

58.1 Dispute Notice:

58.1.1 The Contractor and the Employer, hereinafter referred to as "the parties" shall have the right to dispute any ruling given by the Engineer in terms of Clause 48 or Clause 57;

58.1.2 If the Engineer fails to give his ruling according to Clause 48.5 or 57.2, the Contractor shall have the right to submit his claim or disagreement as a Dispute Notice within 28 days after the ruling should have been given. If the Contractor fails to do so within the 28 days, the Employer shall be discharged from all liability in connection with the claim or disagreement.

58.1.3 All further references herein to a ruling shall relate to the ruling, or part thereof, set out in the Dispute Notice, as varied or added to by agreement between the Contractor and the Engineer or by the Mediator's opinion or the Adjudicator's decision to the extent that it has become binding in terms of Clauses 58.2.6 or 58.3.

58.1.4 If either party shall have given notice of compliance with Clause 58.1, the dispute shall be referred immediately to adjudication or mediation, whichever is stated in the Contract Data.

58.1.5 Notwithstanding that the parties may, in respect of a ruling, have given a Dispute Notice, the ruling shall be of full force and carried into effect unless and until otherwise agreed by both parties in terms of Clause 58.2.6 or as determined in an accepted adjudication decision or an arbitration award or court judgement.

58.2 If the Contract Data provides for dispute resolution by mediation:

58.2.1 The mediation shall be conducted by a Mediator selected by agreement between the parties or, failing such agreement within 7 days

354 The Engineer referred to is the appointed engineer of the project; as defined in clause 1.1.15 of the GCC 2004.

after a written request by either party for such agreement, nominated on the application of either party by the President for the time being of the South African Institution of Civil Engineering.

58.2.2 Neither party shall be entitled to be represented at any hearing before or at any meeting or in any discussion with the Mediator except by:

58.2.2.1 The party himself, if a natural person,

58.2.2.2 A partner in the case of a partnership,

58.2.2.3 A chief executive officer or an executive director in the case of a company,

58.2.2.4 A member in the case of a close corporation,

58.2.2.5 The Engineer,

58.2.2.6 A bona fide employee of the party concerned.

Such limitation shall not be construed as preventing any person from giving evidence as a witness.

58.2.3 The Mediator shall, as he deems fit, follow formal or informal procedure and receive evidence or submissions orally or in writing, sworn or unsworn, at joint meetings with the parties or separately or from any person whom he considers can assist in the formulation of his opinion;

Provide that:

58.2.3.1 Each party shall be given reasonable opportunities of presenting evidence or submissions and of responding to evidence or submissions of the other party, and

58.2.3.2 Each party shall be given full details of any evidence or submissions received by the Mediator from the other party or any other person otherwise than at the meeting where both parties are present or represented.

58.2.4 The Mediator shall have the power to propose to the parties compromise settlements of or agreements in disposal of the whole or portion of the dispute.

58.2.5 The Mediator shall, as soon as reasonably practical, give to each of the parties his written opinion on the dispute, setting out the facts and the provisions of the Contract on which the opinion is based and recording the details of any agreement reached between the parties during mediation.

58.2.6 The Mediator's opinion shall become binding on the parties only to the extent that it is correctly recorded as being agreed by the parties in the Mediator's written opinion or otherwise as recorded as being agreed in writing by both parties subsequent to the receipt of the Mediator's opinion.

58.2.7 The dispute on any matter still unresolved after the application of the provisions of Clause 58.2.6 shall be resolved by arbitration or court proceedings, whichever is applicable in terms of the Contract.

58.2.8 Save for reference to any portion of the Mediator's opinion which has become binding in terms of Clause 58.2.6, no reference shall be made by or on behalf of either party, in any proceedings subsequent to mediation, to the Mediator's opinion, or to the fact that any particular evidence was given, or to any submission, statement or admission made in the course of the mediation.

58.2.9 Irrespective of the nature of the Mediator's opinion:

58.2.9.1 Each party shall bear his own costs arising from the mediation, and

58.2.9.2 The parties shall in equal shares pay the Mediator the amount of his expenses and the amount of his fee based on the scale of the fees as agreed between the Mediator and the parties before the commencement of the mediation.

58.3 If the Contract Data does not provide for dispute resolution by mediation:

58.3.1 Adjudication shall be conducted in accordance with the addition of the Construction Industry Development Board's adjudication procedure current at the date of issue of the Dispute Notice

58.3.2 The Adjudicator shall be appointed in terms of the Adjudicator's agreement bound in the Construction Industry Development Board's adjudication procedure.

58.3.3 Save if otherwise stated in the Contract Data, the party, which raises the dispute, shall select 3 adjudicators from the panel of adjudicators published by the South African Institution of Civil Engineering, determine their hourly fees and confirm that these adjudicators are available to adjudicate the dispute in question. The other party shall then select within 7 days one of the three nominated adjudicators, failing which the President for the time being of the South African Institution of Civil Engineering shall nominate an adjudicator.

58.4 If the Contract Data provides for determination of disputes by Arbitration and if a dispute is still unresolved as provided in Clause 58.2.7 or after adjudication, or the dispute is one to which Clause 58.7 refers:

58.4.1 The matter shall be referred to a single arbitrator to be arranged on between the parties or, failing such agreement within 28 days after delivery to the parties of the mediator's opinion, or the adjudicator's decision, nominated on the application of either party by the President of the time being of the South African Institution of Civil Engineering, and any such reference shall be deemed to be a submission to the arbitration of a single arbitrator in terms of the Arbitration Act, Act no 42 of 1965, (as amended), or any legislation passed in the substitution therefore;

58.4.2 In the absence of any other agreed procedure, the arbitration shall take place in accordance with the Rules for the Conduct of Arbitrations issued by the Association of Arbitrators (South Africa) which are current at the time of referral to arbitration;

58.4.3 The Arbitrator shall, in his award, set out the facts and the provisions of the Contract on which his award is based.

58.5 If the Contract Data does not provide for the determination of disputes by arbitration and if a dispute is still unresolved as provided in Clause 58.2.7 or after adjudication or the dispute is one described in Clause 58.7, the dispute shall be determined by court proceedings.

58.6 The following common provision shall apply:

58.6.1 Nothing herein contained shall deprive the Contractor of the right to institute immediate court proceedings in respect of failure by the Employer to pay the amount of a payment on its due date or to refund any amount of retention money on its due date for refund.

58.6.2 No ruling or decision given by the Engineer in accordance with the provisions of the Contract shall disqualify him from being called as a witness and giving evidence before the Arbitrator or the Court on any matter whatsoever relevant to the dispute concerned.

58.6.3 The Arbitrator and the Court shall have full power to open up, review and revise any ruling, decision, order, instruction, certificate or valuation of the Engineer relevant to the matter in dispute and neither party shall be limited in such proceedings before such Arbitrator or Court to the evidence or arguments put before the Engineer for the purpose of obtaining his ruling.

58.6.4 The following provisions shall apply in respect of the appointment of the Mediator, Adjudicator or Arbitrator in terms of this Clause:

58.6.4.1 If, for any reason, the person appointed fails to assume or to continue in the office concerned, the provisions of this Clause shall apply with the necessary changes in the appointment of a successor, and

58.6.4.2 In the making of his nomination in terms of Clause 58.2.1, Clause 58.3.3 or Clause 58.4.1, the President for the time being of the South African Institution of Civil Engineers shall, at his own discretion, act in consultation with the President for the time being of the South African Association of Consulting Engineers and the South African Federation of Civil Engineering Contractors, and

58.6.4.3 If the President required to make a nomination in terms of this Clause shall have a direct or indirect interest in the subject matter of the dispute, the nominations shall be made by the next senior officer of the body concerned who has no such interest.

58.7 Notwithstanding anything else being provided in this Clause, any dispute between the Contractor and the Employer:

58.7.1 Not relating to a ruling, a decision, order, instruction or certificate by the Engineer, or

58.7.2 Arising after the completion of the contract or, if a Defects Liability Period is provided, after the termination of that period shall be determined, without the application of the provisions of the Clauses 58.1, 58.2 and 58.3, by arbitration, if stated in the Contract Data or Court proceedings and which may be initiated by either party, in which event the provision of Clauses 58.4, 58.5 and 58.6 shall apply.

58.8 Clause 58 is a separate, divisible agreement from the rest of the Contract and shall remain valid and applicable notwithstanding the Works may have been completed or that the rest of the Contract may void or voidable or may have been cancelled for any reason.

Addendum 2 Clause 10 of GCC 2010

10.1 Contractor's claim

- 10.1.1 The following provisions shall apply to any claim by the Contractor for an extension of time for the Practical Completion of the Permanent Works in terms of Clause 5.12, or in terms of any Clause that refers to Clause 10.1 for additional payment or compensation;
- 10.1.1.1 The Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to this Clause setting out:
- 10.1.1.1.1 The particulars of the circumstance, event, act or omission giving rise to the claim concerned,
- 10.1.1.1.2 The provisions of the Contract on which he bases the claim,
- 10.1.1.1.3 The length of the extension of time, if any, claimed and the basis of calculation thereof.
- 10.1.2 If, by reason of the nature and circumstances of the claim, the Contractor cannot reasonably comply with all or any of the provisions of Clause 10.1.1.1 within the said period of 28 days, he shall:
- 10.1.2.1 Within the said period of 28 days notify the Engineer, in writing, of his intention to make the claim and comply with such of the requirements of Clause 10.1.1.1 as he reasonably can, and
- 10.1.2.2 As soon as practicable, comply with such requirements of Clause 10.1.1.1 as have not yet been complied with.
- 10.1.3 If the events or circumstances relating to the claim are of an ongoing nature, the Contractor shall, in addition to delivering the said notice within 28 days, each month deliver to the Engineer, in writing, updated particulars required in terms of Clause 10.1.1.1 and, within 28 days after the end of the events or circumstances, deliver his final claim.
- 10.1.2 If, in any respect of any claim, the Contractor did not comply with the provisions of Clause 10.1.1 because he was not and could not reasonably have been aware of the implications of the facts or circumstances concerned, the period of 28 days referred to in Clause 10.1.1 shall commence to run from the date when he should reasonably have become so aware. The cost and time of all work done in this regard by the Contractor prior to giving such notice shall be deemed to be covered by the rates and/or prices set out in the Pricing Data and the time stated in Contract Data relating to Clause 5.5.1.
- 10.1.3 To properly assess the extent and validity of claims submitted in terms of this Clause, the following provisions shall apply:
- 10.1.3.1 All facts and circumstances relating to the claims shall be investigated as and when they occur or arise. For this purpose, the Contractor shall deliver to the Engineer, records in a form approved by the Engineer, of all the facts and circumstances which the Contractor considers to be relevant and wishes to rely upon in support of his claims, including details of the Construction Equipment, labour and materials relevant to each claim. Such records shall be submitted promptly after the occurrence of the event giving rise to the claim.
- 10.1.3.2 The Engineer may record facts and circumstances, additional to those recorded by the Contractor, he considers

relevant and the Contractor shall, for this purpose, supply the Engineer with all the information he may require.

10.1.3.3 The Engineer and the Contractor shall, at the time of recording in terms of Clauses 10.1.3.1 and 10.1.3.2, set out, in writing, signed by each party and delivered to each other, their respective agreement or disagreement with regard to the correctness of the matters recorded.

10.1.3.4 Each record of an agreed fact in terms of Clause 10.1.3.3 shall in any dispute be conclusive evidence of the fact concerned.

10.1.3.5 For the purpose of this Clause, information arising from a technical investigation or analysis undertaken after the events that gave rise to the claim have occurred, shall not be regarded as facts or circumstances required to be recorded in terms of this Clause.

10.1.3.6 The Employer, the Engineer and the Contractor shall not in any proceedings in accordance with Clauses 10.3 to 10.11 be entitled to give or lead evidence of or rely on any fact or circumstance not recorded in terms of this Clause, if the other party to the dispute is prejudiced by such non-recording of the facts.

10.1.4 If, in respect of any claim to which this Clause refers, the Contractor fails to comply with the 28 day notice period in Clause 10.1.1, as read with Clause 10.1.2, or does not deliver his final claim within 28 days after the end of the events or circumstances, the Due Completion Date shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged of all liability in connection with the claim.

10.1.5 Unless otherwise provided in the Contract, the Engineer shall, within 28 days after the Contractor has delivered his claim in terms of Clause 3.1.2 and deliver to the Contractor and the Employer his written and adequately reasoned ruling on the claim (referring specifically to this Clause). The amount thereof, if any, allowed by the Engineer shall be included to the credit of the Contractor in the next payment certificate;

Provided that:

10.1.5.1 The said period of 28 days may be extended if so agreed between the Contractor and the Engineer, and

10.1.5.2 Any amount that has been established to the satisfaction of the Engineer, before his ruling on the whole claim, shall be included to the credit of the Contractor in the next payment certificate.

10.2 Dissatisfaction claim

10.2.1 In respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer shall have the right to deliver a written dissatisfaction claim to the Engineer. This written claim shall be supported by particulars and substantiated.

10.2.2 If, in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter.

10.2.3 The Engineer shall, within 28 days after the Contractor or Employer has delivered the dissatisfaction claim to him, give effect to Clause 3.1.2 and give his adequately reasoned ruling on the dissatisfaction, in writing to the Contractor and the Employer, referring specifically to this Clause. The amount thereof allowed by

the Engineer, if any, shall be included to the credit of the Contractor or the Employer in the next payment certificate

10.3 Dispute Notice

10.3.1 The Contractor or the Employer, hereinafter referred to as "the parties", may deliver to the other a written notice, hereinafter referred to as a "Dispute Notice", of any dispute arising out of or in connection with the Contract;

Provided that:

10.3.1.1 The dispute arises from an unresolved claim.

10.3.1.2 Reference shall be made to this Clause in the Dispute Notice.

10.3.1.3 A copy of the Dispute Notice shall be delivered to the Engineer.

10.3.1.4 The Dispute Notice shall clearly state the nature of the dispute and the extent of the redress sought.

10.3.1.5 The Dispute Notice shall be delivered within 28 days of the event giving rise to the dispute has arisen. Failing such a delivery, the parties shall have no further right to dispute the matter.

10.3.2 If either party shall have given notice in compliance with Clause 10.3.1, the dispute shall be referred immediately to adjudication in terms of Clause 10.5, unless amicable settlement is contemplated.

10.3.3 In respect of a ruling given by the Engineer, and although the parties may have delivered a Dispute Notice, the ruling shall be in full force and carried into effect unless and until otherwise agreed by both parties, or in terms of an adjudication decision, an arbitration award or court judgment.

10.4 Amicable settlement

10.4.1 The parties may at any time, without prejudice to any other proceedings, agree to settle any claim or any dispute amicably with the help of an impartial third party. Amicable settlement may include any settlement technique as agreed by the parties.

10.4.2 If the other party rejects the invitation to amicable settlement in writing or does not respond in writing to the invitation within 14 days, or amicable settlement is unsuccessful, referral to adjudication shall follow immediately, provide that, if amicable settlement failed subsequent to adjudication, the dispute shall be resolved by arbitration or court proceedings, whichever is applicable in terms of the Contract.

10.4.3 Amicable settlement shall become final and binding on the parties only to the extent that it is correctly recorded as being agreed by the parties.

10.4.4 Save for the reference to any portion of any settlement or decision which has been agreed to be final and binding on the parties, no reference shall be made by or on behalf of either party in any subsequent adjudication, arbitration or court proceedings, to any outcome of an amicable settlement, or to any submission, statement or admission made in the course of amicable settlement.

10.5 Adjudication

10.5.1 If the Contract Data provides for dispute resolution by a standing Adjudication Board, the Employer, together with the Contractor, shall, within 56 days of the Commencement Date, appoint the member or members of the Adjudication Board.

10.5.2 If the Contract Data does not provide for dispute resolution by a standing Adjudication Board, the dispute shall be referred to ad-hoc adjudication.

- 10.5.3 The Adjudication Board shall consist of the number of members stated in the Contract Data. It shall be effected and its proceedings conducted in accordance with the Adjudication Board Rules.
- 10.6 Disagreement with Adjudication Board's decision
- 10.6.1 Either party shall have the right to disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the Contract; Provided that:
- 10.6.1.1 The decision shall be binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable in terms of the Contract.
- 10.6.1.2 A party shall not dispute the validity or correctness of the whole or specified part of the decision before 28 days or after 56 days from receipt of the decision. Unless either party shall on or after the said 28 days, or on or before the said 56 days from receipt of the decision, give written notice to the other party, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the decision, he shall have no further right to refer such a dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract.
- 10.6.2 In the event that a decision of the Adjudication Board was not disputed and a party fails to comply with the decision, the other party may, without prejudice to any other right he may have, refer the failure to arbitration or court proceedings, whichever is applicable in terms of the Contract.
- 10.6.3 If the Adjudication Board fails to give its decision within the time stated in the Adjudication Board Rules or otherwise agreed by the parties, either party shall have the right to submit the dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract, by giving written notice to the other party, referring to this Clause, within 28 days after the decision should have been given. If either party fails to give such a notice within 28 days, the Engineer's ruling, or any agreed settlement shall be final and binding.
- 10.7 Arbitration
- 10.7.1 If the Contract Data provides for determination of disputes by arbitration and a dispute is still unresolved, the matter shall be referred to a single arbitrator. Any such reference shall be deemed to be a submission to the arbitration of a single arbitrator in terms of the Arbitration Act (Act No. 42 of 1965, as amended), or any legislation passed in substitution therefor.
- 10.7.2 In the absence of any other agreed procedure, the arbitration shall take place in accordance with the Rules for the Conduct of Arbitrations issued by the Association of Arbitrators (Southern Africa) which is current at the time of the referral to arbitration.
- 10.7.3 The arbitrator shall, in his award, set out the facts and the provisions of the Contract on which his award is based.
- 10.8 Court Proceedings
- 10.8.1 If the Contract Data does not provide for the settlement of disputes by arbitration, and if a dispute is still unresolved, the dispute shall be determined by court proceedings.
- 10.9 Appointment
- 10.9.1 The dispute resolving person or persons shall be appointed by agreement of the parties. Failing agreement within seven days of

either party delivering a request in writing to agree to such appointment, the person or persons shall be nominated, on the application of either party, by the President or his nominee of the South African Institution of Civil Engineering.

10.10 Common Provisions

10.10.1 Nothing herein contained shall deprive the Contractor of the right to institute immediate court proceedings in respect of failure by the Employer to pay the amount of a payment certificate on its due date, or to pay any amount of retention money on its due date for payment.

10.10.2 No ruling given by the Engineer in accordance with the provisions of the Contract shall disqualify him from being called as a witness and giving evidence before the arbitrator or the court on any matter whatsoever relevant to the dispute concerned.

10.10.3 The arbitrator and the court shall have full power to open up, review and revise any ruling, decision, order, instruction, certificate or valuation of the Engineer and to reconsider any decision by the Adjudication Board relevant to the matter in dispute, and neither party shall be limited in such proceedings before such arbitrator or court to the evidence or arguments put before the Engineer for the purpose of obtaining his ruling, or the Adjudication Board for the purpose of obtaining a decision.

10.11 Continuing validity

10.11.1 Clause 10.1 to 10.11 are a separate, divisible agreement from the rest of the Contract and shall remain valid and applicable notwithstanding that the Works may have been completed or that the rest of the Contract may be void or voidable, or may have been terminated for any reason.

Addendum 3: Section 108 HGCR

108 Right to refer disputes to adjudication

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
- (2) The contract shall –
 - (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
 - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as agreed by the parties after the dispute has been referred;
 - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
 - (e) impose a duty on the adjudicator to act impartially; and
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme of Construction Contracts apply.
- (6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the Scheme appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

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