

The use of online alternative dispute resolution in the resolution of South African construction disputes

M Mabaso

 **orcid.org 0000-0001-5831-4465**

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Supervisor: Prof MB Schoeman

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Student number: 25975714

ABSTRACT

One of South Africa's key employment industries and socio-economic drivers, the construction industry, is largely impacted by the detrimental effects of delayed conflict resolution, consequently leading to poor service delivery, cost overruns and project infeasibility, amongst others. This is one of the reasons why it lends itself well to having the disputes arising within the industry, to be resolved by means of alternative dispute resolution. However, technology has permeated numerous economic processes and offers alternative methods for communication, information exchange and dispute resolution. This is referred to as online alternative dispute resolution (OADR) from an alternative dispute resolution perspective.

OADR is a relatively new and growing practice in South Africa, with limited authoritative directives. In light thereof, the research methodology draws on analyses of secondary data, both quantitative and qualitative, with specific emphasis on the opportunities and obstacles experienced in construction industries' practices in Hong Kong, Australia, and Singapore (Focus Countries) – all in comparison with the basic principles implemented in the South African construction sector. In South Africa, the practice of virtual court has expedited the growth in OADR, and although we can acknowledge the cost and time effectiveness of OADR in the various Focus Countries, there is an indication that this practice could possibly exclude necessary parties if they lack the adequate technology, tools or connectivity required to participate in virtual dispute resolution. This study explores the ways in which OADR may possibly remedy the current gaps in the basic alternative dispute resolution (ADR) principles evidenced by ADR practitioners in the construction industry in order to determine how OADR can assist with the resolving disputes arising in the South African construction industry.

Key words: OADR, ADR, construction disputes, dispute resolution, online dispute resolution

TABLE OF CONTENTS

ABSTRACT	i
LIST OF ABBREVIATIONS.....	vi
Chapter 1 Introduction	1
1.1 Problem statement.....	1
1.2 Research methodology	4
1.3 Chapter outline	4
Chapter 2 Online Dispute Resolution: Basic Principles	6
2.1 Introduction	6
2.2 Online Alternative Dispute Resolution (ODR) Methods	7
2.2.1 Online negotiation	7
2.2.2 Online mediation	8
2.2.3 Online arbitration.....	8
2.3 Advantages and disadvantages of Online Alternative Dispute Resolution (ODR).....	9
2.3.1 Advantages	9
2.3.1.1 Cost effective	9
2.3.1.2 Jurisdictional issues	10
2.3.1.3 Enforcement of awards	10
2.3.2 Disadvantages.....	11
2.3.2.1 Potentially inaccessible.....	11
2.3.2.2 Confidentiality concern.....	12
2.4 Virtual court	12
2.4.1 Introduction to Virtual Courts	12
2.4.2 Virtual court in Africa	13
2.4.2.1 Nigeria	13
2.4.2.2 Kenya	14
2.4.2.3 South Africa	14
2.5 Infrastructure challenges	16
2.5.1 Power outages	16
2.6 Use of virtual courts in other countries	17

2.6.1	<i>Australia</i>	17
2.7	<i>Advantages of virtual court</i>	18
2.8	<i>Disadvantages of virtual court</i>	19
2.9	<i>Conclusion</i>	19
Chapter 3	A brief analysis of the ADR methods used in construction industries	21
3.1	<i>Introduction</i>	21
3.2	<i>Negotiation</i>	21
3.3	<i>Mediation</i>	22
3.4	<i>Conciliation</i>	24
3.5	<i>Adjudication</i>	25
3.6	<i>Arbitration</i>	26
3.7	<i>Conclusion</i>	27
Chapter 4	International Construction Industry: Best Practices	29
4.1	<i>Introduction</i>	29
4.2	<i>UNCITRAL Model Law</i>	29
4.2.2	<i>Technical Notes on Online Dispute Resolution of UNICITRAL</i>	30
4.3	<i>Singapore</i>	32
4.4	<i>Australia</i>	33
4.5	<i>Hong Kong</i>	34
4.7	<i>Conclusion</i>	36
Chapter 5	Current OADR practices in the South African construction industry	38
5.1	<i>Introduction</i>	38
5.2	<i>Mediation in terms of South African legislation</i>	38
5.3	<i>Arbitration proceedings in terms of AFSA</i>	39
5.4	<i>Adjudication</i>	42
5.5	<i>Conclusion</i>	43
Chapter 6	A comparison of the best practices and conclusion	44
6.1	<i>Introduction</i>	44
6.2	<i>Singapore and South Africa</i>	44
6.3	<i>Hong Kong and South Africa</i>	45

6.4	<i>Australia v RSA</i>	46
6.5	<i>Conclusion</i>	47
Chapter 7	Conclusion and recommendation	48
BIBLIOGRAPHY	52

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AFSA	Arbitration Foundation of South Africa
AI	Artificial Intelligence
AMA	Australian Mediation Association
CAM	Court Annexed Mediation
CIDB	Construction Industry Development Board
DR	Dispute Resolution
EU	European Union
OADR	Online Alternative Dispute Resolution
ODR	Online Dispute Resolution
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNICTRAL	United Nations Commission on International Trade Law

Chapter 1 Introduction

1.1 Problem statement

The construction industry is one of the major contributors to South Africa's GDP in that it contributes to 3% of South Africa's GDP.¹ 8% of formal employment in South Africa is accounted for by the construction industry.² In 2019 there were 187 000 jobs created in the construction industry together with the 1.3 million people that were already employed in the construction industry.³ The construction industry plays a vital role in the growth of the economy, and its contribution can be hampered due to the industry frequently experiencing delays on the completion of projects, which are often the result of contractual disputes that have arisen between the parties.⁴ The consequence hereof is that projects are halted and/or delayed until the dispute is resolved. This can be detrimental in instances where the aim of the project is to provide essential services to the community, such as water for example. It has been held that the construction industry should address the impact that the possible risk that the disputes pose on the time and costs of building projects.⁵ It is therefore important that disputes in the construction industry be resolved timeously, amicably, and effectively.⁶

Dispute Resolution (DR) is the course of action which is used to resolve conflict between parties.⁷ It has been held that traditional dispute resolution is judicial in nature, meaning that conflicts are resolved by submitting these conflicts to the

¹ Zingoni 2020 <https://mg.co.za/opinion/2020-10-19-deconstructing-south-africas-construction-industry-performance/>.

² *Construction Monitor Employment Report*, 2019.

³ *Construction Monitor Employment Report*, 2019; Zingoni 2020 <https://mg.co.za/opinion/2020-10-19-deconstructing-south-africas-construction-industry-performance/>.

⁴ Brand, Steadman and Todd *Commercial Mediation* 14; Sarsa *Proactive management and proactive business law* 88; Rao and Sheffield *Alternative Dispute Resolution* 82; Ramsden *The Law of Arbitration* 14.

⁵ Wilcocks and Laubscher 2017 *Acta Structilia* 148.

⁶ Brand, Steadman and Todd *Commercial Mediation* 14; Sarsa *Proactive management and proactive business law* 88; Rao and Sheffield *Alternative Dispute Resolution* 82; Ramsden *The Law of Arbitration* 1.

⁷ Sliva "Dispute Resolution Procedures" 185.

court.⁸ Dispute Resolution has also seen the benefits of using technology to assist in the resolution of disputes between parties. This may be seen by the introduction of technology to court proceedings especially during covid-19. This became known as the Online Dispute Resolution (ODR). Alternative Dispute Resolution (ADR) on the other hand is a process in which a neutral third party assists the parties to resolve the dispute without submitting the matter to a court.⁹

ADR is flexible in that it allows the parties to the dispute to tailor each method to meet their needs.¹⁰ The most used ADR methods in the construction industry include mediation, arbitration, negotiation, adjudication, and conciliation.¹¹ These traditional methods require face-to-face contact, which at times may not be possible, which results in further delays. This may be due to parties being in different locations or scheduling conflicts.¹² However, the world is ever changing, and this can especially be seen in the fact that many industries are using technology in order to advance their business.¹³ They do this by taking advantage of the internet in order to be more productive in their daily work routine due to the internet's speed and accessibility, thereby bringing about immediate results.¹⁴

Online Dispute Resolution (ODR) is a branch of dispute resolution, which uses technology to facilitate the traditional dispute resolution process. The courts in South Africa started to take measures to keep up with the digital age by introducing virtual courts.¹⁵

⁸ Sliva "Dispute Resolution Procedures" 185.

⁹ Sliva "Dispute Resolution Procedure" 186; Greyvenstein 2020 <https://www.lexisnexis.co.za/lexis-digest/resources/covid-19-resource-centre/practice-areas/mediation-and-arbitration/online-dispute-resolution>.

¹⁰ Morton *Alternative Dispute Resolution in the Construction Process* 9.

¹¹ De Oliveira *Dispute resolution* 10.

¹² ILO 2020 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/instructionalmaterial/wcms_751232.pdf.

¹³ Broberg 2021 <https://www.gomodus.com/blog/eight-ways-technology-changing-business>.

¹⁴ Asianet Fibre 2022 <https://asianetbroadband.in/importance-of-internet-technology-for-easy-life/>.

¹⁵ Anon 2021 <https://www.lexisnexis.co.za/news-and-insights/virtual-working/covid-19-pushes-courts-to-new-era>.

A Virtual court does not require the legal representatives nor clients to physically be present during court proceedings.¹⁶ By making use of virtual courts, the judiciary is using Online Dispute Resolution to aid access to justice as required by section 34 of The *Constitution of the Republic of South Africa*, which was especially prompted by the Covid-19 pandemic.¹⁷ ADR processes also followed suit by using the internet to facilitate the resolution of disputes by alternative methods. This is known as Online Alternative Dispute Resolution (OADR).

OADR is an alternative dispute resolution procedure that takes place virtually, where a neutral third party is used to assist the disputing parties to settle their dispute. The advantages of using OADR are that the parties can "meet" sooner to resolve their dispute, thereby being quicker, amicable and cost effective, as far as possible.¹⁸ Greyvenstein¹⁹ is of the opinion that civil disputes could be settled by using OADR unless prohibited by law.

Schmitz²⁰ states that we have becoming a "drive through" society, in that there are more means for banking, buying and transacting quickly and conveniently without leaving the comfort of our cars or, couches and/or computers. It is held further that in the digital age that we live in we are likely to embrace "drive-through" means of resolving disputes without leaving the comfort of our homes.²¹

It has already been established that the problem with face-to-face dispute resolution is that its time consuming and costly, therefore, Schmitz²² suggests that ODR is the solution which will harmonise commonalities between the parties in dispute.

¹⁶ Knoetze 2018 *De Rebus* 28.

¹⁷ Section 34 of the *Constitution of The Republic of South Africa*, 1996: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Further discussions shall be provided in chapter3 of this study.

¹⁸ Reddy 2020 *Obiter* 371–395.

¹⁹ Greyvenstein 2020 <https://www.lexisnexis.co.za/lexis-digest/resources/covid-19-resource-centre/practice-areas/mediation-and-arbitration/online-dispute-resolution>.

²⁰ Schmitz 2018 *J Internet Law* 3.

²¹ Schmitz 2018 *J Internet Law* 3.

²² Schmitz 2018 *J Internet Law* 3.

Practices of OADR as adopted by other countries and the implementation thereof could assist in enhancing the position in South Africa, particularly the South African construction industry regarding the use of OADR. Countries such as Australia, Singapore and Hong Kong make use of OADR in the construction industry. In light hereof, a comparison of the general principles of OADR between the South African construction industry and those of other countries could potentially lead to the development of OADR within the South African construction Industry.²³

Wilcocks and Laubscher hold that it is imperative to understand new methods and procedures to expand the fast-tracked nature of the construction industry.

The aim of this dissertation is to explore how online ADR can assist, if at all, in resolving disputes arising in the South African construction industry.

1.2 Research methodology

The study will comprise of a literature study of South African primary and secondary sources. Unfortunately, primary sources of authority in respect of the South African construction industry as well as ADR and OADR are limited and therefore authority referred to will be primarily based on secondary sources and /or industry specific authority. A comparison of the basic principles of ADR and OADR within the construction industry of South Africa will be made with international best practices to assist in answering the research question.

1.3 Chapter outline

This study will comprise of 6 chapters of which chapter 1 is the introductory chapter containing the problem statement and the research question to be answered at the end of the dissertation.

Chapter 2 will provide brief expositions of the different OADR methods that are available, namely, online negotiation, online mediation, online and online

²³ Please refer to chapter 3 for further elaboration.

arbitration. The general principles, the application, the advantages, and disadvantages of each method will also be discussed.

Chapter 3 will provide an analysis of the traditional use of ADR methods in the construction industry and it will also address the best practices in respect of OADR in the construction industries worldwide, with specific focus on Hong Kong, Australia, Singapore, and India. This chapter is then followed by Chapter 4 which will provide a brief analysis of the current practices in OADR in the South African construction industry, due to the limited literature in this regard.

Chapter 5 will compare the international practices to those in the South African Construction industry. This chapter will furthermore provide recommendations which will then conclude by answering the research question being to determine how OADR can assist with the resolution of disputes arising in the South African Construction Industry.

Chapter 2 Online Dispute Resolution: Basic Principles

2.1 Introduction

The reservations regarding ODR in the legal field stem from the concerns about dehumanising the ADR process and the inability of technology to address the complexity of dealing with legal matters.²⁴ Unlike the medical and financial sectors, the law has been slow to join the digital revolution.²⁵ One of the reasons for this is blamed on the reservations that the legal fraternity has. Legal practitioners and members of the judiciary are the most outspoken critics on the use of technology to help litigants to reach a settlement without the intervention of a lawyer, which may be due to members of the legal community having a fear of losing their jobs and the unfounded reservation that OADR might contribute to eroding the rule of law.²⁶

Kluss²⁷ defines ODR as dispute resolution that is supported by information technology. ODR provides a platform to resolve disputes through synchronous and asynchronous communication. Initially ODR platforms were directed at e-commerce disputes, whereas currently these ODR platforms are expanding to other areas of the law besides e-commerce.²⁸

In addition to the traditional digital platforms such as skype and email, artificial intelligence (AI) systems aim to emulate the role of ADR practitioners. The AI system allows for both synchronous and/or Asynchronous ODR.²⁹

Ultimately, it will be concluded that while there are certainly advantages to integrating ODR into more traditional models of ADR, it is unlikely that online platforms and information, and communication technologies will replace the role of

²⁴ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

²⁵ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

²⁶ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

²⁷ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

²⁸ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

²⁹ Kucinski 2010 *Journal of Dispute Resolution* 317.

mediators and arbiters given the irreplaceable value of human insight and judgment in legal matters. ³⁰Instead, ODR will increasingly assist traditional models in facilitating more efficient and cost-effective methods of resolving matters through ADR.³¹

The following chapter discusses the most used OADR methods, namely, online negotiation, online mediation and online arbitration with their two main advantages and three main disadvantages as highlighted. The aforementioned is followed by a discussion on virtual courts in respective African countries and how other countries in the world have made use of virtual courts since the Covid-19 pandemic.

2.2 Online Alternative Dispute Resolution (OADR) Methods

2.2.1 Online negotiation

Online negotiation traditionally took place when the negotiations were conducted from remote sites, and the parties communicate via video call, phone call and email.³² Historically, concerns were raised that using the aforementioned methods of communication to facilitate negotiation did not allow for the exchange of documentation and real-time interaction.³³ In order to address these concerns and to allow for real-time interaction and document exchange, software such as Microsoft NetMeeting and Netscape were developed.³⁴ Due to the introduction of more advanced technology, software such as Microsoft NetMeeting and Netscape are no longer in use, as more advanced software such as Zoom and Microsoft teams are used.³⁵

³⁰ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

³¹ Kluss 2020 *Australian Alternative Dispute Resolution Law Bulletin* 1-8.

³² Yuan 2021 http://www.myacme.org/IJMTP/issue4_2003/2003_paper3.pdf 1.

³³ Yuan 2021 http://www.myacme.org/IJMTP/issue4_2003/2003_paper3.pdf 1.

³⁴ Yuan 2021 http://www.myacme.org/IJMTP/issue4_2003/2003_paper3.pdf 1.

³⁵ The Free Encyclopedia 2022 https://en.wikipedia.org/wiki/Microsoft_NetMeeting.

2.2.2 Online mediation

In the past, online mediation used to rely on teleconferencing and text-based communications such as email.³⁶ However, with the recent technological developments, applications such as Skype, Zoom, Microsoft teams and Google Meets grant parties the opportunity to communicate with each other in real time and also allows for side meetings as well as the exchange of documents as needs be.³⁷

Making use of video conferencing in mediation is beneficial in that, firstly, making use of video conferencing is cost effective (you need a computer and access to the internet), secondly, the parties are able to see the visual and vocal cues of the other parties.³⁸ Thirdly, the mediator has the option of sending separate links to the parties. Each separate link serves as a different meeting room allowing the mediator to hold side meetings with each of the parties to the dispute. Fourthly, the mediator can maintain order during the mediation session in that messages can be typed, microphones must be muted, and the parties may only unmute themselves when it is their turn to speak.³⁹ Lastly, the parties to the dispute and the mediator need not travel to attend the mediation, and the mediation session is private because only the parties who have the link (meeting invite) can be party to the session.⁴⁰

2.2.3 Online arbitration

Online arbitration is one of the mechanisms used to resolve commercial disputes.⁴¹ Online arbitration can be used to settle disputes even though the business transactions were initiated off-line.

³⁶ Shonk and SanPietro 2021 <https://www.pon.harvard.edu/tag/online-mediation/>.

³⁷ Shonk and SanPietro 2021 <https://www.pon.harvard.edu/tag/online-mediation/>.

³⁸ Shonk and SanPietro 2021 <https://www.pon.harvard.edu/tag/online-mediation/>.

³⁹ These are the functionalities of the different applications.

⁴⁰ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>; Widman 2020 <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/confidentiality-and-its-exceptions-in-mediation/>.

⁴¹ Shukla 2022 <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitration-law-Online-Arbitration-Vivek-S.pdf>.

The use of online arbitration is advantageous because it can cut across international boundaries, meaning that online arbitration is suitable for international transactions.⁴² Furthermore, online arbitration is convenient, as its neutrality can be guaranteed due to the internet being a neutral meeting place for the parties, and the parties, when electing an arbitrator, are not limited by the arbitrator's location.⁴³ The Commission for Conciliation, Mediation and Arbitration (CCMA) also makes use of online arbitration to resolve local labour disputes.⁴⁴

2.3 Advantages and disadvantages of Online Alternative Dispute Resolution (OADR)

2.3.1 Advantages

2.3.1.1 Cost effective

When making use of the traditional ADR methods, parties would in all likelihood have to travel in order to participate in the "proceedings".⁴⁵ The author is of the opinion that, in today's day and age, with the cost of fuel increasing worldwide, travelling is a costly affair. Depending on the distance to be travelled, it could also be time consuming due to the long distance. In regard to OADR, a neutral third party (i.e. the mediator) does not have to rent a venue or print the relevant documents for the parties in dispute, as each party can take part in the dispute resolution process from a place of his choosing (home).⁴⁶ This is not applicable when using OADR and the parties need not travel at all. All they need to do is log on to their computers; this also means that all relevant role players can avail themselves simultaneously and decisions can be made quickly. Furthermore, there is no venue hire, printing and other costs associated thereto as the proceedings all take place

⁴² Legal approaches to online Arbitration.

⁴³ Legal approaches to online Arbitration.

⁴⁴ Hajdú *The methods of alternative dispute resolution* 7.

⁴⁵ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

⁴⁶ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

on the parties' computer screens. This also contributes to the saving of costs associated with resolution of disputes.

When using asynchronous communication in OADR, there are no scheduling difficulties, in that messages are not transmitted live, meaning that the parties can participate in the dispute resolution process at their convenience.⁴⁷

2.3.1.2 Jurisdictional issues

A key advantage of OADR is that it avoids the issue of which court has the competency to hear and determine an issue between the disputants (i.e. jurisdiction).⁴⁸ When disputants bind themselves to a determination by agreement, jurisdictional issues can be avoided.⁴⁹ When dealing with an international dispute, the enforceability of the settlement agreement may depend on the rules and the jurisdiction of the OADR provider.⁵⁰

2.3.1.3 Enforcement of awards

With regard to foreign international arbitral awards, countries such as Australia, Hong Kong and South Africa have incorporated UNCITRAL Model Law into their national law.⁵¹ For an arbitral award to be recognised in such countries, the award must first be made an order of court by means of an application before it can be enforced.⁵²

⁴⁷ Arent 2022 <https://rightpeoplegroup.com/synchronous-and-asynchronous-communication-differences-advantages-and-disadvantages/>.

⁴⁸ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>; Goodman 2003 *Duke Law & Technology Review* 1, 16.

⁴⁹ Goodman 2003 *Duke Law & Technology Review* 1.6.

⁵⁰ Gov of Canada, DoJ 2012 *Dispute resolution reference guide* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.htm>.

⁵¹ UN Commission on International Trade Law 2022 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

⁵² Fletcher and De Waal <https://uk.practicallaw.thomsonreuters.com/>.

2.3.2 Disadvantages

2.3.2.1 Potentially inaccessible

ODR requires parties to the dispute to have continuous access to electronic devices such as a cell phone or a computer as well as stable internet connections for the duration of the OADR process. Having uninterrupted access to the internet may be a problem for those who reside in rural areas and those people who reside in countries, such as South Africa, where they experience rolling blackouts.⁵³

It is explained that work and life come to a standstill during these rolling blackouts, as not only does the Wi-Fi die, uninterrupted power supply batteries along with laptop batteries also die.⁵⁴ Mobile network signals are neither steady during these blackouts.⁵⁵

People who are less familiar with computers and those who are unable to communicate effectively through written communication may encounter problems when using OADR and websites that facilitate it, because in order for one to be able to use applications such as Zoom and Microsoft teams, you first need to know the basics of how to operate a computer and/or cell phone and secondly, you must be able to read.⁵⁶

Some applications, such as Zoom and Microsoft teams allow the user to make use of a free version of the application that has limited features, such as a 40minute meeting limit. Whereas Zoom Pro allows users to host meetings for as long as they desire, for a small monthly fee.⁵⁷ With Microsoft teams, you will be granted full access

⁵³ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

⁵⁴ Phillip 2022 <https://www.dailymaverick.co.za/opinionista/2022-09-28-rolling-blackouts-signal-disaster-for-mobile-operator-networks-and-puts-a-damper-in-innovative-forms-of-work/>.

⁵⁵ Phillip 2022 https://www.dailymaverick.co.za/opinionista/2022-09-28-rolling-blackouts-signal-disaster-for-mobile-operator-networks-and-puts-a-damper-in-innovative-forms-of-work.

⁵⁶ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

⁵⁷ Zoom Support 2022 <https://support.zoom.us/hc/en-us/articles/5809097508109-Basic-user-meeting-duration-changes>.

to the features of the application if you purchase the software for one of your devices.

2.3.2.2 Confidentiality concern

A key characteristic that is associated with using the internet is diminished privacy.⁵⁸ When exchanging information in the online mediation process, the disputant's privacy and confidentiality are threatened.⁵⁹ When documents are transmitted over the internet, a copy of such communication is recorded. When dealing with emails and chat rooms, parties can download, save and print these communications.⁶⁰ The traditional mediation process does not create a paper trail/a physical record, whereas with ODR there is an electronic record that could enable either party to the dispute to print out and distribute such communication (i.e. emails, chats, recordings) between the parties.⁶¹ The confidentiality concern may hinder the dispute resolution process because parties will not want to be open and honest when exchanging information due to the recording of, not only verbal, but also written communication.⁶²

2.4 Virtual court

2.4.1 Introduction to Virtual Courts

Due to the Covid-19 pandemic there has been a spike in the digitisation of legal services and the introduction of virtual courts.⁶³

⁵⁸ Meltzer 2006 <https://sfinc.ch/wp-content/uploads/2020/11/SFINC-Confidentiality-in-Online-Mediation.pdf>.

⁵⁹ Meltzer 2006 <https://sfinc.ch/wp-content/uploads/2020/11/SFINC-Confidentiality-in-Online-Mediation.pdf>.

⁶⁰ Meltzer 2006 <https://sfinc.ch/wp-content/uploads/2020/11/SFINC-Confidentiality-in-Online-Mediation.pdf>.

⁶¹ Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

⁶² Widman 2020 <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/confidentiality-and-its-exceptions-in-mediation/>; Goodman 2020 <https://scholarship.law.duke.edu/dltr/vol2/iss1/2/>.

⁶³ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 3.

Knoetze⁶⁴ states that the future of the courts depends on technology and how this technology can improve the functioning of the courts. Moreover, there are three general changes that technology has brought about in the court room: firstly, legal representatives can use technology to present evidence and arguments; secondly, the discovery process has changed due to the existence of electronic documents and lastly, it is held that things such as e-filing, social media and legal research have changed the traditional work of lawyers.⁶⁵ Lawyers can practice almost anywhere irrespective of the time and distance, in so far as online databases and legal software are available to them.⁶⁶ Lawyers are able to meet with their clients in cyber space and they now have virtual portals and digitised legal documents that can be accessed from an internet-enabled device.⁶⁷

2.4.2 *Virtual court in Africa*

2.4.2.1 Nigeria

Nigeria introduced virtual courts in May 2020.⁶⁸ The constitutionality of virtual hearings was brought to question in the Supreme Court.⁶⁹ The state governments of Lagos and Ekiti challenged the video conference platforms used in virtual courts. It was argued that virtual courts still upheld sections 36(3) and 36(4) of the *Constitution of the Federal Republic of Nigeria*,⁷⁰ which states that when determining the civil rights and/or criminal liability of an individual, the courts and tribunals should conduct the trials/hearings and pronounce its decisions in public.⁷¹ Subsequently, the Supreme Court found that virtual court hearings are in line with

⁶⁴ Knoetze 2014 *De Rebus* 28-32.

⁶⁵ Knoetze 2014 *De Rebus* 28-32.

⁶⁶ Anyim 2019 <https://digitalcommons.unl.edu/libphilprac/2904>.

⁶⁷ Anyim 2019 <https://digitalcommons.unl.edu/libphilprac/2904>.

⁶⁸ Adebusoye 2020 <https://technext.ng/2020/07/16/virtual-court-sittings-and-the-evolution-of-virtual-legal-system-in-nigeria/>.

⁶⁹ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5. Suit No SC/CV/260/2020 Attorney General of Lagos State v Attorney General of the Federation & Anor Suit No SC/CV/261/2020 Attorney General of Ekiti State v Attorney General of the Federation.

⁷⁰ *Constitution of the Federal Republic of Nigeria*, 1999.

⁷¹ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5. Suit No SC/CV/260/2020 Attorney General of Lagos State v Attorney General of the Federation & Anor Suit No SC/CV/261/2020 Attorney General of Ekiti State v Attorney General of the Federation.

the *Constitution of the Federal Republic of Nigeria*⁷² because virtual court proceedings are still in line with sections 36(3) and 36(4) of the Nigerian Constitution.⁷³ In as much as the number of people who can stream a virtual court proceedings is limited, depending on the virtual platform in use, the public still have access to the virtual court proceedings.⁷⁴

2.4.2.2 Kenya

After March 2020, the Management Practice Directives, known as the Civil Procedure (Amendment) rules were gazetted.⁷⁵ The directives outline the practice operations of virtual courts e.g. the inspection of documents, the requirements for e-filing etc.⁷⁶ The Civil Procedure (Amendment) rules allowed for the electronic service of legal documents even through social-media platforms such as WhatsApp.⁷⁷ In conjunction with the e-filing system, the judiciary in Kenya accepted virtual court proceedings that took place on Microsoft teams.⁷⁸ Members of the public who wanted to access the virtual proceedings could do so by accessing the link to the virtual court proceedings on the Kenya Law website.⁷⁹

2.4.2.3 South Africa

In March 2020, South African litigators had to adapt to the virtual world as a result of the COVID-19 pandemic.⁸⁰ The Gauteng Division of the High Court of South Africa

⁷² *Constitution of the Federal Republic of Nigeria*, 1999.

⁷³ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5 Suit No SC/CV/261/2020 *Attorney General of Ekiti State v Attorney General of the Federation*.

⁷⁴ Adebusoye 2020 <https://technext.ng/2020/07/16/virtual-court-sittings-and-the-evolution-of-virtual-legal-system-in-nigeria/>.

⁷⁵ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5.

⁷⁶ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5.

⁷⁷ Odhiambo, Mugenyu and Odeya 2022 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-19-october-the-future-of-litigation-in-kenya-virtual-or-hybrid-.html>.

⁷⁸ Odhiambo, Mugenyu and Odeya 2022 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-19-october-the-future-of-litigation-in-kenya-virtual-or-hybrid-.html>.

⁷⁹ Odhiambo, Mugenyu and Odeya 2022 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-19-october-the-future-of-litigation-in-kenya-virtual-or-hybrid-.html>.

⁸⁰ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5.

make use of an e-filing system known as Carelines⁸¹ This platform allows for end-to-end e-filing, digital case management and evidence management systems. Legal practitioners can file their documentation without being physically present at court.⁸²

In the light of the success of Carelines in the High courts in Gauteng, it will be implemented into more jurisdictions in South Africa.⁸³

In 2020, most High Courts in South Africa made use of virtual hearings. The Supreme Court of Appeal and the Constitutional Court made use of Video conferencing facilities to hold virtual hearings.⁸⁴ The Constitutional Court live streams its hearings on its YouTube channel to ensure public access and transparency.⁸⁵ In *Puma Sports Distributors (Pty) Ltd v Hughes*,⁸⁶ the court held that there was no reason to grant a postponement because the defendant was in England and he could not travel to South Africa due to Covid –19 restrictions. The trial was postponed and it was held that the presiding officer will have to decide whether the matter will be heard virtually or face-face.⁸⁷

In 2012 the High Court rules were adapted to provide for the service of court documents via email and when the Covid -19 pandemic started, this practice became mandatory.⁸⁸

⁸¹ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5.

⁸² Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 5.

⁸³ Scriba and Nel 2021 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-31-august-covid-19-silver-lining-the-dawn-of-a-new-digital-era-for-south-african-dispute-resolution-.html>.

⁸⁴ Scriba and Nel 2021 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-31-august-covid-19-silver-lining-the-dawn-of-a-new-digital-era-for-south-african-dispute-resolution-.html>.

⁸⁵ Scriba and Nel 2021 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-31-august-covid-19-silver-lining-the-dawn-of-a-new-digital-era-for-south-african-dispute-resolution-.html>.

⁸⁶ (1820/18) [2020] ZAWCHC 152 (10 November 2020); Grobler 2021 <https://www.lexisnexis.co.za/lexis-digest/legal/virtual-hearings-are-here-to-stay>.

⁸⁷ Grobler 2021 <https://www.lexisnexis.co.za/lexis-digest/legal/virtual-hearings-are-here-to-stay>.

⁸⁸ Scriba and Nel 2021 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Dispute/dispute-resolution-alert-31-august-covid-19-silver-lining-the-dawn-of-a-new-digital-era-for-south-african-dispute-resolution-.html>

The current practice in South Africa is that judges may issue any directive concerning the conduct of their court rooms, including whether the hearing will be held in court or virtually.⁸⁹

2.5 Infrastructure challenges

2.5.1 Power outages

It is said that load shedding has been part of South Africa's life since 2014.⁹⁰ Power outages, especially during virtual court proceedings interrupt hearings and affect service delivery.⁹¹ Lynsey Chutel explains that even Africa's most advanced economy (South Africa) has threatened to regress as rolling blackouts keep the country (South Africa) in the dark.⁹²

According to the International Telecommunications Union, Africa has the lowest percentage of people using the internet in the world, in comparison to other continents.⁹³ Furthermore, it is held that people in the urban areas have twice as much internet access as compared to people in the rural areas.⁹⁴ People in the rural areas are not afforded the same access to justice as the people living in urban areas, in that people who live in urban areas are able to access platforms such as caselines from their laptops and/or smart phones and people who live in the rural areas don't have access to the internet and therefore they cannot easily access platforms such as caselines. The reliability of access to the internet is also hindered by rolling

⁸⁹ Moosajee and Makan 2022 <https://www.theworldlawgroup.com/news/is-south-africa-seeing-the-end-of-virtual-hearings>.

⁹⁰ Chutel 2019 <https://qz.com/africa/1580733/eskom-loadshedding-south-africas-national-service-delivery-crisis>.

⁹¹ Lawyers Hub 2021 https://lawyershub.org/media/virtual_courts_report.pptx 13.

⁹² Chutel 2019 <https://qz.com/africa/1580733/eskom-loadshedding-south-africas-national-service-delivery-crisis>.

⁹³ Lawyers Hub 2021 <https://cipesa.org/2021/09/africa-law-tech-festival-2021-cipesa-underscores-strategies-to-cutting-through-common-emerging-barriers-to-access-to-justice-despite-the-covid-19-pandemic/>.

⁹⁴ Lawyers Hub 2021 <https://cipesa.org/2021/09/africa-law-tech-festival-2021-cipesa-underscores-strategies-to-cutting-through-common-emerging-barriers-to-access-to-justice-despite-the-covid-19-pandemic/>.

blackouts.⁹⁵ Therefore, the two aforementioned infrastructural issues that most African countries are facing, will result in the regression of access to justice.⁹⁶

2.6 Use of virtual courts in other countries

2.6.1 Australia

By the end of March 2020, most courts in Australia had started making use of virtual court hearings.⁹⁷ The first case to be heard virtually in its entirety was that of *Cumberland v The Queen*.⁹⁸

An important challenge is highlighted by McIntyre, Olijnyk and Pender.⁹⁹ The fact that there is no common concept of what is being created or a shared language to describe the ODR system and the virtual court system, can possibly lead to false comparisons between the different ODR systems and that of the virtual court system.

The challenges that Australia faced when phasing in virtual courts included open justice, technological limitations and systematic bias.¹⁰⁰

McIntyre, Olijnyk and Pender¹⁰¹ state that open justice is an essential feature of the Australian judiciary, and it is also an overarching principle that includes that judicial proceedings should take place publicly. The shift to virtual courts threatened this principle in that the public were no longer able to physically attend public hearings.¹⁰²

⁹⁵ Lawyers Hub 2021 <https://cipesa.org/2021/09/africa-law-tech-festival-2021-cipesa-underscores-strategies-to-cutting-through-common-emerging-barriers-to-access-to-justice-despite-the-covid-19-pandemic/>.

⁹⁶ Lawyers Hub 2021 <https://cipesa.org/2021/09/africa-law-tech-festival-2021-cipesa-underscores-strategies-to-cutting-through-common-emerging-barriers-to-access-to-justice-despite-the-covid-19-pandemic/>.

⁹⁷ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 196.

⁹⁸ *Cumberland v The Queen* [2020] HCATrans.

⁹⁹ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 197.

¹⁰⁰ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 200.

¹⁰¹ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 200.

¹⁰² McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 197.

In order to uphold the principle, the Federal Court enforced a practice of including a direction for a person who wished to observe virtual court proceedings to contact the relevant judge's clerk so that they may be provided with a link to view the virtual proceedings.¹⁰³

Inadequate access to technology creates the problem of digital exclusions, in that litigants who do not have access to resources such as a computer or internet access will be unable to participate in litigation.

Systematic bias is the innate tendency of a process to favour particular outcomes.¹⁰⁴ Regarding systematic bias, McIntyre, Olijnyk and Pender¹⁰⁵ state that Zoom fatigue is a disadvantage of working online. Zoom fatigue is the mental burden involved with virtual meetings and virtual proceedings, and in the context of the legal sphere zoom fatigue affects the quality of judge's decision-making abilities.¹⁰⁶

2.7 Advantages of virtual court

There are four advantages of having court proceedings take place virtually: firstly, there is less waiting around for other cases to finish because everyone can schedule the exact time for a hearing. Secondly, there are no traveling expenses because there is no need for travel.¹⁰⁷ Thirdly, legal practitioners need to have all their evidence and documents prepared in advance so that the presiding officer and opposing counsel can review it.¹⁰⁸ Virtual Court prevents the spread of germs due to no one coming into physical contact whilst waiting in queues for court documents or while waiting to enter a court room, because people do not come into physical contact with each other as they would have when being physically present in a real

¹⁰³ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 200.

¹⁰⁴ Psychology Wiki date unknown https://psychology.fandom.com/wiki/Systemic_bias.

¹⁰⁵ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 202.

¹⁰⁶ McIntyre, Olijnyk and Pender 2020 *Alternative Law Journal* 201.

¹⁰⁷ Bailey 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/>.

¹⁰⁸ Bailey 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/>.

court room. Lastly, recordings of the court session can be used to create or to recreate court transcripts and they can be used in the appeal and/or review process.

2.8 Disadvantages of virtual court

Although there are important goals that may be achieved in using virtual courts, there are disadvantages. Firstly, the presiding officer will find it more difficult to control a virtual court room in comparison to a physical court room because the presiding officer is unable to see what is going on behind the camera lens.¹⁰⁹ Secondly, court sessions are usually open to the public, but when you are using an online platform such as zoom, anyone with a link and password thereto can watch the virtual court proceedings.¹¹⁰

2.9 Conclusion

ODR is a traditional dispute resolution with the aid of technology. ODR can take place through synchronous communication and/or asynchronous communication. Synchronous communication takes place on platforms of communication that work together at the same time such as a chat room or skype in that it allows for real time discourse, whereas asynchronous communication is described as the relaying of information with a time lag, meaning that the information is not received in real time as is the case with emails.

The most used OADR methods are online negotiation, online mediation and online arbitration. The main advantages of OADR are firstly, it is cost effective because the parties need not be physically present when the dispute resolution proceedings take place, as parties may now attend proceedings virtually. Secondly, OADR avoids the issue of jurisdiction (i.e., which court has the competency to hear a matter). The disadvantages of OADR include the fact that OADR can potentially be inaccessible because it requires continuous internet connection that may not always be an option

¹⁰⁹ Bailey 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/>.

¹¹⁰ Bailey 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/>.

for people who have limited access to the internet or people who live in countries that experience rolling blackouts. Furthermore, people who are not technologically savvy and/or people who are illiterate will be more reluctant to make use of OADR. A major concern surrounding the use of OADR is confidentiality. Any communication that takes place on the internet is reordered and this poses a threat because parties will not be open and honest when exchanging information due to fear of reprisal.

Considering the Covid-19 pandemic, judiciaries around the world had no choice but to make use of virtual court/online court without any proper preparation, to maintain the law. The principle of open justice is an essential feature of the judicial system of most countries. When the public do not have access to the court hearings because the hearings are now virtual, it can be regarded as a threat to the principle of open justice. Countries in Africa such as South Africa, Nigeria and Kenya have developed their legislation to accommodate the use of virtual court proceedings.

In South Africa and Kenya, the high court's make use of an e-filing system known as case-lines that allows for digital case management.

In Australia, the judiciary highlighted the importance of open justice that includes that judicial proceedings should take place publicly. To uphold the principle of open justice, the court enforced a practice by which persons who want to observe virtual court proceedings in a specific matter, may contact the relevant judge's clerk in order to obtain a link to the virtual proceedings.

Power outages contribute negatively to access to justice, because power outages disrupt hearings and interrupt internet access. Court sessions taking place virtually also limit the general public's access to a trial, meaning that only a limited number of people may attend the virtual proceedings.

Chapter 3 A brief analysis of the ADR methods used in construction industries

3.1 Introduction

Disputes may occur due to the influence of many factors such as the use of improperly or poorly drafted contracts, financial issues and claims, poor communication, poorly managed time, funds and emotions – the ability to handle stress to name a few.¹¹¹ This is particularly so in the construction industry. The impact that a dispute will have on a construction project may range from delays on the project, increase in costs and tarnishing relationships.¹¹² Therefore, it is imperative that the disputes arising within the construction industry are resolved as expeditiously, amicably and in the most cost-effective way possible.¹¹³ Therefore, in the resolution of construction disputes, ADR is best suited to assist.¹¹⁴

The traditional ADR methods used in the construction industry are negotiation, mediation, conciliation, adjudication and arbitration. This chapter provides a short analysis of each of these ADR methods. The brief exposed discussions entail the definition, advantages and disadvantages of each of the abovementioned ADR methods.

3.2 Negotiation

Wilcocks and Laubscher¹¹⁵ are of the view that negotiation is the simplest way to settle disputes because parties are in the best position to know what their strengths and weaknesses are. Negotiation is an informal, unstructured and voluntary process.¹¹⁶ Negotiation is a give and take, and the parties must aim to create a constructive interaction that results in a win-win situation for both parties. It is

¹¹¹ Wilcocks and Laubscher 2017 *Acta Structilia* 148.

¹¹² Wilcocks and Laubscher 2017 *Acta Structilia* 148.

¹¹³ Morton *Alternative Dispute Resolution in the Construction Process* 9.

¹¹⁴ Morton *Alternative Dispute Resolution in the Construction Process* 9.

¹¹⁵ Wilcocks and Laubscher 2017 *Acta Structilia* 152.

¹¹⁶ Hajdú *The methods of alternative dispute resolution* 8.

whereby parties themselves try to reach a settlement without involving an independent third party.¹¹⁷

Negotiation is described as the most economical method of ADR because there are no third parties involved and the parties are able to select the location at which these negotiations will take place as well as agree on what's best for them.¹¹⁸ The success of the negotiation process is dependent on the parties.¹¹⁹

This method is disadvantageous in that, firstly, it is possible that the parties may not come to a settlement agreement because some parties use negotiations as a stalling tactic, in order to keep the other party from asserting its rights.¹²⁰ Secondly, there can be an imbalance of power between the parties.¹²¹ An imbalance of power will result in the negotiations being one-sided, likely leading to an agreement that favours the stronger party.¹²² Lastly, there is a lack of legal protection in the negotiation procedure because negotiation proceedings are protected by legal privilege, and the details of the negotiation may only be revealed in litigation if they are legally relevant.¹²³ The author is of the opinion that negotiation is a precursor for mediation.

3.3 Mediation

Mediation is defined as a means of resolving a dispute outside of the judicial system, by voluntary participation in negotiations structured by agreement of the parties, conducted under the guidance and supervision of a trained impartial third party,

¹¹⁷ Wilcocks and Laubscher 2017 *Acta Structilia* 146–167.

¹¹⁸ Hajdú *The methods of alternative dispute resolution* 8.

¹¹⁹ Hajdú *The methods of alternative dispute resolution* 8.

¹²⁰ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>; Gov of Canada, DoJ 2012 *Dispute resolution reference guide* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.htm>.

¹²¹ Gov of Canada, DoJ 2012 *Dispute resolution reference guide* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.htm>.

¹²² Harness 2021 <https://bizfluent.com/info-8613387-disadvantages-negotiation.html>.

¹²³ Chambers and Smith 2020 <http://disputeresolutionblog.practicallaw.com/privilege-confidentiality-and-settlement-agreements/>; STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

known as a mediator.¹²⁴ A resolution reached in the mediation session is not binding on the parties unless the parties reduce the resolution to writing.¹²⁵

A mediator plays an active role in the mediation process by facilitating communication between the parties. Mediators may suggest specific ways to settle the dispute, which the parties can use if the parties voluntarily agree to the resolution.¹²⁶ The mediator may not impose a solution on the parties to the dispute.¹²⁷

Evaluative mediation is often used in the building and construction industry in South Africa.¹²⁸ Evaluative mediation is the type of mediation in which mediators can make recommendations and suggestions as opposed to solely focusing on the interest of the parties to the dispute.¹²⁹ The main concern in evaluative mediation is the legal rights of the parties or the industry standards and norms as opposed to traditional mediation where the concern is the parties' interests.¹³⁰

In evaluative mediation the mediator strengthens the likelihood of settlement by directing the parties towards narrowing their differences insight of the technical facts and legal issues in dispute.¹³¹

Mediation gives the parties more control, in that they can decided on a settlement that they are satisfied with.¹³² Mediation preserves the relationship of the parties to

¹²⁴ Merriam-Webster Dictionary date unknown <https://www.merriam-webster.com/dictionary/mediation> "a means of resolving disputes outside of the judicial system by voluntary participation in negotiations structured by agreement of the parties and usually conducted under the guidance and supervision of a trained intermediary".

¹²⁵ Hajdú *The methods of alternative dispute resolution* 8.

¹²⁶ Hajdú *The methods of alternative dispute resolution* 4.

¹²⁷ Hajdú *The methods of alternative dispute resolution* 4.

¹²⁸ Wiese *Alternative dispute resolution* 49.

¹²⁹ Shonk 2022 <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/>.

¹³⁰ Wiese *Alternative dispute resolution* 49.

¹³¹ Bruner 2014 <https://scl.org.sg/enews/PDF/Evaluative%20Mediation%20of%20complex%20construction%20disputes.pdf> 1.

¹³² STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

the dispute and the matter is resolved timeously.¹³³ In the mediation process, confidentiality is important to allow the parties to try and reach an amicable solution without the fear of reprisal. Mediators are not allowed to disclose any information revealed during mediation, which assists in ensuring that the process remains confidential.¹³⁴

STA Law¹³⁵ states that the lack of formality in the mediation procedure could be a disadvantage, since the procedure followed in mediation is informal; it is not based on legal principles. Another disadvantage to mediation would be that the truth of the issue may not be revealed, whereas in litigation, legal practitioners have access to avenues provided to them by law of evidence, which allows for witnesses to be called.¹³⁶

3.4 Conciliation

In this process, there is a third party who helps the parties to understand their conflict in an informal setting.¹³⁷ This is a flexible process in which the parties voluntarily submit themselves to a conciliator or a panel of conciliators' aid the parties to the dispute to seek a resolution.¹³⁸ The parties choose the time, structure and the issues to be dealt with during the proceedings.¹³⁹ Parties in the conciliation process are unrepresented.¹⁴⁰

¹³³ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

¹³⁴ US Office of Special Counsel date unknown <https://osc.gov/Services/Pages/ADR-Advantages.aspx>.

¹³⁵ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

¹³⁶ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>; Upcounsel 2020 <https://www.upcounsel.com/disadvantages-of-mediation#:~:text=Mediation%20has%20several%20disadvantages%20of,is%20not%20available%20in%20mediation.>

¹³⁷ Hajdú *The methods of alternative dispute resolution* 6.

¹³⁸ Hajdú *The methods of alternative dispute resolution* 7.

¹³⁹ Hajdú *The methods of alternative dispute resolution* 7.

¹⁴⁰ Hajdú *The methods of alternative dispute resolution* 7.

Conciliation is advantageous in that it is flexible because the process is informal.¹⁴¹ The conciliator is an expert in the field and therefore the parties need not call upon witnesses to explain the technical terms.¹⁴² It has been highlighted that conciliation reduces tension between parties, opens channels of communication and it facilitates continued negotiations.¹⁴³

A decision that has been reached by a conciliator in the process cannot be appealed, and the process is binding upon the parties to the dispute.¹⁴⁴

3.5 Adjudication

Adjudication is described as a statutory or contractual procedure, wherein a party to a construction contract has the right to have a dispute decided by an adjudicator.¹⁴⁵ Disputes that are submitted for conciliation are those that take place between two or more groups and/or two or more organisations.¹⁴⁶

Parties that have submitted their dispute to adjudication may not proceed with arbitration or litigation until 28 days after an adjudicator has made his/her determination.¹⁴⁷ It has been held that this method of ADR is less disruptive because the parties to the dispute can continue with their contractual obligations and meet their obligations.¹⁴⁸

The decision of the adjudicator is final and binding on the parties, but the decision of an adjudicator can be reviewed by arbitration or by the court.¹⁴⁹

¹⁴¹ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

¹⁴² STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

¹⁴³ Hajdú *The methods of alternative dispute resolution 2*.

¹⁴⁴ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

¹⁴⁵ LexisNexis Construction Expert 2022 <https://www.lexisnexis.co.uk/legal/glossary/adjudication>.

¹⁴⁶ Wilcocks and Laubscher 2017 *Acta Structilia* 154.

¹⁴⁷ Wilcocks and Laubscher 2017 *Acta Structilia* 154.

¹⁴⁸ Wilcocks and Laubscher 2017 *Acta Structilia* 154.

¹⁴⁹ Martiz 2009 *Essays Innovative* 78-79.

3.6 Arbitration

Arbitration is described as a formal process, wherein the disputing parties voluntarily submit their dispute to a neutral third party of their choice, who is preferably knowledgeable on the subject.¹⁵⁰ The decision of the neutral third party is final and binding.¹⁵¹ This may be regarded by the inclusion of arbitration as part of the dispute resolution process prudent in the standard constitution of contracts.¹⁵² For a long time in the construction industry, arbitration was the only alternative to litigation.

Morton¹⁵³ states that arbitration resembles court litigation and that it has unique advantages: firstly, the arbitrator is usually an expert on the subject matter, secondly, parties may choose the time and place of the hearing without having to worry about the backlog of the court roll, thirdly, the decision of the arbitrator is final and cannot be appealed and lastly, the arbitration proceedings are private.

Arbitration hearings can be tailored to meet the parties' needs.¹⁵⁴ Arbitration hearings are similar to court procedures in that in both instances, parties argue their case by presenting evidence and testimony, but the strict rules of evidence that are applied by the courts do not apply in arbitration hearings.¹⁵⁵

If parties agree to arbitration in their initial contract, they waive the right to approach the court when there is a contractual dispute. Furthermore, it is held that arbitration awards are not directly enforceable, and they can be executed by the court.¹⁵⁶

¹⁵⁰ Wilcocks and Laubscher 2017 *Acta Structilia* 155; Polity.org.za 2017 <https://polity.org.za/article/arbitration-in-south-africa-2017-05-05>.

¹⁵¹ Wilcocks and Laubscher 2017 *Acta Structilia* 155.

¹⁵² Morton *Alternative Dispute Resolution in the Construction Process* 20; FIDIC clause 20, GCC clause 10, JBCC clause 40, NEC clause 90.2.

¹⁵³ Morton *Alternative Dispute Resolution in the Construction Process* 20.

¹⁵⁴ Mix 1997 *Ohio St J on Disp Resol* 468.

¹⁵⁵ Mix 1997 *Ohio St J on Disp Resol* 468.

¹⁵⁶ STA Law Firm 2019 <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>.

Arbitration is advantageous in that, firstly, the arbitration proceedings are private and therefore confidential. Secondly, the parties elect an arbitrator of their choice to handle their dispute. Lastly, the arbitration award may be enforced by the courts.

The arbitration process can be inexpensive, but it is not always an expeditious procedure.¹⁵⁷ There is no right to discover in the arbitration process, unless discovery is provided for in the arbitration clause/agreement and/or if the arbitrator allows for discovery.¹⁵⁸ The arbitrator does not make an award based on the rules of law or law of evidence, but his award must be in line with the principles of justice and equity.¹⁵⁹

3.7 Conclusion

Disputes in the construction industry may occur as a result of many different factors such as poor drafted contacts and poor communication. These factors can lead to disputes that can result in delays in the project, increased costs and tarnished relationships. Therefore, it is important that construction disputes be resolved amicably in a timeous manner. The aim of ADR is to resolve disputes timeously and amicably, while preserving the relationship.

The general methods of ADR as used in the construction industry are negotiation, mediation, adjudication, conciliation and arbitration. Negotiation is an informal, unstructured voluntary process, wherein the parties try to reach a settlement without the assistance of a third party. Mediation is an informal, non-binding process, wherein a neutral third party (a mediator) assists the parties to resolve their dispute.

Adjudication is a statutory or contractual procedure that takes place when a dispute between two groups/organisations is referred to a neutral third party known as a adjudicator. Conciliation is a flexible but binding process, wherein the parties to the

¹⁵⁷ Mazirow 2008 <https://www.Mazirow.com.com/>.

¹⁵⁸ Mazirow 2008 <https://www.Mazirow.com.com/>.

¹⁵⁹ Mazirow 2008 <https://www.Mazirow.com.com/>.

dispute appoint a conciliator or a panel of conciliators who are experts in that specific field to make a decision about the dispute. Arbitration is a formal process wherein the parties present their case to a neutral third party (an arbitrator), to make a decision about the dispute. Arbitration hearings are similar to court hearings in terms of procedure. The decision made by an arbitrator is binding on the parties and can only be reviewed by the courts. Each of the abovementioned ADR methods has its unique own benefits and disadvantages.

The following chapter will provide an international perspective of OADR and how it is used in countries such as Singapore, Australia, Hong Kong and India.

Chapter 4 International Construction Industry: Best Practices

4.1 Introduction

As the world moves towards the fourth industrial revolution, many businesses are taking a data-informed approach in their day-to day business operations.¹⁶⁰ In many jurisdictions, OADR has become the first step in a multi-tiered dispute resolution process.¹⁶¹ Countries such as Singapore, Hong Kong and Australia that are regarded as arbitration friendly have been more proactive in adopting diverse approaches to digital transformation.¹⁶²

The following chapter provides a discussion on UNCITRAL Model Law by looking at UNCITRAL Model Law on International Commercial Arbitration (1985) and the Technical Notes on Online Dispute Resolution. The discussion is followed by a brief overview of the international perspective on how countries such as Singapore, Hong Kong and Australia have embraced OADR in resolving disputes in the construction industry.

4.2 UNCITRAL Model Law

UNCITRAL's main function is to further the increased accommodation and unification of the law of international trade.¹⁶³ The UNCITRAL is a legal body in the field of international trade that was established in 1966 by the general assembly of the UN.¹⁶⁴ The Commission has seventy members including Australia, India, Singapore and South Africa.¹⁶⁵

¹⁶⁰ Waddell 2022 <https://www.pinsentmasons.com/out-law/analysis/construction-disputes-online-adr-popularity>.

¹⁶¹ Waddell 2022 <https://www.pinsentmasons.com/out-law/analysis/construction-disputes-online-adr-popularity>.

¹⁶² Pui-Ki Emmanuelle Ta 2022 *Asian Dispute Review* 173-180.

¹⁶³ UN Commission on International Trade Law 2022 https://uncitral.un.org/en/about/faq/man_date_composition.

¹⁶⁴ UN Commission on International Trade Law 2022 https://uncitral.un.org/en/about/faq/man_date_composition.

¹⁶⁵ UN Commission on International Trade Law 2022 https://uncitral.un.org/en/about/faq/man_date_composition.

There are many texts by UNCITRAL, but those that are relevant for this study are UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 and UNCITRAL technical notes on Online Dispute Resolution.¹⁶⁶

UNCITRAL Model Law on International Commercial Arbitration (1985)¹⁶⁷ was developed with the aim of unifying the significant differences in national laws on arbitration in order to meet the needs of international commercial arbitration.¹⁶⁸ The Model Law covers the arbitration agreement (chapter two), the arbitration process (chapters 3 to 5), the extent of court intervention and the recognition and enforcement of the arbitral award (chapters 5 to 8).¹⁶⁹ In as much as the Model Law is designed for international commercial arbitration, it offers a set of basic rules that are also suited for domestic disputes.¹⁷⁰ A number of states have enacted the Model Law into their national legislation of which South Africa is one.¹⁷¹

4.2.2 Technical Notes on Online Dispute Resolution of UNICITRAL

In 2016, after having taken note of the rise in online cross-border transactions and the need for a mechanism to resolve the disputes that arise from such transactions, UNICTRAL finally adopted the Technical notes on Online Dispute Resolution (herein referred to as "the technical notes").¹⁷² The technical notes describe and reflect on the elements of an OADR process.¹⁷³ The aim of the technical notes is to assist consumers and businesses to resolve their disputes quickly in a secure and flexible

¹⁶⁶ UNCITRAL 2022 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status; UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

¹⁶⁷ With amendments as adopted in 2006.

¹⁶⁸ UNCITRAL 2022 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

¹⁶⁹ UNCITRAL 2022 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status 1.

¹⁷⁰ UNCITRAL 2022 https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status 25.

¹⁷¹ *International Arbitration Act* 15 of 2017.

¹⁷² UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

¹⁷³ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

manner without the need for physical presence at a hearing whilst fostering the development of OADR.¹⁷⁴ They are also intended to be used in cross border disputes that are of a low value or disputes arising from service contracts concluded via electronic communications.¹⁷⁵ Regarding the aforementioned, the author is of the opinion that the technical notes were not intended to aid large disputes in the construction industry, as most disputes in the construction industry are complex and are of high financial value. Furthermore, the technical notes are applicable to disputes arising out of business-to-business transactions and business-to-consumer transactions.¹⁷⁶

Article 26¹⁷⁷ explains that OADR requires a technology-based intermediary (an OADR platform). The OADR platform will be responsible for sending, receiving, exchanging, storing and processing the communications in a secure and reliable manner.¹⁷⁸ It is recommended that all communications in the OADR process must take place via the OADR platform that the parties agreed to use.¹⁷⁹ The OADR platform that will be used by the parties must meet the highest standard of data and privacy security and fraud prevention and fraud detection in order to protect the privacy and confidentiality of the parties.¹⁸⁰

There are three stages identified in the technical notes: the first stage is the negotiation stage followed by the mediation stage and lastly, the arbitration stage.¹⁸¹ The aforementioned stages follow in that particular order. In the case of a

¹⁷⁴ Dennis 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/4-6_michael_dennis.pdf 2.

¹⁷⁵ Dennis 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/4-6_michael_dennis.pdf 2.

¹⁷⁶ Dennis 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/4-6_michael_dennis.pdf 6.

¹⁷⁷ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 4.

¹⁷⁸ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 4 article 26.

¹⁷⁹ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 4 article 30.

¹⁸⁰ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 6 articles 40-45.

¹⁸¹ UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 6 articles 40-45.

stage failing (i.e. the parties fail to reach a settlement) the parties move on to the following stage.¹⁸²

Should the mediation stage fail, the administrator will inform the parties of the nature of the arbitration stage and the procedures that will be followed in the arbitration process.¹⁸³

Even though the technical notes exist and would aid in making more unified approach to resolving commercial disputes, of which a construction dispute is also considered. Countries such as Singapore, Australia and Hong Kong have chosen to introduce their own methods of resolving disputes in the construction industry.

4.3 Singapore

The main OADR method used in Singapore is arbitration.¹⁸⁴ Arbitration is the OADR mechanism in the construction industry that allows disputes to be resolved by fast track via documents.¹⁸⁵ *Singapore International Arbitration Centre (SIAC) Rules*¹⁸⁶ also allow for document-only arbitration. Under normal circumstances the tribunal is required to hold a hearing to examine witnesses, but Rule 5.2 (C) states that such a hearing need not take place if the parties have agreed to have the dispute decided solely on documentary evidence.¹⁸⁷ In order for a dispute to qualify for document-only arbitration, the amount in dispute may not exceed 5,000,000.00 Singapore Dollars unless the parties agree, or the dispute results in an urgent matter.¹⁸⁸

¹⁸² UNCITRAL 2017 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf section 6, articles 40-45.

¹⁸³ Nan 2022 <https://law.asia/online-dispute-resolution-proceedings-uncitral/>.

¹⁸⁴ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 1.

¹⁸⁵ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 1.

¹⁸⁶ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 2.

¹⁸⁷ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 2.

¹⁸⁸ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 2.

The International Centre for Dispute Resolution Manufacturers/Suppliers ODR Protocol¹⁸⁹ is an online platform consisting of two phases.¹⁹⁰ Phase one is the negotiation phase and the second phase is the arbitration phase in which manufacturers and suppliers may submit documents online to the arbitrators, and an expert arbitrator will make a determination (within 30 days) based on the documentary submissions.¹⁹¹

Changaroath¹⁹² explains that, under section 16(4)(1) of the *Building and Construction Industry Security of Payment Act 2004*, an adjudicator may make a determination in a matter solely based on the adjudication application and the responses submitted therein on condition that such documents contain sufficient information.

4.4 Australia

Australia is seen as a forerunner in the field of ADR due to its establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC).¹⁹³ NADRAC is tasked with the continuous development of ADR within Australia, regardless of the sector.¹⁹⁴

NADRAC's main function is to promote using and developing ADR, and its purpose is achieved by releasing non-binding statements that may be adopted as policy to the attorney general.¹⁹⁵ A report by NADRAC stated that:

Information technology provides opportunities to facilitate communication and so assist in prevention and management of disputes...to provide

¹⁸⁹ Changaroath 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 3.

¹⁹⁰ Changaroath 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 3.

¹⁹¹ Changaroath 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 3

¹⁹² Changaroath 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 1.

¹⁹³ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 484.

¹⁹⁴ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 484.

¹⁹⁵ Kaufmann-Kohler and Schultz *Online Dispute Resolution* 94.

information to parties and to complement or be substitute for traditional face-to-face interventions.¹⁹⁶

NADRAC identified that using technology in ADR is beneficial, and it may substitute and aid traditional ADR.¹⁹⁷ As a result, the Australian government is adapting policies and adapting processes in order to take advantage of using technology in resolving disputes. The Australian government's contribution to the development of OADR has resulted in several government-sponsored bodies such as NADRAC that are responsible for the development of OADR.¹⁹⁸ Sourdin and Liyanage¹⁹⁹ state that, in as much as Australia is seen as a forerunner in the use of ADR, it is evident that Australian Literature is limited in terms of some aspects of OADR.

In 2013 NADRAC was abolished by the Australian government and its functions were absorbed by the Attorney-general.²⁰⁰ It was held that the Australian government abolished NADRAC in order to boost productivity and to reduce red tape. Batagol²⁰¹ states that that NADRAC was unique in that its main purpose was to work towards providing a high quality ADR system that is accessible and integrated in to the federal system. NADRAC was considered to be providing high quality ADR services because it was independent council that provided Australian with access to justice without having to approach the courts.²⁰²

4.5 Hong Kong

The Department of Justice in Hong Kong announced that it would be launching a Covid-19 ODR scheme in June 2020.²⁰³ The aim of this scheme is to aid small and

¹⁹⁶ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 484.

¹⁹⁷ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 484.

¹⁹⁸ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 484.

¹⁹⁹ Sourdin and Liyanage "The Promise and Reality of Online Dispute Resolution in Australia" 483.

²⁰⁰ Gormly 2013 <https://apo.org.au/node/67061>; Batagol 2013 <https://adrnetwork.wordpress.com/2013/11/12/dumb-decision-the-closure-of-nadrac/>.

²⁰¹ Batagol 2013 <https://adrnetwork.wordpress.com/2013/11/12/dumb-decision-the-closure-of-nadrac/>.

²⁰² Batagol 2013 <https://adrnetwork.wordpress.com/2013/11/12/dumb-decision-the-closure-of-nadrac/>.

²⁰³ Short and Wong 2020 <https://www.mondaq.com/hongkong/operational-impacts-and-strategy/949610/covid-19-hong-kong-online-scheme--way-forward-for-small-and-medium-sized-construction-disputes>.

medium-sized businesses in resolving their construction disputes while expediting the dispute resolution process.²⁰⁴

In order to speed up the dispute resolution process, the scheme encourages the parties to first negotiate amongst themselves.²⁰⁵ Should the negotiation fail, the parties will mediate with the option to submit the dispute to arbitration should mediation fail. This is considered a multi-tier dispute resolution process.²⁰⁶

There are 5 criteria that need to be met for a construction dispute to be referred to the ODR process:²⁰⁷

- The dispute in question must be Covid-19-related and the amount of the claim must not surpass 500,00 Hong Kong Dollars;
- The plaintiff or the defendant must be a resident of Hong Kong/a Hong Kong company;
- There is a registration fee of 200 Hong Kong Dollars;
- The parties must consent to ODR.²⁰⁸

The Department of Justice in Hong Kong successfully launched the scheme on a platform known as eBram on 29 June 2020.²⁰⁹ The scheme operates independently on the eBram platform, wherein the parties are able to sign electronic agreements and conduct the ADR hearings online.²¹⁰ The government in Hong Kong provided 150 mediators and arbitrators with training on how to use the platform, upon

²⁰⁴ Short and Wong 2020 <https://www.mondaq.com/hongkong/operational-impacts-and-strategy/949610/covid-19-hong-kong-online-scheme--way-forward-for-small-and-medium-sized-construction-disputes>.

²⁰⁵ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

²⁰⁶ Short and Wong 2020 <https://www.mondaq.com/hongkong/operational-impacts-and-strategy/949610/covid-19-hong-kong-online-scheme--way-forward-for-small-and-medium-sized-construction-disputes>.

²⁰⁷ eBRAM 2021 https://www.ebram.org/covid_19_odr.html.

²⁰⁸ eBRAM 2021 https://www.ebram.org/covid_19_odr.html.

²⁰⁹ eBRAM 2021 https://www.ebram.org/covid_19_odr.html.

²¹⁰ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

completion of the training, eBram was open to aid in the dispute resolution process.²¹¹

There are three tiers in the scheme; the first tier is the negotiation stage.²¹² The parties must attempt to settle the matter within three days, upon failure to do so the parties may extend the negotiation by three days.²¹³ Failure to reach settlement within the extended three-day period will result in the parties having to move to the mediation stage.²¹⁴

The second tier is the mediation stage; in this stage the parties will choose an eBram-trained mediator who will assist the parties in their attempt to reach a settlement. The parties must attempt to reach a settlement within three days of the mediation process, failure to do so will result in the parties moving to the arbitration stage. In this tier, the parties may choose an arbitrator from a list of suggests provided by eBram.²¹⁵ The arbitrator will set a deadline by which the parties need to have completed all submissions. All submissions must be completed with a month period from the commencement of arbitration. The award made by the arbitrator is final and binding, and therefore cannot be appealed.²¹⁶

4.7 Conclusion

The development of UNCITRAL Model Law was the first step towards unifying the law of international trade. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 was developed in order to unify the national laws of arbitration, whereas UNICTRAL technical notes on Online

²¹¹ eBRAM 2021 https://www.ebram.org/covid_19_odr.html.

²¹² Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

²¹³ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

²¹⁴ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

²¹⁵ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

²¹⁶ Cheng 2020 <https://www.bcplaw.com/en-US/insights/hk-covid-19-9-key-points-on-the-hk-governments-covid-19-online-dispute-resolution-scheme.html>.

Dispute Resolution was adopted in 2016 in order to aid the rising number of online transactions. Arbitration friendly countries such as Singapore, Australia and Hong Kong are said to be proactive in adopting digital transformation approaches.

In the construction industry in Singapore there is an ODR mechanism that allows for disputes to be resolved by means of fast-tracked documentation. The adjudicator may only decide based on the documents submitted on condition that the documents contain sufficient information. The Singapore International Arbitration Centre (SIAC) rules allow document-only arbitration in which the parties to the dispute may agree that the dispute will be subject to a document-only arbitration process. In order for a dispute to be submitted for document-only arbitration it has to meet certain criteria as set out by the International Arbitration Centre Rules.

In Australia there was an advisory council known as NADRAC that is tasked with developing ADR in Australia. NADRAC identified that the use of technology in ADR is beneficial, and it may substitute to aid traditional ADR. NADRAC was abolished in 2013. In as much as Australian literature is limited in terms of some aspects of OADR, Australia is still regarded as a forerunner in the use of ADR.

In 2020 the Department of Justice in Hong Kong announced that it would be launching an ODR scheme aimed at small- to medium-sized businesses. The multi-tiered DR scheme would aim to resolve disputes timeously. In order to qualify for the abovementioned scheme, the dispute in question must meet the criteria as set out by the Department.

Chapter 5 Current OADR practices in the South African construction industry

5.1 Introduction

It is trite that the South African construction industry encounters challenges especially when dealing with the resolution of disputes arising herein.²¹⁷ Traditionally the South African construction industry used mediation, arbitration and until recently adjudication to resolve disputes. The covid -19 pandemic brought about change to the manner in which disputes were resolved.²¹⁸ The focus of this chapter will be to illustrate how the South African construction industry has embraced the use of OADR, if at all.

5.2 Mediation in terms of South African legislation

Mediation is one of the commonly used methods used in the resolution of disputes in the construction industry.²¹⁹ In South Africa we have voluntary mediation and statutory mediation.²²⁰

Statutory mediation is regulated by legislation.²²¹ Court -annexed mediation allows for parties to have their dispute resolved by means of ADR prior to litigation or during litigation but before judgment is given.²²² In the High Court, Rule 41A provides that parties must consider mediation .It is a novel idea to include these provisions in the rules of court, but they are not of any value when dealing with construction disputes.²²³ According to the author the reason that may be found is that by the time parties in a construction dispute approach the courts for assistance they will already have attempted ADR, mediation in particular. This is attributed to

²¹⁷ Rooney 2021 <https://www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution>.

²¹⁸ Rooney 2021 <https://www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution>.

²¹⁹ Woodward-Smith 2022 <https://www.systech-int.com/insights/thoughts/mediation-advantages-and-disadvantages>.

²²⁰ Olivier *The role of court-annexed mediation* 4.

²²¹ Olivier *The role of court-annexed mediation* 33.

²²² Olivier *The role of court-annexed mediation* 38.

²²³ Wessels 2020 <https://www.traceyleighwessels.com/2020/10/online-mediation/>.

the fact that the construction contracts make provision for disputes to be resolved by means of ADR- mediation usually being the first step.²²⁴

In light of the fact the platforms such as zoom and Microsoft Teams have become part of people's daily lives, it is presumed that the construction disputes resolved by means of mediation are also resolved by using the aforementioned platforms. At the time of submission of this mini-dissertation, there was no empirical research or data available to confirm or reject this view and this will form part of a future study.

What is not an established fact is whether this method is used online within the construction industry.²²⁵

5.3 Arbitration proceedings in terms of AFSA

The *International Arbitration Act*²²⁶ incorporates the *UNICITRAL Model Arbitration Law* into South African legislation. Williams²²⁷ explains that the modernization of arbitration legislation, its practices and procedures has led to the development of arbitration on a domestic and international level. *Arbitration Foundation of South Africa's (AFSA) International Rules* came into effect on the 1st of June 2021 with the aim of improving AFSA's management of international cases.²²⁸ Fawcett²²⁹ explains that these rules provide for hearings to be held either in person or by "any other means" which may be appropriate, such as video conference, phone conference or a combination such of methods, allowing the tribunal to be more flexible.

The Arbitration Foundation of South Africa (AFSA) is a private dispute resolution authority which handles and supervises local and international disputes by way of

²²⁴ Viator 2022 <https://www.levelset.com/blog/alternative-dispute-resolution/>.

²²⁵ Morton *Alternative Dispute Resolution in the Construction Process* 20; IDIC clause 20, GCC clause 10, JBCC clause clause 40, NEC clause 90.2.

²²⁶ 15 of 2017.

²²⁷ Williams 2020 [https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=(sc.Default)&firstPage=true).

²²⁸ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

²²⁹ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

mediation, adjudication and arbitration.²³⁰ This non-profit organization operates through a secretariat which consists of specialized staff. AFSA has various divisions, namely,²³¹

- AFSA Domestic
- AFSA International
- AFSA SADC Division
- AFSA Mediation
- AFSA Municipal
- AFSA Training
- AFSA Construction

AFSA Construction is relevant in this regard because its objective is to resolve infrastructure or construction disputes wherein the parties to the dispute are both based in South Africa or in different countries.²³²

The AFSA Construction division is chaired by Advocate Azhar Bham, who explains that parties to a dispute choose trustworthy experts and that parties in different jurisdictions can choose a neutral and convenient location for their dispute resolution proceedings.²³³ The appointment of trustworthy experts is essential because such experts are able to facilitate arbitral proceedings in an effective manner which results in reduced time and costs.²³⁴ The other advantage in using

²³⁰ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³¹ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³² AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³³ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³⁴ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

the rules is the provision and facilitation of using technology to assist in resolving disputes.

The AFSA operation is two-fold, in that the foundation can act as an appointing body for arbitrators, mediators etc. or it can administer arbitration fully.²³⁵ In the case where parties use the foundation to appoint an arbitrator or mediator from its panel, the unadministered rules will apply, whereas if the parties submit the dispute for arbitration under the foundation the AFSA Commercial rules will be applicable.²³⁶

AFSA allows for online filing through a portal called "Matter Manager".²³⁷

Matter manger is a secure cloud-based system which allows parties and arbitrators/mediators to access information (as uploaded on to the cloud) from any location.²³⁸ The parties to the dispute will receive a username and password, which can be used to login into the platform, allowing them to upload documents on to the cloud within the agreed upon time periods, as wells as allowing the parties to access each other's online submissions.²³⁹

As a result of the Covid-19 pandemic AFSA developed the Protocol to keep up with government measures in South Africa and other jurisdictions.²⁴⁰ The Remote Hearing Protocol as published by AFSA, is a recommendation of how remote hearings should be conducted.²⁴¹ The Protocol provides guidelines on aspects such as the Remote Hearing Proceedings, Confidentiality, Privacy and Security.²⁴² It is

²³⁵ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³⁶ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²³⁷ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

²³⁸ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

²³⁹ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

²⁴⁰ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²⁴¹ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

²⁴² AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf>.

important to keep in mind that South Africa is a member of UNICITRAL and therefore any rules and regulations promulgated in South Africa must be subject to UNICITRAL Model Law Texts.

5.4 Adjudication

Construction disputes should be resolved using a mechanism that is conducted by an independent third party, who has been chosen by the parties to the dispute, who is an expert in his respective field.²⁴³ In 2007, Maritz²⁴⁴ investigated the use of adjudication in the South African Industry and according to results of the investigation, adjudication is not an effective dispute resolution method for most contractual disputes in South Africa, because adjudication is best suited for large projects with advanced contractors and subcontractors.

Currently, In South Africa, there is an agency developed by the National Department of public works known as the CIDB agency.²⁴⁵ The main function of this agency is to facilitate and promote the contribution of the construction industry to South Africa's economy.²⁴⁶

Contractual adjudication was introduced to the South Africa construction industry when the CIDB published the CIDB adjudication procedure.²⁴⁷ The CIDB adjudication procedure contains guidelines and principles that need to be observed in adjudication.²⁴⁸ Contractual adjudication is the only form of adjudication that is currently available in South African construction industry.²⁴⁹ One has to wonder whether adjudication, just like mediation, takes place on online platforms.

²⁴³ Martiz 2009 *Essays Innovative* 78-79.

²⁴⁴ Martiz 2009 *Essays Innovative* 78-79.

²⁴⁵ Oelofse *The use of adjudication to resolve disputes* 35.

²⁴⁶ Oelofse *The use of adjudication to resolve disputes* 35.

²⁴⁷ Oelofse *The use of adjudication to resolve disputes* 35.

²⁴⁸ Oelofse *The use of adjudication to resolve disputes* 38.

²⁴⁹ Oelofse *The use of adjudication to resolve disputes* 38.

5.5 Conclusion

South Africa makes use of various ADR methods to resolve disputes arising within the construction industry. Certain methods have transitioned to online platforms – others it is unknown whether in fact the transition has taken place. What is clear from the contents, is that South Africa embraced OADR and there is room for improvement and growth.

Chapter 6 A comparison of the best practices and conclusion

6.1 Introduction

Countries such as Singapore, Australia and Hong Kong are considered to be arbitration friendly countries that are said to be leading in digital transformation approaches such as OADR. In regards to OADR South Africa is still in its infancy stage, which is reflected by the limited amount of South African literature available on the topic.

This chapter therefore compares the use of OADR in the South African construction industry with that of Singapore, Australia and Hong Kong as to get a clearer picture of how South Africa needs to improve with in regard to the use of OADR in resolving disputes in the construction industry. Consideration is given to how the regulations implemented in the aforementioned countries can be altered and incorporated in South Africa to improve and contribute to a more efficient and more accessible online dispute resolution.

6.2 Singapore and South Africa

In Singapore there are two pieces of legislation that allow for disputes in the construction industry to be resolved in a document only Arbitration.²⁵⁰ They are the *Building and Construction Industry Security of Payment Act 2004* and *Singapore International Arbitration Centre Rules* allowing for a document only adjudication and arbitration to take place. Should the parties agree to have the dispute decided solely on documentary evidence, the documents submitted by the parties during the process should the necessary sufficient information.²⁵¹ In order for a construction

²⁵⁰ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 1.

²⁵¹ Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 2; Section 16(4)(1) of the *Building and Construction Industry Security of Payment Act*, *Singapore International Arbitration Centre Rules*.

dispute to qualify for document only arbitration the amount in dispute may not exceed 5,000,000.00 Singapore Dollars unless the parties agree otherwise.²⁵²

In South Africa the *International Arbitration Act 15 of 2017* incorporates the UNCITRAL Model Arbitration Law into South African law, meaning that any legislation, contract or clause relating to arbitration must be in line with UNCITRAL Model Law.²⁵³ The parties may elect whether their dispute will be document only arbitration or if they will be allowed to make representations during the arbitration process.²⁵⁴ The parties can specify such details in their arbitration clause or when they submit their dispute to AFSA. AFSA is a non-profit organisation, that assists parties in resolving their disputes. AFSA has a department that is specifically tasked with resolving disputes in the construction industry that have been referred to them. The core principles of ADR are applicable, in that the parties must agree (voluntarily) to submit their dispute to arbitration.²⁵⁵ The author is of the opinion that the South African construction industry does not have legislation that specifically deals with construction disputes. Dispute resolution in this instance takes place in terms of contractual obligations. The CIDB could also add guidelines for the use of online adjudication in order to encourage the legislature to follow suite.

6.3 Hong Kong and South Africa

OADR scheme was launched in Hong Kong by the Department of Justice. This 3-tier scheme is tasked with aiding the ADR process in the construction industry between small and medium sized businesses using an online platform known as eBram. In order for the dispute to be submitted to the scheme, the dispute in question must firstly be covid-19-related and the amount of the claim must not surpass 500,00 Hong Kong Dollars. Secondly, the plaintiff or the defendant must be a resident of

²⁵² Changaroth 2015 <https://www.scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf> 2.

²⁵³ Williams 2020 [https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=(sc.Default)&firstPage=true).

²⁵⁴ AFSA 2020 <https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Proto.pdf>.

²⁵⁵ Fawcett 2021 <https://www.pinsentmasons.com/out-law/news/afsa-international-arbitration-rules>.

Hong Kong /a Hong Kong company. Thirdly, there is a registration fee of 200 Hong Kong Dollars. Lastly, the parties must consent to OADR.

In South Africa there is no new legislation that was specifically developed/enacted to help facilitate the resolution of disputes in the construction industry amid the Covid -19 pandemic. The *International Arbitration Act 15 of 2017* regulates arbitration in South Africa. There is no other specific criteria that needs to be met in order for the *International Arbitration Act 15* to be applicable to a dispute.

The author is of the opinion that South Africa would benefit greatly from having an OADR scheme launched on an online platform such as eBram, even post the covid 19 pandemic. Having access to a scheme with its own online platform would assist small to medium sized businesses in minimising costs associated with dispute resolution, relationship issues and time. It would likely assist in preventing projects from being delayed for long periods. The author states that such a scheme should only be made available to small to medium sizes businesses and /or for disputes with a financial claim that surpasses an amount as set by the government, to empower small to medium sized businesses that do not have access to resources such as inhouse legal department that large corporations have.

6.4 *Australia v RSA*

The Australian government was ahead of its time when it established NADRAC, an independent advisory council that released nonbinding recommendations to the government. Its main function is to promote the usage and development of ADR regardless of the industry. NADRC had identified that the use of technology in ADR was beneficial.

In South Africa, there is an agency known as the Construction Industry Development Board (CIDB) that was developed by the Department of Public Works in order to facilitate and promote the contribution of the construction industry to South Africa's economy. The author is of the opinion that the CIBD is not as proactive as other boards when it comes to dispute resolution within the construction industry as it is

reliant on the procedures provided for in the recommended standard forms of contract.

The author is also positive that an agency such as the CIBD would benefit from introducing a ADR method specifically designed for resolving construction disputes and getting their regulations promulgated.

6.5 Conclusion

There are various practices used worldwide, primarily in the arbitration industry, such as document only arbitration in Hong Kong. Alternatively, specific legislation dealing with construction disputes such as The *International Arbitration Act* of 2017 that regulates arbitration in South Africa, is better suited for the needs of the industry. The author is convinced that there is room for the growth of OADR within the construction industry worldwide.

Chapter 7 Conclusion and recommendation

The aim of this mini-dissertation was to explore how online ADR can assist in resolving disputes in the construction industry. In answering the aforementioned question focus was placed on OADR, how ODR was used by other countries during the Covid -19 outbreak, how other countries use OADR in the resolution of disputes in the construction industry and how South Africa uses it. A comparison was drawn from this to determine where South Africa can improve, where they are heading and what the future of OADR in South Africa might look like.²⁵⁶

Dispute Resolution (DR) is the course of action used to resolve conflict between parties. It has been held that traditional dispute resolution is judicial in nature. Online Dispute Resolution (ODR) is the use of Dispute Resolution with the aid of technology to assist in the resolution process. Many jurisdictions around the world started making use of ODR during the outbreak of Covid-19. Alternative Dispute Resolution (ADR) on the other hand is a process in which a neutral third party assists the parties to resolve the dispute without submitting the matter to a court. Where OADR is an alternative dispute resolution procedure that takes place virtually, the dispute resolution takes place on an online platform such as ZOOM. Therefore, it is expected that the most commonly used types of OADR include online negotiation, online mediation and online arbitration. We are living in a digital age wherein convenience is key. OADR allows parties to resolve their dispute without having to leave their home.²⁵⁷

During the Covid 19 pandemic countries such as Singapore and Hong Kong started to make use of OADR in the resolving disputes in the construction industry. Practices of OADR as adopted by other countries and its implementation thereof could assist in enhancing the position in South Africa. OADR can take either via take place through synchronous communication and/or asynchronous communication. Synchronous communication takes place on platforms of communication that work

²⁵⁶ Refer to chapter 1.1 above.

²⁵⁷ Refer to chapter 1.1 above.

together at the same time such as a Microsoft Teams that allows for real time discourse, whereas asynchronous communication relies on information with a time lag, such as emails. OADR can also either take place via synchronous communication and/or asynchronous communication. An example of asynchronous communication in OADR is document only arbitration, wherein the arbitrator will make an award based solely on the papers submitted by the parties without hearing any oral evidence.²⁵⁸

Furthermore, the pandemic acted as a catalyst for ODR, in that judiciaries around the world were forced to make use of virtual court without having a chance to prepare for the change. Due to the public not having access to the court hearings because of lockdown, the principle of open justice was threatened. The judiciary in Australia highlighted the fact that the principle of open justice is subject to the public having access to the judicial proceedings and therefore is a practice by which persons who want to observe virtual court proceedings may contact the relevant judge's clerk in order to obtain a link to the virtual proceedings.²⁵⁹

South Africa, Nigeria and Kenya are amongst those African countries who reacted speedily to the lockdown and enacted legislation which would allow for virtual court proceedings to take place. South Africa and Kenya went a step further and made use of an e-filing system known as caselines, which allows for digital case management. Power outages can be seen as a threat to the development of ODR because they disrupt hearings and interrupt internet access.²⁶⁰

It is important that disputes in the construction industry are resolved speedily and amicably because disputes in construction industry result in delays in the project which could have a financial impact on the parties. Negotiation, mediation, conciliation, adjudication and arbitration are ADR methods that are commonly used in in the resolution of disputes in the construction industry. Each of the

²⁵⁸ Refer to chapter 2.2 above.

²⁵⁹ Refer to chapter 2.3.

²⁶⁰ Refer to chapter 2.3.1 above.

aforementioned methods has its own unique advantages and disadvantages and when parties to a dispute can elect an ADR method, they can elect one that best suits their needs.²⁶¹

Countries such as Singapore, Australia and Hong Kong are said to be in the forefront of OADR. Singapore and Australia, like South Africa are signatories to UNCITRAL Model Law on International Commercial Arbitration, which was developed with the aim of unifying the significant differences in national laws on arbitration. The UNCITRAL Model Law on International Commercial Arbitration cover the entire arbitration process, the extent of court intervention and the recognition and enforcement of arbitral awards. South Africa has integrated/enacted the Model Law into its national law in South Africa, namely the *International Arbitration Act 15 of 2017*.²⁶²

Construction disputes that meet the criteria as set out by SIAC may be submitted for document only arbitration. The arbitrator makes an award based solely on the disputants' documents. Australia, NADRAC was created to promote and develop the use of ADR. NAADRAC identified that using technology in ADR is beneficial, and it may substitute and aid traditional ADR which resulted in the Australian government adapting process to take advantage of digital transformation in the ADR sector. NADRAC has since been abolished. In Hong Kong, a multi-tiered OADR scheme was launched in 2020. The scheme was specifically created to aid small to medium sized businesses to resolve their construction disputes. South Africa on the other hand is not so well regulated nor advanced in their use of OADR in resolving construction disputes.²⁶³

South Africa makes use of methods such as mediation, arbitration, adjudication to resolve disputes in the construction industry. Certain methods, such as arbitration, have transitioned to online platforms – with others it is unknown whether in fact

²⁶¹ Refer to chapter 3 above.

²⁶² Refer to chapter 4 above.

²⁶³ Refer to chapter 5 above.

the transition has taken place. What is clear from the contents, is that South Africa embraced OADR and there is still room for improvement. It as thus been established that OADR can assist with the resolving of disputes arising in the South African Construction Industry.

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