

**IS ADJUDICATION A BETTER PROCEDURE
FOR CONSTRUCTION DISPUTE
RESOLUTION THAN MEDIATION?**

CHRISTEL J VAN DER MERWE

IS ADJUDICATION A BETTER PROCEDURE FOR CONSTRUCTION DISPUTE RESOLUTION THAN MEDIATION?

By: Christel Jolandi van der Merwe
23360331

Submitted in fulfillment of part of the requirements for the
Degree of BSc (Hons) (Quantity Surveying)

In the faculty of Engineering, Built Environment of Information Technology



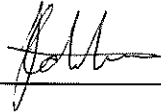
**UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA**

Study leader
Mnr J.H. Cruywagen

October 2009

Declaration by student

I, the undersigned, hereby confirm that the attached treatise is my own work and that any sources are adequately acknowledged in the text and listed in the bibliography

A handwritten signature in black ink, appearing to be 'J. M.', is written above a horizontal line.

Signature of acceptance and confirmation by student

ABSTRACT

Title of treatise : Is adjudication a better procedure for construction dispute resolution than mediation?

Name of Author : Me CJ van der Merwe

Name of study leader : Mnr JH Cruywagen

Institution : Faculty of Engineering, Built environment and Information Technology

Date : October 2009

Arbitration is the most commonly used method of dispute resolution within the South African construction industry. Arbitration is becoming increasingly more expensive and time consuming and alternative methods of dispute resolution are sought.

The objective of this treatise is to study the procedures of adjudication and mediation in order to identify the strengths and weaknesses of these procedures. The findings will be compared to one another, to assess the effectiveness of either these procedures for use in the construction industry, as alternative methods to arbitration and litigation. The major problems of both adjudication and mediation will be discussed to assess its influence on the possibility of a successful dispute resolution. Ultimately the question is asked: Is adjudication a better procedure for dispute resolution in the construction industry?

TABLE OF CONTENTS

Chapter 1: The problem and its setting

1.1	Introduction	1
1.2	Background	1
1.3	Statement of main problem	3
1.4	Sub problems/questions	3
1.5	Hypothesis	3
1.6	Delimitations	4
1.7	The importance of the study	5
1.8	Terms and definitions	5
1.9	Abbreviations	6
1.10	Research methodology	6

Chapter 2: Why is the process of mediation and arbitration necessary

2.1	Introduction	8
2.2	Litigation	9
2.2.1	Cost of litigation proceedings	9
2.2.2	The duration of the dispute	10
2.2.3	Formality of the process	11
2.2.4	Lack of technical expertise	11
2.2.5	Publicity and lack of finality	12
2.3	Arbitration	13
2.3.1	The cost of arbitration proceedings	13
2.3.2	The duration of the dispute	14
2.3.3	Limitations to the parties involved	15
2.3.4	Lack of knowledge of the law	16
2.4	Conclusion	16
2.5	Hypothesis	17

Chapter 3: What is mediation?

3.1	Introduction	18
3.2	The role of the mediator	19
3.3	The procedure of mediation	20
3.3.1	Introductory remarks by the mediator	21
3.3.2	Statement of the problem by the parties	21
3.3.3	Information gathering	21
3.3.4	Problem identification	22
3.3.5	Problem solving	22
3.3.6	Writing the agreement	23
3.4	Advantages of mediation	23

3.5	Disadvantaged of mediation	24
3.6	Conclusion	25
3.7	Hypothesis	25

Chapter 4: What is Adjudication?

4.1	Introduction	27
4.2	General principles	28
4.3	The procedure of adjudication	29
4.3.1	Notice of adjudication	29
4.3.2	Appointment of the adjudicator	31
4.3.3	The referral notice	32
4.3.4	Conduct of the adjudication	32
4.3.5	The decision	33
4.4	Advantages of adjudication	34
4.5	Disadvantaged of adjudication	34
4.6	Conclusion	35
4.7	Hypothesis	35

Chapter 5: How do mediation and adjudication compare?

5.1	Introduction	37
5.2	Advantages of mediation and adjudication	38
5.3	Disadvantages of mediation and adjudication	39
5.4	Similarities between mediation and adjudication	40
5.5	Differences between mediation and adjudication	41
5.6	Enforceability of mediation and adjudication	42
5.7	Typical cases for mediation and adjudication	43
5.8	Conclusion	43
5.9	Hypothesis	44

Chapter 6: Conclusion

6.1	Introduction	45
6.2	Background	46
6.3	Summary	46
6.3.1	Why is the process of mediation and adjudication necessary?	47
6.3.2	What is mediation?	47
6.3.3	What is adjudication?	48
6.3.4	How do mediation and adjudication compare?	49
6.4	Conclusion	50
6.5	Suggestions for further research	50

LIST OF TABLES

Table 1: Advantages of mediation and adjudication	38
Table 2: Disadvantages of mediation and adjudication	39

LIST OF FIGURES

Figure1: The CIDB adjudication Procedure	30
--	----

CHAPTER 1

The problem and its setting

1.1 INTRODUCTION

The purpose of this research is to study alternative dispute resolution methods, in particular mediation and adjudication and to evaluate either alternative's effectiveness.

In order to do this, a study will be done as to how these methods developed, why they were necessary, what exactly they consist of, and how they compare to one another.

1.2 BACKGROUND

In any form of agreement between two parties, there could be some or other disagreement at any stage. Through the ages, as times got more structured, contracts developed to govern agreements and to put certain limits on resulting disagreements. These contracts developed to such an extent that it attempts to regulate every possible scenario that can occur during the time that the agreement is in place. (contracts used today in construction: JBCC, NEC, GCC, FIDIC)

In construction today, because of such complicated contracts, some disagreements can turn into major disputes between parties with large amounts of money involved. This situation gave way for the legal system to develop – litigation as we know it today.

With litigation as the only way of resolving disputes, courts got overcrowded and the whole process became increasingly expensive and more time consuming. This gave opportunity for other methods of dispute resolution to develop for example arbitration, the mini-trial, ‘arb-med’ arbitration, ‘med-arb’ arbitration, ‘look-sniff’ arbitration.

Alternative dispute resolution turned into a profession itself. Today in the construction industry, arbitration is more commonly used. Thus, arbitration became increasingly expensive and more complicated, creating space for other alternative methods of dispute resolution which are less expensive and are resolved in a shorter time period. Although there are various types of alternative dispute resolution methods, this study will only focus on mediation and adjudication.

Adjudication is a fairly new process in South Africa, on the other hand, mediation is an old established process. This immediately give rise to questions such as how can a new process compete with a well established process, did adjudication develop because of lack of effectiveness of mediation, are there room for both of these processes in the construction industry, how do these processes compare to one another, etc.

Closer investigation into the above stated questions, revealed the opportunity for this study. Starting out, the development of these processes is looked into, particularly the reason for their existence. The goal is to compare mediation and adjudication, therefore a detailed study into each process is conducted to arrive at advantages and

disadvantages. Then the ultimate question, which of the two procedures is better suited for construction disputes?

1.3 STATEMENT OF MAIN PROBLEM

Is adjudication a more effective procedure than mediation for construction dispute resolution?

1.4 SUB PROBLEMS/QUESTIONS

The following questions arise in order to adequately solve the main problem

1. Why is the process of mediation and adjudication necessary?
2. What is adjudication?
3. What is mediation?
4. How do mediation and adjudication compare?

1.5 HYPOTHESIS

Hypothesis for the main problem:

Adjudication will be a better procedure for dispute resolution in the construction industry

Hypothesis for the sub problems/questions:

1. Alternative methods of dispute resolution became a priority when the process of litigation was getting increasingly more expensive and time consuming
2. Adjudication is an alternative dispute resolution process which developed to solve relative small and simple disputes, where the parties are bound by the verdict of the adjudicator
3. Mediation is an alternative dispute resolution process to settle disputes which is relatively simple (can be for a larger amount) where the opinion of the mediator is not binding
4. Mediation and adjudication have some similarities as well as some differences. The greatest problem with either procedure is the enforceability of the result.

1.6 DELIMITATIONS

1. This study will only look into adjudication and mediation, the other alternative dispute resolution methods will not be assessed
2. The study will only involve the construction industry
3. Although these processes did not originate in South Africa, this study will be within South African perimeters

1.7 THE IMPORTANCE OF THE STUDY

The study will confirm that both adjudication and mediation are indeed effective methods of dispute resolution for construction disputes. It is important to get the strengths and weaknesses of adjudication and mediation into the open, so that ultimately, one can make a decision as to which method will be most effective for a particular dispute.

This will also shed light on adjudication, for it is still a new process in South Africa. Thus, this will give adjudication some 'publicity' so it can be regarded as a dispute resolution method which is effective within the construction industry.

1.8 TERMS AND DEFINITIONS

ADJUDICATOR is the person named in the contract or appointed by the parties to make the final decision in the case where adjudication is the method of dispute resolution

ARBITRATOR is the person named in the contract or appointed by the parties to make the final decision in the case where arbitration is the method of dispute resolution

"Audi alteram partem" means to hear the other side. This means that both parties must be present when speaking to the arbitrator and that the arbitrator may under no circumstances speak to parties separately

"court" simply refers to the judiciary and not any specific type of court

“he” simply refers to the party at hand and is not gender specific

JUDGE is the person appointed by the court which will give judgment in the case of litigation

MEDIATOR is the person named in the contract or appointed by the parties which will lead the process to a possible settlement in the case where mediation is the method of dispute resolution

1.9 ABBREVIATIONS

ASAQS	-	Association of South African quantity Surveyors
CIDB	-	Construction Industry Development Board
JBCC	-	The Joint Building Contract Committee
PBA	-	Principal Building Agreement

1.10 RESEARCH METHODOLOGY

1. Various books will be read to gather background information on litigation, arbitration and mediation
2. Various articles will be consulted regarding adjudication and mediation
3. An internet search will be done and various websites can provide information that will assist in some of the sub problems/questions
4. Interviews will be conducted with professionals in the construction industry

5. An attempt will be made to acquire statistics regarding mediation and adjudication. This will be valuable information when conducting a comparison between the two processes

CHAPTER 2

Why is the process of mediation and adjudication necessary?

2.1 INTRODUCTION

In any circumstances, an alternative becomes appealing due to the shortcoming of the obvious options. In construction law, that is also the case.

The two most popular dispute resolution methods in the construction industry are litigation and arbitration, where the public sector prefers litigation and the private sector prefers arbitration. Other alternative methods of dispute resolution have been in use for many years, and now the question is asked: why are those alternatives becoming increasingly appealing?

For the purpose of this chapter, the processes of litigation and arbitration will be assessed to established what shortcomings is leading to the need for proper alternative methods of dispute resolution. Thus the study will not focus on the advantages and the success rates of litigation and arbitration and will also not look into the processes itself.

2.2 LITIGATION

Litigation is the public prosecution system which is governed by the law. There are many different types of courts and to decide which one to use will depend upon the case at hand and the jurisdiction of the court.

In this section, the main disadvantages of litigation will be discussed in order to see why parties to contracts would rather prefer to use alternative methods for dispute resolution.

The main disadvantages that will be discussed are:

1. Cost of litigation proceedings
2. The duration of the dispute
3. Formality of the process
4. Lack of technical expertise
5. Publicity and lack of finality

2.2.1 Cost of litigation proceedings

“The disadvantages of litigation can be summed up in two words: time and money” (Jervis, Levin 1988) Litigation proceedings are prone to amount to massive legal costs. As stated by Wilmot-Smith (2003), by the time any case has proceeded even a short distance the costs will come to match or exceed the amounts in issue.

The parties involved in the litigation proceedings do not have to pay for the judge, the officials involved, the courtroom, the court office, the recording of the proceedings and the mechanical recording department.

Thus, the legal fees involved in a litigation case are mostly that of the legal representatives. “The prolonged, detailed factual discovery process makes litigation very expensive. Huge amounts of attorneys’ time are consumed during pretrial discovery and in the resolution of pretrial motions”. (Jervis, Levin 1988) These attorneys are paid at hourly rates and each party has his own team of attorneys. The fees of legal representation does not come cheap and can easily amount to thousands of Rands, and even a very simple litigation case can go on for months before it reaches finality. The cost of the legal team is directly proportionate to the duration of the proceedings (which will be discussed in the following section)

Although the costs can be recovered, it is, as discussed by Wilmot-Smith (2003), to the discretion of the judge. It is a myth that the costs are always awarded to the unsuccessful party. The costs will follow the proceeding (Wilmot-Smith, 2003), meaning that both parties will win some of the points in question, so the costs will be likewise divided

2.2.2 The duration of the dispute

The time taken to complete a litigation case can be anything between two to six years, and even longer in very complicated cases. This is one of the major disadvantages of litigation.

The process is started when the claimant files the claim at the court and a copy to the defendant. The defendant then has a time period in which he has to respond/acknowledge the claim and to submit a letter of acknowledgement – this can be accompanied by a counter claim.

After the claim has been lodged, the pre-trial proceeding starts. As discussed by Jervis, Levin (1988) this part of the proceedings takes up the most time. In this

period, the legal teams of both parties have to discover all the appropriate documents and relevant information regarding the case in hand. During this time, meetings between parties can be set up for the purpose of gathering information or to settle some of the matters. This is the part of the process that consumes most of the time during the case; this time also provides ample opportunity to settle most of the matter of the dispute.

Another issue that contributes to the long duration of litigation cases is the backlog of the courts. The date of the trial is determined by the Court and due to extreme backlogs; it can be months before the trial date can be fixed.

After the trial, the unsuccessful party can still appeal the outcome. This will add another delay to the finality of the proceedings

2.2.3 Formality of the process

Court proceedings are very formal and are governed by numerous rules and regulations. (Jervis, Levin 1988) This means that the involvement of the parties to the dispute are very limited (one can almost say that the parties act as spectators). The legal representatives of the parties handle the trial because of their legal expertise. This constitutes the need for an advocate on the legal team, as the parties to the dispute usually have little knowledge or experience of court proceedings

2.2.4 Lack of technical expertise

The parties to the dispute have no control over who the Judge will be for the case. The judge is assigned by the Court. This entails that the Judge will most probably be someone with a legal background. Due to the technicality of construction cases, this can cause some problems.

In the trial, expert witnesses will have to give their opinion of the situation to explain the situation to the judge. These experts can cause heavy delays, and this will add to the cost and the duration of the case.

A further problem that can occur, is that the judge, due to the lack of expertise in the construction industry, can misunderstand the expert's explanation and ultimately this can influence the judgment of the case.

2.2.5 Publicity and lack of finality

In litigation, the court proceedings are well recorded and open to the public (Elliott 1985). Anyone can sit in for a hearing and hear all the details of the case at hand. The recordings are documented and published, and the documents are also available for anyone who wants to view it.

This can be a major concern for companies entering into a dispute. A court case in the public view has the potential to harm the name of the company. In the case where popular companies are involved, this can attract large media attention and as stated in Elliott (1985) everything said in court is open for gossip and criticism by the public.

Regarding the finality of the dispute, in litigation the judgment can be appealed to a higher court (Jervis, Levin 1988). In the appeal hearing, everything starts from the beginning, so that the facts that lead to the previous judgment can be re-evaluated. This has the potential to drag the process out, again amounting to higher costs.

2.3 ARBITRATION

Arbitration is an alternative dispute resolution method which is an agreement between the two parties to the contract. According to Jervis, Levin (1988) that if an arbitration clause exists in the contract, the parties agree to submit any/all disputes to arbitration and the decision will be binding. Arbitration is governed by the Arbitration Act 42 of 1965 and the Rules for the Conduct of Arbitrations fifth edition 2005. This is a voluntary process and both of the parties must reach consensus regarding the arbitration agreement and the appointment of the arbitrator.

The disadvantages of arbitration create an area of opportunity to explore other alternative methods of dispute resolution.

The main disadvantages that will be discussed are:

1. The cost of arbitration proceedings
2. The duration of the dispute
3. Limitation to the parties involved
4. Lack of knowledge regarding the law

2.3.1 The cost of arbitration proceedings

As discussed in Elliott (1985) “some people fondly believe that arbitrations are free of the enormous legal costs that court actions involve. This is not true.” In small and simple cases, it might be more cost effective than litigation due to a shorter time frame.

In construction cases, parties usually have legal representatives (though arbitration does not compel parties to be represented) and that amounts to the same expenses as in litigation (discussed in paragraph 2.2.1)

Added costs to the parties involved, are the fees of the arbitrator, the cost of the arbitration room and the cost of the recordings of the proceedings. All of these mentioned are charged at hourly rates (Elliott, 1985)

Another disadvantage to this is that the arbitrator usually wants the parties to pay all the fees due to the arbitrator before the award is made. This means that the parties usually equally share the fees of the arbitration and it is difficult to recover those costs.

The costs of arbitration can also be written into the arbitration agreement. This includes the way that costs are handled, for example if costs are shared or should it be awarded by the arbitrator.

2.3.2 The duration of the dispute

Because arbitration is a voluntary procedure, one of the foremost problems is the delays caused by the parties. One of the main reasons for this is the “Audi alterim partem” rule (Butler, Finsen 1993). Therefore, setting dates for meetings which suites both parties could easily drag out the proceedings.

In arbitration, all the documents to the project are submitted to the arbitrator whether relevant or not. (Jervis, Levin 1988) This will influence the time spent by the arbitrator viewing all the documents and sorting the document to only review the relevant documents.

The actual process of arbitration can also become a very lengthy process in complicated cases. From the appointment of the arbitrator to the actual hearing can take many months (and in very complicated cases years). The claimant must submit

his claim accompanied by all supporting documents after which the defendant has a timeframe to respond to the claim. Another timeframe are allocated for the defendant to submit a counter claim with supporting documents, again allowing some time for the claimant to respond thereto (Proceedings as discussed in Butler, Finsen 1993)

A preliminary meeting is set up to discuss the agreement and the nature of the proceedings. Before the hearing there can be many preliminary meetings. Before the hearing the arbitrator has time to review all the documents. The actual hearing could sometimes be a very lengthy procedure, especially if a large number of expert witnesses are called for (Proceedings as discussed in Butler, Finsen 1993)

After the hearing, depending on the happenings within the hearing and the complexity of the case, the arbitrator has some time to review everything before reaching an award. This time can vary from a week to months.

2.3.3 Limitation to the parties involved

A rule in arbitration is that only the parties to the contract can be involved in the arbitration proceedings (Butler, Finsen 1993). This can complicate a construction case very easily because of the involvement of various consultants and subcontractors.

In most cases the dispute rises from mistakes by various persons involved on the project, but the arbitration will only be between the employer and the contractor for example. This can make it very difficult to prove the extent of the liability of each party towards the specific dispute.

2.3.4 Lack of knowledge regarding the law

The arbitrator can be any person as long as it a mutual agreement between the parties to the appointment of the specific person (Butler, Finsen 1993). In construction arbitration cases, the arbitrator is usually someone from the industry like an engineer or an architect.

The problem arising in such a case is that the appointed arbitrator may have little knowledge regarding points of law and may only focus on the technical issues of the case in hand (Elliott 1985)

The award of arbitration is final and binding only with a few exceptions where an appeal will be granted. Should the arbitrator make a mistake regarding a point of law, the Court will grant an appeal and remove the arbitrator from the case.

2.4 CONCLUSION

Looking back to the question asked at the beginning of this chapter – why is alternative dispute resolution methods becoming increasingly more appealing? Looking at the disadvantages of litigation and arbitration this question was thoroughly answered.

Alternative dispute resolution methods like mediation and adjudication solve the problem of increasing costs and time (and some of the other issues also discussed), which a lot of companies can not afford

2.5 HYPOTHESIS

Hypothesis:

Alternative methods of dispute resolution became a priority when the process of litigation was getting increasingly more expensive and time consuming

Testing of hypothesis:

The hypothesis is partly correct. It is true that the high cost and lengthy duration of litigation force people and businesses to consider alternative methods of dispute resolution.

It was found that there are other factors of litigation involved, for example, the publicity of litigation and the lack of technical expertise.

Another discovery is that the same situation accounts for arbitration, with factors of high cost, long duration, lack of knowledge of law and the limitations of the parties involved.

CHAPTER 3

What is mediation?

3.1 INTRODUCTION

“In any dispute the two opposing parties are logically incapable of designing a way out. There is a fundamental need for a third party” (Bono, 1985)

This third party is called the mediator which acts as a facilitator to the mediation process (without the mediator, the process will merely be negotiations between the parties)

In mediation the parties “are encouraged to disclose information they have not disclosed before, listen to things they have not heard before, open their minds to ideas they have not considered and generate ideas that may not have previously occurred to them.” (Goldberg, 1992)

Mediation is a procedure classified under alternative dispute resolution and the main purpose thereof is to get a settlement between the opposing parties to the dispute. To understand mediation, one has to assess the procedure and look into the advantages and the disadvantages. The role of the mediator in the proceedings is also important.

After the process is understood, one can assess the effectiveness thereof and how it can compare to other methods of dispute resolution (for comparison with adjudication see Chapter 5)

3.2 THE ROLE OF THE MEDIATOR

One of the main differences between mediation and litigation/arbitration is that the mediator does not act as a judge and does not give a judgment/award. The mediator is merely a facilitator to the process of mediation, (Brown, Marriott 1999) and the presence of a mediator immediately changes the dynamics of the situation at hand.

What is of the utmost importance, as stated by Brown, Marriott (2003), is that the mediator is an impartial third party. This will directly influence the success of the process – the parties to mediation are not bound by the process and thus, if one party even slightly suspects that the mediator is not impartial, that party will terminate the procedure.

The mediator is under no authority to enforce a possible outcome. The mediator is there to guide the procedure so that the parties can reach a settlement. Because the parties are not bound to the procedure, either one can end the mediation at any stage if the particular party feels forced into an agreement.

Other roles and duties of the mediator as stated by Goldberg (1992):

- Encourage exchange of information
- Provide new information
- Help parties to open their minds to the other's opinion
- Let the parties know that their concerns are understood
- Promote productive levels of emotional expressions
- Deal with differences in perceptions and interests
- Raise questions about the impact of change
- Encourage flexibility

- Shift focus from past to future
- Encourage parties to suggest creative settlements
- Invent possible solutions to meet the fundamental interests of both parties

3.3 THE PROCEDURE OF MEDIATION

Mediation is a flexible, informal process and does not have an exact structure governed by regulations. Because mediation strives to create a win-win situation, the procedure will follow the mood of the parties. Contrary to public believe, there is some structure to the proceedings, for mediation “attempts to systematically isolate points of agreement and disagreement, explore alternatives solutions and consider compromises for the purpose of reaching a consensual settlement of the issues relating to the conflict” (Rau, 2006)

Although there are different guidelines as to how mediation can be conducted, the classical procedure will be discussed as it is discussed within Rau (2006) and in Christie (2001). What is very important to keep in mind, is that this is not a strict procedure and these different stages can be integrated and the phases will naturally flow into one another. (Thus, no clear division between stages)

The phases within the classical procedure are as follows:

1. Introductory remarks by the mediator
2. Statement of problem by parties
3. Information gathering
4. Problem identification
5. Problem solving
6. Writing the agreement

3.3.1 Introductory remarks by the mediator

The purpose of the first step of mediation is for the mediator to explain the process to the parties. Step one is undertaken by the mediator with little interaction between the parties. Thus, the mediator addresses the parties.

Most important in this phase is for the mediator to ensure that the parties have no objection to the mediator himself – that both parties realize the impartiality and neutrality of the mediator.

The rules and the layout of the procedure are set down and the mediator must assist the parties to establish realistic expectations. The commitment of the parties must be assessed, for a lack of commitment will lead to an unsuccessful mediation.

3.3.2 Statement of problem by the parties

This phase gives each party a chance to state their problems/issues, the party who declared the dispute will go first. The purpose thereof is to get a framework of the issues at hand and to provide the mediator with information leading to the dispute.

This is not the time for detailed elaborations and comprehensive facts and it does not take a lot of time. The parties get a chance to vent their emotions and state their concerns.

3.3.3 Information gathering

After the problems are stated, it is time to get the story behind the story. Here the parties have some interaction and each have opportunity to give their opinions,

history to the conflict and facts leading to the dispute. Parties can also respond to accusations in a civil manner.

The mediator has a guiding role, asking questions that lead to uncovering misunderstandings and ultimately resolve them. The mediator should stay clear from yes and no questions in order to promote participation by the parties.

3.3.4 Problem identification

Problem identification leads out of the information gathering stage. By this time the interest of the parties will be known to the mediator, as well as the needs and risks of both parties. By the process of elimination, some of the issues can be discarded (it is not always feasible to resolve every little problem) and the real problem can be identified.

The identified issues can be listed in order of likeliness of solving them. If there is a problem that is too difficult to solve in one session, it will be postponed and the simpler issues will be dealt with first. It will be determined which of the issues the parties are most committed to solve and those will be put on top of the list of issues.

3.3.5 Problem solving

The mediator can give some enlightening perspective on the problems at hand, but it is important that the parties themselves come up with some concrete suggestions – the parties will be more likely to reach a settlement if they arrive at some solutions themselves.

Negotiations and bargaining are the key elements of this phase, where each party will evaluate his own resources in order to reach a feasible solution. Here the

mediator can guide the discussion to look at alternative solutions and some creative option gathering. If the key issues are solved, the other problems will be very easy to resolve. The success of the process depends on the participation of both parties.

3.3.6 Writing the agreement

Once a settlement is reached by the parties, it is important to write an agreement which the parties have to sign. The mediator can assist the parties to set up the agreement so that it is clear and unambiguous and must ensure that each party fully understands the terms and conditions of the agreement.

Because mediation is a voluntary process and the parties arrived at the settlement on their own terms, they will also feel obligated to keep to the agreement. Once the agreement is signed by both parties, it becomes a contract between them

3.4 **ADVANTAGES OF MEDIATION**

The greatest advantages of mediation are that it is relatively quick and inexpensive. The process usually only involves the parties with no legal representation. The only cost is the fee of the mediator and that is split equally between the parties no matter what the outcome of the proceedings (Christie, 2001). The duration of the process largely depend on the co-operation of the parties. Overall, mediation is much faster than litigation and arbitration.

Mediation is a flexible and informal process and is governed by the parties themselves. There are no strict rules and regulations; therefore it is a simple and easily understandable process (Rau, 2006)

Another advantage is that mediation is private and confidential. It does not attract unwanted media attention. Confidentiality also exists between the parties and the mediator, meaning that parties can speak to the mediator without the other party being present. (Nolan-Hayley, 2001)

Mediation is an empowering process. The parties govern the proceedings and reach the settlement. This will automatically ensure that the parties are more committed to the proceedings. As stated in Brown, Marriott (1999), it is also a voluntary process; parties are not forced into mediation. It is a joint decision between the parties and therefore the parties will be more willing to co-operate

The relationship between the parties is very important, so mediation strives to reach a 'win-win' solution and to mend the relationship between the parties. Mediation covers a much broader situation than merely the legal aspects of the conflict. (Nolan-Hayley, 2001)

3.5 DISADVANTAGES OF MEDIATION

The greatest disadvantage is that mediation is not binding (Butler, Finsen, 1993). Any party can at any time, when feeling dissatisfied, abandon the proceedings. The mediator can give his opinion, but it is not an award or a verdict and the opinion is not enforceable. The only thing that can be enforceable is when a written agreement was set up and signed by both parties – that will become a contract which is governed by contract law.

Mediation is not a search for the truth and does not search for the defaulting party (Rau, 2006). This can become a problem, for a party can easily provide false information or information that is not even relevant in order to manipulate the other

party. Some legal aspects can easily be ignored and there is no legal representation to point this out.

The success of mediation depends on the parties' participation. This can be misused by a party who simply wants to delay litigation. This can also give some room for manipulation by one party (Brown, Marriott, 1999). A good mediator will probably pick up this underlying agenda and re-assess the commitment of the parties.

3.6 CONCLUSION

Mediation is indeed an effective method of dispute resolution in the construction industry. Mediation will be appealing to parties due to its flexible, inexpensive and speedy nature.

What has to be thought of when entering into mediation is the commitment of the parties and their willingness to participate during the proceedings, because that will directly influence the success of the procedure.

3.7 HYPOTHESIS

Hypothesis:

Mediation is an alternative dispute resolution process to settle disputes which is relatively simple (can be for a larger amount) where the opinion of the mediator is not binding

Testing of hypothesis:

The hypothesis is found to be true.

What can be added thereto is the fact that mediation is an inexpensive and much speedier method of dispute resolution

CHAPTER 4

What is adjudication?

4.1 INTRODUCTION

Adjudication was first introduced in the UK by the Housing Grant, Construction and Regeneration Act 1996. In South Africa, the Institution of Civil Engineers has copyright over the procedure and refined it to suit the South African construction industry. The CIDB produced a document – CIDB Adjudication Procedure – to explain the procedure and set out some basic principles.

According to the CIDB Best Practice guide, adjudication can be defined as an accelerated and cost effective method of dispute resolution that, unlike other means of resolving disputes involving a third party intermediately, the outcome is a decision by a third party which is binding on the parties in dispute and is final unless and until reviewed by either arbitration or litigation. An important fact to take into consideration is that adjudication only deals with disputes under the contract as stated by Redmond (2001).

To understand the procedure, this chapter will look at the principles, the procedure and some advantages and disadvantages. After the process is understood, one can assess the effectiveness thereof and how it can compare to other methods of dispute resolution (for comparison with mediation see Chapter 5)

4.2 GENERAL PRINCIPLES

The following general principals have been set by the CIDB (Adjudication Procedure, 2004) to govern the adjudication procedure:

1. The adjudication shall be conducted in accordance with the edition of the CIDB Adjudication Procedure which is current at the date of issue of a notice in writing of intention to refer the dispute to adjudication (hereinafter called the Notice of Adjudication). The adjudicator shall be appointed under the Adjudicator's Agreement.
2. The object of adjudication is to reach a fair, rapid and inexpensive determination of a dispute arising under the Contract and the Procedure shall be interpreted accordingly.
3. The Adjudicator shall be a named individual, shall act impartially and in accordance with the rules of natural justice.
4. In making a decision, the Adjudicator may take the initiative in ascertaining the facts and the law. The adjudication shall be neither an expert determination nor arbitration, but the Adjudicator may rely on his own expert knowledge and experience.
5. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the Parties otherwise agree to arbitration) or by agreement.
6. The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration. Payment (if applicable) shall be made in accordance with the payment provisions in the Contract, in the next stage payment which becomes due after the date of issue of the decision, unless otherwise directed by the Adjudicator.

4.3 THE PROCEDURE OF ADJUDICATION

Although there are a few similarities to arbitration within the adjudication procedure, the two processes are indeed much different. This will become clear as the procedure of adjudication is discussed.

The following aspects of the procedure will be discussed as it is set out within the CIDB Adjudication procedure (2004) and in Redmond (2001):

1. Notice of Adjudication
2. Appointment of the Adjudicator
3. The Referral Notice
4. Conduct of the Adjudication
5. The Decision

Flow Chart 1 shows an overall layout of the adjudication procedure, from the point where one party becomes aware of a dispute to the finalization of the decision and the fulfillment thereof. This chart sets out the relations between different actions and parties, and stipulates the timeframes within the procedure.

4.3.1 Notice of adjudication

The Notice of Adjudication (hereafter referred to as Notice) is a formal statement that one party intends to refer the dispute to adjudication. The information that has to be included within the document is the details of the parties involved (names, addresses, contact details, etc), the nature and a brief description of the dispute and the details that gave rise to the dispute.

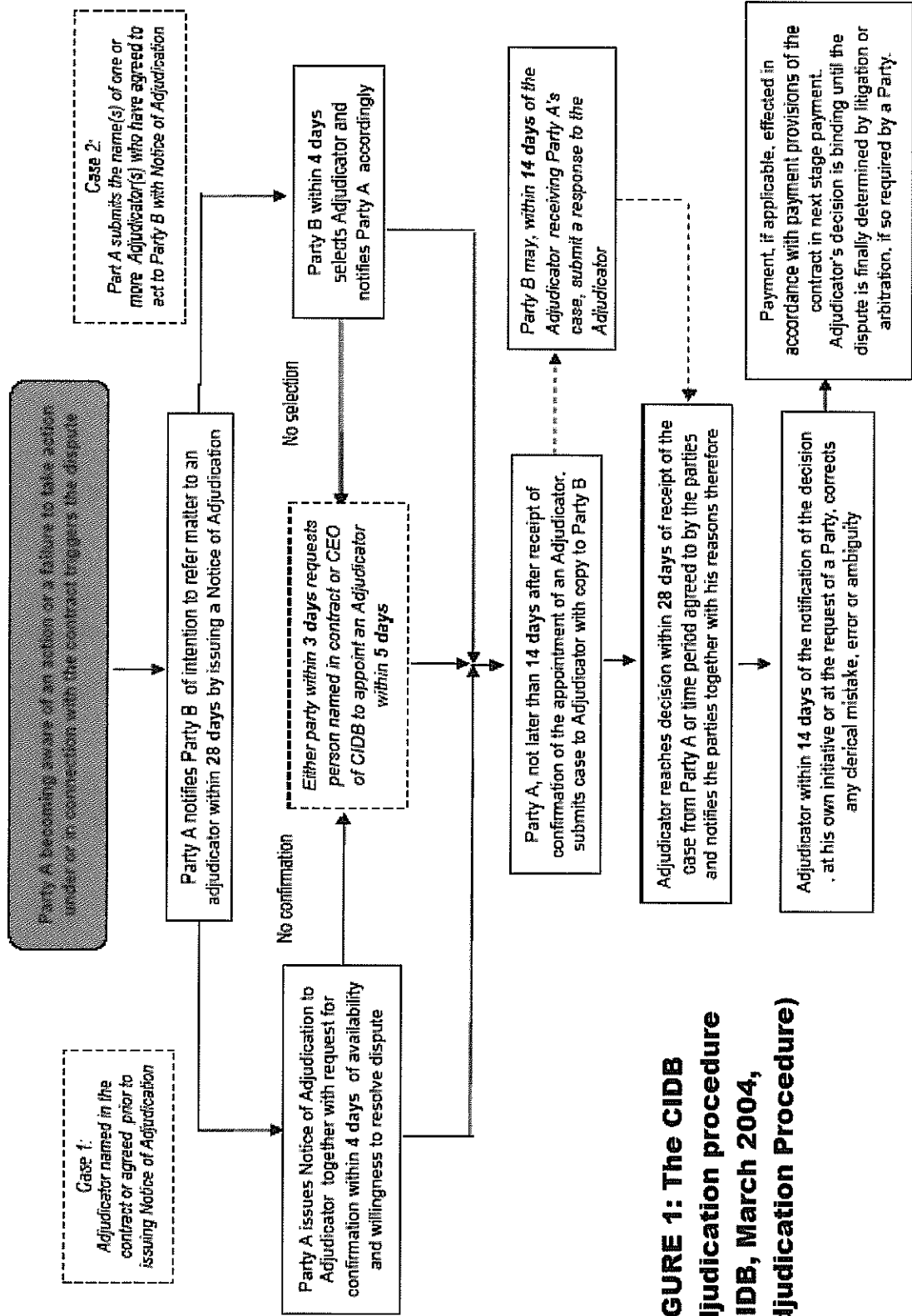


FIGURE 1: The CIDB adjudication procedure (CIDB, March 2004, Adjudication Procedure)

Although the Notice is not a substantial document, it will form the basis of the procedure as it defines the dispute. The Adjudicator will be appointed on the basis of the Notice, and the jurisdiction of the Adjudicator will be determined by it.

This Notice can be produced at any stage during the contract and there are no pre-conditions to produce it. It must be delivered to each party to the contract as well as to the Adjudicator or appointing body.

Because of the fact that Adjudication is such a rapid process, the timing of the Notice is very important. If the referring party is extremely well prepared for the whole case, the Notice can be strategically used to put the other party off guard and place the referring party in a stronger position.

4.3.2 Appointment of the adjudicator

The appointment methods are much the same as that of arbitration. The Adjudicator can be named in the contract, alternatively an appointing body will name an Adjudicator. The referring party can also name a few Adjudicators and then the other party can agree on one. What is of utmost importance is that the parties agree on the appointment of the specific adjudicator.

The responsibility to appoint an Adjudicator lies with the referring party and he has to do so within limited time, as the Referral must be delivered to the Adjudicator within 7 days after the delivery of the Notice. The Adjudicator has the right to receive a reasonable fee as well as security for payment of this fee. The parties shall agree to the payment terms of the fee beforehand, which will be written into the Adjudication agreement.

4.3.3 The referral notice

The referral notice is a detailed document of the referring party's case that is handed to the Adjudicator as well as to the other party to the dispute. This document includes everything that the Adjudicator may need to effectively make a decision on the dispute. The Referral must be delivered to the Adjudicator, together with a copy of the Notice and any adjudication provision within the contract.

The contents of the referral notice include the following:

- An Explanation of the project, the current stage of the works and relevant circumstances that led to the dispute
- The details regarding the dispute (what it is all about)
- Statement of the relevant contractual terms
- Specific facts that is relevant to the situation at hand
- The other party's argument and the reason for the referring party's disagreement
- Any relevant law applications
- A summary of the decision sought

The opposing party may submit a response document to the referral notice. If so, this has to be submitted within 14 days after the Adjudicator received the referral notice. An extension may be granted for the response document, only if both parties are in agreement.

4.3.4 Conduct of the adjudication

One of the important factors is the Notice which points out the jurisdiction of the Adjudicator and the matters within the Adjudication Agreement. This implies that

the Adjudicator shall only determine the matters set out in the above mentioned documents.

The timeframe of the adjudication shall be agreed beforehand between the two parties, but the general rule is that a decision should be reached within 28 days. An extension of 14 days may be permitted only if the referring party consents.

As for the conduct of the procedure, the Adjudicator is in control and shall establish the procedure and the timeframe. The adjudication is subjected only to the rules of natural justice and the decision should be made without a formal hearing (if required, a formal hearing may be conducted)

If required, the Adjudicator may inquire input from professionals (technical or legal). He can only do so if both parties are notified in advance.

4.3.5 The decision

When the Adjudicator reached a decision (which must be within the set timeframe), he must notify both parties and give reasons for his decision. The Adjudicator may notify the parties (7 days before the decision is due) that the decision will be withheld until his fees are paid in full.

Should the Adjudicator fail to reach a decision within the timeframe, he must notify the parties in due time; either party may give notice (within 7 days) to refer the dispute to an alternative Adjudicator.

Regarding costs, each party is responsible for their own costs and the fees of the Adjudicator will be split equally between the parties. The Adjudicator may at his own initiative award costs to either of the parties in full or partially.

4.4 ADVANTAGES OF ADJUDICATION

Adjudication is a speedy process. A decision has to be made within 28 days after the Referral has been delivered to the Adjudicator (Adjudication procedure, 2004).

Extension may be granted, but only for up to 14 days. This automatically creates the next advantage which is cost effectiveness. There are much less legal fees to the parties because it is such a rapid procedure. Parties do not need legal representation and there is no hearing, which can quickly increase the cost. The largest expense is the Adjudicator's fees.

As already mentioned, there is no formal hearing (Wilmot-Smith, 2006). This makes the proceedings more informal and it is mostly based on documentation. Therefore no legal representation is required.

Another advantage is that adjudication can be done at any stage during the works, without the works coming to a halt (Redmond, 2001). This method of dispute resolution will not cause further delays within the contract and when the dispute is resolved, works can just continue.

The remedy to the decision of the Adjudicator will be dealt with in the next payment according to the payment provisions in the contract (Adjudication procedure, 2004). This is the easiest way to deal with such a payment for both parties.

4.5 DISADVANTAGES OF ADJUDICATION

A major disadvantage to adjudication is the enforceability of the Adjudicator's decision. As stated in the CIDB Adjudication Procedure document, the decision is binding until resolved by other legal proceedings (arbitration or litigation for

example). This provides a problem regarding the finality of the procedure. Although the losing party is obligated to make the payment, he can still refer the dispute to arbitration. To date, there is no act in place to support the finality of the Adjudicator's decision as is the case with arbitration.

Another disadvantage is that the Adjudicator may use his own initiative and the only requirement is to comply with the rules of natural justice (Wilmot-Smith, 2006). Thus, the Adjudicator does not have to comply with rules of evidence, rules of any courts, outcomes of previous court cases, etc.

4.6 CONCLUSION

Adjudication is a very effective method of dispute resolution; the rapid and inexpensive nature of the procedure will be very appealing for less complicated disputes.

For very complicated disputes, adjudication will not be advisable due to the short timeframes and the lack of legal knowledge of the Adjudicator.

4.7 HYPOTHESIS

Hypothesis:

Adjudication is an alternative dispute resolution process which developed to solve relative small and simple disputes, where the parties are bound by the verdict of the adjudicator

Testing of hypothesis:

The hypothesis is partially correct. It can be added that it is a speedy and inexpensive process. The parties are bound by the decision of the Adjudicator until the dispute is referred to another legal procedure (thus, enforceability is still a problem)

CHAPTER 5

How do mediation and adjudication compare?

5.1 INTRODUCTION

In the previous two chapters the procedures of mediation (chapter 3) and adjudication (chapter 4) have been discussed. Now that these methods of dispute resolution are understood, it has to be put against each other to see how it compares.

In order to compare mediation and adjudication thoroughly, all aspects have to be taken into consideration. The purpose of this comparison will be to see whether the processes are suitable for construction disputes and which method must be chosen in order to have the best chance of a successful process with a result that both parties accept. The details of the processes have been discussed in previous chapters, thus, this chapter should be read in conjunction with chapter 3 and 4.

Firstly the advantages and the disadvantages will be discussed, after which the similarities and the differences between the two processes will be discussed. The greatest problems of both processes will be discussed and whether these problems influence the successful solution of the dispute.

For the purpose of this chapter, all research has been done and references made within chapter 3 and 4. All findings made in the previously mentioned chapters are now put in a comparison format in order to solve the main problem. Information was

also gathered from interviews regarding the comparison between mediation and adjudication.

5.2 ADVANTAGES OF MEDIATION AND ADJUDICATION

The advantages of both mediation and adjudication have been discussed respectively in chapter 3 and 4 (thus, the table is a summary of the findings within chapter 3 and 4). To compare the advantages of these procedures it will be best to state in a table format and against one another. This will give an indication of the reason for a particular process to be better suited in certain cases.

MEDIATION	ADJUDICATION
Fast procedure	Very fast procedure
Inexpensive procedure	Inexpensive procedure
No formal hearing	No formal hearing
No legal representation required	No legal representation required
Easy to understand proceedings	Easy to understand proceedings
Flexible procedure	Process is mostly based on documentation
Private and confidential	Can be done at any stage of project
Parties govern proceedings	Result will be implemented in the next payment cycle
Create 'win-win' situation	

TABLE 1: ADVANTAGES OF MEDIATION AND ADJUDICATION
(REFERENCE TO CHAPTER 3 AND 4)

According to this table, one can analyze the dispute at hand and then decide which aspects will be desirable. Thereafter a decision could be made as to whether either mediation or adjudication would be better suited for the particular situation.

5.3 DISADVANTAGES OF MEDIATION AND ADJUDICATION

As with the advantages, the disadvantages will also play a role when a decision has to be made regarding which process would be chosen for a dispute. The disadvantages are showed in a table format against one another according to the findings made within chapters 3 and 4 respectively.

MEDIATION	ADJUDICATION
Result not binding	Only binding till resolved by other legal procedure (no act in place to enforce Adjudicator's decision)
Legal facts can be missed	Legal facts can be missed
No strict rules or regulations	No regulations (only observe rules of natural justice)
Not a search for the truth	Adjudicator uses own initiative
One party can easily manipulate the other party	

TABLE 2: DISADVANTAGES OF MEDIATION AND ADJUDICATION
(REFERENCE TO CHAPTER 3 AND 4)

In the case of the disadvantages, when a dispute arises and the situation is analyzed one can determine which aspects cannot be accommodated. By the process of

elimination, a decision can be made as to whether mediation or adjudication would be better suited for the particular dispute at hand.

5.4 SIMILARITIES BETWEEN MEDIATION AND ADJUDICATION

The similarities that are discussed is according to the findings made within chapters 3 and 4 respectively. Thus, for references, refer to chapter 3 for mediation and chapter 4 for adjudication.

Mediation and adjudication share a few aspects which are both in the positive sense as well as in a negative sense. Both these procedures are fast and relatively inexpensive in relation to other methods of dispute resolution (for example litigation or arbitration). Within the interviews conducted with Proff. Maritz and Mnr Pienaar this is considered the main motivation for referring a dispute to mediation and adjudication.

In both processes there are no need for legal representation. This contributes to the fact that the processes are less expensive and that the proceedings are speedier. The downside thereof is that none of the participants may have any legal background and/or previous experience of dispute resolution which could lead to mistakes being made and facts of law may be missed.

No formal hearing is conducted in either of the processes. These dispute resolution methods are conducted in a more informal manner and are very easy to understand. Another similarity between mediation and adjudication is that there are no regulations governing the proceedings. This gives way for the use of own initiatives, but may create a cumbersome process.

5.5 DIFFERENCES BETWEEN MEDIATION AND ADJUDICATION

The differences that are discussed is according to the findings made within chapters 3 and 4 respectively. Thus, for references, refer to chapter 3 for mediation and chapter 4 for adjudication.

One of the major differences is the involvement of the mediator/adjudicator. In mediation, the mediator has a very hands-on approach with the goal of reaching a settlement between the parties. The mediator is interactively involved in the proceedings. This is not the case with adjudication. The adjudicator acts more like a judge and will ultimately give an award, on the other hand, the mediator merely gives his opinion. The adjudicator's interaction with the parties is very limited and he is not permitted to address either party without the other party being present.

The role that the parties play in these processes differs quite a lot. With mediation the parties govern the proceedings and reach a settlement with only the guidance of the mediator. With adjudication the parties follow the procedure as set out by the adjudicator. The adjudicator is in control of the proceedings. (Redmond, 2001)

Another difference is in the result/outcome of the procedure. A mediator gives an opinion which is not binding at all which means if one party is not happy with the situation he can abandon the procedure and valuable time could be wasted. The adjudicator gives an award which is binding until it is resolved with another legal procedure. The award has to be delivered in the next payment cycle of the project, but if one party does not agree with the award he can refer the dispute to arbitration which will take place after the completion of the project.

5.6 ENFORCEABILITY OF MEDIATION AND ADJUDICATION

The greatest problem with mediation is that the opinion of the mediator is not binding (Prof Maritz, Mr. Pienaar). Thus the success of the process is directly dependant on the commitment of the parties. This creates an opportunity for a stronger party to manipulate and misuse the situation to 'buy' some time and stall the situation till the dispute are referred to arbitration.

Another problem is that by the time that a possible settlement can be reached, any party can abandon the mediation. In such a case, valuable time could be wasted and the dispute resolution will start all over with arbitration, for example. If this happens, the whole purpose of mediation being a speedy, inexpensive method of dispute resolution, have been missed and a lengthy, expensive battle could begin with arbitration.

As in the case with mediation, the enforceability of the adjudicator's award is also a major problem. Although the award is binding and will be carried out within the next payment cycle of the project, the losing party could continue to refer the dispute to arbitration afterwards (Adjudication Procedure, 2004).

There is as yet no payment act in South Africa that can fully enforce the award of the adjudicator (Prof Maritz). In the UK, adjudication is very successful because there is such an act to support the process.

According to Mr. Pienaar, because of the lack of enforceability, some companies can use either of these procedures as a tool for buying some time before entering into arbitration; this can be part of the dispute strategy to manipulate the other party. This can cause major problems for the other party relating to time, money and future projects.

5.7 TYPICAL CASES FOR MEDIATION AND ADJUDICATION

As Prof Maritz states, there are no typical cases for mediation. Any dispute, no matter what the extent or complexity can be referred to mediation. Generally, if the complexity of a case is very high, the parties will be reluctant to enter into mediation and will rather opt for arbitration.

In the case of adjudication, there is a trend that disputes relating to claims between contractors and subcontractors are referred to adjudication according to Prof Maritz. Even though a trend exists any dispute, regardless of the extent and complexity, could be referred to adjudication. Mr. Pienaar provided the following example: with the contract for the Soccer City Stadium, some budget overruns occurred and an adjudicator was appointed to resolve all the main contractors' claims.

5.8 CONCLUSION

Keeping this comparison between mediation and adjudication in mind, it is of utmost importance to handle each dispute on its own merits. Each dispute should be analyzed objectively to determine the extent of the situation. Thereafter, a decision has to be made as to which method of dispute resolution will be best suited for the particular dispute. This is done by assessing the advantages and disadvantages of both mediation and adjudication; the similarities and differences between the two processes will also indicate which is the best suited for the particular dispute. If the correct method is chosen, the chance of having a successful outcome is increased substantially.

5.9 HYPOTHESIS

Hypothesis:

Mediation and adjudication have some similarities as well as some differences. The greatest problem with either procedure is the enforceability of the result.

Testing of hypothesis:

The hypothesis is found to be true.

CHAPTER 6

Conclusion

6.1 INTRODUCTION

During this study, different aspects of both adjudication and mediation were discussed; this entails a study into each procedure and a comparison between the two procedures. The shortcomings of other methods of dispute resolution were discussed in order to determine the reason for the need of mediation as well as adjudication.

In this chapter, the study will be summarized and the findings made during the study will be discussed shortly to create an overall picture regarding the matters of adjudication and mediation.

Firstly, the main problem will be stated, followed by the sub problems and the results of the study. Thus, one can refer back to the relevant chapter if need be.

With everything in contention, the answer to the main problem will become clear.

6.2 BACKGROUND

In the construction industry, there are a number of methods of dispute resolution. Arbitration is the method that is mostly used in construction disputes. With arbitration becoming increasingly more expensive and time consuming, alternatives are sought by parties which do not want legal representation or cannot afford the legal expenses.

This led to the alternatives adjudication and mediation, which are also used in the construction industry. This gave reason for the study, because both of these procedures have some problems, and the following question became the main problem:

Is adjudication a better procedure for construction dispute resolution than mediation?

6.3 SUMMARY

In order to solve the above stated question, four sub problems were identified:

1. Why is the process of mediation and adjudication necessary?
2. What is mediation?
3. What is adjudication?
4. How do mediation and adjudication compare?

These sub problems will now be discussed shortly, stating the initial hypothesis and the testing thereof.

6.3.1. Why is the process of mediation and adjudication necessary?

Chapter 2 dealt with the shortcomings and disadvantages with litigation and arbitration. Discussing all the disadvantages of litigation and arbitration, it becomes apparent that alternative methods of dispute resolution are necessary which eliminates some of the disadvantages created by litigation and arbitration.

Hypothesis:

Alternative methods of dispute resolution became a priority when the process of litigation was getting increasingly more expensive and time consuming.

Testing of hypothesis:

The hypothesis is partly correct. It is true that the high cost and lengthy duration of litigation force people and businesses to consider alternative methods of dispute resolution.

It was found that there are other factors of litigation involved, for example, the publicity of litigation and the lack of technical expertise.

Another discovery is that the same situation accounts for arbitration, with factors of high cost, long duration, lack of knowledge of law and the limitations of the parties involved.

6.3.2 What is mediation?

In Chapter 3, the process of mediation was discussed. This is important because once the procedure is understood, one can assess whether the procedure can be effective for dispute resolution in the construction industry.

Other important aspects discussed were the role of the mediator, advantages and disadvantages of mediation.

Hypothesis:

Mediation is an alternative dispute resolution process to settle disputes which is relatively simple (can be for a larger amount) where the opinion of the mediator is not binding

Testing of hypothesis:

The hypothesis is found to be true.

What can be added thereto is the fact that mediation is an inexpensive and much speedier method of dispute resolution

6.3.3 What is adjudication?

Chapter 4 dealt with the procedure of adjudication. It is most important that the procedure is understood, before an assessment can be made as to whether adjudication is an effective method of dispute resolution in the construction industry of South Africa.

Other aspects that are discussed are the general principles of the procedure, advantages and disadvantages of adjudication.

Hypothesis:

Adjudication is an alternative dispute resolution process which developed to solve relative small and simple disputes, where the parties are bound by the verdict of the adjudicator

Testing of hypothesis:

The hypothesis is partially correct. It can be added that it is a very speedy and inexpensive process. The parties are bound by the decision of the Adjudicator until the dispute is referred to another legal procedure (thus, enforceability is still a problem)

6.3.4 How do mediation and adjudication compare?

After mediation and adjudication are understood, one can compare the procedures to one another. Chapter 5 has combined information within chapter 3 and 4 in a comparison in order to solve the main problem. Aspects within the comparison are advantages, disadvantages, similarities, differences, typical cases and the issue of enforceability.

Hypothesis:

Mediation and adjudication have some similarities as well as some differences. The largest problem with both procedures is the enforceability of the result.

Testing of hypothesis:

The hypothesis is found to be true.

6.4 CONCLUSION

Main problem:

Is adjudication a better procedure for construction dispute resolution than mediation?

Answer:

Yes

It is found that both mediation and adjudication are effective alternative methods of dispute resolution as to litigation and arbitration. Although adjudication has a weakness in the enforceability of the decision of the Adjudicator, it still has an advantage over mediation.

The mediator only gives an opinion which is not binding. The parties to the mediation are not bound to the procedure, meaning that any party can abandon the procedure at any time without need of a definitive reason.

With adjudication, the parties are bound to the decision made by the Adjudicator until the matter is decided upon by another legal procedure. Adjudication is more structured and the parties have to abide by the set of rules provided by the adjudicator; thus, once the dispute is referred to adjudication, the parties cannot abandon the proceedings.

6.5 SUGESTIONS FOR FURTHER RESEARCH

1. Enforceability of adjudication in South Africa
2. Do Mediators/Adjudicators need specific training?

REFERENCES

Articles

CIDB, March 2004, *Adjudication Procedure*, First edition of CIDC document 1014

CIDB, September 2005, *Best Practice Guideline*, Second edition if CIDB document 1011

THE ASSOCIATION OF ARBITRATORS, 1992, *Guidelines for mediation under construction contracts*, 1st edition

Books

BONO E, 1985, *Conflicts: a better way to resolve them*, ?: Penguin Books

BROWN HJ, MARRIOT AL, 1999, *ADR Principles and Practice*, 2nd edition, London: Sweet & Maxwell

BUTLER D, FINSEN E, 1993, *Arbitration in South Africa: Law and Practice*, South Africa, Johannesburg: Juta & Co (Pty) LTD

CHRISTIE RH, 2001, *The law of contract in South Africa*, 4th edition, South Africa: Butterworth Publishers (Pty) LTD

ELLIOTT RF, 1985, *Building Contract Litigation*, 2nd edition, London: Longman Group Ltd

GOLDBERG SB, SANDER FEA, ROGERS NH, 1992, *Dispute resolution – Negotiation, Mediation and other processes*, 2nd edition, Canada: Little, Brown & Company Ltd

JERVIS BM, LEVIN P, 1988, *Construction Law – Principles and Practice*, USA:
McGraw-Hill Publishing Company

NOLAN-HALEY JM, 2001, *Alternative dispute resolution in a nutshell*, 2nd edition,
USA: West Group

REDMOND J, 2001, *Adjudication in construction contracts*, London: Blackwell Science
(Pty) LTD

RAU AS, SHERMAN EF, PEPPET SR, 2006, *Process of dispute resolution – The role of
lawyers*, USA: Foundation Press

WILMOT-SMITH R, 2006, *Construction Contracts – Law and Practice*, New York:
Oxford University press

Interviews

Proff MJ Maritz – Head of Department of Built Environment of University of Pretoria

Mr. DN Pienaar – Director of De Leeuw Quantity surveyors