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Alternative Dispute Resolution (ADR) in the Construction Industry

PRESENTATION BY:

Dr S. DIARRA

Chief Executive Officer

The Zimbabwe Institution of Engineers

Alternative?

"*Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time*".

Abraham Lincoln

Percentage of companies that are likely to commence litigation (per sector)

- Energy: 49%
- Manufacturing: 52%
- Retail/Wholesale: 56%
- Insurance/Commerce: 58%
- Engineering/Construction: **75%**

How do disputes arise?

- Construction projects are integrated processes which involve a multitude of parties with unique expertise and responsibilities
- The parties to a construction project generally include the Owner, Architect, Engineers, Quantity Surveyor, contractor, sub-contractors, suppliers, labour, etc.
- To successfully complete a construction project on time, within budget requires all the parties to cooperate smoothly
- However there are many barriers to such smooth cooperation. These are mainly due to **“conflicting objectives”** of the Parties involved (for instance owner seeks project completed on time within or even below budget while contractor is interested in maximizing profit)

How do disputes arise?

- Construction industry is one the most dynamic, risky and challenging industries in the world. It is an industry where conflict is inevitably pervasive
- In the beginning all the parties enter the contract with the best of intention to have the work completed as per planning and design, within the agreed time and at the most reasonable cost as possible.
- However when a problem occurs, with the potential of impacting negatively the profit margin of either party, the problem transforms into a conflict
- **Conflicts are the underlying causes of disputes**

How do disputes arise?

- The continuum of problem to dispute:

- “Conflict” can be defined as a situation which arises when individuals are faced with competing goals or ideas.

Causes of conflicts in construction industry

- Latent Conditions
- Changes of scope/Variations
- Quality of works

Causes of disputes in construction industry

- Competitive tendering
- Inequitable risk allocation
- Perceived bias of the team leader
- Non compliance/breach of the contract

Why ADR?

"Courage is what it takes to stand up and speak. Courage is also what it takes to sit down and listen".

Sir Winston Churchill

Why ADR?

- Growing dissatisfaction with litigation as a method of resolving disputes
- Many disputing parties now resorting to more effective and efficient, quick and cheaper alternative methods to resolve their disputes
- These are methods, alternative to the long (at times tortuous) and well established formal procedures of the Courts of Justice, administered by the State

Types of ADR Methods

There are several alternative dispute resolution (ADR) methods, most notable among them:

- Negotiation
- Adjudication
- Expert Determination
- Early Neutral Evaluation
- Senior Executive Appraisal
- Mediation
- Arbitration

Negotiation and Adjudication

- **Negotiation**: Direct attempt by Parties on a **“tête-à-tête”** basis, without a facilitator, to reach a settlement or some kind of compromise to solve the issues at hand
- **Adjudication**: Generally a precursor to Arbitration and Mediation as prescribed by Clause 69 of ZGCC 1984, disputes are first referred to the Engineer, Architect or Quantity Surveyor. Alternatively the dispute could also be referred to an independent expert or a panel of experts such a Dispute Adjudication Board. Outcome is final and binding (provisionally binding) unless if the dissatisfied party gives notice (within an agreed period of time) of his intention to escalate the dispute and commence arbitration proceedings or litigation

Expert Determination

Expert Determination (ED)

- Often invoked with reference to a clause in construction contracts which prescribe that disputes, should they arise, shall be resolved by an expert
- The expert would receive and take into account facts and arguments presented by the parties
- The expert makes a decision based on the evidence presented to him/her by the parties with their inquiries, knowledge and expertise
- The expert appointed by the parties should have specific knowledge and expertise in the area of the dispute
- Determination of expert is binding, unless reversed by a subsequent arbitration
- More suitable for disputes of technical nature

Early Neutral Evaluation

Early Neutral Evaluation (ENE)

- The parties appoint an independent, neutral third party to analyze the facts, evidence and legal merits of a dispute
- Evaluation of neutral is non-binding
- Generally initiated within the court system, with the Neutral third party being a judge, court officer or legal practitioner

Senior Executive Appraisal

- More structured ADR method compared to negotiation and mediation
- Particularly suited to large and complex construction projects disputes
- Assumes that parties have senior executives not directly involved in the dispute who meet with Neutral to formulate possible basis for settlement
- The meeting is chaired by the Neutral chosen by the senior executives from both sides of the dispute
- Neutral may give opinion (legal and factual) for the settlement of the whole dispute or for the resolution of some of the issues.

Mediation

Mediation is centered around consensus

"Consensus means that people comprehend the final decision, have committed themselves to executing the chosen course of action, feel a sense of collective ownership about the plan, and are willing to cooperate with others during the implementation effort."

Michael Roberto

Mediation (cont.')

- An independent, neutral official known as mediator is agreed upon by the parties to facilitate the resolution of their dispute. The mediator does not adjudicate the dispute. He only guides the smooth running of the process enabling the parties to listen to each other.
- The agreement to mediate should either indicate who is going to be the mediator or how he or she shall be appointed
- The mediator can confer with the disputing parties together or separately
- The mediator does not make any decision or proposal for settlement.

Mediation (cont.')

- The parties themselves arrive at a compromise which, with the help of their legal representatives they will put in writing and sign in the presence of the mediator
- Mediation proceedings are conducted on a "without prejudice" basis. That means that the content of the discussions between the mediator and the parties cannot be disclosed in evidence in subsequent court or arbitration proceedings without the consent of both parties
- The procedures can be abandoned by either of the parties at any given point in time after giving notice to the mediator

Mediation (cont.')

- In the mediation proceedings the parties in the dispute have control over the procedure and the outcome
- It is entirely the prerogative of the parties whether to make their agreed settlement binding or not
- The fees and expenses of the mediator are usually apportioned equally between the parties and each party will bear his own costs, irrespective of the outcome

Types of mediation

- **Facilitative Mediation**

Mediator facilitate negotiation process. Does not express own pinions or make recommendations

- **Evaluative Mediation**

Mediator expresses opinions about merits/strength and demerits of a party's case

- **Conciliation**

Facilitate an agreed resolution of the dispute. Conciliator is usually expert in the subject matter of the dispute. Similar to evaluative mediator

Advantages of Mediation

- Mediation is quicker than litigation and Arbitration and less expensive
- It makes it possible for the parties to reach a genuinely quick settlement and at the same time leaves them with the hope to do business together in future
- The fact that the final outcome is not binding is rather positive for the dissatisfied party

Disadvantages of Mediation

- Mediation is a consensual procedure and therefore depends on the cooperation of the parties
- Conceding party can be perceived to have a weak case
- Writing the settlement can prove to be difficult and cause further frictions between the parties
- There are no records of mediation proceeding kept before the mediator

Arbitration

- A process whereby parties to the dispute enter a formal agreement (arbitration agreement) to appoint a third independent party called Arbitrator. The Arbitrator can be appointed directly or indirectly by the Parties.
- The reference to the arbitrator is possible only it is pursuant to an arbitration agreement between the parties
- The Arbitrator's role is to make a final **impartial** decision after s/he has considered the submissions from the disputing parties.
- The arbitrator's decision (award) is based on the parties' substantive legal rights with reference to what occurred in the past

Arbitration (cont.')

- The fees and costs of the arbitrator are borne equally by the parties. However, the party that achieves substantial success in the arbitration proceedings is usually entitled to be awarded costs
- The arbitrator's award is final and binding

Advantages of Arbitration

- Specialized knowledge of the chosen arbitrator by the Parties
- Can be a lot quicker than litigation and at reasonable cost
- Multi-side convenience - venue, date and time, duration of hearing sessions
- Flexibility - arbitration procedure is agreed by the arbitrator and the parties, representation by advocates not mandatory, even participation of lawyers at the hearing is optional
- Arbitration proceedings are private and confidential
- Proceedings are rather informal and less intimidating setting when compared to court proceedings- essential, especially when the disputing parties intend to continue doing business together in future
- Arbitration award is final and binding and not subject to appeal

Disadvantages of arbitration

- Arbitration procedure can only be instituted when there is an agreement to arbitrate and when all the parties to the dispute are consenting (makes it very difficult to commence, especially when there are multi-parties involved).
- The parties have to agree to the choice and subsequent appointment of the Arbitrator
- When arbitration proceedings are formally conducted similar to High Court procedures, it can cost more than litigation. This is so, especially when there are legal advisors involved
- A dissatisfied party with the award of the Arbitrator, has limited recourse for redress.

Arbitration Law & Practice in Zimbabwe

- In 1993 the Zimbabwe Law Development Commission conducted an enquiry into the Law of Arbitration in this country
- The Commission concluded that Chapter 7:02 had become outdated and needed reform, in particular to cater for the increase in international arbitrations which have become a feature of international commerce.
- Chapter 7:02 was eventually repealed and Zimbabwe adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration with certain modifications

Arbitration law & practice in Zimbabwe (cont.')

- In January 1994 the Minister of Justice, Legal and Parliamentary Affairs received a final report from the Law Development Commission of Zimbabwe on the matter of Law of Arbitration in the country and adopted it in principle.
- The Minister ultimately processed the recommendation of the Law Development Commission into law in the form of the 1996 Arbitration Act
- The Model Law adopted by Zimbabwe closely follows the UNCITRAL text
- The Act came into operation on 13 September 1996
- The Act repeals the previous arbitration Act [*Chapter 7:02*] and makes consequential amendments to various other statutes

Professional Arbitration Bodies in Zimbabwe

- At the moment, there are several individual independent professionals who practice arbitration in Zimbabwe
- The most known professional body representing arbitration practice in the country is the Harare Commercial Arbitration Centre. As such, the Centre acts as an appointing Institution for arbitrators and mediators who are on their list of practitioners
- Various professional organisations like the Zimbabwe Institution of Engineers, the Architect Council of Zimbabwe, the Law Society of Zimbabwe, the Construction Industry Federation of Zimbabwe, etc.. also appoint arbitrators on behalf of disputing parties.

Adversarial Culture in the Construction Industry

- To apply successfully any of the alternative dispute resolution methods referred to above, there is a need for open communication, deliberate cooperation and the adoption of a problem-solving approach from each one of the parties involved in construction contracts.
- Such approach will enable the parties to develop and maintain a positive and trusting working relationship
- However, more often than not, construction projects tend to foster highly confrontational environments resulting in hostilities that lead to a complete breakdown in communication

Adversarial Culture in the Construction Industry (cont.')

- The ever antagonistic positions of the parties in the construction industry is the root cause and barrier to the speedy adoption and implementation of ADR in the construction industry
- The antagonistic behaviour of the main two parties i.e. the owner and the contractor is fueled by the content of the contract (Standard Form Contract) and its interpretation by the respective lawyers from both sides
- In Zimbabwe, like in many other parts of the world, the parties are quick to take their dispute to the Court even in cases where the contract gives first preference to ADR.

Way forward

- First and foremost, positive changes in attitude are necessary for the disputing parties to fully understand the merits and embrace ADR methods. This can be achieved through training of contractors and other parties involved in construction projects
- There is an urgent need to review the Standard Form Contract in the Construction industry in a way that would promote the use of ADR methods
- The general language of construction contracts needs to be toned down in order to encourage collaboration between the parties from the outset of the project

Way forward (cont.')

- The Zimbabwe General Conditions of Contract (ZGCC – Edition 1984) need a complete review to reflect the modern trends in the Construction Industry
- Lawyers involved in construction projects must be trained to avoid resorting to the weapons of the advocate
- Construction law course curriculum to be designed
- It would be worthwhile considering the introduction of construction dispute avoidance process from the beginning of the project
- Zimbabwe could also consider instituting statutory ADR
- There is a great need for **change**

The winds of change

"He who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery"

Harold Wilson

"We need to form a conflict-resolution team to settle the dispute over who should be chosen for our conflict-resolution team."