Dispute Resolution

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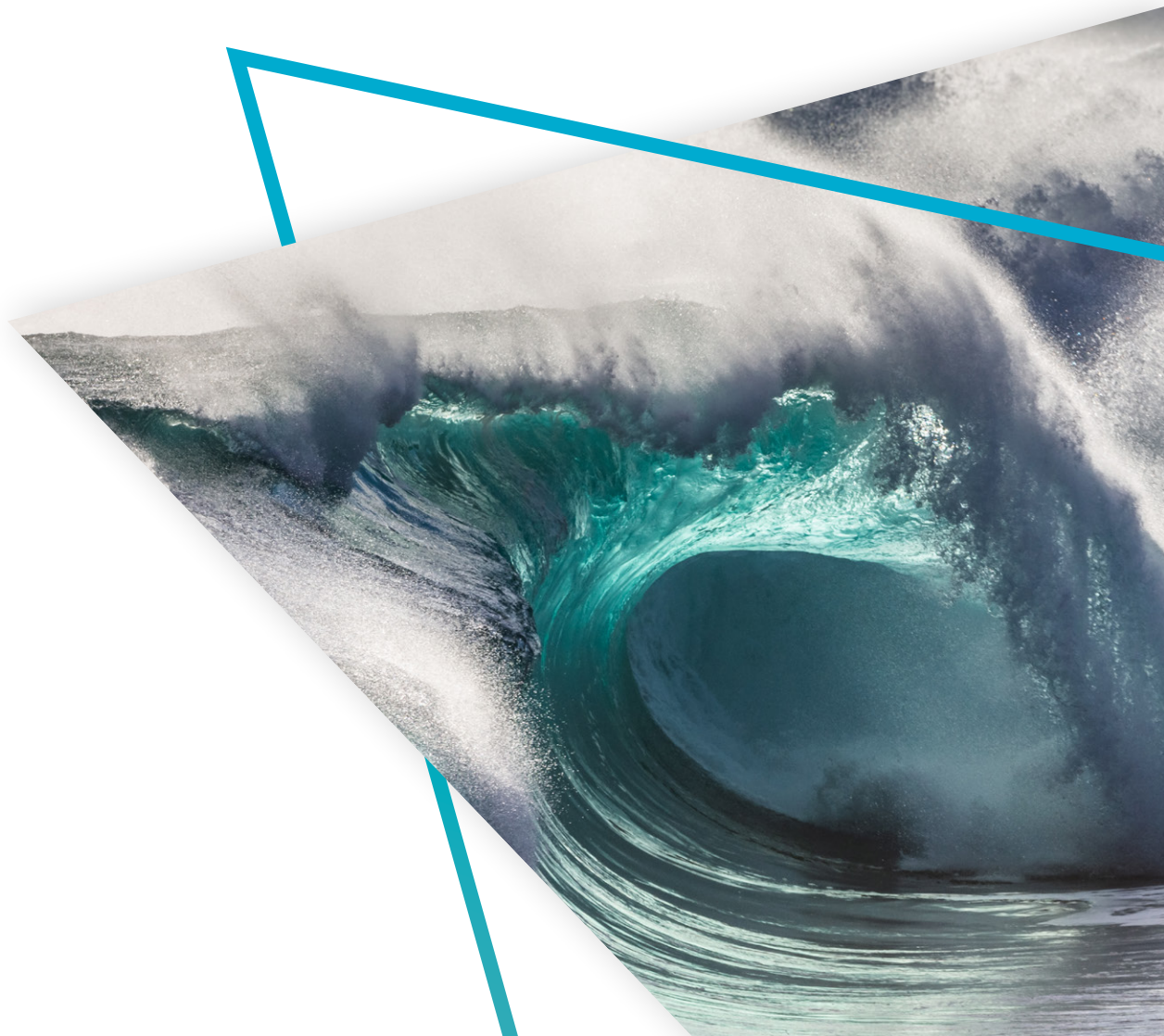

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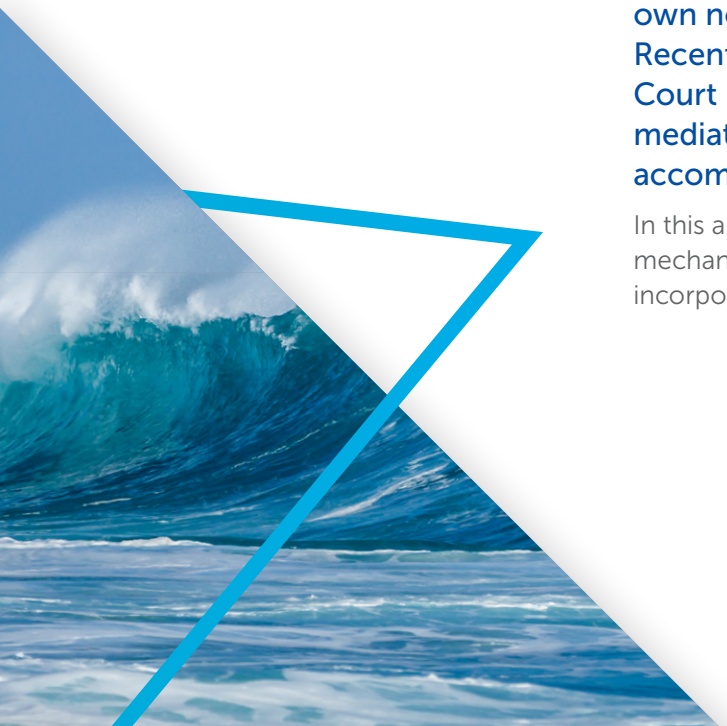

Alternative dispute resolution (ADR) methods have become the preferred mechanism to resolve commercial disputes. The traditional approach to dispute resolution used to be litigation. The popularity of alternative methods of dispute resolution can in part be attributed to the backlogs experienced by courts. This has also resulted in the incorporation of one of the alternative dispute resolution methods into the Uniform Rules of Court. The introduction of the new Rule 41A in March 2020 meant that an initiator of litigation proceedings was required to file a notice asking the other party whether they were amenable to mediation and the other party was required to respond with its own notice, but mediation was by agreement. Recently, the Gauteng Division of the High Court issued a directive introducing mandatory mediation in the Gauteng division and the accompanying protocol.

In this article, we discuss ADR as a dispute resolution mechanism and the various methods that can be incorporated into commercial agreements.

Alternative dispute resolution

The term *"alternative dispute resolution"* is commonly understood to refer to the resolution of disputes by way of methods outside of traditional litigation. An ADR process usually entails the involvement of a neutral third party appointed by agreement between the parties or a nominating body agreed upon by the parties. ADR methods are a fundamental aspect of commercial agreements as they cater for the resolution of any disagreements that arise between the parties during the existence of the contract. There may be disagreements regarding an aspect of the agreement, which may crystalise into a dispute. The inclusion of preferred dispute resolution methods in the agreement caters for this occurrence.

The importance of ADR

ADR methods are meant to ensure timeous and speedy resolution of disputes. The processes and timelines are usually within the parties' control. Unlike the traditional court processes, the parties will usually agree on the person who will act as the neutral third party. In most instances, provision is made in the agreement for the appointment of such person by a nominating body where the parties cannot reach agreement. An example of such a provision is contained in the Joint Building Contracts Committee (JBCC) Principal Building Agreement (PBA) which has the Association of Arbitrators as its default nominating body. The parties can agree on the appointment of other appointing authorities that are suitable to them.

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ADR versus litigation

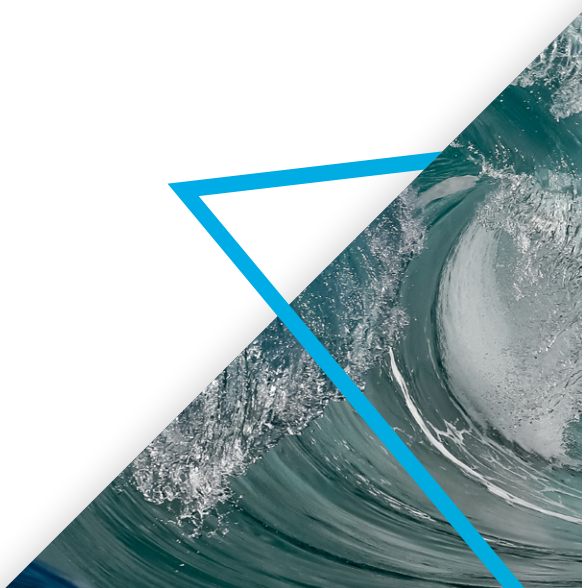
Litigation proceedings are conducted in accordance with standard rules of court and, in most instances, take place in open court. Due to the backlogs encountered by courts, the actual hearing of the matter is usually delayed by at least three years from the institution of the action until a hearing takes place, and a year for motion proceedings. When incorporating alternative dispute resolution methods in their agreement, the parties can decide which of the tribunals can make a final decision or award on the issue in dispute. One of the major advantages of ADR proceedings is that they are confidential. Notwithstanding the incorporation of the ADR methods, parties are not prohibited from approaching a court to review a binding decision of the neutral third party under limited circumstances. The three most common types of ADR methods are mediation, adjudication and arbitration.

Mediation

Mediation is a process by which a neutral third party is appointed to listen to the parties, consider their positions on the dispute, and try and move the parties towards settlement of the dispute. The neutral third party is referred to as the "*mediator*". This ADR method is usually preceded by unsuccessful negotiations by the parties' representatives. The appointment of the mediator is in most instances by agreement and the appointment should be guided by the nature of the dispute and the outcome envisaged by the parties. For example, where the dispute relates to a technical aspect, it is ideal to appoint a mediator who is well-versed in the particular technical issue about which the dispute arises.

The mediator may request that each party deliver a position paper which sets out each party's contentions. The parties will thereafter agree on a date for the mediation. During the mediation, the parties will usually discuss their views on the dispute. Each party may propose a solution either during the meeting with the other party and the mediator or in a separate discussion only with the mediator. The mediator will then have discussions with the parties following the separate discussions to inform a party of the other party's proposed solution. A party can request that a mediator not divulge certain information, and the mediator must comply with that requirement. If the parties reach agreement on a proposed solution, then the mediator can assist with the preparation of a binding settlement agreement.

The primary obligation of a mediator is to be neutral and hear both sides without being seen to be taking either party's side. They act as a facilitator of a resolution of a dispute.



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Adjudication

Adjudication proceedings involve the appointment of a neutral third party, referred to as the "*adjudicator*". This ADR process is commonly used in the construction industry. It is meant to be a speedy process in which the adjudicator determines a dispute and their decision is binding on the parties. The agreement will usually provide that the decision is binding on the parties unless and until it is set aside by an arbitrator. The appointment of an adjudicator will either be by agreement between the parties or by a nominating body provided in the agreement. There are instances where an adjudicator may be appointed when the agreement is concluded as the process is meant to ensure project continuity, notwithstanding disputes.

Adjudication proceedings are initiated by the issuing of a notice in accordance with the agreement. The referring party may propose nominees for appointment as the adjudicator to the other party and the receiving party may accept one or more of the nominees or propose its own nominees for the referring party's consideration. The adjudicator is usually a person who is an expert in the subject matter of a dispute. For example, where an issue relates to the measurement of work done by a contractor, the adjudicator should preferably be someone with the relevant qualification and experience. If the dispute relates to the interpretation of, for example, a construction agreement, then the adjudicator can be an attorney or advocate who has the specialised knowledge and experience in construction. If the parties cannot reach agreement, the appointing/nominating authority can be approached to appoint or nominate an adjudicator.

Once an adjudicator is appointed, they will convene a pre-adjudication meeting where the parties will agree on the procedure to be applied to the proceedings and the applicable rules. This includes agreeing on dates by which each party must file their submissions and the delivery of the adjudicator's decision. Some rules provide a period for filing submissions and the delivery of decisions – where rules of this nature are agreed upon the parties must comply with the time periods. However, they are not prohibited from extending any such period by agreement on the request of an indulgence by one party or the adjudicator. However, there may be a hearing, in the form of a meeting with the adjudicator, on a limited point to provide clarity to the adjudicator. It is not envisaged that there will be a formal protracted hearing.

As the decision of the adjudicator is binding, the adjudicator is required to observe the rules of natural justice, failing which their decision may be susceptible to review. Once an adjudicator's decision is issued, it is binding on the parties and the parties must give effect to it without delay. Where a party has failed to comply with the adjudicator's decision, the party in whose favour the adjudicator decided may approach a court to make the decision an order of court.

Arbitration

Unlike the other ADR methods, arbitration proceedings are governed by the Arbitration Act 42 of 1965 (Arbitration Act) in South Africa. This act is meant to provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and the enforcement of the awards made by these tribunals. Where a commercial agreement incorporates an arbitration agreement (which is usually in the form of a provision), the arbitration is subject to the act. The neutral third party is known as the "*arbitrator*". The process of appointing an arbitrator is usually similar to the process for the appointment of an

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adjudicator. Arbitration proceedings are commenced by a notice. Where a party is dissatisfied with an adjudicator's decision, the party will deliver a notice of disagreement with the decision and notify the other party of its intention to refer the dispute to arbitration. Where there was no adjudication, but the referral is a result of unsuccessful mediation proceedings or simply in accordance with the dispute resolution procedure provided in an agreement, in most instances there is a requirement that the referring party issue a notice of arbitration.

The Arbitration Act envisages that the arbitrator will issue their award within four months of their appointment. However, parties may agree to waive the applicable provision of the Arbitration Act during the pre-arbitration meeting. A pre-arbitration meeting is convened by the arbitrator to confirm the appointment of the arbitrator and agree on the applicable rules and procedures, including the date of delivery of submissions, the hearing and the arbitrator's award.

Unlike adjudications, arbitrations are geared towards hearings with oral evidence by both factual and possibly expert witnesses. Preceding the hearing and following the close of pleadings, the parties may deliver factual and expert witness statements. There may also be a discovery process where the parties deliver documents that they intend to rely on during the hearing. Once this process is complete, the parties will have the arbitration hearing.

Unlike an adjudicator, who delivers a decision, the arbitrator delivers an award. Once delivered, the award is binding on the parties. The default position according to the Arbitration Act is that an arbitrator's award is not subject to appeal. If a party fails to comply with the award, a party may approach a court of competent jurisdiction to make the award an order of court.

Conclusion

ADR methods assist in providing speedy recourse while providing the parties with control over the process. The accelerated nature of the process is great for saving costs and time for the parties to ensure that they focus on performing in terms of the agreement. Their incorporation in commercial agreements further assists in alleviating some of the load faced by courts as disputes are resolved outside the court system.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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