

## **Adjudication and arbitration as a technique in resolving construction industry disputes: A literature review**

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*Abstract— This paper presents a preliminary literature review on the prospects of reforms of adjudication and arbitration to aid construction dispute resolution in South Africa. At the moment, the prevailing method of resolving construction disputes in South Africa are Adjudication and arbitration. This paper seeks to propose effective legal framework for dispute resolution processes for the construction industry in South Africa. While relying on some recent advances recorded in Malaysia and Singapore. While the method adopted is purely doctrinal legal research, the study identifies the relevance of alternative dispute resolution (ADR) processes in the construction industry in South Africa as utilised elsewhere. The study found that the building blocks for the proposed dispute resolution framework in the construction industry in South Africa are already in place but they need to be properly placed for a sustainable framework. The use of qualitative approach was to enable the study to know the experiences, perspectives and challenges facing the stakeholders in the construction industry in the use of the existing processes for construction dispute resolution. This approach will validate the need for effective construction dispute resolution processes. This is proposed to be part of the overall project management plan in any construction project so that the final project performance is not negatively impacted.*

**Keywords—** ADR, Construction Dispute Resolution, Dispute Review Boards, South Africa

### **I. Introduction**

Disputes are inevitable in any given construction industry due to the complex nature of the industry itself. Mohammed *et al* (2012) suggested that the most common disputes associated with the industry are delay in the supply of material, delay in payments for completed work, improper construction method, delay caused by the subcontractor and discrepancies in contract documents between the various parties.

Mohammed further pointed that there is bound to be disputes because different professionals are always involved in the execution of construction project although each with distinct and well defined specialized role. Delays can also give rise to suspension of work and loss of productivity, late completion of project, increased time related costs and third party claims and abandonment or termination of contract. (Othman, 2014). Other factors include contractor related problems, owners' financial constraints, high inflation increased material price; design change by client; defective design; weather conditions; delayed payment on contracts and defective construction work. (Owolabi *et al.*, 2014).When delay occurs in construction projects, it has adverse consequences on project objectives in terms of time, cost and quality.

According to Abedi *et al.* (2013) stated that Construction-related disputes can consume a lot of time, money and in most cases the consequences of construction disputes are severely devastating. The complexity of the construction industry is always responsible for inevitability of disputes in the industry. In addition, construction disputes can occur from various stakeholders within the industry ranges from dispute between clients and contractors, consultants and contractors, contractors and suppliers, contractors and employees, among others. Rasheed *et al.* (2013) suggested that it may also be as a result of time and cost overruns, poor execution of work, payment delays to contractors, suppliers, and workers.

According Potts *et al.* (2012) litigation and arbitration have for long time been the unitary mechanism for resolving construction disputes. Studies have revealed that litigation and arbitration need to be supported with other alternative dispute resolution mechanisms for efficient and effective performance of the construction industry. Wong, chen Hin (2011).

## II. An insight into construction dispute resolution

The concern of this study is that major construction disputes still surfer in the hands of litigation thereby resulting to wasting of materials, resources and abandonment of projects. This study therefore, examines the practice of ADR in construction industry in South Africa, its effects on the parties concerned, the attitude of courts in relation to construction disputes with a view to propose a lasting solution to the problem(s) identified. The study also observed that there is problem of selecting the most appropriate resolution technique that can fit in the nature of the dispute and best satisfy the disputing parties' needs. Nowadays, arbitration is also becoming more expensive than litigation and this has become a concern to the stakeholders to look unto a more effective alternative dispute resolution that can serve the industry better. It is easy to conclude that there must be a more efficient way to resolve disputes. The perceived shortcomings of litigation and arbitration, with their concomitant rise in costs, delays, and adversarial relationships, have encouraged the rapid growth of alternative dispute-resolution processes, which indeed comprises of expert appraisal, conciliation, mediation, expedited arbitration and reform of the uniform Commercial Arbitration Act.

However, resolving construction disputes using an adversarial approach, such as modern arbitration, was considered to be in opposition to the maintenance of harmonious relationships between the parties (Harmon, 2003). The parties often prefer alternative dispute resolution to avoid ruining this business relationship (Cheeks, 2003). Moreover, arbitration is only available at practical completion of the whole of the works, which means that the two parties may have to bear a poor relationship for a long period, in particular if the dispute happens during the early stages of the project. Attention is gradually focused on various dispute resolution alternatives such as mediation, which provides potential for both time and cost savings. These processes seem to be inadequate in minimizing disputes in the construction industry due to their inherent limitations and lack of flexibilities.

Nowadays, resolving disputes by alternative forms of dispute resolution has been on the rise in the construction industry. Alternative forms of dispute resolution have been preferred because of the complex nature of construction disputes, the high cost of resolving these disputes in court (contributed in part by

disclosure of voluminous construction documentation as required by the discovery obligations imposed by the courts) and the damage court proceedings have impacted on the parties' business relationship. Parties want to have control over their matters, more so with the complex and technical nature of the industry, it requires the experts in the field to give rulings in line with professional ethics in response to dispute at hand. But recently, arbitration has been considered as a last resort for resolving disputes in construction industry because of its costs and some other reasons; hence the advent of other alternative dispute resolution such as Adjudication, mini-trial and other hybrids processes of ADR. The quest for reforming the construction dispute resolution landscape in South Africa courts has been the main impetus for this paper. This calls for a re-think and review of the existing dispute resolution mechanism in resolving construction disputes and to give room for a more cost-effective and timely ADR process in resolving any kind of dispute in the construction industry.

Adjudication is widely gaining recognition as a construction disputes resolution mechanism and a lot of success has been recorded. Adjudication was first introduced in UK in 1996 by the Housing Grant, (construction & Regeneration Act (Construction Act) to serve the construction industry and this has contributed positively towards projects' success and improved the working relationship amongst the team players in the industry. This has also been extended to Singapore, Australia, South Africa, Malaysia and Sri Lanka to mention but a few. Parties are obliged to comply with the decision of the adjudicator(s) because such decision is final and binding unlike Mediation, mini-trial, conciliation which are only built upon good faith of the parties. The failure of mediation and its other siblings has led to the introduction of adjudication (Harmon, 2003).

Adjudication has also been introduced in South Africa, Sri Lanka, New Zealand, Australia, Singapore, etc. because of its effectiveness, many writers have written on its implementation in Malaysia. It is trite that when something is good, everybody would want to emulate and adopt. Perceiving the possibility that South Africa may wish to head towards such process in response to global needs and practice, there must be a reform on the current practice of dispute resolution mechanism in the South Africa construction industry. Nowadays business are rapidly growing so there is need for rapid decision and dispute resolution process

that will be supportive without undermining business and customer relationship in the construction industry. Given the nature of construction industry with the technicalities involved, every dispute arising therefrom should be handled by the experts who have the technical know-how and with the use of the existing alternative measures without causing any hindrance to the working progress in the industry. Maritz opined that construction disputes are well served by mechanisms that are speedy, cost-effective and binding. Such mechanisms should be conducted by an independent third party and should be undertaken by a person (or group of people) chosen by the parties and with the required legal/technical knowledge or who are able to acquire them. Such mechanisms should be able to hear any matter, should be capable of becoming final and enforceable, and should not interfere with the progress of the work (Harmon, 2003).

This study intends to look at the possibility of encouraging the project managers, engineers, architect, builders, planners, financial institutions and construction worker to have a rethink in taking their grievances to courts knowing fully well that there is time limit within which to deliver up their projects and court would not abandon other prior cases to attend to their needs. There are other friendly processes they can explore in solving their disputes such as adjudication and other hybrid ADR processes. They save time, and are cost-efficient, friendly and parties are in full control of how their matters are being conducted. They are also at liberty to choose who to decide their faith with respect to the dispute at hand. This will enhance the smooth running of the activities in the industry.

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#### A. *Exploring the relevant literature*

The literature review is discussed under three main headings: the advent of ADR in Construction Industry; ADR in construction industry in South Africa; and ADR in construction industry in Malaysia and Singapore. These include scholarship on emergence of formalized ADR in construction disputes in the modern world, ADR in the context of construction disputes in South Africa, and Malaysia and Singapore models of ADR in construction disputes. These different aspect of the relevant literature are examined in order to understand their contributions and relationships to the current research as well as identify some focal gaps that need to be filled. In the end a justification for this current research is provided.

### *III. The advent of ADR in the construction industry globally*

ADR had been in the construction industry nearly half a century ago. The United States Army Corps of Engineers (USACE), initiated the use of partnering process to promote disputes prevention in construction contracts (Podziba, 1994). It was used to resolve disputes arising from small scale projects but gained a wider acceptance in the industry to address any form of disputes arising thereto. This was abused over time because of its non-binding effect. H Klein raised the issue of some the professional institutions that served the construction industry that developed ADR processes purposely for resolving disputes arising from the Industry promptly and for cost-effective than Arbitration and Litigation. These processes were also integrated and unified into the construction contract for dispute resolution (Klein Howard, 2006). The Dispute Resolution Board was introduced into construction industry the Dispute Resolution Board Foundation in the late 90s to serve the industry from the inception of a project till its completion. This board are assigned to pay regular visit to the site and manage any disputes arising therefrom before they escalate to serious ones that will gulp the money allotted for the completion of the project itself. This process has become an integral part of project management worldwide. However, due to the large scale of Construction projects and emergence of disputes which could not be resolved at the level of this board, the industry was prompted to beaming its searchlights in furtherance to finding more efficient and useful ways of resolving their disputes. Many of the Alternatives found to be more useful and cost effective than litigation and arbitration turned out to toothless dogs that could not bite because of their non-bindingness. Howard associated the failure of

other ADR processes in the construction industry to their non-binding effects. Statutory Adjudication was born to mitigate the insufficiency of the existing alternative dispute resolution processes and for quick administration of justice required due to the nature of the industry. Now, adjudication is gaining an increasingly acceptance and utilization in UK because of its adequacy and effectiveness in the resolution of disputes emanating from construction industry. Statutory adjudication was first introduced for settlement of disputes arising from house grant which was informed by the Housing Grants, construction and Regeneration Act in 1996 (Construction Act) as a procedure to resolve disputes in the construction industry. The Act came into force on 1 May 1998. This technique has found its way into legislation of many countries including Australia, South Africa, Malaysia, Singapore, Sri-Lanka to mention but few. A lot of success had been recorded in the construction industry where this process had been adopted and used for construction dispute resolution particularly for payments claims.

#### A. *ADR in the construction industry in South Africa*

The ADR process is intended to give parties control and responsibility for the outcome (Bevan, 1992:p18) which ultimately produces advantages and is referred to as the Four C's. These advantages which constitute the features of the ADR context apply to the non-adjudicative methods of ADR and are as follows Consensus: Continuity: Control and Confidentiality. These features produce effective outcomes Loots, (1991) and Verster, (2006).

Adjudication now takes precedence to arbitration in the dispute clauses of the following contracts: General Conditions of Contract for Works of Civil Engineering Construction (GCC) (2010), the New Engineering and Construction (NEC3) (2005) and the International Federation for Consulting Engineers (FIDIC) (1999). Adjudication in the engineering discipline follows a different process in the form of Dispute Adjudication Boards (DAB) Lalla & Ehrlich, (2012) which is supported by the FIDIC (1999), GCC (2010) and the NEC, (2005) contracts, whereas in the building industry, adjudication is supported by the JBCC PBA (2007). The South African Institute of Architects (SAIA) generally practise adjudication according to the JBCC PBA Dispute Clause 40 (The Cape Institute for Architecture, (2010). The DABs follow much the same process however; the establishment of the board differs

where three adjudicators are appointed to resolve the dispute. The process relies on the expertise of engineers Owen, (2003).

Researched authors are of the opinion that there is a growing preference for adjudication in the construction industry and courses have been developed in order to promote the practice of adjudication Alusani, (2012). Maritz (2009) is of the opinion that adjudication will be underutilised without statutory intervention however; the Construction Industry Development Board (cidb) promotes adjudication as a rapid and cost effective method cidb, (2012).

Similar to this process is the method of expert determination. With adjudication, a dispute is referred to an expert rather than to litigation, where a judge may base his decision on law, rather than technical issues. Expert determination is also based on rules what is ADR, (2010). This suggests that adjudication in the JBCC PBA (2004) was based on the principles of expert determination. In view of the above, DABs are based on the same principles and may involve more experts which according to Swart, (2012: personal communication), tends to generate expenses and may be suited to larger projects. Mediation has been identified as a preferred method of ADR however; the application of mediation in the South African construction industry has been questioned. Professionals are appointed as mediators due to their expert knowledge and the mediation process is often expedited to suit the hurried nature of the construction industry. As such, mediators are relying on inherent ADR communication skills and making decisions for the parties (Povey, 2010).

Conciliation is the psychological component of mediation where the neutral third party will attempt to create an atmosphere of trust and co-operation which is conducive to constructive negotiation. The aim of conciliation is to correct perceptions, reduce fears and improve communication in order to relax parties and guide them into conflict-free negotiations and bargaining. Conciliation also offers parties the opportunity to determine their own end results. Being a primary element of mediation, conciliation is applied with the intention of preparing the parties psychologically to enter into the extended process of mediation Moore, (1986). As such conciliation may serve as a preventative measure against disputes developing on site.

The relief of court congestion has been addressed by the Department of Justice and Constitutional Development in the Civil Justice Reform Programme (CJRP) (2012) by simplifying lengthy and complex court processes and implementing ADR in the form of mandatory mediation in order to settle out of court. The intention is to implement these court based mediation rules gradually commencing in 2012. However, Joubert and Jacobs (2012) are of the opinion that for this process to be successful, the voluntary process of mediation would be considered an obstacle.

In 2009 and 2011, the South Africa Construction Industry witnessed a radical change through the emergence of Arbitration and Conciliation which proved to be more effective means of dispute resolution procedure with Arbitrators managing the timetable and cost more effectively. This was abused over time and cost of settling construction disputes became expensive and reference to court for final decision resurfaced. The only ADR processes in South Africa as of today are arbitration and conciliation and this has influenced the direction of literatures in South Africa which are basically on arbitration and litigation. This means that there has not been any literature on adjudication but only few writings were found on the use of other alternative dispute resolution for construction dispute resolution as far as this study is concerned. Nevertheless a critical analysis shall be made to some of these works in order to justify the need for a new dawn of ADR mechanism that will adequately and effectively served the South African construction industry with respect to dispute resolution.

Martitz (2014) discussed the issue of using Alternative Dispute Resolution mechanisms such as mediation, conciliation, court-connected ADR service as well as the use of arbitration for settlement of industrial disputes, an attention was not given to the construction industry. The work lacks the recommendation to the construction industry using the best practice for resolving disputes occurring while project is being executed. Regarding to dispute resolution in the excerpt, a mention was not made of issue relating to problems facing the construction industry using arbitration for construction disputes resolution. The cidb was established to attend to cases that need quick responses and prompt attention and refer such cases to the appropriate ADR door or mechanism best suited to its resolution, this is a laudable programme, but because the civil procedure rules has not made provision for adjudication for

resolving construction dispute, the participants in the construction industry are still not been given good judgment in this regard.

Cibd (2014) admitted the need for efficient dispute resolution mechanism for developing nation such as South Africa. He pointed out the need for judicial review of commission's decision relating to arbitration which has become a clog in the wheel of progress in the resolution of industrial disputes which made him suggested and call for amendment of some sections in the arbitration and conciliation act, 2004. However mention was not made of construction industry and the tools for resolving disputes in the industry.

(Isah, 2012) examined the causes of disputes in construction industry and the paper identified as the major cause was delay. They used survey method to determine other causes. Their findings showed that improper planning, lack of communication, design errors and shortage of supply also contributed to delay in construction projects but the work concluded that delay causes more harm hence should be avoided in the construction industry. They gave some recommendations among which proper monitoring of project be made by experienced and qualified professionals in the field. The work did not reflect on payment as the major problem facing the construction industry so they could not recommend adjudication.

Verter (2013) identified construction management cost, time, and quality related factors tendering methods and variation orders as the major factors strongly affecting projects performance in construction industry. His recommendations are that clients, stakeholders, practitioners and consultants should discourage excessive variation orders during construction. The writer had a laudable suggestion such that the policy makers should look into the possibility of appropriate procurement and tendering methods but failed to take a critical look at the existing mechanism used in resolving disputes in construction industry as an instrument that needed to be reviewed or replaced. In view of the above reviewed literature, it is evident that there has not been any work on adjudication in South Africa as a panacea to payment problem in the South African construction Industry which is one of the objectives set out to achieve in this study Exploring.

#### ***Exploring best practices: construction dispute resolution in Malaysia and Singapore***

The literature works on the use of ADR in construction disputes in Malaysia and Singapore

consists of recently published books, articles and theses that were written within the last two years. This work premised on the impact of delayed payment, receipt of less payment or even non-payment as a major clog and impediment which impounds most of construction projects. Talking about how construction disputes are resolved, what readily comes to mind is the newly introduced adjudication process which was born to address the issues of payment. This was championed in UK in 1990 for resolving cash flow problems in construction industry (Bint Zafian, 2013). This act had been adopted and domesticated by many countries like Australia, New Zealand, Sri Lanka, South Africa, Malaysia, Singapore and a host of others. Before the introduction of this new Construction Industry Payment Act in Malaysia, Construction industry were faced with payment problems which could not be adequately settled under the old-existing dispute resolution mechanisms. For example mediation could have been the best process but because of its non-binding effect, the liable parties were not complying with the rulings of the mediators.

Litigation is a long process and majority of the participants in the industry whose rights were affected only resort to it when all other alternatives have been fully explored and there is still need for some issues of law to be clarified. Also where the liable party fails to comply with the decisions of mediator or arbitrators as the case may be. Arbitration is no longer attractive as a resolution mechanism for construction disputes as it used to be because of its cost and duration.

The research work of (Mohd Danuri and et al, 2012) revealed that there was a time when dispute resolution mechanisms available for resolving construction disputes were mainly litigation, arbitration, and mediation. But unfortunately cases of construction disputes were among the highest number of cases pending in courts which brought a lot of setback to the industry. There were over 300, 000 including construction dispute cases pending in courts between the year 2006 and 2008 was alarming that suggestion of their referral to ADR had to be made. However, before this time, in 1987, the Late Tan Sri Dunuk Amar Lee Him (the former chief justice of High Court of Sabah and Sarawak) lamented on the high rate of construction cases in court and wished for a specialised construction court to be established wherein cases of construction disputes could be heard without delay: It has been noted that court's delay in the administration of justice apart from the issue of cost,

the drawbacks in litigations have caused the construction players to consider other methods that could provide them with more realistic options in preserving their rights, profits as well as their present and future between relationship. (M.S. Mohd Danuri, 2012).

His write up revealed his concerned over the construction disputes cases which were not given the adequate and prompt attention required in courts. Given the nature of construction industry, disputes emanating from the industry requires urgent and prompt attention, hence the maxim, "Delay defeats equity, and justice delay is justice denied (delay hampers the working progress of the industry) (Mohammad Danuri et al, 2012). This had generated a lot of concern among the stakeholders in the industry. There were series of workshops and seminars organized among which spurred the director of KLRCA together with the Master Builders Association Malaysia and other participants from the industry to see how this problem could be resolved. Surveys on payment issues was embarked upon which revealed the extent to which this phenomenon has left a dead blow in the industry. A construction industry roundtable was mooted in June 2003 during which the Construction of Industry Development Board Malaysia (CIDB) together with other construction industries resolved to make prompt payment as one of ten priority areas in the Malaysian construction industry.

Consequently, Construction Industry Working Group on Payment known as WG10 led by Institute of Surveyors Malaysia (ISM) was then constituted. In June 2004, the group came up with laudable recommendations during the construction industry roundtable chaired by the Honourable Minister of Works. The creation of a Malaysian Construction Industry Payment and Adjudication Act (CIPAA) was one of the topmost recommendations made by this group. The problems identified include withholding of certificates, deposit of retention monies in a separate Bank account among others (Naseem Ameer, 2013). However, the problem of cash flow was give more preference because of its severe impact and the adverse effect caused on the growth of the Industry which calls for immediate attention and solutions. The importance of cash flow in the construction industry had been brightly painted by Lord Denning MR thus in the case of *Modern Engineering (Bristol) v Gilbert Ash (Northern)*: "There must be a "cash flow" in the building trade. It is the very lifeblood of the

enterprise.” ((1973) 71 LGR 162, CA at P.167). The Malaysian payment statutory act known as Construction Payment and Adjudication Act (CIPAA) was fashioned and modelled after the UK model of Housing Grants, Construction and Regeneration Act of 1996 to resolve the payment problems bedeviling the construction industry. This act received the royal assent in Malaysia on 18 June, 2012 under the rules of Malaysian act 746 (Hin, 2011) and same was published in the Gazette on 22nd June, 2012. The same act came into force sometimes in 2013. (Mohamed Nor Azhari Azman and *et al*, (2014). The similar research was conducted by Wong Chen Hin (2011), and Nik Din and Ismail, 2014 revealed that the issue of payment has been a global concerned in construction industry which statutory adjudication has come to lay to rest in the construction industry. Adjudication has now become the household name used for resolving a large scale disputes including payment claims in construction industry in Malaysia. The act applies to all construction contract made in writing after 22nd June, 2012 including those entered into by the Government of Malaysia. By virtue of Section 28 of the legal framework of adjudication Act in Malaysia, adjudicator’s decision has been placed on equal footing with the decision of the High. An adjudicator can give several other remedies to the favoured party under adjudication decision. Where a respondent fails to pay the full or part of the stipulated amount pursuant to the adjudication decision, the claimant can suspend the work in the event within the stated time (Hasmori and *et al*, 2014). The act covers all construction contracts made in writing that relates to construction work carried out wholly or partly within the territory of Malaysia inclusive of the contract entered into by the Government of Malaysia. This also includes the local and international construction contracts. Part V of the Act vested some functions on the Kuala- Lumpur Regional Centre for Arbitration (KLRCA) as one of the adjudication authority. The centre can be approached for the selection of adjudicator as well as handling of adjudication cases. Mohammad Danuri and *et al* gave further explanation on this that KLRCA can among its others functions set competent standard and criteria of an adjudicator, and provide administrative support for the conduct of Adjudication. The effect of the Act is to facilitate a regular and timely payment and speedy dispute resolution mechanism through adjudication. Rozina asserted that it may be too early to give full account of the success of adjudication under the Construction Industry Payment and Adjudication Act now. This is because the process is still at infancy stage

but there has been some improvement on payment attitude in the construction industry at the operation of this act in Malaysia. However, record reveals that a large percentage of the participants are highly satisfied with the outcome of Adjudication proceedings most especially with help of the slogan, “Pay now and argue later” (Madden – May 30, 2014). On the effectiveness of the construction industry payment adjudication act (CIPAA) in Malaysia with respect to adjudication process, the Bar council has this to say “According to Gould, Vivian, R. and Robert Gaitskell QC, in a revolutionary new approach, quoting Sir Vivian Ramsey, or a system that is a ‘runaway success a great success’ or one which has been referred to as the best invention since sliced bread is introduced by ‘leading jurisdictions’, of course it takes time for other ‘followers’ to take it up (Gould and *et al*, 2013). There are now 12 jurisdictions around the world that have taken up adjudication process. Adjudication is now a Bill in parliament in Ireland. And all states and territories in Australia have now introduced statutory adjudication. Several other countries are also discussing the adoption of adjudication. Meanwhile, because of the success of adjudication, the leading jurisdictions are now talking about expanding adjudication to even other non-construction industries. Countries that are followers ought to monitor these successes closely – and when ready and if appropriate move to prevent potential future disasters (such as sudden insolvencies), and proactively improve practice in the construction industry. The clever learn from their mistakes. The wise learn from others’ mistakes. Fools never learn from either. The Malaysian construction industry must take pride in its far-sighted wisdom on this issue. CIPAA is a recommendation under the Strategic Thrust of the Construction Industry Master Plan (CIMP) which aims to improve and develop the construction industry in tandem with the Vision 2020. Therefore, it is imperative on other countries to emulate this great accomplishment by amending their relevant laws and giving way for the application of adjudication ADR as a dispute management technique in both Construction Industry and commercial disputes. The battle for the operation of Construction Industry Payment and Adjudication Act (CIPAA 2012) has been long awaited but Industry players can finally celebrate now following the Act’s implementation on 15th April, 2014 by the Minister of Works (Foo *et al*, 2014). The Construction Industry Payment and Adjudication Act (CIPAA) 2012 has come into operation effective 15 April 2014. The Act was passed on 18 June 2012 and gazette on 22 June 2012. The Ministry of Works had

proposed the Construction Industry Payment and Adjudication (Exemption) Order 2014 and the amended Construction Industry Payment and Adjudication Regulations 2014. Both had been approved by the Minister of Works Datuk Haji Fadilah bin Yusof and is operative 15 April 2014 (Rajoo, 2014).

### ***Statutory adjudication in Singaporean construction industry***

In the past few years in Singaporean construction industry were bedeviled with a lot of challenges. According to Cing. (2012), there was a concern in the industry such that the players at the lower end of the supply chain had limited recourse in payment dispute. He further observed that many contractors were plagued by poor cash flow and some had been forced to call it a day (Cing, 2012). A bill was intended in this regard with efforts from the stakeholders in construction industry which include the Singapore Contractors Association Limited (SCAL), The Singapore Institute of Architects (SIA), The Real Estate Developers Association of Singapore (REDAS), The Institution of Engineers Singapore (IES), and the Singapore Institute of Surveyors and Valuers (SISV) and with a view to study the problems facing the Building and Construction Industry. There was a serious deliberations concerning the issue on how anybody carrying out the assignment of construction work should have the right to receive progress payment for work done and materials supplied. With the minister for National Development announced the need to take up measures that could help the ailing construction industry together with the efforts of other stakeholders in the industry, the resolution was eventually translated into having a change in the payment attitude in the Construction Industry.

Today in Singapore, the problem of payment for work done either partially or fully in the course of any project being carried out can now be resolved through the use of the act known as “Building and Construction Industry Security of Payment Act 2006”. This act was initiated and the much awaited Building and Construction Security of Payment Act was introduced in Singapore in October, 2004. This provides a framework for rapid payment dispute resolution through adjudication. It followed the model of similar legislation in Australia. The act was promulgated to ease payment among the participants in the industry, from the contractors to the sub-contractors, sub subcontractors no matter the level of participation. The

bill came into force with effect from April 1st, 2005. The act was intended to smooth the cash flow across the country and provide some respites as at the time Singapore was experiencing bottom of the economic downturn. Payment provision under the act states that any person who has carried out any construction work, or supplied any goods or services under a contract is entitled to a progress payment The construction act is now applicable to all construction contracts- whether wholly, partly in writing or wholly oral. Stipulation period for final determination of construction dispute is to be conducted within 28 to 30 working days (Ramachandra & Rotimi, 2011). The work of Shu revealed the problems faced the industry before the enactment of the act and how construction dispute cases were not given prompt attention in the courts in the past. (Shu, 2012). His findings revealed that construction disputes have not given proper attention it deserved under the existing dispute resolution mechanisms which informed the introduction of adjudication. Given the duration of adjudication and its application for construction dispute resolution, research revealed that a huge success has been recorded in the Singaporean construction industry. There is now a Building and Construction Industry Security of Payment Act, a caricature of Part 8 of the Local Democracy, Economic Development and Construction Act in England, Wales and Scotland to increase clarity in construction contracts; to introduce a “fairer” payment regime and improve rights of contractors to suspend work in non-payment circumstances and encourage the use of adjudication for resolving disputes. King gave a summary of the amount of progress payment to which a person is entitled under a contract as either be the amount calculated in accordance with the terms of the contract or if the contract does not so provide, the amount is calculated on the basis of the value of the construction work carried out or the goods or services supplied. (King, 2011). This work also gave explanation on date for the progress payment to be made, where the contract provides for the date on which a progress payment becomes due and payable on the date as specified or determined in accordance with the terms of the contract or the date immediately upon expiry of thirty-five (35) days after. Adjudicator is empowered to determine his or her own jurisdiction on a provisional basis and that the determination will be binding unless it is challenged in the High Court. Adjudication determination is treated as a decision of the high court (Katzenstein, 2012). Adjudication is a quick and cost efficient process in which an independent third party

makes binding decision on construction contract disputes. The adjudicator's powers are defined by the parties in relation to the contract under which he has been appointed. His decision is mandatory on the parties. The current concern with adjudication is that there has been an increasing trends for a large and complex disputes being referred to adjudication such as delay, disruption and acceleration claims.

Wong Chen Hin asserted that some disputes, particularly at the completion of projects are too complex to permit a fair adjudication process within the time limits of the scheme (Hin, 2011). Prudhoe, noticed that there was a fear at the initial stage on the application of the act as to how practicable and the tendency to be a subject of legal challenge but today there has been an increase of large and complex disputes to be referred to adjudication such as delay, disruption and acceleration claims ( Prudhoe, 2006). Goldstein asserted that the effect of the Act was that it created a dual system whereby a claimant had a statutory right which operated in addition to, and not in derogation of, any contractual right to be paid for the work that a claimant had undertaken (Goldstein, 2009). Since the amended Act came into effect has caused a "tsunami" of litigation in New South Wales in that since 2003 there have been about 200 Supreme Court decisions and about 30 Court of Appeal decisions. The Courts have consistently spoken of the scheme of the Act to be "pay now, argue later."

### ***Scaling up the dispute resolution framework in the construction industry in South Africa***

From then forgoing analysis, it is established that there is a need to fill up the literature gap in terms of the dispute resolution framework for the construction industry in South Africa. This requires the exploration of best practices as represented by the two jurisdictions selected: Malaysia and Singapore. A careful review of the existing literature reveals that no researcher has specifically examined, through a comparative study with Malaysia and Singapore, the legal framework on construction disputes in South Africa. While some of the available literature are general discussions on ADR in South Africa, some of which neither specifically addressing Mediation in construction disputes in Malaysia nor present a comparative study both Malaysia and Singapore. This research goes beyond the general ambit explored in the above classified materials. Despite the wide classification of the literature, none of the above works has pointedly

examined the legal framework of ADR and the need to introduce reforms in the mechanism adopted by the courts in addressing construction disputes in South Africa. The Malaysian, Singapore and other literature examined here are meant to propose a better framework for South African Construction Industry having special regards to best practice in field. An important contribution of this research to knowledge is the Adjudication being proposed to streamline its process of dispute resolution to enhance the case management duty of the courts. This study is therefore an attempt to go beneath the surface and delve into the relevant laws in the three jurisdictions under study to bring about meaningful changes, particularly in the administration of justice in construction disputes within the South African Legal System.

### ***Conclusion and recommendations***

Adjudication process was enacted to move construction projects progressively regardless of any disputes between parties. It encourages disputing parties to resolve their disputes without delay. It is working successfully in UK, New Zealand, Australia, there has been an indication of its progress in Singapore, with the recent operation in Malaysia, there is hope for the stakeholders in the construction industry to have their disputes resolved as quickly as possible such that no project would be impounded.

At the passage of the Act UK, there were two fears hovered, one that the theoretical promise of adjudication promise might be damped after its coming into force and that there would high demand in adjudication and lesser adjudicators to cope with it but no sooner than these anticipation were dispelled, there appear to be sufficient capacity of adjudicators to meet current demand.

The advantages of the Act is far outreaching any perceived disadvantages and that the process of adjudication has so far proved a great success both in the construction industry and in the legal profession. There is hope that adjudication process would work well in Malaysia as it is presently in UK (Rajoo.S, 2014). It is generally felt, both in the construction industry and in the legal profession, that the advantages of statutory adjudication under the HGCRA far outweigh any perceived any disadvantages and that the process of adjudication has so far proved a great success.

It is on this note that study proposes that the existing legal framework for Construction Dispute Resolution in South Africa be reformed base on the following recommendations vice recommendations:

- That giving the nature of Construction Projects, disputes arising from the industry should be given prompt attention to avoid delay, overrun cost, and total abandonment hence adjudication process is strongly recommended.
- That our lawmakers should re-visit the laws governing commercial transactions in South Africa and allow the construction industry have a separate legal framework that can stand on its own due to the nature of the industry so as to be in tandem with the international practice.
- That South African legal framework for Construction Dispute Resolution need to be expanded so as to accommodate other processes use in resolving construction disputes to enable it be at in tandem with the international standard: i. there is need to put in place Dispute Review Board in order to minimize dispute at site level, ii, there is need to put in place Expert Determination Board for the seniors to make their input by giving their expertise opinion when the need arises and iii, Statutory Adjudication to facilitate regular and timely payment; prompt payment in the industry and provides remedies for the recovery of payment in the construction industry.
- That there should be an Adjudication Act to regulate and facilitate payment culture in the industry.
- That Department of Public works and construction industry development board should join hands with the stakeholders in the construction industry to initiate the establishment of construction court by footing a bill in the house of assembly for this purpose to enable quick dispensation of justice.
- That Arbitration and litigation should be the last resort for Construction Dispute Resolution.

- There is a need for establishment of Construction Court to compliment the decision obtain from Adjudicator in order to extirpate the problem of undue delay out of construction industry.

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