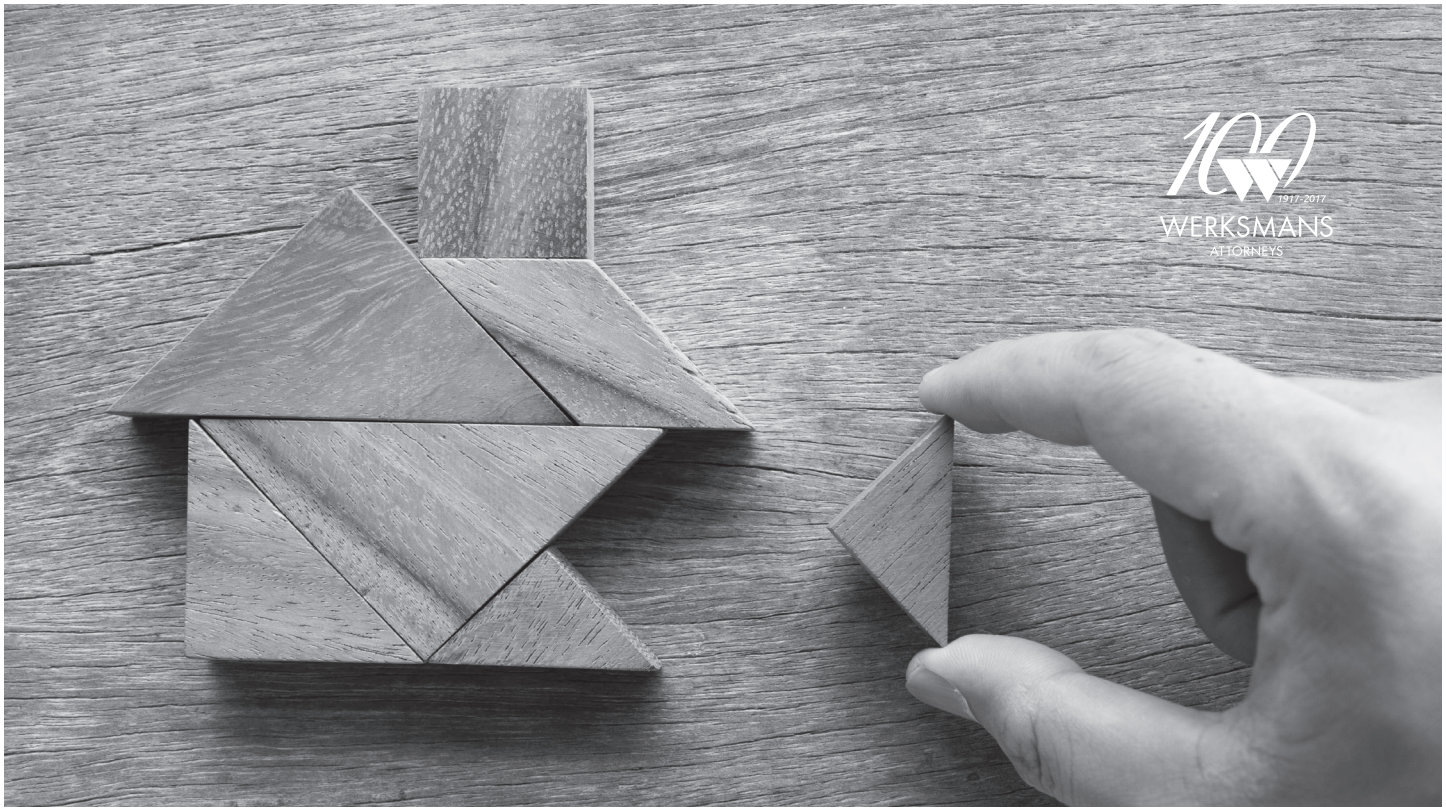

PRIVATE DISPUTE RESOLUTION – ON THE RISE, AND WHY NOT?

By Jennifer Smit, Director

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More and more private companies and individuals are turning to private resolution of their disputes for a variety of reasons – efficiency and speed are key, but probably the best and least profiled of these is flexibility of approach – the sky is practically the limit.

WHAT IS ADR?

ADR stands for Alternative Dispute Resolution – a private and alternative process to resolve disputes that is outside of the courts.

ADR can take many forms:

> **Conciliation** – where two parties meet informally to try and work things out between them with no intermediaries present – the outcome of this process is generally not binding, unless an enforceable agreement is concluded.

> **Mediation** – where the parties agree to try and resolve the matter informally through the use of an intermediary acceptable to both parties with a view to finding a binding settlement.

> **Expert determination** – where the parties contemplate a dispute over a specific issue which would require the input of a third party expert, such as an accountant, an auditor or a technical expert on a specific practical field, without the parties being legally represented, whose determination binds the parties.

> **Arbitration –** where the parties agree to effectively run trials and hearings privately according to an agreed procedure before a privately hired arbitrator whose award will broadly equate to a court order.

The first three categories are generally regarded as informal and can be conducted on short notice with minimal cost and delay, mostly without legal representation. Such approaches are exceptionally useful and highly recommended where the parties, despite their differences, are confronted with the prospect of an ongoing relationship that they must both seek to preserve.

Arbitration is a more formalised process which involves the appointment of legal representatives, the exchange of substantive pleadings, the leading of evidence and the making of legal submissions and arguments. Arbitral awards, once handed down, only assume the status of court orders once a short application to the court for the recognition of the award is made, generally for enforcement purposes.

WHEN WOULD YOU CONSIDER ADR?

Private dispute resolution mechanisms and the autonomy of parties to bind themselves contractually are concepts which are recognised by the legal system in this country and others, but there is a catch – namely that the parties must have agreed to those proceedings being the means by which their dispute is to be resolved.

What then follows is an out of court process that is generally binding on the parties.

WHAT CAN BE ADDRESSED THROUGH PRIVATE DISPUTE RESOLUTION?

There are some matters that only our public courts may preside over – criminal matters and matters pertaining to the capacity and status of citizens. Divorces, insolvency, mental incapacity applications and the like are not capable of being resolved by means of ADR.

Most civil claims can be pursued through alternative dispute resolution mechanisms which are legally recognised and are as enforceable as court orders.

HOW CAN YOU ENGAGE ADR MECHANISMS?

You could consider ADR when the dispute arises, but generally speaking, when the parties are going to war (whatever the cause of the dispute), the parties are not in the mood to be agreeable – generally parties will not be able to obtain consensus on the privatisation and management of their dispute when the dispute arises.

The trick therefore is to gear up and take "insurance" and build a dispute resolution mechanism into the agreement which governs your relationship, so that if and/or when the fight is picked, you are in a managed process which is set up in advance.

WHY WOULD YOU CONSIDER ADR?

There are pros and cons to adopting ADR over court proceedings. Some advantages are more important for certain individuals than others, depending on the nature of the relationship and the dispute. At a high level, here are some key considerations which may play a role:

ADVANTAGES

> The proceedings are private – court proceedings are a matter of public record. Sometimes, dirty linen is better managed behind closed doors – it protects the reputations of all concerned, and can only make the light of day once an award is made an order of court.
> It is immeasurably quicker – especially if the dispute can be resolved at conciliation or mediation level.
> It can be cheaper, especially if results can be achieved at mediation and conciliation or expert determination level. Arbitration can be more costly than court litigation, there is no question – but the question of costs is a double edged sword – delays in outcome often "cost" business, so saving on legal costs by proceeding in court may result in significant losses on other fronts.
> Flexibility – the parties can determine and agree on their own procedure, and can work around each other's availability and constraints, rather than having to try and factor in the court's logistics and constraints as well.
> Finality – the outcome of the process is binding, the parties can exclude the right to appeal.
> Managed – the arbitrator general gets involved and participates in meetings in the lead up to the trial.
> You avoid the difficulties encountered in the court environment – lost files, presiding officers not present on the day, poor courtroom facilities, overburdened rolls, postponements, indefinite delays and issues with allocations – the procedure for application of hearing dates in court is onerous and can be problematic of the court allocates dates when the parties' legal representatives are not available due to prior commitments.

DISADVANTAGES

> In an arbitration, costs can be higher – remember, the parties must, in addition to paying their legal costs in the ordinary course, now also cover the costs of the venue for the conduct of proceedings, the costs of recording and transcription, as well of course as the costs of the arbitrator (there can be one or three), and this can be considerable. Some arbitrations are managed by secretariats such as the Arbitration Foundation of South Africa, or the ICC International Court of arbitration who also render a fee to the parties for the administration of the process.
> What if the other side does not pay their half share? Normally these costs are shared equally until the outcome of the matter, but sometimes the party being sued does the less than honourable thing and refuses to pay their share, nevertheless opposing. The upshot is that the claimant will have to pay that portion on the defaulting party's behalf – a bitter pill to swallow, especially if the claim against the defaulter is one for more money.
> Once you are bound to ADR, you can't go to court unless your dispute resolution clause specifically contemplates circumstances when this may be allowed (urgency or declarators).
> Impoverishing precedent – this is a more subtle downside, but if one thinks about the precedent which is built up through the years of matters heard, important issues can be determined, but the relevant case law precedent is only that which is published. The arbitrated matters are not reported or reportable, and whilst they may provide useful argument and precedent to other parties in the future to assist in arguing novel cases, this is not available. Strictly this is not a disadvantage for the parties in the process itself, but is a more long term effect of mass ADR.
> Poorly worded dispute resolution clauses can create disputes themselves, which can cause the parties to tie themselves in knots rather than address the actual dispute between them.

On balance, the pros outweigh the cons - clauses for dispute resolution can be properly worded, precedent going forward is not a hurdle to the immediate litigant. If your opponent is going to play games and not pay their share, he/she/it would probably play equally underhand games in a court environment and delay the outcome of the matter interminably – this would probably end up costing you more. If merits on your side, you will recover all of the extra costs of the private hearing.

But of course, before embarking on any litigation, be aware that the outcomes are unpredictable, and before you embark on the path of righteous indignance and incur many costs, be sure the party you are suing is good for the sum claimed, otherwise you will have wasted time and money!

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Jennifer Smit has been with Werksmans Attorneys since 2007. She has wide ranging experience in Commercial Litigation and Dispute Resolution and is currently a director of the firm and practicing in the fields of Dispute Resolution (including ADR), Construction and Engineering as well as Insolvency, Business Rescue and Recoveries.

Jennifer specialises in ADR and has extensive experience in conducting both local and international arbitrations as well as successful mediations in the sphere of property/lease, construction and engineering and general contractual disputes. Jennifer also undertakes substantial recoveries work, including liquidations, sequestrations and business rescue proceedings.

Jennifer was awarded a BA LLB from Rhodes University in 2002. Her academic achievements are extensive and include being on the Dean's List for Outstanding Academic Achievement for three years running at Rhodes and being awarded a Georgia Rotary Student Program Scholarship to study in the United States for a year. Jennifer completed the AIPSA Insolvency diploma course *cum laude* at the University of Johannesburg (2011).

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