DECISION SUPPORTING FLOW CHART FOR DISPUTE RESOLUTION

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Construction projects usually are susceptible to conflicts because of their complexity. Additionally, the involvement of different stakeholders pursuing different aims and implementing them by different means, often results in disputable situations that must be solved. The existence of several dispute resolution procedures with various advantages and disadvantages makes it difficult to select the most suitable one for solving the particular conflict. Not every method seems appropriate for resolution of each type of dispute. Litigation may take a long time and incurs substantial cost. However, conflict parties seldom choose alternative dispute resolution (ADR) procedures such as adjudication, mediation and conciliation. Based on literature research and the analysis of several surveys, the authors identified a massive knowledge deficit of construction industry regarding the details of ADR procedures. The authors conclude that deeper knowledge about pros and cons of the various dispute resolution methods can help construction companies with their decision for a suitable way of conflict settlement. The paper provides information about a decision supporting chart for choosing the appropriate dispute resolution measure. That decision supporting tool, developed by the authors, primarily shall assist smaller and mid-size construction companies, normally not having easy access to legal advice, in deciding for a dispute resolution strategy.

Keywords: Construction conflicts, Conflict settlement, ADR, Tool.

1 INTRODUCTION

The long-term character and complexity of construction projects makes them particularly susceptible to conflicts. Therefore, per year, conflict parties bring around 85,000 construction disputes to the German courts (Diederichs 2021). However, there are only 1,750 construction conflicts per year solved with Alternative Dispute Resolution (ADR) in average (Haghsheno and Schilling Miguel 2018). An increased usage of ADR to settle construction conflicts may reduce the number of litigations and thus will help to relieve the judicial system.

Currently, in Germany, solving construction disputes by ADR is not very popular. Central reasons are the manifoldness of ADR methods and lacking information about advantages and disadvantages of using alternative dispute resolution for solving construction conflicts (Haghsheno and Schilling Miguel 2018). The identified lacking knowledge about the various ADR procedures, also in comparison to litigation, impedes disputing parties to decide for the best conflict settling strategy for their individual dispute, in particular if they have not a low-threshold access to legal advice. That was the starting point for the development of a decision supporting tool that will assist conflict parties with the decision for a dispute resolution strategy.
2 DISPUTE RESOLUTION METHODS

Using ADR methods to solve a construction dispute may have advantages in comparison with litigation such as a preservation of the business relationship, confidentiality of the non-public procedure, selection of competent deciders by the parties, a shorter conflict solving duration, and less costs. Thus, Diederichs (2021) found out that ADR procedures are <20 % shorter and <50% cheaper than conflict solving in litigation in average. However, there are also disadvantages of ADR, such as lower chances to settle the conflict finally (Masser et al. 2017), an unbalanced negotiations situation between the disputing parties, or lacking enforceability of the results (Quapp and Holschemacher 2020). The nonbinding and potentially non-conclusive nature of ADR is a major disincentive to parties who believe to have a strong case (Ng and Banaitis 2017).

Thus, not for all construction conflicts it is the best way to solve them out-of-court. Nevertheless, for all the others, currently, a variety of alternative dispute resolutions procedures exist which may help disputing parties to solve the construction conflict. The methods, among others, differ in costs, duration, confidentially, and role of a third party (Quapp and Holschemacher 2020). Which kind of measure is the most suitable for the respective conflict highly depends on the individual preferences of the disputing parties. They further should consider if they intend to continue their business relationship after solving the dispute.

System and the requirements of litigation are well known. In contrast to that, ADR procedures are numerous, manifold and new procedures are developed continuously. An overview over current ADR procedures, without claiming to be exhaustive, is provided in the following:

- Adjudication
- Arbitration (not in Germany)
- Dispute Boards
- Expert Determination
- Mediation/Moderation
- Mini Trial
- Conciliation
- Appeal to Superior Authority (VOB/B)
- Mock Litigation/Mock Arbitration
- Partnering
- Collaborative Law
- Interest Based Negotiation (Harvard Concept).

Arbitration in Germany is not considered as a conventional ADR procedure. Contrary to other countries, (non-state) tribunals find a decision in the dispute, which usually is legally binding and can be declared as enforceable in state courts (Quapp and Holschemacher 2020).

Characteristics of the most important ADR methods the authors present in Table 1 and under the following sections. Alternative dispute resolution procedures also can be combined, such as in the MedArb procedure. For more information, see Quapp and Holschemacher (2020).

2.1 Adjudication

ADR originally was developed for conflicts in commercial matters, family disputes or neighbor’s conflicts and sometimes do not meet the requirements of construction industry. However, adjudication specifically has been established for construction conflicts. Normally, it is used in the planning or construction phase of construction projects, mainly for legal problems arising in large-scale projects (German Association for Alternative Dispute Resolution in the Construction
and Real Estate Industry 2021). An advantage in comparison with litigation is that parties may freely agree about the procedure of the conflict settlement. That allows faster results and summary decisions. Also, this ADR measure uses the expertise of neutral third persons for dispute resolution.

While Adjudication in Germany, parties assign one or a number of neutral experts to analyze and to settle the dispute. Within a defined period of time, the adjudicator hears the parties, examines facts, and analyzes the conflict from a technical as well as a legal perspective. Decisions in adjudication procedures are temporary legally binding and need to be observed, but later can be reviewed and adjusted by an arbitration tribunal or state court (German Association for Alternative Dispute Resolution in the Construction and Real Estate Industry 2021).

Advantageous is that adjudication can start at an early stage of the conflict, which helps to save financial means and ensures the cash flow of construction companies. As enormous disadvantages of the adjudication can be considered the lacking enforceability of the decision and its non-binding effect for subcontractors.

Table 1. Main characteristics of dispute resolution procedures referring to German Law (Quapp and Holschemacher 2020).

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Litigation</th>
<th>Arbitration</th>
<th>Mediation</th>
<th>MedArb</th>
<th>Adjudication</th>
<th>Conciliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>(-)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
</tr>
<tr>
<td>Binding decision</td>
<td>(+)</td>
<td>(+)</td>
<td>(-)</td>
<td>(-)</td>
<td>(-)</td>
<td>(-)</td>
</tr>
<tr>
<td>Confidential</td>
<td>(-)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
</tr>
<tr>
<td>Neutrality</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
</tr>
<tr>
<td>Structured</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(+)</td>
<td>(-)</td>
</tr>
<tr>
<td>Interest-based</td>
<td>(-)</td>
<td>(-)</td>
<td>(+)</td>
<td>(+/-)</td>
<td>(-)</td>
<td>(+)</td>
</tr>
<tr>
<td>Non-adjudicative*</td>
<td>(-)</td>
<td>(-)</td>
<td>(+)</td>
<td>(+/-)</td>
<td>(-)</td>
<td>(+)</td>
</tr>
</tbody>
</table>

*The third party assumes a facilitative rather than an inquisitive role in the ADR process, and should not investigate the case, interrogate the parties, express opinions, and give judgment or verdict.

2.2 Conciliation

Parties, who prefer a voluntary and confidential procedure without a fixed structure, should decide for conciliation. Details, such as content, type and length of the process can be freely agreed between disputants and conciliator. This ADR measure is characterized as dynamic, consensus-oriented mediatory. An independent expert (conciliator) conducts a target-oriented discussion about the conflict and proposes detailed recommendation for settling the dispute (German Association for Alternative Dispute Resolution in the Construction and Real Estate Industry 2021). Nevertheless, contrary to adjudication, the conciliator is not authorized to take decisions, though the expert has a more active part in difference to mediation.

It is the free decision of the parties to accept the not directly enforceable dispute resolution suggestion. However, if a party is not interested in settling the conflict and/or does not act consensus-oriented, conflict parties should choose another ADR measure.

2.3 Mediation

The German Mediation Act (2015) describes mediation as “a confidential and structured process in which the parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators”. In international literature, mediation is defined as “a consensual process in which a neutral third party, called the
mediator, works with the disputing parties to help them explore, and if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute” (Trinkūnas et al. 2021).

The independent and neutral expert, called mediator, has no decision-making power but accompanies parties through the mediation process, Section 1 of the German Mediation Act (2015). The legal regulations contain requirements to ensure independence and neutrality of the third party, but no detailed rules regarding the process of mediation. Thus, the parties are free to establish a procedure and to define the scope of the mediation process, according to their preferences. The mediator only guides the dispute resolution and does not propose an own solution for the problem. In comparison with the other ADR methods, mediation is the ADR procedure with the strongest autonomy and self-responsibility of the conflict parties.

3 DECISION SUPPORTING FLOW CHART

3.1 Intention for Flow Chart Development

The intention of the authors is to support conflict parties in finding solutions for construction disputes. Primarily, the decision supporting flow chart shall help smaller and mid-size construction companies, normally not having own legal divisions or easy access to legal advice, to decide for or against ADR. Furthermore, it gives information about the specifics of the respective ADR measure, such as if third parties are involved and if they shall have the power to take a final decision in the case. The flow chart supports disputing parties who have not enough time or are not willing to inform themselves about all available dispute resolution procedures in detail. After a first selection, conflict parties may go deeper in the character of the remaining ADR methods, which may help to save time and costs.

It is obvious, that the flow chart is not able to map the decision-making process in its complexity. Therefore, the authors additionally recommend obtaining legal advice if the case is complex or of high value.

3.2 Principles

The development of the decision supporting flow chart based on the following principles. As discussed before, the major argument for a decision against alternative dispute resolution seems to be the lacking enforceability of the results. That is why the first decision disputing parties have to make is about the enforceability of the conflict resolution result. It is necessary to mention that arbitration in Germany is not considered as a conventional ADR procedure (Quapp and Holschemacher 2020). That fact conflict parties must keep in mind if the chart is used in other countries than Germany.

At that stage of development of the flow chart, the authors excluded the cost factor for the specific dispute resolution procedures from the chart. Although considering the high relevance of the cost factor for a decision pro or contra a dispute resolution measure, at this time it was not possible to include a decision option in the flow chart. The reason is that the case significantly determines the costs for the dispute resolution. In Germany, court fees (German Litigation Cost Act 2021) and lawyer fees (German Act on the Remuneration of Lawyers 2021) depends on value of the claim. Costs for ADR are not regulated by German law and vary depending on the dispute’s matter, complexity and the expert conduction the ADR measure. Furthermore, a possible cost reduction should not be the driving force for a decision pro ADR. In Germany, only approximately 50% of the ADR procedures are successful. The parties solved the conflict in 42% of the cases “seldom or never” and in 34% “sometimes” (Masser et al. 2017). That means, in worst case, double costs for dispute settlement, first for ADR and then for litigation may arise.
3.3 Usage of the Flow Chart

Disputing parties can use the flow chart (see Figure 1) in answering the following questions:

(i) Shall the result of the dispute resolution be binding and enforceable?
(ii) Shall a third party be involved?
(iii) If “yes”: Shall the third party have decision power?

Answering the questions with “yes” or “no” will guide the disputing parties to a selection of adequate dispute resolution procedures for settling their conflict. At that stage of flow chart development, the decision for a specific measure within the red colored selection (see Figure 1) conflict parties have to take under consideration of additional information or legal advice.

Figure 1. Decision Supporting Flow Chart under consideration of German Law.

3.4 Deficiencies and Future Development

In its current version, answering the flow chart questions leads to a selection of ADR methods. Although the decision supporting tool helps to eliminate inadequate ADR methods, the decision is not clear for one specific ADR measure. For unexperienced disputing parties or those who have no access to detailed information about the methods, the decision between the selected ADR procedures can be challenging.

Therefore, the authors plan to extent the flow chart and to include more information after first practice experience is available. Additional decision points could be the wish to preserve the business relationship and the character of the ADR process (for example structured, interest-
based, non-adjudicative). Nevertheless, first of all, follow-up research and application in practice has to show if the target group will find the chart helpful.

4 CONCLUSIONS

ADR to settle a construction conflict in Germany is not very popular. One of the major reasons for that is a lack of knowledge about ADR among disputing parties. Providing an easy usable decision supporting tool can help smaller and mid-size construction companies to get a first idea which facts should be considered while deciding for a dispute settling strategy. Of course, it is recommended to consult a legal expert, especially in high value and complex disputes. However, the flow chart may be a help for disputing parties who have not low-threshold access to legal advice.

References


