Available online at www.sciencedirect.com
ScienceDirect
International Journal of Project Management xx (2017) xxx – xxx
International Journal of Project Management
www.elsevier.com/locate/ijproman

An examination of the 'rule of law' and 'justice' implications in Online Dispute Resolution in construction projects

Udechukwu Ojiako [a,b,*], Maxwell Chipulu [c], Alasdair Marshall [c], Terry Williams [b]

[a] College of Engineering, University of Sharjah, UAE
[b] Hull University Business School, University of Hull, UK
[c] Southampton Business School, University of Southampton, UK

Received 16 May 2017; received in revised form 15 August 2017; accepted 11 October 2017
Available online xxxx

Abstract

This paper examines the 'rule of law' and 'justice' implications of using Online Dispute Resolution (ODR) platforms as technology-mediated interfaces for small claim dispute resolution in construction projects. Data is obtained from a questionnaire survey of construction stakeholders, administered using direct non-random sampling of professional contacts with the authors. Data is analysed using SAS 9.4 *(SAS Institute, Cary, NC)* on a Windows 7 platform. Surprisingly, study findings do not suggest any 'rule of law' and 'justice' implications for small claim ODR. Tentatively, this conclusion supports wider use of ODR. The originality of the study is that although there is considerable academic and practitioner interest in various alternative forms of dispute resolution (ADR), both practitioner use and academic study of ODR remain sparse. Thus, this study serves as a foundation for further empirical exploration of ODR as a nascent component of ADR.

Keywords: Projects Construction Dispute resolution

1. Introduction

Following concerted efforts by a number of national courts to transform from being proctors of litigation and adjudication to sponsors of settlement (Roberts, 2009) in recent years, Alternative Dispute Resolution (ADR) has emerged as a popular means to resolve both public and private disputes (Mulcahy, 2013; Storskrubb, 2016). More fully, ADR uses substitute non-litigation based procedures and processes to both resolve (Nelson, 2013) and prevent (Lorenzo-Hervé, 2012) disputes. Correspondingly, Spiess and Felding (2008) regard it as a combined conflict prevention and resolution tool. ADR processes and procedures may be non-state (private) or state sanctioned. When state sanctioned, ADR is institutionalised through court-connected or mandated use (Nabatchi, 2007; Pappas, 2015).

Within the extensive literature on ADR, it is generally accepted that uptake has been particularly strong in the construction industry. Hence we chose this industry, considering it as a form of operations spanning the design, building and maintenance of infrastructure (Parvan et al., 2015; Chileshe et al., 2016) required for economic productivity (Giang and Pheng, 2011), as the context for our study. According to the World Economic Forum (2016) the construction industry contributes approximately 6% of global Gross Domestic Product (GDP). Yet this contribution is hampered by prevalent disputes (Pang and Cheung, 2014). Arcadis (2015) suggests that in 2014, the average value of a global scale construction project dispute was approximately US$53 million, with an average dispute resolution time of 13.2 months. Generally, claim-driven disputes arise in construction projects when differences arise between different stakeholders regarding the legitimacy or value of specific rights to remedy which one party seeks to assert.

Arguably, the prevalence of disputes within an industry of such strategic importance to the global economy justifies

* Corresponding author at: College of Engineering, University of Sharjah, UAE.
E-mail address: gojiako@sharjah.ac.ae (U. Ojiako).

https://doi.org/10.1016/j.ijproman.2017.10.002
0263-7863/00

greater attention than the emerging literature (e.g. Lambeck and Lees, 2011; Nielsen and Powell, 2011; Cheung and Pang, 2012; Tam, 2017) has so far been able to provide, also taking into account studies concerned with ADR more generally (e.g. Zaneldin, 2006; Lee et al., 2016).

Nelson (2013) argues that ADR is one of the most significant developments in the law over the last century, citing as evidence that various countries have provided legislative support and thereby set ADR on a statutory footing. Such legislative support is itself preceded by the Federal Arbitration Act of 1925 in the United States. More recent support has arisen with the Arbitration Act 1996 in the United Kingdom and Articles 203–218, 235–238 and 239–243 of the Civil Procedure Code, 1992 Federal Law No. (11) of the United Arab Emirates. In the European Union, statutory provisions exist within Directive 2013/11/EU1 on Alternative Dispute Resolution for consumer disputes, which was brought into force across the entire EU on the 9th July 2015. The main effect of this directive is to obligate Member States to ensure that certified bodies exist within them, to provide ADR services across all facets of customer disputes.

While a number of countries have provided legislation to support ADR, the reality is that ADR still faces unintended institutional challenges. These challenges relate to ADR's form and usage procedures, its use in dispute prevention, the question of whether ADR is private or imposed by the state, the role of technology and finally, its industry contextualisation. It is within this context of unintended and unforeseen problems that can arise within ADR that this paper seeks to examine the 'rule of law' and 'justice' implications of using Online Dispute Resolution (ODR) platforms in particular, as technology-mediated interfaces for construction project dispute resolution. The paper undertakes this examination by 'explor[*ing*] territory' (Handfield and Melnyk, 1998, p. 324) in the area of 'the rule of law', justice, ADR and ODR. Thus, the research question is presented as:

> *What are the implications from a 'rule of law' and 'justice' perspective in using ODR platforms to adjudicate and resolve project claims disputes in the construction industry?*

In Section 2 we clarify how the context of the study relates to low value claims using ODR on construction projects. Section 3 then reviews literature on ADR, ODR and their relationship to the 'rule of law' and 'justice'. Section 4 presents the research methodology, focusing on the more complex second and third research questions in particular. Section 5 analyses data and findings are then discussed in Section 6. Conclusions are drawn in Section 7.

2. The context

2.1. Low-value claims in construction projects

A significant proportion of disputes in construction operations are low-value, with home construction and renovation problems representing a major component of these claims (Pilarski, 2013). Zaneldin (2006) found that while the value of construction disputes can range up to US$21,674,650, the majority are valued below US$500,000. Nonetheless, some studies (e.g. Ison, 1972; Kosmin, 1975) maintain that low-value claims are sufficiently numerous as to be more costly for industry overall than high-value claims. Such arguments of course make assumptions about what constitutes a low-valued claim, and such assumptions are known to vary between legal jurisdictions. In England and Wales,[1] small and low-valued claims are determined as property and monetary claims of approximate value below US$32,350. In the UAE Federal court system, disputes with claimed values under approximately US$273000 are dealt with by the Minor Circuit. On the other hand, in the DIFC,[2] a 'Freezone' operating within the UAE, small claims are determined as not exceeding approximately US$136,000. The European Union (EU)[3] designates small claims as disputes valued similarly, up to approximately US$217470.

General industry and legislative interest in small claims has led to a special means of dealing with them being incorporated within the legislative frameworks of countries including the United Kingdom,[4] the United Arab Emirates (specifically, the Emirate of Dubai),[5] South Africa[6] and Zimbabwe.[7] These legislative frameworks have been scrutinised in two particular two areas. The first of these relates to the key 'rule of law' principle, that *"…means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve"* (The Lord Bingham, 2007, p. 77). Hence, this principle relates to the legislative mechanism's cost-effectiveness, such that the cost of adjudication and resolution of a small and low-valued claim should not normally exceed the value of those claims. On this cost-effectiveness issue, Woolf (1996) observes that the average cost of settling small and low-valued claims and disputes tends to be between 40% and 95% of their value. The second focus for scrutiny of legislative frameworks focused on small and of low-value claims, as highlighted by Vestal (1965) and Sarat (1976), relates to their ability to provide legal certainty; which is to say, final closure without fear of further litigation. Taking stock of both angles of scrutiny, we posit that ADR in the form of ODR may enable small and low-valued disputes to be resolved with finality and without prohibitive cost or inordinate delay.

2.2. Alternative Dispute Resolution (ADR) usage

While ADR has become popular in dispute prevention and resolution within construction projects (Harmon, 2003; Lee et al., 2016), a number of factors make its use particularly challenging. These include its form and usage procedures, its use in dispute prevention, the question of whether ADR is private or imposed by the state, the role of technology and finally, its industry contextualisation.

[1] Department of Justice, 2015; Civil Justice Council, 2015; p. 4; Civil Procedure Rules, 2015 (Section 26:6).
[2] Under DIFC Law No. 10 of 2004 (Part 53) (the DIFC Court Law).
[3] Under Council Regulation 861/2007.
[4] Department of Justice, 2015; Civil Justice Council, 2015; p. 4; Civil Procedure Rules, 2015 - Section 26:6.
[5] DIFC Law No. 10 of 2004, Part 53.
[6] Small Claims Court Act 61 of 1984.
[7] Small Claims Courts Act 7[12].

Please cite this article as: U. Ojiako, et al., 2017. An examination of the 'rule of law' and 'justice' implications in Online Dispute Resolution in construction projects, Int. J. Proj. Manag. https://doi.org/10.1016/j.ijproman.2017.10.002