Two men glare at each other. Long-haired and bearded, their garments oily from use, they hold gnarled clubs loosely at their sides. Emotions have been building since the rainy season started and the river overflowed. Who will be forced to brave the swollen river to hunt, and who will hunt near their village? Today it will be decided. With war cries, the disputants raise their clubs and begin to circle.

Suddenly an old man appears, shouting "Behold, the Deciding Stone!" The two men stop in midstride. The old man says, "Ush, the smooth side is yours; Ore, the rough side is yours." The pair hesitate, looking angrily at each other and at the old man, and finally they nod in agreement.

With all his might, the old man throws the stone into the air. Their heads turn to the sky as they watch the stone turn over and over.

This imaged story of prehistoric times illustrates that while humans have always had the tendency to solve their differences by fighting, they also have recognized the benefits of settling matters peacefully by flipping a coin or some other peaceful way. This search for alternatives to violence is a precursor to today's alternative dispute resolution (ADR).[1]

[1] This fictional story is from A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement by Jerome T. Barrett. (2004 Jossey-Bass)

A NEW BUSINESS MODEL TO RESOLVE LEGAL DISPUTES IN A NEW WORLD

In an excellent article by three Attorneys of Dechert LLP, a leading international law firm with their main office in the United States of America, they wrote how Covid-19 has caused a widespread evaluation of how existing therapies could assist in treating this new pathogen. They examine how dispute boards, a dispute resolution mechanism historically found in construction contracts, can assist with disputes relating to Covid-19. In their excellent article they explain what dispute boards are, explore how their characteristics can assist with Covid-19 related disputes and address how to establish a dispute board, if a contract does not already provide for one.

Firstly, then what are dispute boards? Dispute boards are a mechanism for resolving disputes without going to Court or to an arbitral tribunal. Typically, in this form of resolution each side presents its case, first in writing and then, if required, orally at a hearing before the decision maker – the dispute board decides the case. Dispute boards can either be binding on the parties because the parties are members of an industry body or grouping and have agreed to such dispute boards in the constitution governing such industry body or grouping or *ad hoc* meaning that they are set up to settle a specific dispute once it has arisen. In the case of a standing committee typically the management body of the committee would choose the adjudicator and in an *ad hoc* scenario the parties themselves would choose the adjudicator. Dispute boards are commonly used as an initial or intermediate step in dispute resolution mechanisms. If a dispute board fails to resolve a dispute, the matter can then proceed to either arbitration or to Court.

The Dechert Attorneys pose the question why consider dispute boards now? Their answer, with which I associate myself, is that Covid-19 is seriously disrupting

economic activity globally. As Asif Saad, a strategy consultant, wrote “business owners longing for things to return quickly to what they were in pre-Covid-19 days may be on the wrong side of history.” Dispute boards are another available tool to assist in resolving disputes stemming from those disruptions. A very important point made is that dispute boards may be of particular interest where the effects of Covid-19, and the measures to combat it, are causing differences of opinion in longer term relationships. Indeed, it follows that dispute boards’ evolution as a means of resolving disputes results in it being well suited to scenarios in which it is vital to both ensure the parties’ ongoing and future cooperation and nevertheless settle disputes over discreet issues. Given the necessity of entities to resolve disputes expeditiously without exorbitant legal costs, this relatively short and flexible procedure also means that they could be used effectively to resolve pressing issues during the ongoing disruption caused by Covid-19 and immediately afterwards as hopefully the world returns to normal. The question of course is what is normal.

Dispute boards have several distinct features, including limiting the time to be taken in resolving the matter, the procedures and evidential rules are flexible and they allow for relatively detailed briefs. They are also informal and the parties can agree to them providing a definitive result. All of these features contribute to making dispute boards an effective tool to promptly resolve issues both as they arise by the ongoing disruption caused by Covid-19 and the months in which activities are reinitiated and the world hopefully starts to recover from the present disruption.

Finally, in their article, the attorneys pose a very important question, namely, how to provide for a dispute board if your contract does not already do so, and, as I have added, if the association of which you are a member does not provide for such a procedure in their constitution which binds the parties. In such a case the parties will need to consent but it is anticipated that in the present uncertain times counterparties may be open to discussing new means of efficiently managing issues in their relationships mindful of the fact that money spent on legal costs can be better spent on employees and other stakeholders of the entity.

If an agreement is reached to use a dispute board, one of the standard clauses published by several organisations can be adopted or one specific for the dispute can be prepared. It is very important to point out that the attorneys in conclusion state that as dispute boards normally form part of a tiered dispute resolution mechanism (often providing for arbitration where a party will not accept the dispute board's decision) it is important that contractual amendments are properly integrated with the rest of the dispute resolution mechanism and contract as a whole.

After reading the article, on which this one is based, one of the issues which I thought important to share with readers of my article is what happens if an adjudicator makes an honest mistake. The answer is to be found in *Telematrix (Pty) Limited v Advertising Standards Authority of SA*, where South Africa's Supreme Court of Appeal held that in different situations Courts have found that public policy considerations require that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions. The overriding consideration has always been that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that must impact on the independence of the adjudicator. Decisions made in bad faith are, however, unlawful and can give rise to damages claims. An incorrect decision which was arrived at negligently during the adjudicative process which purports to serve the public interest cannot on any basis be regarded as being unlawful. In that case the Court held that the process in that case purported to serve the public good and incorrect decisions, some based on wrong legal concepts, and others involving the erroneous exercise of a discretion or value judgment, some because of mistaken factual findings, are to be expected and have to be accepted by those affected by them, directly or indirectly.

It appears that in South Africa we are already moving in this direction. The Property Industry Group (PI Group), an alliance of South Africa's biggest retail landlords and Johannesburg Stock Exchange-listed Real Estate Investment Trusts (REITS), has called on the South African Government to come in as a mediator to help resolve the impasse around major retailers paying some form of rent during the Covid-19 lockdown.

Forbes wrote in an interesting article that Covid-19 has transformed our cities, our jobs and our economy. It's also fundamentally transforming businesses – from the urgent need to address operational and financial challenges to turning broadly pronounced statements of stakeholder purpose to precise examples about how companies are treating their stakeholders in a crisis. In a stakeholder centric country such as South Africa, it is incumbent upon the governing body of all entities to take into account the interests of all stakeholders. That must include finding ways to avoid lengthy and costly dispute resolutions and attempt to substitute same with a procedure which hopefully will result in an amicable and speedily obtained resolution where, in many instances, the parties can continue afterwards to interact with each other, thus not wasting large sums of money which are often involved in negotiating contracts and other business relationships. King IV, South Africa's Corporate Governance Code, makes it clear that the governing body of all entities must always attempt to resolve a dispute by methods alternative to costly and expensive litigation.

As Tony Robbin, one of America's top life and business strategists, said "identify your problems but give your power and energy to solutions."

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May 2020