



Settling Environmental Disputes using Alternative Dispute Resolution strategies and the impact on tourism activity in South Africa

Ms. M. van der Bank
Faculty of Human Sciences
Vaal University of Technology, South Africa
Tel: 016 950 7534
E-mail: marjonevdb@vut.ac.za

and

Prof. C.M. van der Bank*
Vaal University of Technology, South Africa
Tel: 016 950 9240
E-mail: riana@vut.ac.za

Corresponding author*

Abstract

The field of environmental law is an area of competing interests in which disputes are bound to occur. Environmental issues cannot be perceived as separate from other resources. This article presents a detailed and critical review of Alternative Dispute Resolution as a non-judicial mechanism for the settlement of environmental disputes because they are cross-sectoral- covering such issues as tourism, agricultural, fishing, and urbanisation. The article therefore, is concerned largely with the wider environmental issues of economic impact in general, and tourism in particular, and their implications for sustainability and conservation of exhaustible and renewable productive and energy resources. Ordinarily, disputes whether environmental or otherwise are resolved through court processes, but due to delays, costs, publicity and technicality associated with Alternative Dispute Resolution (ADR) mechanisms evolved. An ideal environmental dispute resolution mechanism should not only be accessible, affordable and effective but must also be adaptable to various environmental disputes in a given situation. Alternative Dispute Resolution is a more effective dispute resolution. Adversarial Litigation is the only means, apart from agreement, of resolving disputes. Important questions are: Are alternative dispute resolution mechanisms appropriate for use in resolving environmental disputes? If not so, what changes or improvements should be made? The article also considers the economic concept of the failure of the market and then the consequences for tourism and the natural environment.

Keywords: alternative dispute resolution tourism, environmental disputes, non-judicial, settlement.

Introduction and Problem Statement

Tourism is wholly dependent on the natural environment. Natural resources for example, the beaches, seas, lakes and rivers as well as manmade resources such as heritage, parks, historically significant buildings, sites, and monuments, constitute the primary source of tourism. Any degrading of such primary sources is likely to lead to a decline in tourism since these are what tourists travel to see and experience.

During the past ten years, the South African tourism industry has been recording rapid and broad based economic growth. Tourism development has been based on the sustainable exploitation of resources. With the development of resorts, or even habitation development, major environmental problems are likely to arise. The field of environmental law is an area of competing interests in which disputes are bound to occur. This article presents a detailed and critical review of Alternative Dispute Resolution as a non-judicial mechanism for the settlement of environmental disputes because they are cross-sectoral- covering such issues as tourism,



agricultural, fishing, and urbanisation. Ordinarily, disputes whether environmental or otherwise are resolved through court processes, but due to delays, higher costs, publicity and technicality associated with Alternative Dispute Resolution (ADR) mechanisms evolved. An ideal environmental dispute resolution mechanism should not only be accessible, affordable and effective, but must also be readily adaptable to various environmental disputes in a given situation. Undoubtedly, there are methods of resolving disputes which are less expensive and more expeditious than formal litigation. Alternative Dispute Resolution is a more effective dispute resolution mechanism. Adversarial litigation is the only means, apart from agreement, of resolving disputes. The aim of this paper is to investigate whether or not South Africa's economic growth process is environmentally sustainable and tourism friendly. Specifically, it seeks to examine the policy and governance interventions which are in place, or not in place, and which are required to secure environmentally sound outcomes, specifically associates with tourism.

Important questions are: How can litigation assist in facilitating environmental dispute resolutions mechanisms especially with the relaxation of the law of *locus standi*. Are alternative dispute resolution mechanisms appropriate for use in resolving environmental disputes? If not, what changes or improvements should be made?

Key environmental issues affecting tourism

The domestic tourism sector is growing in South Africa and the primary sources as well as secondary sources such as accommodation, transport facilities, shops, restaurants and other facilities which entail physical changes and expansion in general economic activities caused a change in the environment. Like other economic activities, tourism consumes resources. Tourism has a marked impact on the demand for exhaustible and renewable resources. Extended tourism expansion or concentration in certain destinations has neglected the long term dependence of the industry on the environment and led to an over exploitation of the natural resource base and the generation of non-priced effects (Cater and Goodall, 1992).

The environmental effects, widely defined, include cultural and social elements, and are probably the biggest problem facing tourism. Excess numbers also increases the demand of secondary resources, water, energy which might be scarce at certain destinations and has a huge influence on the environment. Loss of fauna and flora occurs due to tourism expansion. The attainment of sustainable tourism has been seen as an urgent need. It would imply a carefully factored balance between commercialization, resource conservation, waste disposal management and pollution control.

Environmental impacts of tourism are most visible in tourist destinations. The output of aircraft, ferries, buses, cars equipment and promotional material consumes productive and energy resources and generates waste in origin areas, while travel generates pollution in the atmosphere and adversely effects the environment of areas traversed by tourists and others. These problems caused disputes that could be solved more effectively by ADR.

Sustainable tourism

Sustainability should be the cornerstone of the development of tourism, since the natural environment constitutes most of its primary resource base. Sustainable development is required for both the tourist industry and environmental protection enterprise. The unity of ecology and the dynamic nature of tourism put forward higher requirements for ecotourism legislation. Only by adhering to the basic principle of sustainable development, can we improve the natural and human environments while making scientific and effective use of tourism resources, minimizing the negative impacts of the tourism industry on the environment as far as possible, and maintaining the natural and biological diversity through proactive human activities, thus ensuring that the resources and environment meet the needs of contemporary people without jeopardising the needs of future generations as stated in the Brundtland Report 'Our Common Future', from the United Nations World Commission on



Environment and Development (WCED) which was published in 1987. Its targets were multilateralism and a focus on the interdependence of nations in the search for a sustainable development path.

The Brundtland Commission was mandated to re-examine the serious issues of environment and development and to formulate innovative, concrete, and realistic action proposals to deal with environmental challenges. It also sought to strengthen international cooperation on the environment and development thereof, and to assess and propose new forms of cooperation that can break out of existing patterns which may influence policies and events in the direction of needed change. Critically, it sought to raise the level of understanding and commitment to action on the part of individuals, voluntary organizations, businesses, institutes, and governments” (WCED, 1987: 347). The Commission focused its attention in the areas of population, food security, the loss of species and genetic resources, energy aspects, industrial problems, and human settlements - realizing that all of these are connected and cannot be treated in isolation one from another. All of these impact on tourism as well.

Moreover, with growing awareness of both tourists and residents, firms and governments are under increased pressure to take concrete action to attain sustainability. Firms have also taken the concern of tourists and residents alike that tourism should be environmentally responsible. In order to achieve such effects firms need to comply with environmental regulations and standards. With the development of a resort, or even by habitation, major environmental problems arise. This has implications for management, and therefore management measures must be taken in consideration.

In this context aiming to reach sustainability means an integrated holistic effort in which all participants are present: hosts, government, business entrepreneurs, natural resources and environment in a related equal importance in which all human groups think, decide, compromise, act assume related responsibilities. A quantitative approach will be used in this paper.

Meaning of ADR

ADR is an acronym for Alternative Dispute Resolution. In brief, ADR denotes all forms of dispute resolution other than litigation or adjudication. ADR provides an opportunity to resolve disputes through the use of a process best suited to particular disputes and conflicts. Therefore it is a broad range of mechanisms and processes designed to supplement the traditional courts litigation by providing more effective and faster resolution process. It is a procedure for the settlement of disputes by means other than confrontational and relationship destroying litigation. Amicable settlement of disputes is preferred to litigation. The ADR processes are not only less formal but also less expensive and more expeditious than the court processes. ADR involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute.

The goals of ADR may be described as follows:

- To relieve court congestion;
- To facilitate access to justice;
- To prevent undue cost and delay; and
- To provide more effective dispute resolution.

The essence of the study and practice of ADR is to provide mechanisms and processes to resolve disputes more effectively than automatic recourse to litigation. The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the objectives of the courts. The court added that parties should bear



in mind the overriding objective and purpose of ADR and should be careful before rejecting it especially when recommended by the court (Macfarlane; 1997). There are methods of resolving disputes, which are less expensive and more expeditious than *forma* litigation.

Most environmental disputes are characterised by issues involving data interpretation and scientific uncertainty to which many stakeholders have different but overlapping interests (Bingham and Haygood, 2008). Crowfoot and Wondolleck (1990) point out three characteristics of any given environmental dispute resolution; (i) voluntary participation by the parties to the dispute; (ii) direct- face to face group interaction among the representatives of the parties to the dispute; and (iii) mutual agreement or consensus decisions by the parties on the processes to be used and any settlement that may emerge.

One of the most significant effects that dispute resolution practice has had in South Africa over the last decade is to challenge the view that adversarial litigation is the only means, apart from agreement, of resolving disputes.

Different forms of alternative dispute resolution

- Mediation is a consensual process in which disputing parties engaged the assistance of an impartial third-party mediator, who helps them to try to arrive at an agreed-on resolution of the dispute. Mediation is a type of ADR methods of which purpose is to facilitate negotiations between the disputants so as to enable them to resolve their disputes. It is a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties to reach amicable settlement of their disputes. It requires the direct participation of the third party mainly to encourage the disputants resolve their differences themselves. Legal rules may be relevant to mediation but not mandatory. It is just one of the factors to be considered in the process but more importance is accorded to the subsisting relationship and interest of the parties. That is why mediation is suitably adopted in the resolution of conflicts of a sensitive and confidential nature where the disputants would wish to settle them in private rather than in public as required in litigation.
- Arbitration is an adjudicative process. Arbitration is one of the most established alternatives to litigation although some Alternative Dispute Resolution literature does not recognised arbitration as an alternative dispute resolution because arbitration is more akin to litigation. Parties who have failed to negotiate or mediate may refer their dispute to arbitration. The impartial arbitrator's role is to make a decision for the parties, which decision is intended to be final, binding and enforceable. Some ADR processes are similar to adjudication, but are not binding; the non-binding nature of such processes means they are not arbitration.
- Negotiation is the most common and familiar form of Alternative Dispute Resolution mechanism. It is a dialogue or a consensual discussion with a view to reaching a compromise without the aid of third parties. Negotiation has become as indispensable part of our daily lives as it happens in almost every transaction between two or more persons. It is a means to an end and not an end in itself, the end being a mutually beneficial dispute settlement. Therefore, unlike in arbitration and mediation, the parties in negotiation are in full control of both the process and the outcome either in persons or by proxy (Bryan, 2017). Where decisions are reached through this process, the parties are bound since they are architects of both the process and the solution.
- Facilitation is a collaborative process in which a neutral third party assists a group of stakeholders in constructively discussing the issues of controversy (O'Leary and Bingham, 2003). In practice the difference between facilitation and mediation is not always clear and these terms are sometimes used interchangeably (O'Leary and Bingham, 2003). The goal of facilitation is to improve communication and increase understanding but not to achieve an agreement.
- Negotiated Rule-making also known as regulatory negotiation or reg-neg is a process in which regulatory agencies design environmental regulations by first negotiating with



interested stakeholders. This form of administrative rulemaking has its origin in the United States (Lyster, 1998). Negotiated rulemaking offers a formal public consultation process in advance of a formal notice and comment process before the agency has formulated a full proposal (Tripp and Alley, 2003).

International Best Practices to Environmental Disputes

A dispute resolution is a method by which a dispute may be resolved. However, the phrase “dispute resolution” is frequently being used to refer to disputes resolution methods which is alternative to litigation. Environmental dispute resolution is often understood as the application of alternative dispute resolution mechanisms to environmental disputes. In this sense, environmental dispute resolution excludes litigation as a mechanism of environmental dispute resolution (Lyster, 1993).

Moore describes environmental dispute resolution as “approaches where people meet face to face and use some form of consensus building or negotiation to seek a mutually acceptable resolution of disputed issues” (Moore, 1996). O’ Leary and Bingham describes that “environmental dispute resolution or environmental conflict resolution refer to various alternatives to dispute resolution techniques as applied to environmental conflicts” (O’Leary and Bingham, 2003). Bingham and Haygood (Bingham and Haygood, 1986) correctly pointed out that alternative environmental dispute resolution processes are supplementary tools to litigation because they may (or may not) be more effective or efficient in particular circumstances. Disputes over environmental issues are so varied that in some cases no new dispute resolution process is likely to be successful in all situations. Depending on the circumstances, the parties may prefer to litigate, lobby for legislative change, or appeal to an administrative agency for favourable action, rather than negotiate a voluntary resolution of the issues. The applicable laws and regulations may also differ from one country to another therefore complicated strategic decisions should be made to take into consideration the best interest by the different approaches.

Amy observes that the characterisation of environmental conflicts as misunderstandings arising from miscommunication, misinformation or scientific disagreements is wrong (Amy, 1987). There are always conflict between environment and economy and the misunderstandings are only a contributory factor.

Environmental disputes arise from different groups within the society such as industry, tourism environment, government, environmentalists, community groups and in some cases the public at large. Political democracy provides a venue for expression and protection of these differences and promotes decision-making when differences need to be solved (Crowfoot and Wondolleck, 1990). Therefore, in order for environmental dispute resolution mechanisms to be effective and efficient they must be employed at the stage of policy-making and rule-making. An appropriate environmental dispute resolution is seen as the one that split the difference between equally valid interests by achieving a compromise in which each side gets some of what it wants (Amy, 1987). By treating disputes in terms of conflicting interest, rather than conflicting values, the mediation process, for example, suppresses the most fundamental issues at stake (Ryan, 1997).

The Best Practice is that environmental dispute resolution through courts and administrative bodies may still be appropriate depending on the nature of an environmental dispute in question.

Environmental Dispute resolution mechanisms must take a multi-faceted approach. The nature of an environmental dispute will necessarily determine the best practice of environmental dispute resolution. It is difficult to demand that consensus must be achieved in all environmental disputes. Resorting to environmental litigation is necessarily in some instances.



Environment Dispute Resolution in South Africa

The Constitution of the Republic of South Africa, 1996, provides for the constitutional and legislative foundation for environmental protection. Section 24(a) recognises the rights of every person to an environment that is not harmful to their health or well-being. Section 24 (b) recognises the right of every one to have the environment protected, for the benefit of present and future generations, through reasonable legislative measures and other measures that prevent *inter alia*: (i) pollution and ecological degradation; (ii) promote conservation (iii) secure ecologically sustainable development and use of natural resource while promoting justifiable economic and social development (Constitution of the Republic of South Africa, 1996).

Life on earth is remarkably complex and diverse, but also fragile and facing enormous pressures. The many linkages between protection of human rights and protection of the environment have long been recognized. The 1972 United Nations Conference on the Human Environment declared that "man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself." The mechanisms of environmental dispute resolution in South Africa will be examined and evaluated in this paragraph.

The Republic of South Africa consists of national, provincial and local spheres of government and the resolution of intergovernmental disputes are governed by the Constitution. It is beyond the scope of this paper to discuss those conflicts. Suffice to mention, that the Supreme Court emphasized in the *Western Cape Minister of Education v Governing Body of Mikro Primary School* that there is a constitutional duty on organs of state to foster cooperative government, and to avoid instituting legal proceedings against one another. Those organs have a duty to resolve amongst them at a political level where possible rather than through adversarial litigation. Section 2 (4) (m) provides that actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures. Section 7 (2) (f) of the National Environment Management Act requires that conflicts regarding the functions of national departments and spheres of governments be dealt with by the Committee for Environmental Co-operation. Conflict among national departments within the same sphere and between different spheres of government, private persons may be resolved by conciliation, mediation, arbitration and litigation.

Environmental law is rapidly changing on a global and national scale, perhaps on account of the abuse of the environment which sadly happens with impunity and especially considering the injustices of natural resource exploitation. ADR today is considered a more potent tool in environmental cases than the confrontational and adversarial-based system of adjudication. In South Africa, for instance, the South African Environmental Agency published a policy in 1978 to use ADR methods in the resolution of disputes arising from the enforcement of environmental laws (Tropill, 1991). The agency funded the training of some of its officials in the acquisition of ADR skills to enhance the settlement of disputes between the oil companies and the victims of pollution.

The Minister for Environmental Affairs and Tourism is required to create a panel or panels of persons from which appointment of facilitators and arbitrators may be made or contracts entered into (National Environmental Act, 1998). Pending the establishment of this panel or panels, the Minister for Environmental Affairs and Tourism may adopt the panel established in terms of section 31 (1) of the Land Reform (Labour Tenants) Act, 1996. The Director-General for Environmental Affairs and Tourism may occasionally appoint persons or organisations with the relevant knowledge or expertise to provide conciliation and mediation process.

The Director-General of Environmental Affairs and Tourism is required to keep a record and to prepare an annual report on environmental conflict management for submission to the Committee for Environmental Coordination and the National Environmental Advisory Forum



for the purpose of evaluating compliance and conflict management measures in respect of environmental laws (Section 22 (2)(a) of the NEMA Act).

NEMA tries to provide an Alternative Environmental Dispute Resolution mechanism which meets the basic requirements of a successful environmental dispute resolution mechanism. A decision relating to a reference of a difference or disagreement to conciliation, appointment of a conciliator, facilitator or an investigator must take into considerations the following factors:

Speed – expeditious determination of cases remains one of the attributes of ADR which is unlikely to be available in the courtroom. Litigation is extremely time consuming.

The desirability of resolving differences cheaply. No doubt, ADR mechanism is less expensive than litigation. This is an invaluable advantage especially today that the cost of litigation in South Africa has soared to the extent that many litigants can no longer pursue their cases.

The desirability of giving indigent persons access to conflict resolution measures in the interest of the protection of environment.

Improving the quality of decision-making by giving interested and affected persons the opportunity to bring relevant information to the decision-making process.

Any representations made by persons interested in the matter, and

Other relevant considerations relating to the public interest.

In order to use Alternative Environmental Dispute Resolution mechanisms free from suspicion and corruption, it is necessary to ensure that the agencies using Environmental Alternative Dispute Resolution mechanisms allow public involvement through open meetings to discuss the issues, public records of the proceedings in the meetings, and public opportunity to comment on ADR decisions (Strukenborg, 1994). There is also a fear in cases of environmental disputes between private parties and national departments and it may be a factor discouraging alternative environmental dispute resolution. Environmental disputes either between private persons themselves or within national departments, NEMA creates a more effective legal mechanism for enforcement by private persons. Section 32(1) of NEMA also states that a person or group of persons may seek appropriate relief in the interest of protection of the environment, apart from other interest that may be sought before the court. In *Hichange Investments (Pty) Ltd v Cape Produce* (2004 2) SA 393 an applicant successfully obtained an order directing the Director-General of Environmental Affairs and Tourism to order the respondent, to conduct an environmental impact assessment of the gases emitted from a semi-tanning owned by the respondent.

Mandatory versus voluntary mediation

Mandatory mediation consists of court-mandated mediation and statutory mediation. This mediation compels parties to come together in an attempts to reach an agreement in a non-hostile, non-adversarial manner. Parties are not forced to reach an agreement through the mediation process, but are merely compelled to attend a mediation session and to attempt to reach a mutual agreement.

Empirical data from Europe provide supportive evidence that mandatory mediation is much more effective than a purely voluntary process (Casals, 2005). A contrary view could also be expressed that in some instances, mediation is not only inappropriate but actually has no chance of resulting in a settlement.

The question of whether it would be constitutional to make attendance at an initial mediation session mandatory is being debated. Parties cannot be forced to mediate, because mediation should be voluntary due to its very nature. The Constitution provides the opposite view that the interests of the parties are paramount, and hence forced attendance would not be



unconstitutional. If a party does not attend mediation or disrupts the mediation process, it will be noted.

It is of interest that courts in the United Kingdom impose sanctions on parties who unreasonably refuse or fail to mediate. In the United States of America, mediation is more firmly embedded in the litigation process, with courts applying various degrees of coercion to encourage parties to mediate (Joubert, 2014). In Canada, lawyers are required to certify that they have complied with their duties to discuss dispute resolution options with their clients prior to starting a proceeding in court. This policy promotes the informed use of out-of-court processes to resolve disputes.

Arbitration as opposed to Litigation

Avoidance of adversarial proceedings is said to favour the idea of both mediation and arbitration. Arbitration is not necessarily consensual or non-adversarial by the time parties are involved in it. Arbitration can be every bit as bitter and contentious as litigation. In the case of disputes it is not always necessary to go through litigation as an alternative to this according to Chapter 4 of NEMA is mediation or arbitration. Preference is given to mediation because mediation allows parties to focus on their needs and interests. Very often these overlap or are compatible and the parties can agree on a solution to the problem.

A frequently cited advantage of arbitration is that it can significantly speed up the process, as there are no long waiting periods for a court date (De Jong, 2014). Closely linked to the advantages of flexibility and an expedited process is the claim that arbitration is less costly than litigation. Parties can streamline the process and avoid the delays that may occur in the formal court process. The fact that arbitration is a private and confidential process is also regarded as a plus. Arbitration is a private and flexible procedure which is intended to avoid the formalities, delays, expense, and irritation of routine litigation.

It is an advantage that the parties themselves, guided by their legal representatives (if they are represented), can select the person who they wish to arbitrate their disputes - someone with experience and expertise in environmental matters, and especially experience and expertise in the particular controversy or conflict being presented. The parties can appoint one and the same arbitrator to deal with the dispute from start to finish. This will result in continuity and an informed and holistic approach by the arbitrator to all the different issues that might arise from a dispute (De Jong, 2014).

The public interest also overloaded the court system and that results pressure on courts to deal with cases expeditiously and make it difficult for judges to examine their cases thoroughly. It may therefore be in the public interest to use arbitration to help to relieve pressure on our overloaded court system (Thorpe, 1994).

Green Economy at Municipal Level

The 'nuts and bolts' of the green economy drive, primarily exists at local level. Unless municipalities are proactive, entrepreneurs can only use the unsolicited bid sections of the municipal regulations to gain access to existing infrastructure for the roll out of municipal projects (Section 120 (7), Municipal Finance Management Act). The policy and regulatory frameworks linked to the intergovernmental relations system in South Africa is both highly complex and fragmented. To achieve the outcomes of the green economy, as set out in national policy documents, there is a need to innovate, revise and rewrite legislation and regulations, so that they become enablers for, rather than obstacles to a green development (Dormady, 2012).

Implementation challenges will continue, thereby hindering the execution policy. We require organic learning policy networks to identify the challenges and cooperatively develop interdepartmental and intergovernmental solution (Paquet and Wilson, 2011). A capable state



will help, but it is the degree of innovation, initiative and networking that will allow interdepartmental teams to space and explore and develop enabling and regulatory complaint solution (Sorensen and Torfling, 2011).

Green economy has enormous potential at the municipal level. Realising the potential of the green economy requires innovation and regulatory review adding another dimension to national, provincial and municipal coordination.

Reduced electricity consumption through energy efficiency and localised energy generation threaten the South African revenue base. Until all of these challenges are addresses through clear policy guidelines, the renewable energy sector will remain undeveloped at local level, even though it has vast employment creation and local manufacturing potential.

Tourism impacts

The impacts that occur in any tourism activity can be divided into three categories, economic, social and environmental (Saayman, 2007).The continued growth in the tourism industry makes it difficult for park management and the environment disputes to strike a balance between the environment and quality experience for tourists. The fact that South Africa's biodiversity is ranked third in the world, supports the importance and existence of South African National Parks to protect these valuable and pristine natural areas (Retief, 2006).

To sustain tourism it is imperative for the management to identify environmental impacts caused by tourism that will reflect negatively on the experience of tourist on the environment. Appropriate strategies must be developed in order to minimise impacts that negatively affect the tourist experience, for example, to apply ADR. Therefore, environmental impacts that occur for example, in national parks due to tourism, have the ability to adversely influence the experience of tourists. Environmental impacts such as waste, pollution, overcrowding, climate change and litter, to name but a few, really do affect the experience of tourists in natural settings. The environmental disputes could be solved faster and more cost effective by ADR. Tourists are more environmentally sensitive and this thus provides them with the ability to identify key issues such as environmental impacts.

South Africa must make greater use of renewable energy sources. The opportunities from energy generated by wind, wave and solar energy should be explored for implementation by South African Parks for example. They must determine a certain percentage of energy used at each park for example, that must be based on renewable resource use. The carbon footprint of tourists to South Africa ought to be more carefully studied. This will hopefully provide information on environmental impacts from another point of view.

Conclusion

We can simply reiterate that environmental issues have become pivotal in the economics of tourism. The more intensive the insistence on the subjects is, such as sustainable development, the rational us of resources, and mitigation of negative results of expansion of tourism, the more widespread will the desire for sound management of tourist resources be. A sustained active role of firms and governments is considered vital for the future of tourism development.

We have discovered in this work, that disputes which are inherent in business relationship are today resolved more by ADR processes than by litigation. Indeed, Alternative Dispute Resolution (ADR) processes have been fully developed in other jurisdictions as a means of resolving environmental disputes. ADR has been effectively used to enhance public confidence in environmental decisions, facilitate technical inquiries and information exchanges, and to identify creative solutions to daunting problems. As earlier stated, ADR comprises, *inter alia*, arbitration, conciliation, mediation, negotiation, including the court-connected ADR mechanism. This work has established the criteria for determining which particular process fits a dispute.



We have weighed the pros and cons of these mechanisms *vis-à-vis* the judiciary. No doubt, the merits of the ADR outweigh the judicial processes, especially in view of the latter's adversarial and confrontational nature. We have no wish to create the impression that ADR does not have its shortcomings. It certainly does. For instance, engaging an outside mediator who is acceptable to both parties may not only be expensive but also take a little more time to put in place. Again, it is not all kinds of cases that can be settled through the ADR mechanism.

Considering its increasing popularity world over, it is imperative that we strive to have a background knowledge of arbitration theory and practice despite our professions, such as engineers, accountants, doctors, surveyors, among others, so that the practices of arbitration should not be an exclusive preserve of the practitioners in the field. Even the judges who handle environmental cases should have basic knowledge of arbitration. Fortunately, many universities especially in Europe have included in their programmes comprehensive arbitration curriculum with in-depth study of arbitration theory and exposure to practical aspects such as how to draft arbitral awards.

In some cases, however, one party decides to settle a dispute voluntarily by admitting the allegations made by the other party, time and money will definitely be served. Perhaps the greatest challenge now is to determine an appropriate environmental dispute resolution for a particular environmental dispute. Inappropriate tourism development, coupled with the rise in the number of tourists, will lead to the destruction of the natural environment if not managed responsibly for example through ADR. It is therefore important to develop alternative dispute tools to minimise the impacts of tourism on the environment. Furthermore, this will ensure the planning of a sustainable tourism industry as the environment will be preserved.

In South Africa, environmental dispute resolution processes provide for citizen participation but the process is still State-centred. The current mechanism for alternative environmental dispute resolution restricts the parties to environmental disputes to choose a third party because the panel is statutorily determined by the Minister, a MEC or Municipal Council. The environmental resolution process in South Africa is much closer to international best practices.

Proactive and early intervention are also recommended as the best way of dealing with differences, disagreements and disputes. In contrast, ADR promotes the settlement of disputes in a manner that avoids many of the transactional costs associated with litigation. In fact, the monetary savings achieved through ADR processes and the results have been acknowledged in a lot of jurisdictions. In some cases, the cost may be borne either by the government, or the multinational companies who are desirous of sustaining their relationship with the host communities, and not the poor victims of pollution as is the case in litigation.

References

- Amy, D.J. (1987). *The Politics of Environmental Mediation*, New York: Columbia University Press: 165-166.
- Bingham, G. & Haygood, L.V. (1986). Environmental Dispute Resolution: The first Ten Years, *the Arbitration Journal*, Vol. 41 No 4: 3-14. [Electronic] Available: Business Source Complete accessed on 9 May 2008.
- Cater, E & Goodall, B. (1992). 'Must Tourism destroy its resource base?' in Mannion, A. and Bowley, S. *Environmental Issues in the 1990s* Chichester: Wiley.
- Casals, M.M. (2005). *Divorce Mediation in Europe- An Introductory Outline* University of Girona Spain.
- Crowfoot, J.E. & Wondolleck, J.M. (1990) *Environmental dispute settlement* Washington, DC; Island Press: 19.



- De Jong, M. (2014). Arbitration of Family Separation Issues - A useful adjunct to Mediation and the Court Process PER/PELJ 2356.
- Dormady, N. (2012). The political Economy of Collaborative Organization. *Administration & Society*, 45(6): 748-772.
- Garner, B.A. (2017). Black's Law Dictionary 10th Abridged 10th edition.
- Joubert, J. (2014). Mediation Rules Finally Signed by Minister of Justice but Require Judicial Activism to get the System Going, *Legal Brief Today* 28 January 2014.
- Lyster, R. (1993). Environmental Dispute Resolution, in Pretorius P (Ed), Dispute Resolution, Cape Town Wetton & Johannesburg: JUTA & Co Ltd: 145.
- Lyster, R. (1998). Should we Mediate Environmental Conflict: Justification for Negotiated Rulemaking, *Sydney Law Review*, Vol. 25 [Electronic] Available: Westlaw 2017, May 10.
- Macfarlane, J. (1997). *Rethinking Disputes: The mediation alternative*. E Montgomery Publications: 392.
- Moore, S. (1996). Defining "Successful" Environmental Dispute Resolution; Case Studies from public land planning in the United States and Australia, *Environmental Impact Assessment Review*, Vol 16: 151-169 [Electronic] available: www.elsevier.com/locate/eiar accessed on 09 May 2017.
- O'Leary, R. & Bingham, L. (2003). The Promise and Performance of Environmental Conflict Resolution Washington, DC; Resources for the Future.
- Paquet, G. & Wilson, C. (2011). Collaborative co-governance as inquiring systems. *Optimum Online: The Journal of Public Sector Management*, 42(2) Available at <http://www.optimumonline.ca/article.php?id=386> accessed on 8 July 2017.
- Retief, F. (2006). The quality and effectiveness of Strategic Environment Assessment (SEA) as a decisionaiding tool for national park expansion: the greater Addo Elephant Park case study. *Koedoe* 49(2): 103-122.
- Ryan, M. (1997). *Alternative Dispute Resolution in Environmental Cases: Friend or Foe Tulane Environmental Journal* Vol 10, Summer 1997: 397-415.
- Saayman, M. (2007). En route with tourism: an introductory text. Potchefstroom: Leisure Publications: 383.
- Sorensen, E. & Torfling, J. (2011). Enhancing collaborative innovation in the Public Sector, *Administration & Society*, 43(8): 842-868.
- Strukenborg, C. (1994). The Proper Role of Alternative Dispute Resolution (ADR) in Environmental conflicts, *University of Dayton Law Review*, Vol 19 (1994):1305-1339 [Electronic] accessed on 15 May 2017.
- Thorpe, M. (1994). Statutory Arbitration in Ancillary Relief. *CILSA* 122.
- Tripp, T.B.J. & Alley, N.G. Streamlining NEPA's Environmental Review Process: Suggestions For Agency Reform *New York University Environmental Journal*, Vol. 12: 74-110 [Electronic] Available Westlaw accessed on 10 May 2017.
- Tropill, A.T. (1991). Alternative dispute resolution in a contemporary South African context.



WCED- World Commission on Environment and Development (1987). *Our Common Future*. Oxford: Oxford University Press, 27.

Legislation

Constitution of the Republic of South Africa, 1996.

Municipal Finance Management Act 56 of 2003.

National Environmental Management Act 107 of 1998.

Cases

Hichange Investments (Pty) Ltd v Cape Produce (2004 (2) SA 393.