

## **What are the requirements for the South African construction industry to fully utilise adjudication?**

**Maiketso NC<sup>1</sup>, Maritz MJ<sup>2</sup>**

<sup>1</sup>Trans-Caledon Tunnel Authority (TCTA), Centurion

<sup>2</sup>Department of Construction Economics, University of Pretoria, Pretoria

*Email: NMaiketso@tcta.co.za; tinus.maritz@up.ac.za*

### **Abstract:**

Adjudication as an alternative dispute resolution (ADR) mechanism has recently been introduced to the South African (SA) construction industry. This paper outlines what the requirements are for the industry to realise the full potential of adjudication. To this end the paper reviews the necessary contractual, institutional and legislative framework, discusses relevant skills and available training, and establishes what impact the situation has on the current practice of adjudication in SA.

An extensive literature review was conducted, covering the local and international practice of adjudication. A structured interview was conducted with adjudicators, and those who were out of geographic reach were sent a survey questionnaire. The results obtained were statistically analysed.

The research established that adjudication appears to have found acceptance in the SA construction industry, but it was considered that the industry is not yet able to realise the full potential of adjudication, and the main reason for this was considered to be lack of knowledge.

**Keywords:** adjudication, alternative dispute resolution, payment, construction industry, legislation.

---

### **Standard abbreviations used**

JBCC Series 2000	Joint Building Contracts Committee (SA)
CIDB	Construction Industry Development Board (SA)
GCC 2004	General Conditions of Contract (SAICE)
FIDIC	Federation Internationale des Ingenieurs-Conseils
NEC	New Engineering Contract (ICE)

## **1. Introduction**

Adjudication has recently been introduced into the four CIDB-endorsed forms of contract (JBCC Series 2000, GCC 2004, FIDIC and NEC) as one of the standard methods of dispute resolution. As with others elsewhere, the SA construction industry is more familiar with other forms of dispute resolution, such as arbitration, mediation and litigation. Adjudication is a relatively new concept and is, therefore, not yet well-understood. It also faces challenges in application as most adjudicators are trained and/or experienced in these other forms of dispute resolution and not in adjudication per se. Those meant to be served by it, i.e. clients, consultants and contractors, also appear to have limited understanding of the process or how best to make use of it.

The purpose of this paper is to investigate what the requirements are for the SA construction industry to fully utilise and benefit from adjudication. To facilitate this, the research reviewed the necessary contractual, institutional and legislative framework and other enabling factors, discussed relevant skills and available training, assessed whether or not these are in place in the SA construction industry, and established what impact the whole situation has on the current practice of adjudication. Recommendations are then made based on the findings.

### **1.1 Problem Statement**

#### *1.1.1 Main Problem*

What are the requirements for the SA construction industry to fully utilise adjudication?

#### *1.1.2 Sub-problems*

The main problem was elaborated through the following sub-problems:

- How does the SA construction industry understand adjudication, how is it distinguished from other forms of dispute resolution, and what makes it an attractive alternative ADR process?
- Is adjudication adequately provided for in the contractual, institutional and legislative framework?
- Are there enough adjudicators in SA? Is there an established set of skills for adjudicators, and is relevant training available on adjudication?
- What impact does the status established above have on the realisation of the full potential of adjudication in SA?

### **1.2 Hypothesis**

Adjudication is neither sufficiently understood nor appropriately practiced for the SA construction industry to realise its potential in full.

This was also broken down further into corresponding sub-hypotheses as follows:

- Adjudication is not yet well-understood, and in practice it is not sufficiently distinguishable from the other forms of dispute resolution. It is regarded as attractive because of the perception that it is quick and cheap.
- Although all four CIDB-endorsed forms of contract now make provision for adjudication it does not enjoy sufficient institutional support, as there is neither legislation nor voluntary association for adjudication.
- There are not enough adjudicators in SA who possess of the required skills for adjudicators, and there currently exist neither regulation nor organization and training for the practice of adjudication.
- The status depicted above (as established through the findings of the research) negatively impacts on the realization of the full potential of adjudication.

## 2. Literature Review

### 1.3 Definition

The term “adjudicate” is found in general usage to mean “give a ruling” or “to judge”. In more recent times, a specialised use of the term “adjudication” appears as a form of ADR available to the construction industry. Its definition in this context is not universally agreed, it being more often defined by what it is not than by what it is, but the following characteristics are reflected by most definitions (after CIDB 2004):

- Object is to reach a fair, rapid and inexpensive decision.
- The adjudicator is to act impartially and in accordance with rules of natural justice.
- Adjudication is neither arbitration nor expert determination, but the adjudicator may rely on own expertise.
- The adjudicator’s decision is immediately binding.

### 1.4 Origins

Differing views have been expressed regarding the origins of adjudication in construction (Gould 2006), but it is a commonly held view that its primary aim was to secure timely payment, having recognised that one of the most notorious inefficiencies of the construction industry is non- or late payment of contractors/sub-contractors by employers/contractors respectively (see for example Maritz 2007). This is possibly why adjudication is so closely associated with legislation of the form “Security of Payment Act”, and why it has been characterised by the adage “*pay now, argue later*” (Uff 2005).

An earlier form of adjudication is recorded to have been in use in the United Kingdom (UK) in the 1970’s, focusing on the payment problem between contractor and sub-contractor. In the United States of America (USA), dissatisfaction with rising costs of arbitration and litigation in the construction industry led to the appearance of dispute boards in the 1960’s, and this started to take root in the 1970’s (Gaitskell-3 2005). Of perhaps greater significance is that the *quasi-judicial* role of the principal agent has also been brought into question in recent times. One of the principles of natural justice, that one

cannot be judge in his own cause, appears to have played a major role in this latter development, and this also features prominently in adjudication.

In their 1999 white paper to the Minister, the CIDB also recommended the use of ADR, as arbitration and litigation were observed to have become costly and time-consuming (CIDB PGC3 2005). The Latham report (UK 1994) is also referred to as a point of departure, as with many other jurisdictions in the world, which have come to rely on the report as an authority. The CIDB went further and made it mandatory for the SA construction industry to adopt adjudication (CIDB PGC3 2005).

### **1.5 Adjudication within ADR**

The rise in the modern use of ADR procedures appears to be due to the following factors (Uff 2005; Butler and Finsen 1993), which to a large degree used to be claimed for arbitration as its strong points before (in comparison to litigation):

- Expertise (of facilitator).
- Lower cost and shorter duration.
- Convenience and flexibility.
- Privacy and informality.
- Voluntary or customised dispute resolution process (can be made mandatory by agreement/contract).

Having observed that arbitration had become more formal and legalistic, Butler and Finsen (1993) expressed the hope that the advent of ADR would rekindle arbitration and provide it with appropriate techniques to sustain its use. Indeed more than ten years later Uff (2005) observed that positive developments like the “100-day arbitration procedure” had grown out of the lessons learned from adjudication.

Many authors however view all dispute resolution methods as constituting a continuum or spectrum, with each method having its rightful place (see for example M’khomazi and Talukhaba 2004). Indeed for enforceability if nothing else, ADR has had to form an alliance with the formal court system (Maritz 2007).

### **1.6 Adjudication in Practice**

The practice of adjudication was reviewed through its three tiers of application, namely standard forms of contract, institutional guidelines and legislation.

#### *1.6.1 Standard Forms of Contract*

Many believe that standard forms of contract are more important than statutes and case law, as they reflect current professional practice and mindset. A comparison was drawn between adjudication provisions of the four CIDB-endorsed forms of construction contract namely JBCC 2005, GCC 2004, FIDIC ‘99 (“red book”) and NEC 3 (“black book”). From this, the following summarised findings emerged:

- The adjudicator (or Dispute Adjudication Board) is appointed jointly by the parties, some at the beginning of the contract, others once a dispute has arisen. Otherwise a named authority appoints.
- The adjudicator's agreement is co-signed by both parties and the adjudicator/board member. The agreement generally requires the adjudicator to be impartial and independent, and to disclose any potential conflict of interest. The adjudicator's expertise is required to differing degrees.
- Adjudication is not to be conducted as an arbitration, but the adjudicator has procedural discretion "...to ascertain the facts and the law". Thus generally an inquisitorial approach is encouraged, as is reliance on own expertise. Procedural powers and duties are listed to differing levels of detail.
- The adjudicator is immune from liability unless his act or omission is in bad faith, and is not to be called as a witness in subsequent proceedings.
- Disputes referred to adjudication can be in connection with anything under the contract.
- A hearing is held at the adjudicator's discretion, but is generally discouraged.
- Emphasis is generally placed on rules of natural justice or procedural fairness.
- The adjudicator can decide own jurisdiction under JBCC and FIDIC, but is restricted to decide matters in dispute under GCC and NEC.
- The adjudicator's decision is binding until revised by arbitration, litigation or agreement. Failure to comply can be referred to court or arbitration
- Administrative aspects are provided for to differing degrees, e.g. communications, termination, etc.

### *1.6.2 Institutional guidelines*

A comparison was drawn between Adjudication Guidelines from selected institutions, namely JBCC, CIDB, Dispute Resolution Board Foundation (DRBF), American Arbitration Association (AAA), International Chamber of Commerce (ICC), World Bank, and Construction Umbrella Bodies (UK).

The following major findings emerged:

- The guidelines generally go into more detail, particularly on procedural matters like the hearing, unless the associated form of contract already provides procedural rules e.g. FIDIC.
- Some institutions are more involved in the administrative aspects of the adjudications, such as appointments and hearings (e.g. AAA).
- Some guidelines from financial institutions are prescribed for projects funded by them, thereby effectively acquiring the status of regulation, one step closer to legislation discussed below.

### 1.6.3 Legislation

A comparison was drawn between selected adjudication legislation, namely that from the UK, New Zealand, Queensland (Australia) and Singapore. The legislation was found to generally address the following:

- Conditional payment clauses in contracts e.g. pay-when-paid.
- Establishing minimum payment terms.
- Establishing statutory adjudication system for disputes.
- Remedies available in case of non-payment.

## 1.7 Level of Use and Knowledge

The work of the Adjudication Reporting Centre at the Glasgow Caledonian University (Kennedy 2005) appears to represent best practice for collecting statistics in the use of adjudication. The centre issues regular reports based on information obtained from Adjudicator Nominating Bodies in the UK. The data handled includes, inter alia:

- Number and discipline of adjudicators.
- Trends in adjudications (growth, decline, fluctuations).
- Performance of adjudication (dissatisfaction or otherwise).

From elsewhere, various levels of acceptance and use of adjudication have been claimed, in all its various forms. Dispute boards continue to grow in use in the form of Dispute Review Boards, Dispute Adjudication Boards or Combined Boards (DRBF 2007). The World Bank along with other development banks is perhaps leading the way in this aspect, more recently with the help of FIDIC's harmonised conditions of contract. Povey's research (2005), whilst focusing on mediation, also revealed that SA mediators tended to conduct themselves more like the modern adjudicator. Van Langelaar (2001) confirms the international trends discussed above for Southern Africa and further notes that although the adjudication system appeared to have been successful, the knowledge base needed to be expanded.

## 1.8 Skills and Techniques

A comparison was drawn between information on *adjudication skills and training* from selected institutions, namely the CIDB, Institution of Civil Engineers (ICE), Chartered Institute of Arbitrators (CIArb), DRBF, AAA and FIDIC. The following major findings emerged:

- Formal training is common, varying from workshops to formal tuition and assignments.
- Formal assessment and accreditation is also common, including examinations and peer reviews, used in different formats and to varying degrees of intensity.
- Continuing Professional Development (CPD) as an on-going requirement has become universal.

Thus the right mix has to be found which would be suitable for SA conditions. Whilst one does not necessarily want to "kill it with science", there could be legitimate cause for

concern that sub-standard levels of skill may not do justice to adjudication, or be able to exploit its full potential for the benefit of the construction industry.

### 3. Research Methodology

#### 1.9 Population Size and Sampling

Due to limited numbers of knowledgeable people on the subject, purposive or target sampling was adopted. Panels of dispute resolution practitioners were sourced from relevant organisations (Association of Arbitrators SA (AASA), South African Association of Consulting Engineers (SAACE or CESA of late), South African Institution of Civil Engineering (SAICE), NEC Users Group), within which adjudicators were targeted. Some 30 practitioners were identified as being theoretically accessible for interviews and were contacted, out of which 18 availed themselves. Survey questionnaires were sent to some 17 practitioners who were outside geographic reach, out of which 6 were received. Some 9 additional candidates were identified by snowball sampling and acquaintance (including 2 based in the UK), from who 5 completed questionnaires were received. See Table 1 below for summary.

Table 1: Sampling summary

Sampling group	Total contacted	Successful	Percentage
Interview	30	18	60%
Completing questionnaire – adjudicators	17	6	35%
Completing questionnaire – general sample	9	5	56%
Totals	56	26	52%

To the extent that this study leans towards engineering construction, its conception was also structured as a collaborative effort with the Maritz (2007) study, which tended to focus on building construction, the two studies thus covering the entire construction industry. Also, certain findings of the Maritz (2007) study were unpacked as part of this study, for example the possible content of an “adjudication qualification”.

#### 1.10 Research design

The research design adopted was generally quantitative, but made provision for qualitative data in the form of comment. A survey questionnaire was developed and administered to answer the sub-problems or test the hypotheses, with input from the University of Pretoria’s Department of Statistics on the final format for ease of data capture and interpretation. The questionnaire design and administration incorporated considerations of threats to validity and research ethics.

The data was analysed statistically, and content analysis was employed for qualitative results.

## 4. Results

The summarised results are presented in Table 2 below.

Table 2: Summarised results

Question	Result
1. Background	
1.1	58% of the respondents practiced in engineering construction and 34% in building construction
1.2	65% of the respondents held a qualification in engineering, 13% in architecture, and 10% in each of quantity surveying and legal
2. Level of use and knowledge	
2.1	46% rated their knowledge of adjudication very high, 39% high and 14% average
2.2	34% each use adjudication rarely, 56% often/regularly and less than 10% each for “never” and “always”
2.3	Total of 96% agreed that adjudication was quicker, 86% for cheaper, 80% for providing interim relief, 72% for immediately binding, 69% for expertise of adjudicator, 55% for enforceable, and 53% for consensual
2.4	Total of 80% of respondents had had satisfactory experience with adjudication.
3. Adjudication in practice	
3.1	Contractual provisions for adjudication were considered sufficient by total of 55% of respondents for JBCC, 48% for GCC, 68% for FIDIC, and 62% for NEC
3.2	Institutional guidelines for adjudication were considered adequate by 50% of respondents for JBCC, and between 60% and 90% of respondents were not familiar with other (international) guidelines
3.3	Legislation for adjudication was considered effective by 50% of respondents for UK, and over 75% of respondents were not familiar with legislation from other countries
3.4	Other enabling factors appeared in the order of (from most suggested) skills, party relations, court support and publicity.



4. Skills and techniques	
4.1	65% of respondents considered that there were not enough adjudicators in the SA construction industry
4.2	Total of 90% of respondents agreed that both technical expertise and legal knowledge were relevant skills for adjudicators, and 70% agreed with project management skills
4.3	96% of respondents agreed that the inquisitorial approach was useful in an adjudication, 60% disagreed with the adversarial approach, 80% agreed with the facilitative approach, and 90% agreed with the evaluative approach
4.4	Total of 70% agreed that age was a desirable personal attribute in an adjudicator, 96% agreed with experience, 60% agreed with professional registration, 40% did not agree with professional accomplishments, 45% agreed with corporate seniority, 93% agreed with fairness, 84% agreed with procedural approach, and 90% agreed with availability
4.5	Total of 80% agreed that participating in an adjudication was important to acquire knowledge and experience, 90% agreed with conducting an adjudication, 80% agreed with self-study, 72% agreed with attending seminars, and 84% agreed with taught courses and 72% agreed with assignments
4.6	62% agreed that examination was important to assess competence, 80% agreed with interview/peer review, 65% agreed with mock adjudication, and 45% considered that a certificate of attendance was a nice-to-have
4.7	Respondents were roughly split equally on regulating the practice of adjudication, but majority believed it should be better organised (similar to AASA role in Arbitration).
5. Impact	
5.1	Respondents were roughly equally split on whether or not SA is able to realise the full potential of adjudication
5.2	75% believed the factors discussed had an impact on the practice of adjudication
5.3	50% considered lack of knowledge as the single most important contributing factor
5.4	Suggestions for improvement appeared in the order of (from most suggested) skills and training, promoting adjudication, improving contracts, work-shopping lessons learned, introducing legislation and providing institutional support
6. Legislation	
6.1	Total of 75% agreed that SA needs a "Payment and Adjudication Act" similar to that in the UK and other countries
6.2	Total of 60% agreed that such legislation should address minimum payment terms, 90% agreed with statutory adjudication, and 95% agreed with remedy in case of non-payment
6.3	95% agreed that scope for such law should cover all disputes under the contract, and there was a split opinion on professional liability as well as on special provisions for emerging contractors
6.4	80% agreed that such law should have an international component
7. Interest	96% of research respondents wished to see the results of the study

## 5. Findings

The results appear to reveal the following on the research problem:

- The first sub-hypothesis was disproven as far as adjudication practitioners are concerned: their understanding appears to be quite high, and is in keeping with generally accepted characteristics of adjudication. However, the same cannot necessarily be said of the rest of the construction industry.
- The second sub-hypothesis was disproven in the first part: contractual provisions were generally considered sufficient in all standard forms of contract except GCC. Lack of organisation and visibility was a recurring theme. Thus the other part of the second sub-hypothesis was confirmed in that it was generally agreed institutional support was lacking. Regularisation was suggested along the lines that the practice of arbitration is organised under AASA.
- The third sub-hypothesis was confirmed: there were not enough adjudicators, and although there was no established set of skills or minimum training requirements for adjudicators, there was general agreement on relevant skills, useful techniques and desirable personal attributes. There was also broad agreement on the possible content of an “adjudication qualification” if it were to be implemented, from the acquisition of knowledge and experience, to the assessment and accreditation of competence.
- The fourth and over-arching sub-hypothesis was confirmed: the SA construction industry was generally considered not to be able to realise the full potential of adjudication in the current circumstances, and the main reason for this was considered to be lack of knowledge.

### Note on Interpretation

The results appear inconclusive on whether or not SA is able to realise the full potential of adjudication, if based only on the results of *Question 5.1 Ability to realise full potential* above which shows a split response. But if a holistic view is taken, starting with the results of *Question 5.2 Factors contributing to situation* which show that the factors discussed are in fact considered to have an impact on the situation, combined with the findings pertaining to those factors themselves, which generally show adjudication facing more challenges than successes (e.g. usage remains low, institutional support lacking, skills and training remains a major concern), then it becomes evident that, overall, SA is not yet able to realise the full potential of adjudication. Furthermore, it is through such an interpretation that the rest of the research findings fit together: it is contended that it is due to the recognition of lack of knowledge as the most important contributing factor to this untenable situation, that skills and training has been identified as the most favoured means of addressing the situation.

## 6. Conclusion

Based on the findings above, it can be concluded that adjudication has found acceptance in the SA construction industry. However, it still has some way to go before its potential can be realised in full. Certain challenges need to be overcome to enable this to happen, which range from the contractual, institutional and legislative framework, to matters of skills and training. It is in this spirit that recommendations are made below.

## 7. Recommendations

In keeping with the conclusion and findings, the following recommendations can be made:

- Increase knowledge and understanding of adjudication by the construction industry.
- Improve the wording of standard forms of contract, strengthen provisions for adjudication, and standardise the process as far as possible.
- Organise the practice of adjudication, either through an existing organisation (e.g. AASA, CIDB, DRBF etc.) or by establishing a dedicated one.
- Introduce legislation to support the process of adjudication.

## 8. References

- Butler, D. and Finsen, E. 1993. *Arbitration in South Africa: Law and Practice*. Cape Town: Juta & Co Ltd
- Construction Industry Development Board (CIDB). *Best Practice Guideline for Adjudication #C3 2005* (2nd ed.), Pretoria, SA
- Dispute Resolution Board Foundation (DRBF). 2007. *Practices and Procedures*. Seattle: Dispute Resolution Board Foundation
- Gaitskell, R (3). 2005. *Using Dispute Boards under ICC rules – what is a dispute board and why use one?* Conference of Society of Construction Law (2005: London). Proceedings. London: Society of Construction Law
- Gould, N. 2006. *Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members*. Conference of Society of Construction Law (2006: Singapore). Proceedings. London: Society of Construction Law
- Kennedy-Grant, T., 2005. *A review of the existing legislative models for a Construction Industry Payment and Adjudication Act*. International Forum: Construction Industry Payment Act and Adjudication – ICW 2005, Kuala Lumpur, Malaysia
- Maritz, M.J. 2007. *An investigation into the adjudication of disputes in the South African construction industry*. International Conference: RICS COBRA 2007, Atlanta, USA
- M'khomazi, X.J. and Talukhaba, A., 2004. *Comparison of alternative dispute resolution methods in resolving disputes in the construction industry*. 2nd Postgraduate Student Conference – CIDB, Cape Town, SA
- Povey, A. 2005. *An investigation into the mediation of disputes in the South African construction industry*. Journal of the South African Institution of Civil Engineering, Vol. 47 No. 1
- Uff, J. 2005. *Construction Law*. 9th ed. Sweet & Maxwell: London, UK

RICS COBRA Research Conference, University of Cape Town, 10-11<sup>th</sup> September 2009.  
N C Maitso and MJ Maritz, pp 1556-1567

United Kingdom. Department of Trade and Industry. 2004. *Construction Act Review*, Report by Construction Act Review Group (chaired by Sir Michael Latham) to Construction Minister. London: DTI Construction Sector Unit

Van Langelaar, A. 2001. *The use of dispute boards as an alternative dispute resolution mechanism on construction projects in Southern Africa*. Unpublished MSc dissertation. Cape Town: University of Cape Town.