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Adjudication as an alternative dispute resolution method in the South African construction industry

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Adjudication has recently been introduced to the South African construction industry as an alternative dispute resolution mechanism. This study investigates what the requirements are for the industry to realize the full potential of adjudication. To this end the study reviews the necessary contractual, institutional and legislative framework, discusses relevant skills and available training, and establishes what impact all these have on the current practice of adjudication.

A 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.

Adjudication appears to have found acceptance in the South African construction industry, but it was found that the industry is not yet able to realize the full potential of adjudication, the main reason for this being a lack of knowledge.

FREQUENTLY USED ABBREVIATIONS

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

INTRODUCTION

Adjudication has recently been introduced into the four CIDB-endorsed forms of contract (JBCC, GCC, FIDIC and NEC) as the standard method of dispute resolution. As with almost everywhere else, the South African (SA) construction industry is more familiar with earlier forms of dispute resolution, namely mediation, arbitration and litigation. Adjudication is a relatively new concept and is not 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 have limited understanding of the process or how best to make use of it.

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

Problem statement

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

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 attractive?
- Is adjudication adequately provided for in the contractual, institutional and legislative framework?
- Are there enough adjudicators in South Africa? Is there an established set of skills for adjudicators, and is relevant training available on adjudication?
- What impact does the state of affairs established above have on the realization of the full potential of adjudication in SA, and what can be done about it?

Hypothesis

The SA construction industry does not realize the full potential of adjudication because it is not sufficiently understood nor appropriately practised

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

- Adjudication is not well understood, and in practice it is not sufficiently distinguishable from the other forms of dispute resolution. It is, however, attractive because it is seen as quick and cheap.
- Adjudication does not enjoy sufficient institutional support, as there is neither legislation nor a voluntary association for adjudication. The four CIDB-endorsed forms of contract now all make provision for adjudication, but they can all be improved.
- There are not enough adjudicators in SA. There is no established set of skills for adjudicators, as there is neither regulation nor organisation for the practice of adjudication. There are therefore no universally accepted minimum training or skills requirements.
- The impact of the status above (as established through the findings of the research) on the realization of the full potential of adjudication is negative.

Recommendations are made based on the findings.

LITERATURE REVIEW

Definition

The term "adjudicate" is found in general usage to mean "to give a ruling" or "to judge". In more recent times, a specialised use of the term "adjudication" appears as a form of alternative dispute resolution (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.
- Adjudicator is to act impartially and in accordance with rules of natural justice.
- Adjudication is neither arbitration nor expert determination, but adjudicator may rely on own expertise.
- Adjudicator's decision is immediately binding (finality is dependent on whether it is challenged within the allotted time, in which case finality may be reached through arbitration, litigation or by agreement).

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", and why it has been characterised by the adage "pay now, argue later" (Uff 2005).

An earlier form of adjudication was used in the United Kingdom (UK) in the 1970s, focusing on the payment problem between contractor and sub-contractor. In the United States of America, dissatisfaction with rising costs of arbitration and litigation in the construction industry led to the appearance of dispute boards in the 1960s, and this started to take root in the 1970s (Gaitskell 2005). Of perhaps greater significance is the recent questioning of the *quasi-judicial* role of the principal agent. One of the principles of natural justice – that one cannot be judge in one's 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 of Public Works, the CIDB recommended the use of ADR, as arbitration and litigation were seen as costly and time-consuming (CIDB PGC3 2005). The Latham report (UK 1996) is referred to as a point of departure. The CIDB went further and made it mandatory for the SA construction industry to adopt adjudication before referring disputes to arbitration or litigation (CIDB PGC3 2005). Table 1 presents some historical developments of adjudication.

Table 1 Some historical developments of adjudication (Source: Maiketso 2008, based on Gould 2006)

Year	Development
1985	ICE reviews contracting strategies
1993	ICE issues NEC (engineer separated from adjudicator)
1994	Latham Report issued (adjudication by contract and legislation)
1995	World Bank adopts DB in its procurement guidelines
	FIDIC introduces Dispute Adjudication Board (DAB) in orange book
1996	FIDIC introduces DAB as an option in red book (4th edition)
1998	Part II of UK Housing Grants, Construction and Regeneration Act 1996 becomes effective (including mandatory adjudication provisions)
1999	FIDIC introduces DAB into new suite: all books (no longer optional)
2004	JBCC (SA) introduces adjudication into 4th edition
	GCC (SA) introduces adjudication into 2004 edition
	CIDB issues adjudication procedure and recommends use of GCC, JBCC, FIDIC, NEC

Adjudication within ADR

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

Butler & Finsen (1993) observed that arbitration had become more formal and legalistic, and expressed the hope that the advent of ADR would rekindle arbitration and provide it with appropriate techniques to sustain its use. 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 & Talukhaba 2004). Indeed, for enforceability if nothing else, ADR has had to form an alliance with the formal court system (Maritz 2007).

Table 2 Three tiers of application of adjudication (After Maiketso 2008)

Tier of application	Elements reviewed	Summary findings
Forms of contract	JBCC 2005, GCC 2004, FIDIC '99 ("red book") NEC 3 ("black book")	Adjudicator's (or DB's) appointment: by the parties, otherwise by a named authority
		Adjudicator's conduct: impartial, independent
		Inquisitorial: can ascertain the facts and the law
		Adjudicator not liable and not called as witness
		Dispute scope: anything under contract
		Decision: immediately binding
Institutional guidelines	JBCC, CIDB, DRBF, AAA, ICC, World Bank, CUB*	More detail than forms of contract
		Procedural and administrative aspects
		Funding institutions may prescribe
Legislation	UK, New Zealand, Queensland (Australia) Singapore	Conditional payment clauses outlawed (e.g. pay-when-paid)
		Establishing minimum payment terms
		Establishing statutory adjudication system
		Remedies available for non-payment

* AAA – American Arbitration Association; DRBF – Dispute Resolution Board Foundation; ICC – International Chamber of Commerce; CUB – Construction Umbrella Bodies (UK)

Table 3 Sampling summary

Sampling group	Total contacted	Successful	Percentage
Interview – adjudicators	30	18	60%
Completing questionnaire – adjudicators	17	6	35%
Completing questionnaire – general sample	9	5	56%
Totals	56	29	52%

Adjudication in practice

The practice of adjudication was reviewed through its three tiers of application, namely standard forms of contract, institutional guidelines and legislation. See Table 2.

Level of use and knowledge

The work of the Adjudication Reporting Centre (Kennedy 2005) appears to represent best practice in monitoring the use of adjudication. The centre issues regular reports based on information obtained from adjudicator nominating bodies in the UK. The reports include:

- number and discipline of adjudicators
- trends in adjudications (growth, decline, fluctuations)
- performance of adjudication (dissatisfaction or otherwise).

Generally, this reporting shows adjudication to be successful.

Various levels of acceptance and use of adjudication in all its various forms have been recorded from elsewhere. Dispute boards (DBs) 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 playing a significant role in this aspect, more recently with the help of FIDIC harmonised conditions of contract (MDB). 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 that the international trends discussed above apply to southern Africa, including the observation that the DB role was not always understood or agreed between project participants. Van Langelaar (2001) further notes that, although the system appeared to have been successful, the knowledge base needs to be expanded.

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, American Arbitration Association (AAA) and FIDIC. The following major findings emerged:

- Formal training is common, varying from workshops to formal tuition and assignments.
- Formal assessment and accreditation are 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 too much 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.

RESEARCH METHODOLOGY

Population size and sampling

Due to limited numbers of people with knowledge of the subject, purposive or target sampling was adopted. Panels of dispute resolution practitioners were sourced from relevant organisations (Association of Arbitrators Southern Africa (AASA), Consulting Engineers South Africa (CESA), South African Institution of Civil Engineering (SAICE), and NEC Users Group), within which adjudicators were targeted. See Table 3 for summary.

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 sub-hypotheses. The questionnaire design and administration incorporated considerations of threats to validity and research ethics.

The questionnaire was divided into the following categories (about 25 questions):

1. Adjudicator background
2. Level of use and knowledge

3. Forms of contract, institutional guidelines, legislation
4. Skills and techniques
5. Impact
6. Legislation as possible solution.

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

RESULTS

Graphs 1, 2 and 3 were selected for illustrative purposes from question groups 2, 3 and 4 above, pertaining respectively to distinguishing features, sufficiency of adjudication provisions and useful techniques when using adjudication. A short summary is presented below. More detailed results are presented in Appendix 1.

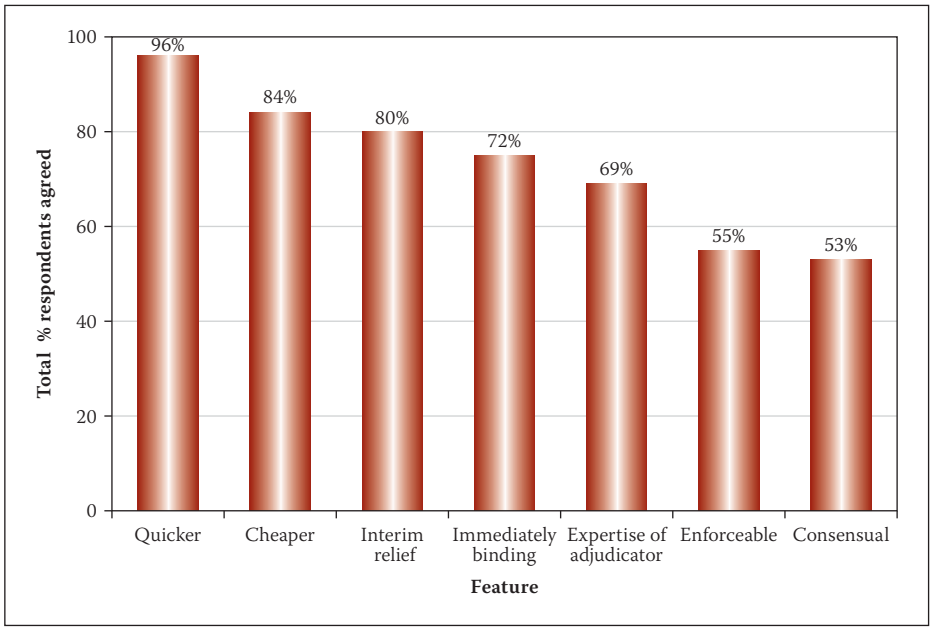
Summary of graphs

- From Graph 1 the respondents agreed that the most distinguishing feature of adjudication was the speed within which the process is concluded.
- Graph 2 illustrates that respondents agreed that the four forms of contract were sufficient in their provisions for adjudication, with FIDIC scoring the highest.
- From Graph 3 the respondents consider the "inquisitorial" approach to be the most useful technique when conducting an adjudication.

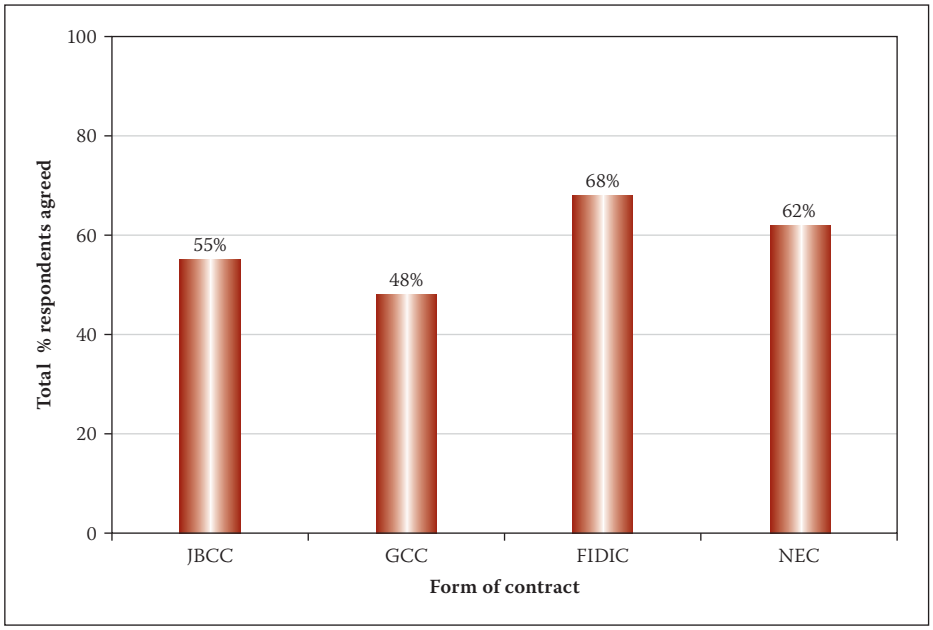
FINDINGS

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

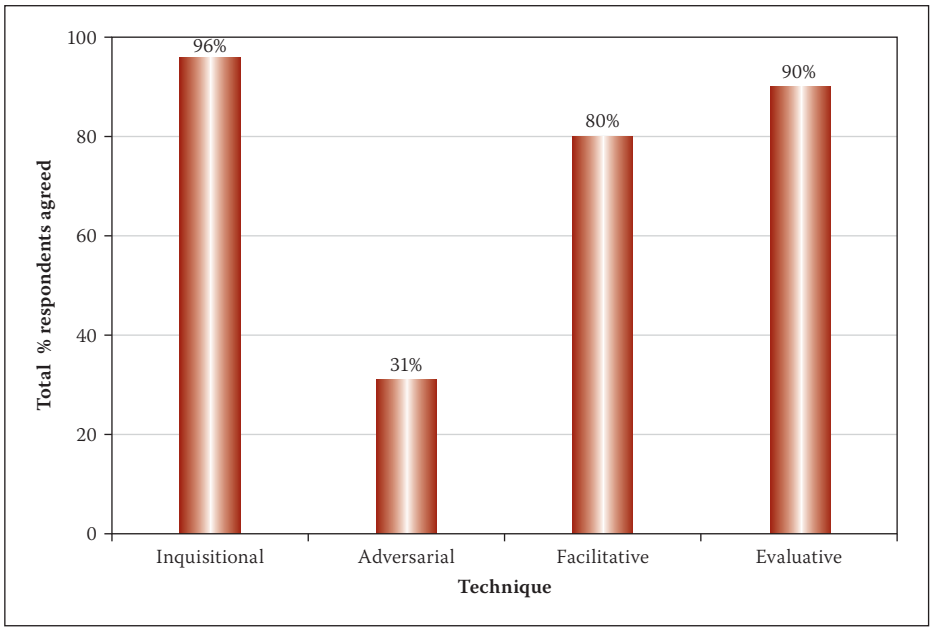
- The first sub-hypothesis was disproved as far as adjudication practitioners are concerned – their understanding appears to be quite high, and is in keeping with generally accepted characteristics of adjudication. However, the same cannot necessarily be said of the rest of the construction industry.
- The second sub-hypothesis was disproved in the first part – contractual provisions were generally considered sufficient in all standard forms of contract, with the possible exception of 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 that 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"



Graph 1 Distinguishing features of adjudication



Graph 2 Sufficiency of provisions for adjudication in forms of contract



Graph 3 Useful techniques in adjudication

if it were to be implemented, from the acquisition of knowledge and experience to the assessment and accreditation of competence.

- The fourth sub-hypothesis was confirmed – the SA construction industry was generally considered not to be able to realize the full potential of adjudication in the current circumstances, and the main reason for this was considered to be lack of knowledge.

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 realized in full. The main challenge appears to be lack of knowledge. Other challenges range from the contractual, institutional and legislative framework, to matters of skills and training. It is with this in mind that the recommendations below are made.

RECOMMENDATIONS

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

- Increase knowledge and understanding of adjudication by the construction industry (full treatise available at libraries of SAICE, AASA).
- 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 local chapter, etc) or by establishing a dedicated one.
- Introduce legislation to support the process of adjudication.

SELECTED REFERENCES

(The full list of references is available from the authors on request.)

Butler, D & Finsen, E 1993. Arbitration in South Africa: law and practice. Cape Town: Juta.

Kennedy, P 2005. Statistics and trends in statutory adjudication in the UK since 1998. *Proceedings*, International Forum on the Construction Industry Payment and Adjudication Act, Kuala Lumpur, Malaysia.

Construction Industry Development Board (CIDB) 2005. Best practice guideline for adjudication, No C3, 2nd ed. Pretoria: CIDB.

Dispute Resolution Board Foundation (DRBF) 2007. Practices and procedures. Seattle, US: DRBF.

Gaitskell, R 2005. Using Dispute Boards under ICC rules – What is a dispute board and why use one? *Proceedings*, Conference of the Society of Construction Law, London.

Gould, N 2006. Establishing dispute boards – Selecting, nominating and appointing board members. *Proceedings*, Conference of the Society of Construction Law, Singapore.

Maritz, M J 2007. An investigation into the adjudication of disputes in the South African construction industry. Paper prepared for international conference: RICS COBRA 2007, Atlanta, US.

M'khomazi, X J & Talukhaba, A 2004. Comparison of alternative dispute resolution methods in resolving disputes in the construction industry. *Proceedings*, 2nd Postgraduate Student Conference, Cape Town: CIDB.

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*, 47(1): 3–7.

Uff, J 2005. *Construction law,* 9th ed. London: Sweet & Maxwell.

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

APPENDIX 1: MORE DETAILED RESULTS

Question	Result
1. Background	
1.1	58% of the respondents practised 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 and often, 20% 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 a 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

APPENDIX 1: MORE DETAILED RESULTS (continued)

Question	Result
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, 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 realize 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	
7.1	96% of research respondents wished to see the results of the study