

CONSTRUCT

Unlocking the dispute resolution process
in terms of the JBCC Principal Building
Agreement - Series 2000 Edition 6.2 May
2018 and Edition 5.0 July 2007



Construction & Technology Attorneys

In this article, we will examine the dispute resolution process as set out in clause 30.0 of the Joint Building Contracts Committee (“JBCC”) Principal Building Agreement Edition 6.2 May 2018 (the “JBCC 2018 PBA”) and clause 40.0 of the JBCC Principal Building Agreement Edition 5.0 July 2007 (the “JBCC 2007 PBA”).

The JBCC 2018 PBA, JBCC 2007 PBA and other editions of the JBCC set out the procedure to follow when a dispute arises. The dispute resolution clause in each contract must be carefully considered as no dispute resolution clause is the same. These clauses can also be amended by the parties so it is critical that the contract data which is to be read with the relevant contract is analysed and that the parties are aware of what procedure to follow and when.

If a party does not comply with the timeframes set out in the contract, as amended, and as set out in the relevant rules which govern the dispute process, a party can be barred from pursuing its claim. Therefore the consequences of not following the dispute resolution process strictly, could have dire repercussions.

If a construction contract does not specify or have a dispute resolution clause where the parties have agreed for a dispute to be determined in an adjudication or arbitration forum or if the parties agree to delete such clause, then a party will have to proceed to court to seek relief. This can often lead to lengthy processes and it could take years for a dispute to be decided.

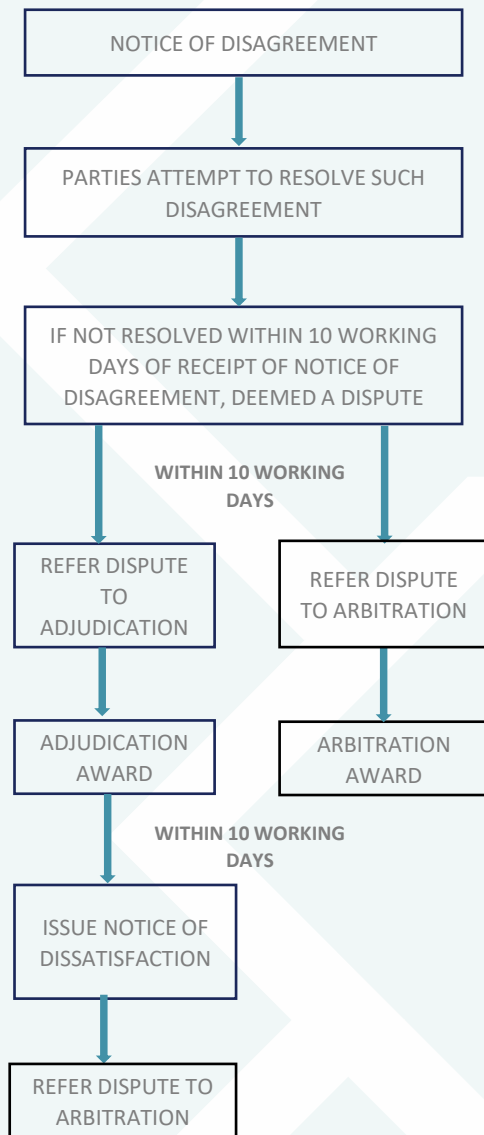
The main purpose of the alternative dispute resolution process via adjudication or arbitration is for such process to be expeditious and to bring a speedy resolution to a dispute. This, however, comes with a hefty price tag.

Procedure

The organogram below specifies the procedure in the JBCC 2018 PBA from a high-level perspective.



The organogram below specifies the procedure in the **JBCC 2007 PBA** from a high-level perspective.



Mediation

In both JBCC agreements, the parties can refer a dispute to mediation at any stage. In practice, however, the parties are often unable to resolve the disagreement informally by mediation or amicable settlement which then commences the dispute resolution process.

Please bear in mind that the parties shall be liable for the costs of the mediation equally, regardless of the outcome.

Some important points to note relating to the adjudication and arbitration process

In the JBCC 2018 PBA, the agreement envisages that the referring party first refers the dispute to adjudication, however, if the procedure is not followed correctly and the dispute is not referred to adjudication within the time allowed, the dispute is referred to arbitration. In the JBCC 2007 PBA, the party referring the dispute can decide whether to proceed to adjudication or arbitration.

If, however, the dispute is determined by way of arbitration without a party first having obtained an adjudicator’s decision via adjudication, the award will be final and binding on the parties and the party will not have another attempt at overturning the award if dissatisfied with it unless it is reviewed in the high court which can only be done if there was a procedural irregularity concerning the award.

An adjudication decision is immediately binding on the parties and enforceable until and if overturned by an arbitration award.

In practice, regardless of the adjudication decision or the arbitration award, a losing party will often not implement the decision or award immediately.

The winning party will usually need to serve a letter of demand on the losing party, calling upon it to implement the decision or award.

If the losing party still does not comply with the letter of demand, the winning party may have to bring an application to the court to enforce the decision or make the arbitration award an order of court.

Tip: In both JBCC agreements, the dispute resolution clauses make provision for an adjudicator to be appointed by the nominating body as specified in the contract data. In the JBCC 2018 PBA, this is the same for the appointment of an arbitrator, however, in the JBCC 2007 PBA, the arbitrator is appointed by the body agreed to by the parties, failing which, the chairman of the Association of Arbitrators (Southern Africa) will make such appointment.

It is essential that the parties agree to the nominating body (as applicable) at the outset. If you don't, this could lead to technicalities being raised regarding jurisdiction and you could be prevented from pursuing your claim.

In practice, a party may have to incur further legal costs and approach the court to intervene and compel the parties to agree to a nominating body if the other party chooses to adopt an obstructive approach which often happens. Luckily, the JBCC 2018 PBA has now introduced a fall-back position under clause 30.10 of the agreement which states that if the parties fail to specify a nominating body to appoint an adjudicator or arbitrator, the referring party shall have the right to choose a local recognised body to suggest the appointment of an appropriate adjudicator or arbitrator which nomination is binding on the parties. Similarly, the JBCC 2007 PBA has a fall-back position for the Association of Arbitrators (Southern Africa) to make an appointment of an arbitrator as applicable. This is another reason why it is important for you to familiarise yourself with the provisions of the relevant construction contract as they are all different.