



# The Legal Process dealing with Construction Disputes

2 CPD POINTS

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**Presented By: Hubert Thompson**

## What are the course objectives?

This two-day practical training course should familiarise you with the legal process dealing with construction disputes. We answer the following: “Why do we need a process to deal with construction disputes and how should the process be applied?”

The purpose of the process is to ensure that the parties to the dispute should be in control of how to deal with the dispute instead of being only bystanders while others are in control. The course would equip you with a better working knowledge and understanding of the different procedures, mechanisms, tools and techniques applicable to this process so that you could afterwards participate with confidence in avoiding and resolving construction disputes.

## Course background?

Infrastructure is necessary for sustainable development and to improve the quality of life. The construction industry plays a major role in achieving this.

Construction contracts may be very complex, containing sometimes even ambiguities and contradictions. Conditions, situation and circumstances encountered during construction are also not known or foreseeable at the start of the project.

Own and unique methods and procedures are therefore necessary to deal with disputes, which should be established on the sound principles on which our legal system is based. Parties usually make use of standard form contracts where possible, as these have been drafted, used, tested and improved in practice over time and on a regular basis. They reflect norms and good practices in the construction industry and cover both areas of law and the specialist disciplines.

These contracts are for example:

- The Joint Building Contracts Committee Principal Building Agreement, 6.2<sup>nd</sup> edition dated May 2018, also known as the JBCC;
- The Engineering and Construction Contract, 4<sup>th</sup> edition dated June 2017, also known as the ECC;
- The General Conditions of Contract for Construction Works, 3<sup>rd</sup> edition dated July 2015, also known as the GCC; and
- The Federation Internationale des Ingenieurs-Conseils Conditions of Contract for Construction of Building and Engineering works designed by the Employer, 2<sup>nd</sup> edition dated December 2017, also known as FIDIC.

In spite of using these standardised contracts, there is still the potential for a wide range of factual and legal disputes. The courts in England stated that “Building contracts are pregnant with disputes”, although in practice “some employers are more reasonable than others when dealing with disputes.”

Work on a construction site cannot stop due to slow and expensive ways to resolve disputes. The role players want some sensible resolution of their problems if there is a dispute and then go back to their real business. And in finding such a solution, a fair, cheap, robust and fast process should be followed.

There should also be an attempt to avoid, or at least minimise, the disruptive and costly impact of the traditional method of dispute resolution. In addition, more cooperative and nonconfrontational approaches should be followed to remove the heat from the dispute and preserve the relationship between the role players. Parties should concentrate on prevention rather than only resolution, so as to avoid that a dispute develops in the first instance.

The process to avoid or resolve disputes together with the associated procedures and techniques are complex, and consist of among others amicable settlement, adjudication, arbitration, court litigation, early neutral evaluation, expert determination and opinion and standing Dispute Review and Adjudication Boards.

Some procedures are finally determinative, such as arbitration, court litigation, expert determination and agreement, while the others are only preliminary, such as adjudication, which is subject to negotiation between the parties how to settle the matter further.

A procedure is also part of the interest- or rights-based approach of the process, depending on when and how the procedure is used. It has a chameleon-like character.

The procedures associated with the interest-based approach are usually the negotiated and preliminary determinative procedures, addressing the interests of the parties. The outcome addresses two critical issues:

- Whether monetary relief is due to the contractor (as positive cashflow is the lifeblood of the construction industry),
- It allows the parties (both the employer and contractor) to take mitigating measures if circumstances are not favourable to the project and their interest.

The procedures associated with the rights-based approach are usually the final determinative procedures. Here the legal rights and obligations of each party to the dispute are finally determined and put into effect without the risk or fear that the rights and obligations being set aside, substituted or altered, although it might not necessarily be in the best interest for the project or the parties.

Although there are similarities between these procedures and their associated techniques, they do differ in matter, contents and application. The legal principles and framework for each are different and each has a different purpose.

A good understanding of the similarities and differences are therefore necessary or else a person participating in these might be held legally and otherwise liable. Further, if not understood correctly, valuable time and resources could be spent by following a wrong framework. The dispute could then also be barred from being resolved.

### Course content?

The process, procedures, methods and techniques would be analysed during the course and then applied through mock proceedings to better understand them.

The following will be addressed during the course:

- Why a process is needed and understanding the process;
- The need to understand the difference between the different dispute resolution procedures (amicable settlement (such as mediation, conciliation, evaluation, senior management intervention)), adjudication, arbitration, court litigation and expert opinion and determination), as well as the purpose and principles of each procedure;
- When is a specific procedure part of the “interest-based approach” of the process and when is it part of the “rights-based approach”;
- The role and differences between Substantive law, Rules of natural justice and Procedural law;
- The role and differences between the facilitative, inquisitorial and adversarial systems to conduct proceedings;
- The role and differences between viva voce type of hearings, hearings on documents only, site visits and meetings;
- Default proceedings;
- Representation of parties during the proceedings;
- How should the functus officio and slip rule be applied;
- Evidential matters and burden and measure of proof;
- Determining the extent of the dispute, including “not a new case” but “new facts and arguments”;
- Appointing the persons to deal with the dispute (presiding officers), including their jurisdiction and fee;
- Determinations by the presiding officers and the enforcement thereof;
- The different dispute avoidance mechanisms (early neutral evaluation, early warning systems and standing dispute review boards)

### Who should attend?

This course is aimed at those dealing with construction disputes from all spheres and disciplines, such as Design Engineers, Project Managers, Contractors, Developers, organs of state responsible for infrastructure, Site Agents, Quantity Surveyors, Architects, Legal Officers and Alternative Dispute Practitioners.

### Course lecturer?

The course will be presented by Hubert Thompson. He is an Honorary Fellow of the South African Institution of Civil Engineering (SAICE). He serves on the Panel of Mediators, Adjudicators and Arbitrators of SAICE and is a Member of the Dispute Resolution Board Foundation (DRBF). He is also registered as a professional engineer with the Engineering Council of South Africa (ECSA) as well as admitted to and authorised to practice as an advocate of the High Court of South Africa. He has been involved in various amicable settlements, adjudications and arbitrations relating to construction disputes.

Hubert is also the author of the book “Adjudication and Arbitration: How to deal with challenges to jurisdiction”. This book could be ordered from the SAICE bookshops at “saice.org.za”. SAICE also presents a course with that name based on the contents of the book.

### Course structure and accreditation

The course is offered over 2 consecutive days. This course has been accredited for 2 CPD credits with the Engineering Council of South Africa.

Copies of the slides used during the course and the book “The Legal Process dealing with Construction Disputes” drafted by Hubert Thompson form part of the course material and will be made available at the commencement of the course.

### Registration

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In-house courses available on request.