ASK EXPERIENCED PRACTITIONERS

Association of Arbitrators (Southern Africa) NPC

Online Workshop
27 November 2026

ADR QUESTIONS AND ANSWERS

Join us for this interactive online workshop, presented by **Mr Jonathan Mitchell**, the Regional Branch Chairman of our Western Cape branch, as part of the Association's ongoing mission to provide regular upskilling opportunities for its members and for everyone interested in alternative dispute resolution (ADR).

The online workshop will be an open discussion and debate forum where Mr Mitchell, an experienced arbitrator, will act as the chairperson of the deliberations.

ABOUT THE ONLINE WORKSHOP:

You are hereby invited to attend the next ADR Questions and Answers online workshop which will take place from 10:00 to 12:00 on Friday, 27 November 2026. Note that the format of this online workshop will be different to previous ADR Question and Answers online workshops in that this session focusses on 2 brief case studies, after which questions relating to each scenario will be put to those present.

CASE STUDY 1 deals with relevant dispute clauses and mechanisms in terms of the **JBCC Principal Building Agreement, edition 6.2** (refer to page 3 hereof).

CASE STUDY 2 deals with the provisions of the dispute clauses in a **GCC 2015** (refer to page 4 hereof).

Attendees are requested to familiarise themselves with the outlines of the case studies prior to the event.

ABOUT THE WORKSHOP:

The questions below have been prepared for the purposes of upskilling seasoned ADR practitioners who have become somewhat 'rusty', alternatively are to be discussed to equip new ADR practitioners with the necessary knowledge to conduct arbitral proceedings properly, professionally and skillfully. This workshop will also be beneficial to the Association's students as it will assist in preparing them to become competent arbitrators.

The online workshop will be an open discussion and debate forum where Mr Mitchell, an experienced arbitrator, will act as the chairperson of the deliberations.

ABOUT OUR PRESENTER:

Mr Jonathan Mitchell:



Jonathan is the Western Cape Regional Branch Chairman of the Association of Arbitrators (Southern Africa). He is also a Director and Life Fellow of the Association. He is a practicing Arbitrator; Adjudicator; and Mediator in the Western Cape and has been practicing since 1994.

Jonathan has a wealth of knowledge and experience in the field of Alternative Dispute Resolution and runs a busy consulting practice in Cape Town. He specialises in the field of disputes in the construction industry and is a Past President of the Master Builders and Allied Trades Association; is a Past Chairman of the Building Industry Bargaining Council; and is a Fellow of the Chartered Institute of Building.

DATE: **Friday, 27 November 2026** **TIME:** **10:00 to 12:00**

LINK: The Zoom link will be emailed to you upon receipt of your completed **Registration Form** and, where required, upon receipt of payment.

COST (incl. VAT):

AoA Members:	**R**	**0.00**
ACPM, BIArb, CESA, ICE-SA, MBA, RICS, SAICE and WISA Members:	**R**	**50.00**
Non-members:	**R**	**100.00**
University Students, Professional Trainees, Pupil Advocates and Candidate Attorneys:	**R**	**0.00**

RSVP BY: **Thursday, 26 November 2026**

Irrespective of whether you are a paying or non-paying attendee, please send your completed **Registration Form** to our Financial Manager **Michelle Venter** at **michelle@arbitrators.co.za**

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CASE STUDY 1 | JBCC PRINCIPAL BUILDING AGREEMENT (EDITION 6.2) (THE PBA)

- The Principal Agent (PA) prepared, submitted and issued the **Final Account** to the Contractor (refer to Clause 26.10 of the PBA).
- Contractor gave **notice of non-acceptance of the Final Account (**as required in terms of Clause 26.11 of the PBA).
- The heading of the notice clearly stated the following: ***"Notice of Non-acceptance of Final Account"***.
- In this notice/as part of the notice , the Contractor identified and listed **11 payment-related items**. The PA and the Contractor could not agree to the final quantities.
- They failed to resolve these issues within 10 working days and, as required in terms of Clause 26.12 of the PBA, the Contractor submitted a **Notice of Disagreement** (refer to Clauses 30.1 and 30.2 of the PBA).
- The "*disagreement*" again was not resolve within 10 working days and therefore deemed to be a dispute.
- The Contractor intentionally failed to comply with the procedure described under Clauses 30.3 and 30.4 of the PBA and such failure caused the dispute to be resolved by means of arbitration (refer to Clause 30.5 of PBA). The Contractor opined that adjudication will be a waste of time and money.
- Soon thereafter the arbitration commenced. Note the provisions under Clause 30.7.2 of the PBA and that the dispute was never referred to adjudication.
- The Association's **Rules for the Conduct of Arbitrations (2018)** applied.
- When the Contractor (Claimant) submitted its Statement of Claim (SoC), there were 12 payment-related items/points at issue. Of the original 11 items referred to above, 9 remained and 3 new items were added. All these items were payment-related items (quantities in dispute) which the PA refused to certify for payment. The Contractor argued it was entitled to all payments, as argued, and also provided proof and documentation as part of its SoC.
- The Employer's (Respondent) Statement of Defence (SoD) *inter alia* argued that the Contractor **cannot/should not be allowed to claim** for the "*additional*" 3 new items as it did not form part of the 11 items listed under Contractor's "***Notice of Non-acceptance of Final Account***".
- The Respondent's representatives argued that the Arbitrator "*does not have jurisdiction to arbitrate over these 3 items*".

Questions

1. Based on the above, should the Arbitrator allow the 3 new items to form part of the Claimant's SoC or should these be excluded?

2. Assume that the Arbitrator agreed with the Respondent and that the 3 items were omitted. It therefore no longer formed part of the arbitration. The fact remains that the Contractor is still of the opinion (convinced) that it is entitled to payment for work executed in relation to these 3 items. How should the Contractor proceed to ensure/argue/claim its entitlement to fair and just compensation?

3. Did it lose its right to claim?

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- The dispute resolution procedure specified under the Contract Data allowed for adjudication (as per Clauses 10.5.1 [Dispute resolution by standing adjudication] and 10.5.2 [Dispute resolution by *ad-hoc* adjudication]) with a single adjudicator and, thereafter, Arbitration (as per Clause 10.7 [Arbitration]) with a single arbitrator.
- A contractual matter (claim) escalated into a dispute.
- The Contractor:
  - Correctly submitted its Clause 10.3.1 Dispute Notice;
  - Invited the Employer to attempt to settle the dispute amicably.
- The Employer immediately responded and rejected such invitation in writing as follows:

  "From Clause 10.3.2 // GCC 2015:

  If either party shall have given notice in compliance with Clause 10.3.1, the dispute shall be referred immediately to adjudication in terms of Clause 10.5, unless amicable settlement is contemplated."

  Also:

  "From The Adjudication Board Rules (GCC 2015) – The AB Rules:

  Rule 4.1: Notice of ad hoc adjudication

  4.1.1 The party referring the dispute for ad hoc adjudication shall, within 28 days of the event giving rise to the adjudication has arisen, give written Notice of Adjudication to the other party and the Employer's Agent. The Notice of Adjudication shall include:

  4.1.1.1 The details of the Contract between the parties.

  4.1.1.2 A copy of the Dispute Notice delivered in terms of GCC 2015, Clause 10.3.1.

  4.1.1.3 Details as set out in Rule 3.2 of the persons selected as potential Adjudication Board Member(s).

  4.1.2 If such Notice of Adjudication is not given within the stipulated 28-day period, adjudication shall no longer apply to the dispute in question, and the other party shall be discharged from all liability in connection with this dispute."

- Eventually, more than 28 days after the event giving rise to adjudication (actually 3 months later) the Contractor submitted and delivered its Notice of Adjudication.
- Both parties appointed legal representatives to assist them during the adjudication proceedings.

NOTE: The Employer's legal representative never noticed the (time-barring) provisions under Rule 4.1.2 of the AB Rules and never (failed to) argued such as part of the Employer's defence.

- The Adjudication proceeded and the Adjudicator delivered/published his decision. The Contractor was partly successful and the Employer was partly successful. (There were numerous items at issue.)
- The Contractor, still not satisfied, proceeded and submitted a Clause 10.6 disagreement and the dispute went to arbitration (as per Clause 10.7).
- Interestingly, both parties appointed new/different legal entities to represent them during the arbitration.
- When the arbitration commenced the Employer's representatives raised a *point in limine*, a special plea of abatement.

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- This *point in limine* was based on and addressed the Contractor's failure to submit and deliver its Notice of Adjudication within 28 days after the event giving rise to the adjudication. The event was when the Employer rejected the invitation to amicable settlement. The Contractor should have submitted and delivered the Notice of Adjudication within 28 days but only did so 3 months later.
- The Employer's representatives argued that:
    - The adjudication should never have been allowed to proceed;
    - The adjudicator had no jurisdiction;
    - The arbitrator should now find that this arbitration also should not proceed; and
    - The Employer should be discharged from all liability in connection with this dispute,

  all based on that provided for in terms of Rule 4.1.2 of the AB Rules.

Questions

1. Based on the above, what should the arbitrator's award/order be?

2. Did the Employer's failure, during adjudication, to raise this as defence cause the Employer to lose its entitlement to such defence during arbitration?

3. The AB Rules do not expressly state that a party will forfeit its right to such defence during arbitration or litigation. Comments?

4. Currently under GCC 2015, Clause 10.3 [Dispute notice], there are 3 Sub-clauses (10.3.1, 10.3.2 and 10.3.3). Had there been a 4th Sub-clause (10.3.4} as follows:

> *"**10.3.4 Notice of adjudication***
>
> *The party referring the dispute for ad hoc adjudication shall, within 28 days of the event giving rise to the adjudication has arisen, give written Notice of Adjudication to the other party and the Employer's Agent. If such Notice of Adjudication is not given within the stipulated 28-day period, adjudication shall no longer apply to the dispute in question, and the other party shall be discharged from all liability in connection with this dispute."*

would this have made any difference to the arbitrator's award on a similar *point in limine* raised by the Employer but now founded on Sub-clause 10.3.4 and never raised during adjudication?

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