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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AICA	Association of Independent Construction Adjudicators
ANA	Authorised Nominating Authority
ANB	Adjudicating Nominating Bodies
CETA	Construction Education and Training Authority
CIArb	Chartered Institute of Arbitrators
CIC	Construction Industry Council
CIDB	Construction Industry Development Board
CII	Construction Industry Indicators
FIDIC	Federation Internationale Des Ingenieurs Conseils
GCC 2015	General Conditions of Contract for Construction Works
JBCC	Joint Building Contracts Committee Principal Building Agreement
KLRCA	Kuala Lumpur Regional Centre for Arbitration
MSA	Malaysian Society of Adjudicators
NEC	New Engineering Contract
RICS	Royal Institution of Chartered Surveyors

IBA	International Bar Association
LDEDC	Local Democracy, Economic Development and Construction Act

DEFINITION OF TERMS

Terms	Definition
Stakeholders	Powerful individuals and interest groups having a stake in a project (Newcombe, 2003), or discrepant interest in a project (Olander and Ladin, 2005)
Legislation	Statutory law or law passed by a legislative body
Regulation	Set of rules or guidelines issued by an executive body such as government agencies or regulatory boards in compliance with the law
Knowledge	Level of familiarity or awareness of a concept e.g. the Act
Understanding	The comprehension of the processes and the benefits of a concept e.g. the Act
Institution	Well-established organizations (formal organisations, court of law, authorised nominating authority, government institutions as well as independent institutions responsible for the adjudication implementation) which fulfil certain purposes for the effective functioning of adjudication practice

CHAPTER ONE

PREAMBLE AND GENERAL BACKGROUND TO THE STUDY

1.1. Introduction

This chapter presents the background to the research under investigation. The brief background provided led to the identification of gaps from previous studies. Filling the identified gaps forms the primary aim of the research. This chapter thereafter provides an outline of the objectives, the scope and limitation of the research, the methodology employed in the investigation, justification for the study, the thesis structure and summary of findings, conclusions and recommendations.

1.2. Background to the study

The concept of adjudication is no longer new in the South African (SA) construction space. Several pioneer works of the Construction Industry Development Board (CIDB) CIDB (2003: 1); CIDB (2005: 1) and others like Maritz (2007: 419) and Hattingh and Maritz (2013: 109) have helped in drawing attention to adjudication as an efficient and appropriate means of Alternative Disputes Resolution (ADR) for the SA construction industry. Adjudication therefore seems to be gaining a lot more support in recent times, so much so that all the forms of contract currently endorsed by the CIDB already incorporate adjudication as an ADR process. These forms of contract are: Federation Internationale Des Ingenieurs Conseils (FIDIC) Conditions of Contract for Construction for Building and Engineering Works; New Engineering Contract (NEC); Joint Building Contracts Committee (JBCC) Principal Building Agreement and General Conditions of Contract for Construction Works (GCC).

The success of adjudication as an ADR mechanism has been researched and well documented in many countries where it has been adopted. In fact, countries like the United Kingdom (UK); Singapore and regions within Australia (such as Northern Territory, New South Wales (NSW), Western Australia, Victoria, the Australian Capital Territory and Queensland) have shifted to adjudication as their principal mode of construction disputes resolution mechanism (Lim, 2005: 80). The discovery is that, in many of these countries where adjudication has been employed as the means of resolving disputes, it has both timeously and satisfactorily

settled disputes and pacified the parties involved. Further, adjudication has proffered acceptable solutions such that litigation was not necessarily required (Gaitskell, 2007: 781, Gould and Linneman, 2008: 300; Dancaster, 2008: 208). Even in the very few cases where some parties had gone to court after adjudication, it was observed that most of the court rulings had favoured the adjudicators' original judgments. As such, adjudication is gaining wider acceptance and increased usage in many countries. However, since its introduction into the SA construction industry in early 2000, the level of usage of adjudication has been reported to be very low (Maritz, 2007: 419). One of the reasons attributed to the underutilization of adjudication is the fact that its practice within the SA construction industry has been based on contractual agreement. However, recently the support of courts in enforcing adjudicators' decisions has positively contributed to the penetration of an ad hoc adjudication in the SA construction industry (Hattingh and Maritz, 2014: 35). Little wonder then, that there has been a concerted effort in the last few years within the SA construction industry to, rather than just keeping adjudication contractual, to enact laws to make it statutory.

In light of this, a draft regulation, having been prepared by the CIDB for some time now, has only recently been accepted by the Minister of Public Works and gazetted for public comments in the Government Gazette Notice 482 of 2015. Once enacted, there will be a shift from contract-based to statute-based adjudication practice within the SA construction industry. This development promises better responses from stakeholders and greater benefits for the industry. That said, it can therefore be categorically stated that as far as the plan for statutory adjudication for resolving disputes within the SA construction industry is concerned, the phase of policy conception and negotiation is apparently over. The industry now enters the more important phase of execution of performance and that of providing tangible developmental deliverables.

A close look at the practice of adjudication in countries where it has become the preferred method of dispute resolution for their construction industry reveals that two key indispensable elements are essential for its success (i) a strong legislative framework and (ii) a vibrant institutional support. These are the two legs on which adjudication can stand for it to be effective and efficient. However, certain challenges have been recognised as hindrances to the pragmatic functionality of adjudication in SA. These challenges are (a) contractual, (b) institutional and (c) legislative (Maiketso and Maritz, 2012: 69). Having studied the newly

signed draft regulations of the CIDB, one can hope that the degree of effort that has been put into the draft is encompassing enough to provide the necessary legal framework, if adequately implemented, for an effective adjudication performance in SA. Hence, a sufficient legislative framework for adjudication is most likely to emerge once this draft regulation receives final approval and adjudication becomes statutory. There is now an urgent need to immediately focus on studying, designing, developing and evolving an appropriate institutional framework that will support the pragmatic functionality and effectiveness of statutory adjudication in the SA construction industry. That is the essential purpose of this study.

1.2.1. Trends in past regulations and an overview of their effectiveness

Globally, regulations are usually used to define or prohibit a certain type of activity in order to help in the imposition of a standard on a system or an organization. The central purpose of regulation is to ensure that the welfare, protection, safety and smooth running of an organization are achieved. In the context of construction, researchers have shown that the main objective of introducing Payment and Adjudication Regulations in many countries is to provide statutory rights in addition to the existing contractual right that will help speed up the flow of payment for works properly executed (Dancaster, 2008: 205; Sahab and Ismail, 2011: 153; Munaaim, 2012: 23; Coggins and Bell, 2015: 420). Closely linked to the aforementioned objective is the second reason for its introduction, which is to widen accessibility to a quick, cheap and contemporaneous dispute resolution mechanism known as adjudication (Munaaim, 2012: 23; Gary *et al.*, 2012: 341). The CIDB's new draft regulations[1] also has its focus in achieving these purposes due to the very obvious but painful fact that payment problems have remained an acute dilemma within the SA construction industry (Maritz, 2007; CIDB, 2009). In fact, the unpredictability of payments within the industry has often resulted in an extremely negative contracting environment (Thumbiran, 2015: 4). This has not only been a

[1]The Construction Industry Development Board (cidb) **Construction Industry Development Amendment Regulations, 2015** (*Prompt Payment Regulations and Adjudication Standard)* appeared on Friday 29 May 2015 in the Government Gazette Notice 482 of 2015 and were open for public comment for 60 days until 29 July 2015. The draft regulations is available and can be accessed from http://www.cesa.co.za/sites/default/files/38822_gen482.pdf

source of concern to both the government and various industry stakeholders, but has also propelled the CIDB to initiate the procedure stipulated in section 33 (Regulations) of the CIDB Act 38 of 2000 by drafting regulations in support of payment and adjudication practice in SA. However, prior to the drafting of these regulations to support the use of ADR and particularly adjudication, a considerable amount of effort has been expended in times past to put in place certain regulations to help overcome these payment problems. The following is a short highlight of the notable ones, and their particular effectiveness in solving payment problems:

- Public Finance Management Act (PFMA), 1999 (Act 1 of 1999), Section 38 (1) The accounting officer for a department …
  - (f) must settle all contractual obligations and pay all money owing … within the prescribed or agreed period.
- Local Government Municipal Finance Management Act 56 of 2003 Section 65 (2e) The accounting officer must ….take all reasonable steps to ensure-
  - That all money owing by municipality be paid within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure
- PFMA Regulations (2005) Section 8.2.3
  - Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment.
- CIDB Practice Note 19: streamlining payment processes issued in June 2009
  - Requires that contractors should be paid promptly within the period agreed in the contract.
- National Treasury Instruction Note on enhancing compliances monitoring and improving transparency and accountability in Supply Chain Management dated 31 May 2011 and,
- National Treasury Instruction Note Number 34 requires that:
  - Payment must be effected within 30 days from receipt of an invoice dated 30 November 2011 (CIDB, Streamline payment process 2009: 2).

Unfortunately, despite all these regulations and provisions in the Act, it has been discovered that the timeous payment culture within the SA construction industry continues to deteriorate (CII, 2008: 1). The yearly CIDB's Construction Industry Indicators (CII), which provides an overview of the state and performance of the construction industry, reveals a discouraging trend in the payment culture in spite of these aforementioned provisions. In particular, the comparison of CII reports in relation to the completed projects between 2007 and 2012 does not in any way show a positive outlook but has rather confirmed payment default as a chronic problem within the construction sector. For instance, the CII reports which represent the aggregated view of the satisfaction of clients, contractors and other industry stakeholders across all the nine provinces of SA specifically reveal that:

- Around 5% of payments to contractors and the clients' agent / consultants were delayed by longer than 90 days; (CII, 2007: 1)
- Timeous payment of contractors shows a significant deterioration between the 2005 and 2008 surveys (CII, 2008: 1)
- Significant differences were also obtained between the public and private sectors, with only 35% of payments being made within 30 days of invoicing in the private sector and 46% in the public sector (CII, 2008: 1)
- The deterioration in timeous payment will begin to negatively impact on the longer term sustainability of contractors (CII, 2008: 7)
- 57% of payments to contractors were made 30 days or longer after invoicing and payment delays in 2009 show quite a significant deterioration over the payment delays in 2007 and 2008 (CII, 2009: 2)
- Contractors were neutral or dissatisfied with the management of variation orders on 31% of the projects carried out in 2009 (CII, 2009: 2)
- Within the public sector, regional and district councils were the slowest to pay contractors in the 2010 survey (CII, 2010: 12)
- Delayed payments to contractors and to client agents remain a concern, with only 45% to 50% of payments being made within 30 days of invoicing. (CII, 2011: 12)

- There are numerous complaints about late payment and contractual disputes between clients and contractors, and main contractors and subcontractors (CIDB annual report, 2012: 50).
- There has been a noticeable increase in the payment delays for both contractors and the client's agent when compared to the 2011 survey results (CII, 2012: 8). In fact, there is a significant decrease in the number of contractors who made more than 10% profit in the industry between 2011 and 2012. Specifically, the number of contractors who made more than 10% profit has decreased from 35% in the 2011 survey to 25% in the 2012. (CII, 2012: 8).

In addition, a more recent survey which was carried out on clients for 374 construction projects, and for contractors on 886 projects across all nine provinces reveals that 43% of payments to contractors were made more than 30 days after invoicing, which runs contrary to the provisions of the existing regulations (Thumbiran, 2015: 7). Unfortunately, the various organs of the state were reported to have continuously disregarded court orders to pay, and there seem to be no consequences for such failure to comply with court orders (Thumbiran, 2015: 7). While it is obvious that legal remedies are available to contractors and subcontractors when a client fails in his contractual obligation to pay for work executed, past research has revealed that the previous legislation supporting the remedies has only succeeded in improving the chances of contractors being paid but has deficiencies in expediting the recovery of contractors'/subcontractors' legitimate payments from their errant paymaster (Munaaim, 2012: 30)

In empirical terms therefore, the findings from the operation of earlier regulations and the CII reports indicate that there exists a gap between the policy reasons for existing regulations and what actually happens in reality. These findings in effect raise a concern as to what extent the construction stakeholders comply with construction regulations. While the policy objective behind the enactment of the above mentioned regulations was to address the endemic default payment problems plaguing the industry, all of the findings from the CII's reports reveal that there is consistent disparity between the policy objectives and its outcome in the SA construction industry.

Recently, the CIDB (2012: 50) has identified lack of understanding and application of the CIDB regulations, as well as non-compliance with the regulations, as major challenges in the construction industry. These observations therefore draw attention to the earlier premise given – that a strong legislative framework alone may not be sufficient in making adjudication solve its intended problems, particularly in effective resolution of disputes occurring mainly from payment defaulting. It can then be stated based on these aforementioned facts, that signing the new draft regulations into law, though in itself a good development, may be insufficient and incapable of making adjudication work effectively in SA. Thus, the argument may be viewed as valid that statutory intervention is not going to be a panacea to the industry payment problem in the absence of complementary measures (Gary et al., 2012: 341). In view of all these, there is an urgent need to determine the institutional supports and other complementary elements that will enhance effective adoption and functionality of statutory adjudication in the SA construction industry.

1.3. The Problem and its setting

All over the world, the occurrence of disputes in the construction industry continues to plague all stakeholders such as clients, contractors, subcontractors, professionals and suppliers, and have had different consequences for those involved in construction projects. These consequences range from delay in project progress to utter abandonment of construction projects. In fact, disputes have also been associated with severe health challenges to injured contracting parties, poor construction work, delay and consequent loss of money used in securing the services of legal representatives, etc. (Cheung, Suen and Lam, 2002: 409; Mohd Danuri, Ishan, Mustaffa and Jaafar, 2012: 2). Hence, contracting parties have always had cause to remediate disputes. Until lately, litigation through the formal courts has been the oldest and possibly the only utilized resolution mechanism available (Dancaster, 2008: 204; El-Adaway and Ezeldin, 2007: 366; Mohd Danuri *et al.*, 2012: 2). While it has been noted that formal courts have over the years played a significant role in the construction industry's dispute resolution and have provided succour and redress to contracting parties, the process of litigation is nonetheless being less appreciated by contractors in the presence of alternatives (IIter, Dikbas and Mel, 2007: 1157 citing Gunnay, 2001). In effect, many experts believe that litigation is currently becoming especially inappropriate for resolving disputes in the construction industry (Harmon, 2003a: 188).

Several reasons have been given for the current disinterest in litigation for dispute resolution within the construction industry. The most prominent of these reasons are: delay in court protocols, which affect execution and completion of the project; serious cash flow problems which lead to lack of survival of many contractors and subcontractors; the win-lose approach which usually leads to adversarial relationships; reduction in job profit and; strained working relationships. (Mohd Danuri *et al.*, 2012: 2). These aforementioned reasons (and several similar ones) have made for consistent calls for some better alternatives for resolving construction industry disputes (Treacy, 1995: 59). The case for ADR mechanisms in order to avoid court procedure as much as possible in the construction industry has been made loud and clear.

Various countries have developed and employed a wide range of ADR mechanisms for resolving construction disputes. These mechanisms vary from negotiation to mediation and arbitration. Disappointingly, as plausible as these mechanisms are, they are also fraught with many challenges. For instance, arbitration as an ADR process, which was initially introduced to be inexpensive, prompt, effective, private, and non-adversarial, has been fraught with challenges relating to cost, speed and procedural complexities (Harmon 2003a: 191). In fact, arbitration does not usually address disputes contemporaneously due to the fact that they can be implemented only after project completion has been attained. Similar arguments can be made about negotiation and mediation. For instance, mediation is facilitative, as a result, the mediator only has process control but the contending parties control whether or not they will settle, thereby retaining outcome control (Harmon 2003: 194). Consequently, the mechanism only possesses advantages of flexibility, confidentiality and protection of the parties' legal right when no agreement is reached (Maritz, 2009: 72). One significant disadvantage of negotiation is the fact that the process does not involve a third party intervention. Thus, it has been argued that negotiation is not usually successful if parties have taken hostile positions on a matter (SACQSP, 2013: 17). As a result of the above mentioned disadvantages, the effectiveness of these ADR mechanisms has been seriously criticized. A much better alternative has therefore been advocated (Hibberd and Newman, 1999; Stephen, 2002).

There are two policy objectives that have led to the introduction of statutory adjudication. The two policy objectives are to improve cash flow and to improve the efficacy of dispute resolution in terms of cost and time. In fact, statutory adjudication has become a trend in the common law world and has largely been effective in providing parties with the right to

payment and adjudication as well as enabling further remedies by which these rights may be determined and enforced. Due to its effectiveness, statutory adjudication has also generated interest in civil law countries. The desire to find a swift, contemporaneous, workable and inexpensive ADR mechanism that can mitigate dispute challenges and cash flow problems faced by contracting parties was what led to the introduction of adjudication in SA. Having gained popularity and wide acceptance in several other countries due to its effectiveness, adjudication seems to have come through as the desired alternative in SA. However, since its over fifteen-year introduction to the construction industry in SA, numerous complaints about late payment, contractual disputes between clients and contractors, main contractors and subcontractors as well as dissatisfaction on management of variation orders has continued at high level within the construction industry (CIDB annual report, 2012:50). It is therefore unfortunate that, in spite of increasing efforts to eliminate this notorious problem through the entrenchment of adjudication provisions in the standard forms of contracts, the situation has rather grown worse. The annual CIDB survey of contractors, clients, consultants and other stakeholders that assess the industry performance in the form of CII has reported continuous and increasing deterioration in both payment culture and management of disputes within the SA construction sector (CII, 2007:1; CII, 2008: 1,7; CII 2009:2, 2011:12; CII,2012:8; CIDB, 2012:50). Further, the report of CIDB entitled "Subcontracting in the South African construction industry; opportunities for development" indicates that no less than 65% of the subcontractors in SA (who are supposed to be protected by the mechanism) have claimed to have experienced delayed payment (CIDB, 2013: 16). The subcontractors have also reported that the delay in payments has been the root cause of disputes within the SA construction industry (CIDB, 2013:16). Yet, these subcontractors have been rather passive in invoking the adjudication provisions to address the issue. This situation has been particularly worse within the public sector construction procurement process in SA.

In recognition of the negative consequences of default payment and the fact that the problem of dispute resolution within the construction industry in SA is an acute reality that requires a timeous and durable solution, Prompt Payment Regulations and Adjudication standards[2] were proposed by the CIDB. The introduction of the regulations into the SA construction industry

[2] The CIDB Prompt Payment Regulations and Adjudication Standards is the proposed regulation that would be governing payment and dispute management under construction work contracts in the South African construction industry.

was premised on the need to facilitate payments, outlaw unfair payment terms and establish a cheaper, swifter and binding ADR mechanism. Once enacted, the regulations are expected to ensure that the lifeblood of the construction industry - cash flow - actually flows (South African Construction News, 2015). However, past studies in some of the countries where similar regulations have been in place revealed that the initial take-up of statutory adjudication faced a lot of teething problems and certain challenges which threatened its efficiencies and undermined its usage. In order to avoid these challenges in SA, this research seeks to develop a framework (focusing mainly on institutional requirements) that will aid the effectiveness of the adoption of the regulations and statutory adjudication practice in the SA construction industry.

1.4. Main research question

What are the institutional requirements for the effective functionality of statutory adjudication in the SA construction industry?

1.4.1. Research sub-questions

The main research question is sub-divided into five sub-questions;

1. What is the current industry status[3] in relation to adjudication practice in SA?
2. What are the key features of the proposed Payment and Adjudication regulations in comparison with the existing legislations from other jurisdictions?
3. What relevant institutions[4] are utilized in other jurisdictions to enhance statutory adjudication and what specific roles are performed by these institutions in effective implementation of the legislation supporting statutory adjudication?

[3] The term industry status as used in this study refers to the current state of adjudication practice in the South African construction industry including the current practices of contractual adjudication, the problems associated with contractual adjudication and the move towards statutory adjudication.
[4] Institutions are well-established formal organisations (such as a court of law, authorised nominating bodies, government institutions as well as independent institutions responsible for the adjudication implementation); they fulfil certain functions for the effective functioning of adjudication practice

4. What are the critical challenges that could generally threaten the realization of the benefits or potential of statutory adjudication and how can they be overcome?
5. In the context of the SA economic and cultural setting, what institutional and implementation requirements will promote and enhance the adoption and realization of the potential of statutory adjudication as an ADR process in SA?

1.5. Aim and objectives

The aim of this study is to determine the institutional requirements of an effective statutory adjudication practice and to develop a framework that will support the pragmatic functionality of statutory adjudication in the SA construction industry.

The specific objectives are to:

1. Critically review the current industry status in relation to adjudication practice in SA;
2. Examine the features of the proposed CIDB Payment and Adjudication regulations in comparison with the existing legislations from other jurisdictions;
3. Identify institutions that are relevant to and responsible for the successful implementation of statutory adjudication and highlight their specific roles in the effective implementation of the legislation supporting statutory adjudication;
4. Identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of statutory adjudication; and
5. Discover and develop the institutional framework that will enhance the effectiveness of statutory adjudication practice in SA.

1.6. Justification of the study

Institutions perform major roles in policy implementation and they are integral to the functionality of any legislation (Salmen, 1992: 11). This is because, without appropriate institutions, the enforceability of a particular legislation may be seriously undermined. In the construction industry, this fact cannot be denied. For a policy to be effective there is a need for proper implementation strategies. Policies are expected to be delivered on time and to expectation. When a policy is defectively implemented, it results in resistance and possible failure, which might lead to waste of resources and loss of potential benefits inherent in such

legislation. Given the complexity, contestability and disputatious nature of the environment in which construction activities are carried out; the implementation of policies is not an easy task. It requires strategies, deliberate plans and an adequate institutional support. Thus the importance of a study of this kind cannot be overstated, which focuses on how institutions should function in order to enhance the effective policy implementation, (especially in the construction industry).

The construction industry is a significant contributor to any country's economy, but is plagued by two chronic problems, which are: default payment (either in form of delayed payment or non-payment) and costly, protracted disputes (Ameer Ali, 2015). These problems have become so critical that to date, sixteen jurisdictions around the world (England and Wales, Scotland, Northern Ireland, New South Wales, Victoria, New Zealand, Queensland, Isle of Man, Western Australia, Singapore, Northern Territory, Tasmania, Australian Capital Territory, South Australia, Malaysia and Ireland) have introduced legislation on payment and also provided for adjudication as a rapid dispute resolution method to help overcome these problems (Coggins and Bell, 2015: 420). While in general the security of payment regimes could be considered as effective, it was discovered that some inherent problems are found as critical lacunae impeding the effectiveness of the legislations in some of these jurisdictions (Munaaim, 2012: 32).

For instance, the UK Housing Grants, Construction and Regeneration Act 1996 (HGCRA, 1996) underwent amendment in 2011 after approximately 15 years of its existence. Prior to this amendment several operational problems were identified as critical factors that could limit the effectiveness of the legislation (Wong, 2011; Munaaim, 2012). These factors include (i) the provision of contract to be in writing; (ii) the complicated payment procedure; (iii) excessive cost of adjudication; (iv) allocation of adjudication cost; and (v) the issues relating to the crystallisation of payment debt. In addition to the above-mentioned operational challenges (Agapiou, 2011) highlighted some other factors that can undermine the effectiveness of the adjudication process if adequate care is not taken. Among these factors are (i) the standard and quality of adjudicators; (ii) the involvement of lawyers; (iii) the financial aspect of adjudication; and (iv) the time scale involved.

In relation to the operational problem of the requirement of a contract to be in writing, the case of *RJT Consulting Engineers v DM Engineering*[5] was a classic example of how restrictive interpretation could limit the scope of application of legislation and thereby defeating the policy objectives of the legislation. According to the judgement of Ward LJ in the Court of Appeal case of *RJT consulting Engineers v DM Engineering*, it was held that all the express terms of a contract must be made in writing in order for the contract to be within the provisions of the HGCRA. This narrow interpretation created unintended difficulties for the small contractors who normally carry out a contract on the basis of oral agreement. As a result, the right of some sectors of the industry who were likely to be considered as vulnerable parties with regard to cash flow was altered because they could not able to initiate adjudication process.

That apart, the widespread of "paid when certified" clauses was identified as another challenge that impeded the effectiveness of the UK Act. The court's decision in *Midland Expressway Ltd v Carillion* Construction Ltd and others[6] stipulated that "pay when certified" clauses are contrary to the intention of HGCRA Act. Thus, Section 110(A) of the Local Democracy, Economic Development and Construction Act 2009 has banned the use of pay when certified clause.

Another area of concern was the issue of excessive cost of adjudication. Literature reveals that adjudication has been plagued with the problem of excessive cost. This has the potential of removing adjudication from being a viable option for smaller contractors with small value of dispute. The fact remains that adjudication would likely be beyond the reach of many small contractors if the cost of adjudication is always in excess of their expectations, as such, the small contractors would not be able to exercise their right because they cannot afford it.

The omission of allocation of adjudication cost under the UK construction Act has engendered difficulties issues in the construction industry. The unfair arrangement that the referring party should bear the cost of adjudication which was given a judicial support in the *Bridgeway Construction Ltd v Tolent Construction Ltd*[7] has the potential of frustrating the

[5] [2002] 217
[6] [2006] ECWA Civ 936
[7] [2000] C.I.L.L 1662 1664

impact of the statutory adjudication. To some extent, this would deter payee from enjoying the benefit of adjudication due to the fear of bearing the cost.

The implementation of statutory adjudication in NSW was not without its own challenges. In fact, Coggins, (2009) noted that the adjudication intervention provided by NSW Act had drifted away from its original plan. The inconsistent judicial interpretation, the variability in the quality of adjudicators, and lack of accessibility to the Act were found to be critical lacuna impeding the effectiveness of the NSW Act (Munaaim, 2011). Unlike the other adjudication regime, the Singapore Act was more regulatory and rule-based (Teo, 2008). As such, the interpretation of some of the Act provisions becomes a challenge. The lack of subcontractors' working knowledge of the Act and procedural irregularities were also recognised as other challenges to the effective implementation.

The Building and Construction Security of Payment Act 1999 (BCSPA) of NSW was amended in 2002 due to some problems which initially threatened the policy objective of the legislation (Munaaim and Capper, 2013: 147). Recently, the Building and Construction Payment Act of Queensland was reviewed and reformed in order to overcome certain challenges to its effectiveness (Wallance, 2013). In fact, the power to appoint adjudicators in Queensland has recently been restricted to the Adjudication Registry as against the initial practice of multiple authorised nominating authorities' involvement in the process of nomination (Wallance, 2013: 9). Thus, learning from these jurisdictions can help to produce informed decision and direction on how best the effectiveness of statutory adjudication in the SA construction industry could be achieved.

In addition, the proposed draft regulations of the CIDB submitted to the Department of Public Works (which have been gazetted for public comments and are currently awaiting final approval) is a bold step toward eliminating the contractual challenges of adjudication in SA. These regulations, once enacted are expected to profoundly impact the traditional practices within the SA construction industry. Notwithstanding, the recent study of Maritz (2014: 10) illustrates in clear terms that, even if the draft regulations are signed into law, a lot of effort still has to be made for the government and contracting parties involved to cooperate in making adjudication work. These efforts, reasonably so, can only be harnessed when the essential ingredients necessary for effective adjudication uptake are available, and different institutions critical to the implementation of adjudication are sufficiently empowered.

Therefore, addressing the issue of implementation of the proposed legislation is important to ensuring that statutory adjudication is effective in SA. This research is therefore significant and important in that it intends to investigate what should be done to ensure effective implementation and functioning of statutory adjudication in SA. Accordingly, the study seeks to identify both the teething problems and critical challenges to the effective implementation of similar legislation in the jurisdictions where it has been in existence for some time now, and how they were resolved, and thereafter to develop a framework for effective implementation of statutory adjudication in SA.

1.7. Scope of the study

The study concentrates mainly on institutional requirements for effective statutory adjudication operation in SA. A study of this nature requires examination of implementation processes and procedures as well as institutional factors that have enhanced effective statutory adjudication in the jurisdictions where similar legislations have been in existence. Due to time constraints this study was confined to obtaining input and information from experienced and seasoned practitioners that are involved in statutory adjudication implementation from four jurisdictions, namely; UK, Australian states of Queensland and NSW, Singapore and Malaysia, with major focus placed on Malaysia as it is the country that most recently introduced statutory adjudication.

The UK experts are selected due to the fact that the UK construction industry is regarded as the pioneer of adjudication, and has the longest history and significant case laws. In addition, the various challenges experienced during the implementation of adjudication in the UK construction industry have led to the amendment of the original Act. As such the experiences of the relevant participants in the UK who were involved in the adjudication implementation are very crucial to the provision of rich information that this research required.

Adjudication experts from two Australian states, namely NSW and Queensland were selected in this study. NSW was selected because its Act is regarded as the main alternative version to the UK adjudication regime. The policy consideration behind the NSW Act and the features of the Act as well as the mode of operation in NSW is different from that of the UK. While the administration of the adjudication processes and procedures is being facilitated by NSW Procurement (a division of the office of Finance and Services), the Queensland government

went a step further by establishing a dedicated agency, called Building and Construction Industry Payments Agency, to undertake the administration roles with regards to the statutory adjudication practice in Queensland. To date, Queensland is the only jurisdiction in Australia that has a registry in charge of adjudication implementation, hence, the need for including Queensland experts to participate in this study. It is therefore considered that the contributions from experts in both Queensland and NSW are very relevant to this study.

Singapore is selected on the basis of the fact that their adjudication regime is an improved version of the NSW Acts in order to suit their own industry structure. Consulting experts in Singapore will therefore reveal how the improvement in their legislation helped in effective implementation. Thus, contributions from Singapore experts are deemed very necessary.

As noted in chapter 1 of 1.6 above, experts from Malaysia are the main targets for this research. Having a focus on the experts from the Malaysian construction industry in this study is not without a reasonable justification. As previously mentioned, Malaysia is the latest country to bring into force legislation providing for the mandatory adjudication of construction payment disputes. Apart from this fact, the Malaysian Act is a product of extensive reviews of the range of legislations available internationally (including lessons learnt from practice under those Acts), along with assessments of how best those models might be adapted for use in their jurisdiction (Coggins and Bell, 2015: 421). In effect, the Malaysian Act is a hybrid of multiple adjudication systems and cannot be grouped into either of the other two leading models (i.e. the UK and NSW) (Evershed, 2014).

Malaysia is also the only country that named an independent institution called The Kuala Lumpur Regional Centre for Arbitration (KLRCA) as an implementing authority in charge of adjudication administration in their legislation. Thus, specific contributions from the experts working in this institution are precisely what are required to meet the objectives of this study. Coggins and Bell, (2015: 448) published a detailed analysis of some of the existing Acts from different jurisdictions. The authors concluded that the Malaysian Act appears to have the most impressive ADR credentials of all the other construction industry payment and adjudication statutes. These facts warrant its inclusion in this research.

1.8. Research methodology

This study adopted a qualitative research approach informed by the interpretivist philosophical assumption. The rationales behind the choice of the interpretive philosophical approach that was adopted in this study are outlined in section 5.2.1. Twenty seven experts from four selected jurisdictions were requested to participate in the research. The participants were selected through the combinations of purposive/judgemental sampling and snowballing techniques. The choice of both purposive and snowballing sampling methods was based on the recognition of the fact that they are the most important kinds of non-probability sampling to identify suitable participants who have had experience relating to the phenomenon under consideration (Kruger, 1988: 150).

Data were collected through two main sources: interviews and documents. The conduct of the qualitative interview followed Patton's (1990: 288- 289) general interview guide principles and was carried out in accordance with the phenomenological approach (Flick, 2014; Groenewald, 2004). The phenomenological approach allows the researcher to collect information from experts who have direct experience with the phenomenon under consideration. Accordingly, the data were collected from recognised professionals that were directly involved in adjudication implementation in the selected jurisdictions. These participants are regarded as experienced and leading adjudicators in their countries. Most of these participants have more than twenty years of experience, and have engaged in adjudication as legal advisers, legal representatives and construction lawyers. In addition, some of the participants have also written books and journal articles on adjudication and payment legislation in their countries and internationally. Details of the background of the participants are reported in Appendix 'A'.

The interview guide used in the study covered four main sections, which included background of interviewees, institutional roles, institutional challenges, and institutional requirements for effective adjudicatory practice. The interview guide was developed to ensure consistency in the trajectory of the interviews. The interview guide comprised of eleven open-ended questions, excluding demographic questions. The questions were to probe the individual's viewpoint regarding the subject matter. The interview lasted on average thirty eight minutes, with shortest and longest durations being 29.40mins and 1hr9mins respectively. Only fifteen, (15) out of the twenty seven experts invited participated in the

research. An acceptable sample size for interviews is from 5 to 25 individuals (Leedy and Ormrod, 2009; Bertaux, 1981: 35; Creswell, 1998: 64; Morse, 1994:225). The interviews were conducted via Skype. With the kind permission of the interviewees, they were audio-recorded and the recordings were transcribed thereafter.

The sources of the documents examined in the research were varied. They covered regulations, books, theses, journals, industry and government's reports, contemporary documents on internal procedures of institutions involved in adjudication implementation, conference proceedings and other relevant documents pertaining to adjudication practices in both SA and other jurisdictions where adjudication is practiced.

The thematic analysis of data was based on general principle of qualitative analysis, in an attempt to comprehend interviewees' contributions on effective adjudication practices (Strauss & Corbin 1998; Tuckett, 2004: 48). The analysis followed the qualitative principle of analysis which includes: transcribing, coding, constant comparison and diagramming. Using this approach, the transcripts were first studied to obtain a general sense of information contained in them. The process was done manually by the researcher for the purpose of getting comprehensive ideas of the data. During this process, key ideas were identified and highlighted. Thereafter, the transcribed data were coded, then the coded data were categorised and relationships were built among the categories. The data from the study were validated by employing the principle of trustworthiness and authenticity established for qualitative research.

1.9. Summary of findings, conclusions and recommendations

The findings of this study have been divided into four main components namely, institutions relevance and roles in the effective implementation of statutory adjudication, challenges to the effective implementation process, institutional requirements needed for effective adoption, and the enablers of effective statutory adjudication implementation. The first component describes the findings on the institutional roles that could enhance the effective implementation of statutory adjudication. The second part identifies challenges that could threaten the effectiveness of the legislation supporting statutory adjudication practice. The third and fourth components identify the institutional requirements for the effective

implementation and facilitatory factors that can promote successful implementation. A summary of the findings are presented below.

With regards to the institution relevance in the statutory adjudication process, it was confirmed that institutions play strategic roles in promoting the effective implementation of the legislation supporting statutory adjudication. Five major institutions were identified namely: (i) the legal institutions, (ii) the nominating authorities, (iii) the government institutions, (iv) the professional institutions and (v) the academic institutions. The institutional involvement in the implementation process is at varying degrees, while some institutions perform critical roles without which the adjudication process would not be successful; some institutions mainly perform supportive roles for continual realization of statutory adjudication policy objectives.

Several roles were identified that are regarded to be critical to effective statutory adjudication implementation. These roles were classified into seven, namely: (i) general administrative and secretarial roles, (ii) publicity and awareness roles, (iii) education and training roles, (iv) information dissemination roles, (v) technical support roles, (vi) financial, sponsoring and approval support roles, and (vii) enforcement roles. These roles are divided among the institutions and it is very important that each institution performs its roles effectively. The underperformance or non-performance of any of the institutions could hamper the effectiveness of adjudication and cause failure in the implementation process.

Under the second component, the critical challenges that could threaten the effective implementation of statutory adjudication were identified and categorised. These are; challenges relating to contents of the legislation; challenges relating to the cost of adjudication and adjudicator's fees; procedural challenges; jurisdictional challenges; capacity challenges; legal technicalities challenges and lack of familiarity with the legislation supporting adjudication practice. The study revealed that these challenges arise from poor drafting, court interference, drafting inconsistency and low level of knowledge. Thus, the suggested steps to be taken in order to avoid the aforementioned challenges were proposed. These include; the use of regulated standard schedule of fees; good accessibility to the legislation; prompt and good provision of the legislation interpretation by court; provision of adequate training and education to all the users of the adjudication legislation; and institutional intervention.

On the issue regarding the institutional requirements for the effective implementation of statutory adjudication, four institutional supports that must always be extant for successful implementation are revealed. These are: (i) the object of the legislation; (ii) the court support; (iii) default nominating authority, and (iv) government support. The consensus among the interviewees was that absence of any of these four institutional supports will negatively influence the effective implementation of statutory adjudication. The detail examination of these factors is presented in Chapter seven.

Finally, several factors that could promote effective implementation of statutory adjudication were revealed from the analysis of the interview data. On the one hand, some factors can encourage and reinforce effective implementation and on the other hand some factors can assist in preventing potential barriers to effective implementation. The factors that can encourage effective implementation as revealed in the study include: (i) easy accessibility; (ii) procedural clarity; (iii) increased knowledge; (iv) availability of adequate and qualified adjudicators; (v) vibrant institutions; (vi) procedural fairness; (vii) reasonable cost; (viii) strict timeline; (ix) supportive court, and (xi) default nominating body/bodies. The study further revealed that factors such as good coordination; good practices; good management of innovation processes; procedural and substantive fairness and creation of good impression through consistence performance are essential to prevent barriers to continual usage.

Based on the above identified factors, a framework that could enhance the effectiveness of statutory adjudication implementation in SA was developed and the following recommendations were made.

1. Institutions are seen to be very critical for effective statutory adjudication; as such, there is need of an implementing or administrative institution that has unquestioned credibility and an acknowledged expertise in dispute resolution and in the subject matter of the disputes to be resolved, in this instance construction disputes. Equally fundamental to a successful adjudication system is a court system that understands and supports the legislative goals of adjudication and appropriately enforces adjudication decisions.
2. There is a need of an institution that is proactive and credible. That institution has to engage in very aggressive and proactive implementation strategies and processes which could appropriately encourage effective implementation of the proposed legislation and prevent critical challenges to effective statutory adjudication.

In conclusion, it is important that the adjudication processes and procedures are fair. Consequently, confidence in the statutory scheme would grow within the construction industry and among industry stakeholders. As a result, more and more people will feel comfortable taking their dispute to adjudication and voluntary compliance with adjudication decisions should follow. If priority is given to these recommendations, then hopefully, adjudication would become the most effective dispute resolution process in the SA construction industry.

1.10. Structure of the study

The research is presented in eight chapters. The structure of the research study is given in Figure 1, which diagrammatically illustrates the setting out of the different parts and chapters of the study.

Chapter one provides insight to the background of the research idea, and it presents the research questions that the research study seeks to answer. It thereafter outlines the aim and objectives and discusses the relevance and scope of the study. It concludes with the structure of the thesis, terms/definitions and abbreviations/acronyms used in this thesis.

Chapter two discusses the process and procedure of adjudication practices, the adjudication provisions in the various construction contracts agreements, the move toward statutory adjudication in the SA construction industry, the key features of the proposed draft regulations and relevant researches related to adjudication practices in the SA construction industry.

Chapter three involves an analysis of the significance, implications and applications of the major/relevant institutions involved in statutory adjudication and the key roles they play, and/or are likely to play, in ensuring that adjudication achieves its ends. Challenges that these institutions face and/or could face toward the realization of the potential of adjudication are also discussed in this chapter.

Chapter four introduces the concept of policy implementation and focuses on the implementation within the policy circle. It reviews implementation processes, common implementation challenges, implementation gaps and critical factors for the effective functionality of any legislation.

Chapter five describes the survey methodology to be applied for data collection and the underlying concepts for the choice of research instruments. The chapter further describes the research design/strategy and the criteria for judging the quality of research design.

Chapter six presents the analysis of the data.

Chapter seven presents the result of the empirical investigation and discusses the research findings.

Chapter eight gives an overview of the research, summary of findings, conclusions and recommendations. Finally, in this chapter, considerations were given to contributions to knowledge and areas for further research on this topic.

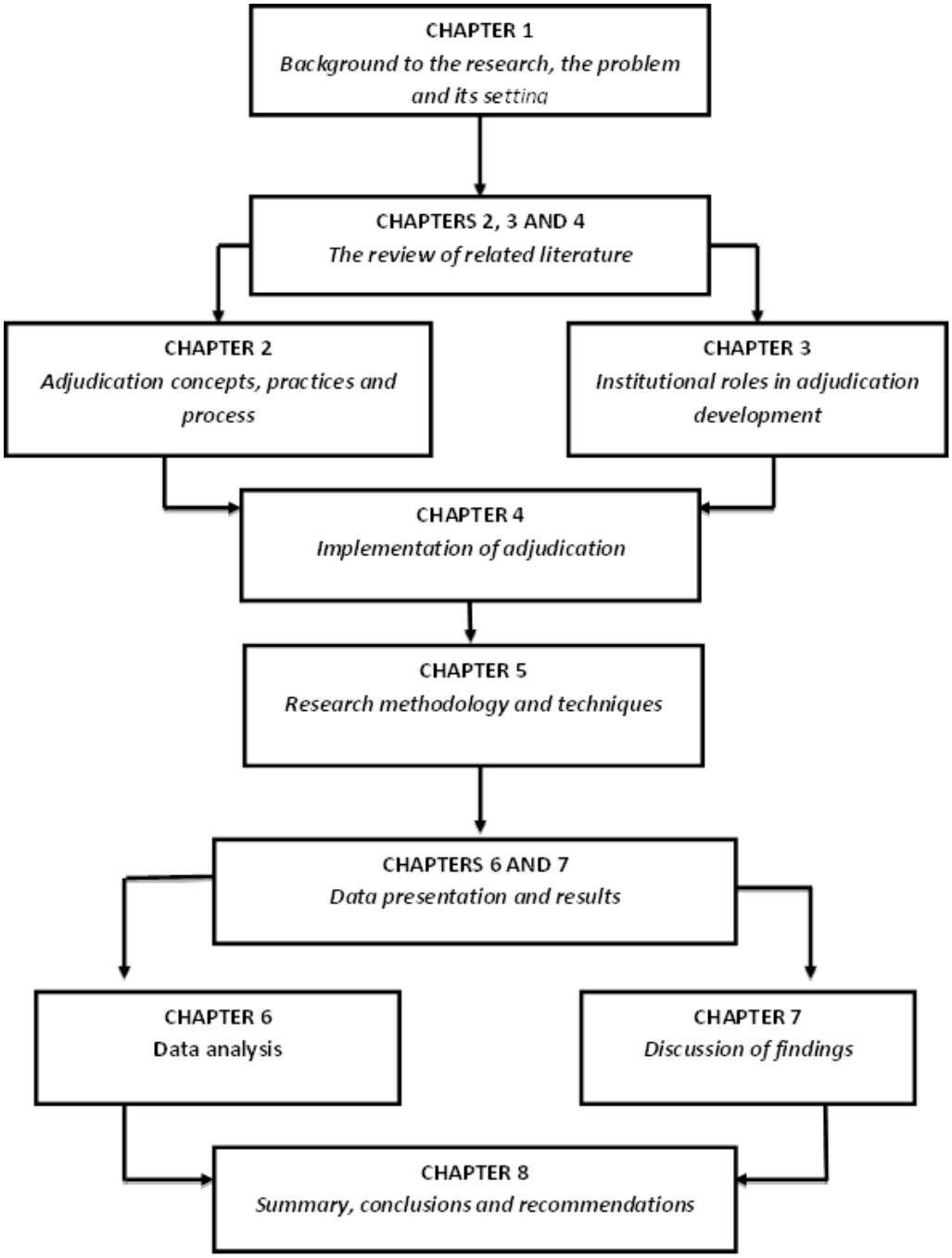

FIGURE 1 – GRAPHIC REPRESENTATION OF THE THESIS STRUCTURE

CHAPTER TWO

REVIEW OF RELATED LITERATURE: ESSENCE OF THE ADJUDICATION PROCESS

2.1. Introduction

This chapter provides an insight into adjudication as an ADR mechanism. It starts by examining the adjudication concept, followed by the rationale for adjudication preference over other resolution methods. It later discusses the adjudication provisions in the various construction contracts agreements, as well as the move toward statutory adjudication in the SA construction industry. Finally, it offers a detailed insight into the provisions of the draft regulations, highlighting the key features in the draft regulations vis-a-vis similar provisions in other jurisdictions in order to focus on the key areas to be given proper consideration for a more effective adjudication experience in the SA construction industry.

2.2. Concept of adjudication

The term adjudication has long been in existence. It is an age-old concept which has been utilized in various fields and in many different ways. Its meaning depends primarily on the nature of its use within a particular context, field or area, without which it will be meaningless (Redmond, 2001: 6). In the field of construction, there is a specialised and non-specialised use of the concept of adjudication (Maiketso, 2008: 21). The non-specialised use of the concept of adjudication is traditionally associated with the quasi-judicial role of the principal agent. However, in more recent times, a specialised use of the concept of adjudication appears as a form of ADR available to the construction industry.

Fundamentally, adjudication comes from the Latin word '*adjudicare*' which means 'to award judicially' (Ong, 2008). In addition, the verb 'to adjudicate' is literally connected with other words such as: "to judge", "to referee", "to give a ruling", or "to arbitrate". The Oxford English Dictionary has defined the word 'to adjudicate' in two ways which are; firstly to act as a judge in a competition or in the court, and secondly, to decide judicially regarding a claim (Simpson and Weiner, 2002). It is described as an action of a judge in an argument or competition for the purpose of making a formal decision. This implies that adjudication involves a procedure and process in which an adjudicator assesses an issue (such as an issue

on which a dispute occurs, a claim, a disagreement or an argument) and decides on who is right or wrong. This interpretation is similar to Alfadhli's (2013: 95) view that an adjudicator makes an official decision about who is right or wrong in a disagreement between two individuals, groups or organizations. In a more comprehensive manner, McGraw (1991) describes adjudication as a procedure where:

> *"A summary interim decision-making power in respect of disputes is vested in a third party individual (an adjudicator) who is not involved in the day-to-day performance or administration of the contract, and is neither an arbitrator nor connected with the State".*

Although the UK construction industry is regarded as the pioneer of statutory adjudication in the construction industry, neither the HGCR Act nor its scheme defines 'adjudication', but simply sets out a number of requirements that an adjudication clause has to meet in order to comply with the Act. Alfadhli (2013: 95) notes that most definitions given by legal scholars have been based on their understanding of the adjudication process and mechanism. As such, it has been argued that it is more often defined by what it is not than what it is. For instance, it is characterized with terms such as 'quick and dirty fix' or 'rough and ready process'. John Uff (2005: 63) describes adjudication in the construction industry as a pay-now-and-argue-later arrangement.

Interestingly, the concept of adjudication was revealed in the landmark case of *Macob Civil Engineering Ltd v Morrison Construction Ltd*[8]. In that case, Mr Justice Dyson (as he then was), having considered the adjudication provisions in the HGCRA 1996, described the purpose of adjudication and the intention of parliament in introducing the UK Act as:

> *"introducing a scheme that aims to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requires decisions of adjudicators to be enforced pending a final determination of disputes by arbitration, litigation or agreement, whether or not those decisions were wrong in point of law or fact".*

[8] [1999] BLR 93

This description discloses the intention of parliament in introducing adjudication as a means of providing a very quick resolution of construction disputes. Once a dispute occurs, it affects many facets of the construction process, including the flow of cash, which in turn have negative consequences on the projects and the parties involved. In order to redress some of the damaging impacts of disputes on the construction process, adjudication was introduced to provide a better solution for resolving disputes swiftly and solving cash-flow problems in the industry.

There are many more definitions from different sources, some of which partially reflect the same intentions as those of the originating sources of adjudication. Simmonds (2003: 3) describes adjudication as a process under which a dispute between contracting parties is decided by a neutral third person (the adjudicator) after examining the arguments of the parties. The adjudicator's decision is usually binding, unless and until the dispute is finally determined by legal proceedings, arbitration or an agreement between the parties. The parties may, however, accept the adjudicator's decision as the final decision on the dispute. This definition is similar to the view expressed by the CIDB on what adjudication entails. The CIDB (2005: 1) defines adjudication as:

> *"an accelerated and cost-effective form of dispute resolution that, unlike other means of resolving disputes involving a third party intermediary, the outcome is a decision by the third party which is binding on the parties in disputes and is final until reviewed by either arbitration or litigation".*

Going through all the definitions and views earlier stated, certain facts emerge which support the argument that adjudication goes beyond making decisions or judging in a competition. As revealed from the review and found in past studies (CIDB, 2004; ed.Gaitskell, 2011: 75; Maiketso, 2008: 26), the concept of adjudication reflects the following characteristics:

- There exist a dispute or differences between the parties in relation to the contract which requires the intervention of an independent third party;
- Evidence and reasoning is involved;
- The decision of the issues in dispute is made by a third party;
- The decision given determines rights and obligations of the parties involved;

- The third party (that is, the adjudicator) is not usually involved in day-to-day operation of contract (except where a standing adjudicator is used);
- The third party (adjudicator) is neither an arbitrator nor a judge;
- Object is to reach a fair, rapid and inexpensive decision;
- An adjudicator is to act impartially and in accordance with the rules of natural justice;
- An adjudicator's decision is immediately binding until and unless overturned by subsequent arbitration or litigation;
- An adjudicator's decision is enforceable by court order; and
- An adjudicator's costs are to be shared equally between the parties.

In addition to the above features of adjudication, Dancaster (2008: 206) has noted that the concept of adjudication in construction is closely related to arbitration, but with two major differences between the two processes. First, adjudication is not a final process and second, adjudication is timeous, cost effective and results in decisions with a temporary binding effect in order to ensure that construction activities are not disrupted. These two major differences are seen as an added advantage of using adjudication in dispute resolution. In effect, Gaitskell (ed. 2011: 75) emphasises that:

> *"adjudication is a typical time and cost-limited procedure which is aimed at delivering certainty on a particular point disputed by the parties, often concerning cash flow, and usually of temporary binding effect, leaving open the possibility of subsequent debate in a more deliberative and thorough manner at a later stage by either arbitration or litigation".*

2.3. Rationale for adjudication

Several authors have observed the inevitability of disputes in the construction industry (Cheung, 1999: 189, Chong, Zin and Lim, 2010: 99). Reasons for these disputes are linked to complex construction processes and interactions between contracting parties. Since disputes are unavoidable, a wide range of mechanisms for resolving construction disputes have been developed and made available to contracting parties in managing disputes when they arise. These mechanisms include negotiation, mediation, conciliation, expert determination, med-

arb, arbitration, litigation and adjudication (Owen, 2008: 223; Chong and Rosli, 2009: 643; Hattingh, 2014).

Among scholars, the preferred means of dispute resolution in the construction industry remains debatable. Harmon (2003a) argues that arbitration is the preferred method of resolving disputes as against litigation because it exempts the rigours of court proceedings and it ensures confidentiality. Wong (2011: 18) contends that arbitration is less preferred in view of the growing recognition of adjudication. The reduction in preference partly hinges on the fact that arbitration, as well as litigation, is considered time-consuming and expensive (Cheung and Yeung, 1998: 367). Adjudication, on the other hand, is seen as having less of both. A significant advantage of adjudication over arbitration is that, unlike arbitral awards, the decisions of adjudicators are only temporarily binding and as such, the mechanism provides the safety valve of taking the dispute further for subsequent debate in a more deliberative and thorough manner at a later stage by either arbitration or litigation, in cases where either of the parties are dissatisfied with the adjudicator's determination (Dancaster, 2008: 206).

As against mediation, the advantage of adjudication is that an adjudicator is empowered to make a decision based on the merits of the case. Mediation is advisory, and the mediator facilitates the process of dispute resolution between the parties. Although the mediator controls the process of resolution, he does not impose any opinion on the merits of the case but leaves the disputants to control the outcome. As such, the process only has advantages of flexibility, privacy, confidentiality, and protection of the parties' legal rights when no agreement is reached (Maritz, 2009: 79). As against negotiation, one significant advantage of adjudication is that the process of adjudication involves a third party intervention. The third party is both neutral and impartial and detached from the sentiments of the parties. One of the differences between adjudication and conciliation is the fact that, while the adjudicator investigates the disputes and makes decisions, the conciliator only facilitates the process and serves as an intermediary between the parties.

The essence of adjudication in addressing different construction payment and dispute problems is well documented in literature. The UK introduced adjudication legislation first in the Part II of the HGCR Act, 1996. Three years later, the state of New South Wales in Australia enacted the Building and Construction Industry Security Act in 1999. These two

jurisdictions are considered the leaders of the practice of legislative intervention. It is important to note that, although the NSW government followed the UK footsteps in the establishment of her legislation, the operation, procedure and application of the two Acts differ. The differences in terms of the application and operational mechanisms have been attributed to the historical and policy reasoning considered important in each jurisdiction (Munaaim, 2012). Historically, litigation and arbitration were the dispute resolution options in the UK construction industry. However, the UK construction industry was interested in developing alternative forms of dispute resolution due to excessive time and high cost of litigation and arbitration (Dancaster, 2008). Moreover, the increase in the competition for scarce construction work in the late 1980s resulted in changes in the payment culture in the UK construction industry (Dancaster, 2008). As such, the pervasive culture of late payment, non-payment and conditional payment were rampant and the subcontractors suffered due to lack of cash flow. The consequences of a poor payment culture and the ineffective dispute resolution system raised a concern which triggered a report titled "Constructing the team" (Latham, 1994). The report revealed the problems associated with the construction industry and made recommendations to address the problems.

Following these recommendations, the UK Government was persuaded that primary legislation was needed to provide all parties to a construction contract with a statutory right to have all disputes resolved in the first instance by adjudication. Thus, the UK regime of adjudication arose primarily as a result of the disputatious nature of the construction industry and inefficiencies of litigation and arbitration in terms of cost and speed in resolving construction disputes as well as poor payment practices within the construction industry. Consequently, the policy objectives of the UK Act were in two folds; (i) to improve payment practices and (ii) to provide an efficient dispute resolution mechanism that is quick and cheap. Thus, Ramsey J in *North Midland Construction Plc v A E & E Lentjes UK, Ltd*[9] stated that *"the purpose of the Act was evidently to make improvements in the construction industry by providing both a rapid dispute resolution method and also more certain payment provisions for the construction industry'.*

The State of New South Wales was the first in Australia to introduce statutory adjudication. Prior to the enactment of NSW Act, it was gathered that poor payment practices in the form

[9] [2009] EWHC 1371 (TCC)

of delaying payment and unlawful reduction in the value of payment due to parties at the bottom of contractual chain are not uncommon in the NSW construction industry (Uher and Brand, 2007: 25). These principal contractors purposely designed payment-delay-tactics for their financial solvency at the expense of subcontractors (Uher and Brand, 2007: 25). Unfortunately, in certain circumstances, the aggrieved subcontractors may choose to forfeit their contractual right to payment and move on to other projects in order to generate positive cash flow and avoid insolvency. Worse still, the payment recovery process available (litigation and arbitration) was not in any way favourable to the subcontractors.

Thus, NSW legislators deemed it very necessary to introduce statutory intervention for the sake of fairness between parties in the construction industry. Thus, the statutory intervention in NSW was primarily enacted to protect parties (the contractors, subcontractors, sub-subcontractors etc) down the bottom of contractual chain with statutory right to recover their legitimate payment and protect them from the risk of non-payment that may arise from the paymaster's insolvency (Munaaim, 2012: 26).

Literature suggests that the adjudication regime in other jurisdictions has closely followed either of the UK Act or the NSW Act with some level of modification. The Building and Construction Industry Security of Payment Act (BCIPA) 2004 of Singapore was purposely enacted to improve cash flow by helping speed up payment in the building and construction industry. In order to achieve this objective, some cultural factors were considered and incorporated during the policy formulation stage of BCIPA. In the context of Malaysia, CIIPA legislation has a comparatively modest scope contrasted to the UK and Singaporean statutes. Thus, the application of the Act was limited to payment disputes. Having established the different policies that underpinned the enactment of security of payment legislation in the above-mentioned jurisdictions, it is worthy of note that there are uniform testimonies of adjudication success and the impact it has had on the construction industry and other dispute resolution mechanisms. The studies of Kennedy, (2006), Uher and Brand (2007), Gaitskell 2007, Kennedy *et al.*, (2010); and Dancaster, (2008) are testaments to this claim.

Dancaster, (2008: 206) discusses some of the advantages of adjudication which give it an edge over other dispute resolution methods. These include; the swift nature of the process, the temporary binding nature and cost. In similar vein, Alfadhli, (2013: 97) notes some added

advantages of adjudication which publicise it as an important resolution method for the construction industry. These include; experience of the adjudicator, expeditiousness, enforceability and cost-effectiveness.

In Summary, the major factors mentioned by various authors to support the adoption of adjudication can be grouped into four, which are; time, cost, its binding nature and enforceability.

As a result of its numerous benefits, in recent time, there has been a growing interest in adjudication. Consequently, the introduction of the HGCR Act (1996) in support of adjudication has been noted to be one of the most important innovations made in the UK construction industry (Ndekugri and Russell, 2006: 380). Adjudication has been welcomed and widely adopted both in the UK and in other countries. According to Gaitskeil (2007: 779), adjudication offers parties the possibility of controlling and reducing the particular hazards associated with the final determination procedures, namely: cost, time and uncertainty of outcome.

Following the success of adjudication in the UK (where it started), many other jurisdictions such as Singapore, Malaysia and regions within Australia (such as Northern Territory, NSW, Western Australia, Victoria, the Australian Capital Territory and Queensland) have adopted it. The World Bank has equally advocated for the use of a serial adjudication known as dispute adjudication board in its funded projects. The advent of adjudication has led to a decrease in the usage of other forms of dispute resolution mechanisms in the construction industry (Gaitskeil 2007: 779).

2.4. Types of adjudication

Generally, there are two types of adjudication: the contractual and the statutory adjudication (Oon, 2003: 9). Both types of adjudication are designed to address the same, problem that an unpaid party (be it a main contractor, subcontractor, sub-subcontractor, supplier or consultant experience in securing periodic cash flow (Gaitskell, 2007: 777). This implies that both contractual and statutory adjudication are based on the same concept and principle of providing redress to the issue of cash flow problems and providing a means by which the disputes arising from the payment issue can be resolved swiftly. According to Maritz (2009: 79), the purpose of both contractual and statutory adjudication is the same, and the operation

is similar except that, in contractual adjudications, the adjudicator derives his power and authority from the agreement between the two parties in contract. This agreement is usually expressed in writing and contains an *ad hoc* set of rules that differ from one contract to another (Gaitskeil, 2011). Moreover, contractual adjudication is associated with inefficiency problems that have to do with power disparity between the contracting parties and inequality of bargaining power between the contractors and their subcontractors. All these and other problems make the introduction of statutory adjudication indispensable. The introduction of statute to support the practice of adjudication is critical to its efficiency, in order to protect the parties in the lower rung of the payment chain against unnecessary insolvency situations. Thus, parties in a lower rung of the payment chain are provided with the right to payment, adjudication and further remedies by which the rights may be asserted, determined and enforced (Munaaim, 2012: 2).

In statutory adjudication, adjudication is provided for and regulated by statute. Under statutory adjudication, a party to a construction contract has the right to refer a dispute arising under the contract to adjudication. Consequently, the statutory adjudication helps to reduce the inequality of bargaining power between the main contractors and subcontractors, thereby providing the latter with rapid and cost-effective access to justice (Lynch, 2011: 19). The decision made by adjudicator in a dispute is 'temporarily' binding on both contractual parties, unless it is set aside by either arbitration, litigation or by agreement between the contracting parties.

Table 1 describes the existence of statutory adjudication in various parts of the world.

TABLE 1 – EXISTENCE OF STATUTORY ADJUDICATION IN DIFFERENT COUNTRIES

Names of the Acts	Country	Year	
Housing Grant Construction and Regeneration Act 1996	United Kingdom	1996	UK Act (Amended in 2009) Amended by section 138 to 145 of LDEDC Act,

Names of the Acts	Country	Year	
			2009
Building and Construction Industry Security of Payment Act 1999	New South Wales, Australia	1999	NSW Act (Amended in 2002 and 2009)
The Victoria Building and Construction Industry Security of Payment Act 2002	Victoria, Australia	2002	Victoria Act (Amended in 2006)
Construction Contract Act 2002	New Zealand	2002	NZ Act
The Queensland Building and Construction Industry Payment Act 2004	Queensland, Australia	2004	Queensland Act
Construction Contract Act 2004	Western Australia	2004	WA Act
The Northern Territory Construction Contract Act 2004	Northern Territory, Australia	2004	Northern Territory
Building and Construction Industry Security of Payment Act 2004	Singapore	2004	Singapore Act
The Tasmanian Building and Construction Industry Security of Payment Act 2009	Australia, Tasmania	2009	Tasmania Act
The Australia Capital Territory Construction Industry (Security of Payment) Act 2009	Australia Capital Territory	2009	ACT
Construction Industry Security of	South Australia	2009	SA Act

Names of the Acts	Country	Year	
Payment Act 2009			
Construction Industry Payments and Adjudication Act	Malaysia	2012	CIPAA
Construction Contract Act	Ireland	2013	Ireland Act
Security of Payment Legislation	Hong Kong	2015	SOPL

2.5. The emergence of adjudication as an ADR mechanism in SA

The construction industry has generally been described as a fertile seed-bed for dispute, due to its complex and fragmented nature (Doran (1997) cited in Lynch 2011: 4). The situation is not different in SA. The SA construction industry is recognised as very large, diverse and complex in nature (CETA, 2008). The industry plays a vital role in SA's economic and social development. However, the industry is particularly plagued with payment defaults, which have been reported to be a chronic problem affecting the delivery chain (Maritz, 2007) and the root cause of construction disputes (CIDB, 2013: 16). Default in payment can be in the form of under-payment, late payment and non-payment (Nik Din and Ismail, 2014: 23). Under-payment occurs when the amount certified and paid by the client is lower than the value of work executed by the contractor. Delayed/late payment occurs when the clients take a longer time to honour the payment certificate or issue payment to the contractor. Non-payment occurs when no payment is made for the certain area of the work completed by contractors or subcontractors. All these forms of default in payment cripple effective project delivery.

The problem of delayed payment (especially on public sector projects) is very acute in SA. The unpredictability of payments has, in certain instances, resulted in an extremely negative contracting environment (Thumbiran, 2015) and as such, disputes are not uncommon within the industry. Disputes have a significant negative effect on growth and performance of the industry. In addition, the traditional means of resolving construction disputes have not helped the matter as the time and cost associated with litigation and arbitration make the process

undesirable. Hence, there have been concerns on how to strengthen the industry to face the present and future challenges with regards to payment problems within the industry, of which the subcontracting sector of the industry usually bears most of the brunt. One of the efforts to surmount the challenges led to the promulgation of the White Paper entitled "Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry" (Department of Public Works, 1999).

The White Paper provides a scheme that enables the construction industry to play a more strategic role in the socio-economic growth of the nation. It sets out government's plans and vision for an enabling strategy aimed at enhancing service delivery, greater stability, improved industry performance, value for money and the growth of the emerging sector. It focuses on the need for improved public sector capacity to manage the construction delivery process. The paper further recommends the establishment of an industry caretaker, known as Construction Industry Development Board (CIDB), with the mandate to champion the process of creating an enabling environment in order to promote the industry at large.

Having recognized the entrenchment of ADR procedures for resolving labour disputes in the Labour Relations Act No. 66 of 1995 and the successful application of ADR procedures in the private sector, the CIDB in the 1999 White Paper to the Minister of Public Works, recommended the use of ADR, in particular adjudication. The recommendation of adjudication is premised on the recognition that litigation and arbitration were observed to be time-consuming and costly, thereby leading to small and emerging contractors' vulnerability in the event of major disputes arising. Hence, contractual adjudication was formally introduced to SA's construction industry through the efforts of CIDB. Thus, contractual adjudication became commonplace in the SA construction industry through the constant usage of the four CIDB endorsed standard forms of contracts. Two of the forms are internationally developed (FIDIC and NEC3) and the other two are home grown (GCC and JBCC). As with many jurisdictions, the standard forms have undergone some amendments since their introduction. The latest versions of the four standard forms are JBCC 2014 edition 6.1, GCC 2015 3rd edition, the NEC3 2005, 3rd edition and the FIDIC 1999 1st edition. In the current version of the forms, adjudication provisions are found under clause 20 of FIDIC, clause 10.5 of GCC, Option W1 of NEC 3 and clause 30 of JBCC.

Each of the forms adopts a standard adjudication procedure. GCC makes use of the CIDB adjudication procedures, JBCC applies its own adjudication rules, NEC provides for two adjudication procedures (Option W1 and W2) based on the UK statutory requirements for adjudication. Option W2 is the Act-compliant procedure for use in contracts subject to the UK Act, while option W1 is the NEC procedure applicable in SA. FIDIC makes use of its own general conditions and procedural rules for adjudication. It is important to know that all the adjudication procedures need to align with the principles underpinning adjudication in SA.

Drawing some comparison from the four forms of contracts, the following points are observable:

- **Appointment:** The parties are to jointly appoint the adjudicator or Dispute Adjudication Board (DAB) by mutual agreement or by a named authority either at the beginning of the contract (standing adjudicator) or when disputes has arisen (*ad hoc* adjudication). The adjudicator's agreement is a tripartite agreement and must be co-signed by the employer, contractor and adjudicator(s).
- **Terms of appointment and conduct of adjudication**: The adjudicator is required to act fairly and impartially in accordance with the rules of natural justice. He is expected to act independently of the parties and treat all matters with confidentiality.
- **Procedure:** The adjudication process is not to be conducted as arbitration. The adjudicator is permitted to decide on the procedure to be followed in the adjudication. He is authorized to use his own initiative to ascertain the facts and laws necessary to resolve the dispute. The adjudicator may use his own expertise, order an interrogation, require or limit further submission of documents or decide on the language of choice for adjudication. The adjudicator can also conduct a hearing (though this is not usually encouraged) or call for meetings, carry out site visits and inspections as he/she deems appropriate, carry out any test and experiment and can appoint an independent expert upon receiving the consent of the parties.
- **Determination:** The adjudicator shall reach a fair, rapid and inexpensive determination of a dispute arising under the contract. The decision of the adjudicator shall be in writing, containing the reasons for his/her decisions if requested by any of the parties. He/she shall determine the amount that any of the parties is liable to pay to the other, the date the payment is to be made and other matters regarding the rights and

obligations of the parties. The adjudicator on his own or upon the application of any of the parties may correct his/her decision so as to remove any clerical or typographical error arising by accident or omission within five days of the delivery of the decision to the parties. The corrected decision shall be sent to the parties as soon as possible. The adjudicator's decision is binding and the parties shall give effect to it regardless of any intention to take the adjudicator's decision on review or arbitration.

- **Payment:** The parties shall implement the adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration. Payment (if applicable) shall be made in accordance with the payment provisions in the contract.
- **Miscellaneous:** The adjudicator is not liable for any act or omission in the course of discharging his duty, except if the act is done in bad faith.

A cursory evaluation of the above provisions shows that several factors have been considered in order to reach a fair, rapid and inexpensive decision. Some of the provisions can be seen as a means of discouraging any delay tactics which can hamper the progress of construction work.

i. The provisions require that there should be strict adherence to the time period specified under the procedure. Any extension to the time must be jointly agreed upon by the parties. The strict time-frame in each of the procedures is to avoid delay. Although the time-frame in JBCC is different from that of FIDIC and the other forms of contract, the procedure in the provisions is to allow for quick resolution.

ii. The decision of the adjudicator is immediately binding, regardless of any intention to take the decision on review or on arbitration. It is therefore clear that the fact that prompt effect is to be given to the decision means there is no room for any delay in project execution. In fact, the provisions require that parties should continue with their obligations in terms of the agreement, notwithstanding the disagreement between them.

iii. The parties are expected to comply with any request or direction of the adjudicator in the adjudication process. In case of default by any of the parties without a reasonable cause, the adjudicator may continue the adjudication in the absence of the party or the documents requested and take a decision on the basis of information before him or her. This is to avoid the use of delay tactics by any of the parties which may affect the speedy resolution of the dispute.

Looking at the adjudication provisions of the different forms of contract, the findings of Maiketzo and Maritz (2009) that there are sufficient contractual provisions for effective practice of adjudication in the CIDB recommended forms of contract can be regarded as valid. However, Maritz (2007) notes that contractual adjudication has not been used to a great extent in SA.

2.6. Transition towards statutory adjudication in SA

Adjudication found its route into the SA construction industry through various initiatives of the SA government, the CIDB and the increased use of international standard form construction contracts. In promoting adoption of adjudication into the SA construction industry the White Paper on "Creating an Environment for Reconstruction Growth and Development in the Construction Industry" argues that the conventional mechanisms and procedures for final dispute resolution in use through the SA construction industry, referring particularly to arbitration or litigation, are both costly and time consuming. The paper broadly advocates the use of ADR mechanisms, in particular adjudication to resolve construction disputes in the SA construction industry. The White Paper further confirms that recommendations adapted largely from the Latham report will be introduced to the construction industry. Latham (1993) outlined the problems associated with the disputatious nature of the construction industry which justifies the imposition of statutory intervention to protect vulnerable parties. As a result, Latham (1993) among other things recommended that a system of adjudication should be introduced within all standard forms of contract (except if comparable arrangements already existed for mediation or conciliation) and that should be underpinned by legislation.

Although the SA government through a series of interventions since 1995 initiated the general implementation of an accelerated and cost effective form of dispute resolution known as adjudication, the SA government's intervention unfortunately has stopped short of executing Latham's key recommendation that the system of adjudication should be underpinned by legislation (Maritz, 2013). Consequently, the obligation to adjudicate in SA only arises on a specific agreement to adjudicate, which agreement is recorded in the dispute management mechanisms captured in the particular construction contract.

In addition to the abovementioned shortcoming, the SA construction industry role players are more familiar with the earlier forms of dispute resolution mechanism. Most adjudicators are trained and/or experienced in other forms of disputes resolution mechanism and not in adjudication per se (Maiketso, 2012). Worse still, the concept of adjudication is not generally understood and the industry players (the contractors, subcontractors, suppliers and others down the contractual chain) who are to be served by the adjudication mechanism, also have limited understanding of the process and how best to use it (Maiketso, 2012). As such, the contractual adjudication faces different fundamental challenges which affect its application in resolving construction disputes in SA.

Maritz (2007) provides an overview of the development of adjudication as an ADR process in the SA construction industry, considering its effectiveness in resolving construction disputes and establishing the extent to which adjudication has been utilised since its introduction into the SA construction industry through the employment of construction contracts incorporating dispute management mechanisms, which include adjudication. The study of Maritz (2007) reveals that the level of usage of the contractual adjudication has been very low. He concludes that '*Experience in other countries who have introduced adjudication has shown that adjudication without the statutory force is not likely to be effective. Enforcement of the adjudicator's decision is critical to the success of adjudication and before South Africa introduces an Act similar to Acts such as the Housing Grants, Construction and Regeneration Act 1996 (UK), the Construction Contracts Act 2002 (NZ) or Building and Construction Industry Security of Payment Act 2004 (Singapore) adjudication will remain largely ineffective and, therefore, underutilised in the South African context*'.

The further study of Maiketso and Maritz (2009) revealed that adjudication has found acceptance in the SA construction industry but has to overcome contractual, institutional and legislative framework, skills and training challenges before its potential can be realized in full. In addition, Van der Merwe (2009) conducted a comparative study of the application of both mediation and adjudication across the SA construction industry to determine which of the two methods is better suited to resolve construction disputes in the SA construction industry. He concludes that both mediation and adjudication are effective alternative methods of disputes resolution to litigation and arbitration but adjudication still have advantages over mediation, although it has weakness in enforcing the adjudicators' decision.

In order to overcome the challenges referred to by Maiketso and Maritz (2009), coupled with the recognition of the negative consequences of default payment and the fact that the problem of dispute within the construction industry in SA is an acute reality that requires a timeous and durable solution, Prompt Payment Regulations and Adjudication Standards were proposed by the CIDB. The introduction of the Prompt Payment Regulations and Adjudication Standards into the SA construction industry was premised on the need to facilitate payments, outlaw unfair payment terms and establish a cheaper, swifter and binding ADR.

Moreover, the SA Courts have exhibited a clear willingness in enforcing adjudication decisions through recent judgements in the High Court of SA, namely, in an unreported judgement of the South Gauteng High Court on 3 May 2013 handed down by D T v R du Plessis A J in *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*[10], and in another unreported judgement of the South Gauteng High Court handed down by Spilg J on 12 February 2013 in *Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd JV v Bombela Civils JV*.

In the Tubular case, the applicant (Tubular Holdings Ltd) applied to the South Gauteng High Court for an order compelling DBT Technologies (Pty) to comply with the decision of the DAB. The dispute between the parties concerns the interpretation of clause 20.4 of the FIDIC, suite of contract (1999 First Edition). The dispute is summed up by Du Plessis in the following words: "The applicant submits that the parties are required to give prompt effect to the decision by the DAB which is binding unless and until it is set aside by agreement or arbitration following a notice of dissatisfaction whereas the respondents says that the mere giving of dissatisfaction undoes the effect of the decision". The court held that "the terms of the relevant contractual provisions are perfectly clear: the parties are obliged to promptly give effect to decision by DAB. The issue of a notice of dissatisfaction does not in any way detract from this obligation; whilst such a notice is necessary where the dissatisfied party wishes to have the decision revised it does not affect that decision; it simply set in motion the procedure in which the decision may be revised. But until revised, the decision binds the parties and they must give prompt effect thereto".

[10]case number: 06757/2013 unreported judgement of D T v R du Plessis in the South Gauteng High Court

In Esor Africa (Pty) v Bombela Civils[11] the applicant applied to the South Gauteng High Court seeking enforcement of the DAB decision and an order compelling the respondent to make payment pursuant to a DAB decision in its favour, the court held that "… The DAB provision is clearly intended to provide an expedited process of dealing with disputes as and when they arise, including the adequacy of interim payment certificates". The Court further concluded that, "The Court is required to give effect to the terms of the decision made by the adjudicator. The DAB decision was not altered and accordingly it is that decision which the court enforces".

The combination of the SA Courts' willingness to adopt a robust approach to enforcing adjudicators' decisions and the initiatives of both the SA government and CIDB particularly to overcome the identified challenges to effective adjudicatory practice are reinforcing a proper foundation upon which to implement a legislative framework to underpin adjudication practice in the SA construction industry (Maritz and Hatting, 2015: 48; Massey, 2014). Recent events in the industry reveal that the draft regulations prepared by an internal task team in support of adjudication practice in SA has been gazetted for public comment and may soon receive final approval. The draft regulations consist of Part IV B titled "Prompt Payment" and Part IV C titled "Adjudication". These provisions in the draft regulations are discussed below.

2.7. Adjudication provisions in the new draft regulations

The latest development in the SA construction industry relating to adjudication practice is the CIDB's initiative, with the support of the construction industry, in introducing statutory adjudication through the proposed draft regulations known as Construction Industry Development Amendment Regulations.

The draft regulations are in two parts: the Part IV B on "Prompt Payment" and Part IV C which deals with "Adjudication". In addition to the provision of speedy resolution mechanism through adjudication, the other key features of the proposed draft are the provisions for prompt payment which outlaw the practice of "pay when paid" or "pay if paid"; the entitlement to progress payment; date of liability for payment and provision of security and remedies for recovery of payment (CIDB, 2014). This particular study is

[11] case number 127442 [2013] unreported judgement of the South Gauteng High Court dated 12 February 2013

specifically focused on Part IV C, the section which deals with adjudication. The next section deals with the main features and scope of the proposed legislation framework.

2.7.1. The main features and scope of the proposed legislative framework

The scope of the Payment and Adjudication legislations in each jurisdiction (that has adopted it) is one of the main areas of divergence. While some jurisdictions include certain types of contracts in their Acts, some exclude them. Thus, the recognition of the types of contracts included in the Act to which the legislation refers is crucial in determining the beneficiaries that the legislation attempts to protect and thereby the legislation's scope of application (Munaaim, 2012: 42).

Unlike other jurisdictions where the security for payment and adjudication were legislated in a new Act, the SA proposal for security of payment and adjudication legislation is somewhat different and unique in that it is effectively subject to existing legislation and not to a separate new Act, as practiced in other jurisdictions. The CIDB Regulations published under GN 692 in GG 26427 of 9 June 2004 were amended by the insertion of part IV B and Part IV C. While the adjudication regulations provide the aggrieved parties with an effective means of redress against perceived wrongs, the payment regulations attempts to alleviate the problems of default payments which are so common within the construction industry. As such, the CIDB's prompt payment regulations in Part IV B:

- prohibit conditional payment provisions e.g 'pay-when-paid' clauses (Section 26B);
- insist on regular payments within a defined time-frame - entitlement to progress payment (Section 26C);
- allow suspension of construction activities - right to suspend performance for non-payment (Section 26F);
- prohibit withholding of payment (Section 26E sub regulation 1, 6); and
- entitle a party to charge interest on late payments (Section 26D sub regulation 2);

In addition to the above-mentioned, the regulations provide for adequate mechanisms for determining the date of liability for payment under section 26D. The regulations require that every construction contract should provide a mechanism for determining when payment becomes due and payable under the contract. The date from which payment becomes due and payable is the date stipulated in the contract, provided that such date may not be more than 30 days after the date on which invoice was rendered (after which interest becomes payable). The purpose of the payment regulation is to address the payment issue which has been a serious problem within the industry. As such, the new proposed Payment and Adjudication regulations are expected to change the way the SA construction industry operates (South African Construction News, 2015).

The introduction of the adjudication provisions in part IV C of the regulations would make it mandatory that construction contracts provide for the resolution of disputes by means of adjudication. In this way, each party to a construction contract would possess a statutory right to refer a dispute to an adjudicator, who would decide the dispute within twenty eight calendar days. The adjudicator's decision will be binding on both parties until finally settled by arbitration, litigation or by agreement.

2.8. Application of the regulations

Section 1 of part IV C of the draft regulations provides that adjudication would be applicable to both public and private sectors where contracting parties have concluded, either in writing or orally, any contract regulating …execution of … construction works… or …construction work-related contract… collectively referred to as the 'construction contract'.

A close scrutiny of the draft regulations reveals the following:

- There is provision for the statutory right to refer a dispute to adjudication;
- For the regulations to apply there must be a dispute;
- It would apply to construction work-related contracts;
- The regulations would apply to both written and oral contracts on both public and private sector construction contracts;

- The regulations are not intended to be retrospective (Section 5 – Transitional provision), which means that the regulations would not apply to any contract that has been entered into before the commencement date; and
- The regulations exclude home-building contracts.

2.8.1. Provision for statutory right to refer disputes to adjudication

Under sub-clause (1) of regulation 26 P [Right to refer disputes to adjudication] either party to the construction contract will obtain a statutory right to refer a dispute arising under the construction contract to adjudication. Thus, sub-paragraph (1) of regulation 26 P (Right to refer disputes to adjudication) of Part IV C (Adjudication) provides:

> *"Every construction works, or construction works-related contract, shall provide for an adjudication procedure, which shall substantially comply with these regulations and if that contract does not contain such a procedure, or in the case of a verbal contract, the provisions of this part and the Standard for Adjudication apply to that contract".*

In effect, Sub-paragraph (1) requires the parties to any written construction works or construction works-related contract to include an adjudication procedure into the contract. In the event that the adjudication procedure provided for in the express terms of the contract does not substantially comply with these Regulations, then, by default, the provisions of Part IV C (Adjudication) together with the "Standard" will apply automatically. Similarly, if the parties conclude any oral construction works contract or construction works-related contract, then, (in the absence of express terms to the contrary recorded in writing) by default, the provisions of Part IV C (Adjudication) together with the "Standard" will apply automatically.

2.8.2. There shall be a dispute for the provisions to apply

The regulation provides that there shall be a dispute for the adjudication provisions within the draft regulations to apply. What would constitute a dispute is specifically defined in sub-clause (2) of regulation 26 P [Right to refer disputes to adjudication]

as including … "any difference between the parties in relation to the contract". The broad definition of a dispute arising under a construction contract defined in sub-clause (iii) of Part 1 is: The Adjudicator [General Principles] accords with the general approach adopted in section 108 (1) of the HGCRA (1996) which provides that … "a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section". For this purpose, dispute includes any difference. The HGCRA (1996) allows all types of disputes to be referred to adjudication and enables a contractual adjudication regime to run in parallel with the statutory adjudication system. The NSW Act is purely statutory, allowing only progress payment-related disputes to be adjudicated. Sub-clause (1) of regulation 26 P [Right to refer disputes to adjudication] creates a statutory obligation on the parties to a construction contract to provide for an adjudication procedure to resolve disputes arising under the construction contract in the express terms of each construction contract. While it is true that a party to a construction contract has the right to refer a dispute arising under the contract to adjudication, it is important to stress that it is a right and not an obligation. As such, should a party choose to refer a dispute directly to an arbitration or litigation, he/she is free to do so.

2.8.3. Application to construction works related contract

A contract will be subject to statutory adjudication provided it falls within the scope of the construction works-related contract. The definition of a construction works-related contract, at this point, is very important as it defines which construction contracts are covered by the legislation, and it is thus subject to its payment and adjudication provisions. The proposed regulations use the term "construction work-related contract" to describe the construction operation that is subject to its legislation, as against the terminology used in other jurisdictions such as in the UK (which uses the term "Construction Operation"), NSW, Malaysia and Singapore (that use the term "Construction contracts"). However, the term "Construction Works" is defined under sub-paragraph (j) of section 1 (Definitions) of the CIDB Act 38 of 2000 as

> *…"the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure"…*

The regulations supplement this definition by including "...Construction works-related contracts…" Unlike in the other jurisdictions where the definitions of what constitutes construction contracts were broadly defined, the draft regulations briefly mentioned what constitutes the goods and services, where goods means

> *materials and components that form part of any building, structure or work arising from construction works; plant or materials supplied in any manner for use in connection with carrying out of construction works" supplied and used in connection with the contract*

In addition, the regulations define the services as including the works of the various professionals as contemplated in under-listed professional Acts:

- the Project and Construction Management Profession Act, 2000 (Act No 48 of 2000);
- the Engineering Profession Act, 2000 (Act No. 46 of 2000);
- the Architectural Profession Act, 2000 (Act No. 44 of 2000);
- the Quantity Surveying Profession Act, 2000 (Act No. 49 of 2000);
- the Valuers Profession Act, 2000 (Act No. 47 of 2000) ; and
- the Landscape Architectural Profession Act, 2000 (Act No. 45 of 2000).

In summary therefore, a careful examination of the draft regulations reveals that the adjudication provisions are extended to a contract that relates to construction works, supply of goods and services and professional services. As such, the scope could be said to be wide enough to cover main contractors and subcontractors, as well as construction professionals.

2.8.4. Excluded construction work

All the existing Acts from the four jurisdictions provided the list of excluded construction works in their Acts, except the Singapore Act which does not provide the list of construction operations that are excluded from its Act. The UK Act and the NSW Act include a provision that they do not cover certain contracts that are associated with other industries such as oil and gas industry and mining industry, while the Malaysian Act specifically provides that certain government contracts (national security related facilities) are exempted from the Act. While the abovementioned types of contracts were not mentioned in the draft regulations, the regulations specifically make it clear that home-building contracts are excluded from the operation of the regulation. The main reason for this is that, within the regulatory framework of the SA construction industry, home building does not fall under the auspices of the CIDB Act 38 of 2000, but is regulated under the National Home Building Regulatory Council Act. Aside from the home building contract, the regulations do not provide for exclusion of any other type of contract. However, it appears that the excluded construction operations mentioned above in other jurisdiction Acts are also not covered by the provisions of the regulations, since they do not specifically fall under the definition of construction work-related contracts within the regulations.

2.8.5. Compliance provision

Similar to the anti-avoidance prohibitions in other Acts, Section 26A (2) of the regulations contain an express provision outlawing any attempt made by parties to avoid being governed by the adjudication provisions. The legislation specifically provides that its provisions have effect despite any provision to the contrary in any contract. This is very important so as to prevent contracting out from the legislation's scope of application.

2.8.6. Transitional provisions

Part IV C section 5 of the draft regulations states that its provisions do not apply to any contract that has been entered into before the commencement date of the

regulations. This implies that the regulations do not have a retrospective effect in contrast to those existing in the Malaysian Act. However, the transition provision of the regulations is similar to the provision of the UK Act, which only has effect on the contract that exists after the Act has been in force. The reasons for this disparity in the scope of application of the legislations in each of the jurisdictions have been attributed to objective policies behind the introduction of each Act (Munaaim, 2012, 42).

2.9. Procedure

In the draft regulations under part IV C, the adjudication procedure provided for must be constructed around the six fundamental requirements specified in sub-clause (4) of regulation 26P [Right to refer disputes to adjudication]. Should the adjudication procedure not incorporate all six requirements, the adjudication procedure will by default be implemented in accordance with the provisions of Part IV C and, more particularly, the adjudication standard.

The requirements are:

i. To enable a party to give notice of his/her intention to refer a dispute to adjudication;
ii. Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him or her within seven days of such notice;
iii. Require the adjudicator to reach a decision within 28 days of referral;
iv. Allow the adjudicator to extend the period of 28 days by up to 14 days with the consent of contracting parties;
v. Impose a duty on the adjudicator to act impartially; and
vi. Enable the adjudicator to take the initiative in ascertaining the facts and the law.

2.10. Adjudicator's decision

Sub-clause 1 of regulation 26 X [Effect of adjudicator's decision] of Part IV C specifically obliges the parties to give effect to the adjudicator's decision within ten days of the decision being notified to the parties, irrespective of whether or not the decision will be later challenged. In addition, the regulation provides that the decision is binding (though not final) on the parties, and must be given effect to, even though a party intends to refer such dispute

to arbitration or litigation. This approach has been supported in *Basil Read (Pty) v Regent Devco (Pty) Ltd* with Mokgoatlheng J holding that, where the contract and Adjudicator's Rules state that the parties are bound to act in accordance with the adjudicator's determination until such time as it is set aside by an arbitrator, declaring a dispute in relation thereto does not relieve the respondent of its contractual obligation.

Further, Sub-clause 2 of regulation 26 X [Effect of adjudicator's decision] of Part IV C provides that … "the decision of an adjudicator constitutes a liquid document or, in the case where it orders the payment of an amount of money, a liquidated amount as contemplated in rule 32(1) of the High Court rules..." This provision goes further than the HGCRA (1996) and the scheme providing mechanisms to recover unpaid amounts by effectively enabling the claimant to institute either provisional sentence proceedings or summary judgement proceedings on the adjudicator's decision itself as a liquid document evidencing a liquidated amount due, owing and payable (Hatting and Maritz, 2013). In addition to the immediate opportunity to institute provisional sentence proceedings afforded by section 2 of regulation 26 X [Effect of adjudicator's decision] of Part IV C, the High Court of SA has, by both summary judgment proceedings and motion proceedings for specific performance, enforced adjudicator's decisions. This approach has also been defended in both *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd*[12] *and Freeman, August Wilhelm N.O, Mathebula N.O, Trihani Sitos N.O vs Eskom Holdings Ltd*[13] by the High Court of SA in the enforcement of adjudicator's decisions by application of entrenched SA civil proceedings.

Going through the draft, the basic adjudication procedure prescribed in the draft can be summarised as follows:

- When disputes arise, the claimant to the dispute initiates the proceeding by giving notice of his or her intention to refer the dispute to an adjudicator – Section 26P 4 (a).
- The notice of adjudication shall contain the details and date of contract between the parties, the nature and a brief of the dispute and the parties involved, details of where the dispute has arisen, the nature and the extent of redress sought and the addresses of the parties.

[12] case number 43346/09, unreported judgement of Kathtree-Setiloane AJ in the South Gauteng High Court
[13] case number 41109/09 (unreported judgement of Mokgoatheng J in the South Gauteng High Court

- Upon the serving of notice, within five days of giving the notice of referral, the referring party shall request the person (if any) named in the contract to act as an adjudicator (Sub-clause 2 - appointment of adjudicator). If no person is named or the person named is unwilling or unable to act, the referring party shall request the nominating body (if any) named in the contract to appoint a person to act as an adjudicator. Where the contract does not provide for a specific nominating body to appoint an adjudicator, or the adjudicator who has been nominated has indicated that he/she is unwilling or unable to act, then the referring party shall write to the adjudicator-nominating body to nominate an adjudicator.
- The named or nominated adjudicator shall, within two days (in accordance with the provision in paragraph 1 sub-clause 2) of receiving the request, indicate if he/she is willing and able to act as an adjudicator. The named or nominated adjudicator shall also write a notice of acceptance confirming his/her appointment based on the terms of the contract.
- The adjudicator is empowered to inquisitorially take the initiative in ascertaining the facts and the law required to take decision. He/she shall establish procedure including limiting submission, requiring further submissions and setting deadlines for submissions. He/she decides on language/languages to be used in adjudication and whether a translation of any document is to be provided and by whom. The adjudicator may use his/her own specialist knowledge, seek expert opinion or appoint an independent expert, subject to obtaining necessary consent from the parties, schedule meetings with the parties, carry out site visits and inspection of the site, goods and materials relating to the dispute, including opening up of work done where necessary. The adjudicator may also open up, review and revise any certificate, decision, opinion, valuation, instruction, and decide on any matter, even though no certificate has been issued on that matter. He or she also conducts a hearing as appropriate (Section 26s sub-clause 2), orders interrogatives to be answered and orders that any evidence should be given under oath or affirmation.
- The adjudicator shall reach a decision within 28 days of referral notice, or 42 days or such period exceeding 28 days after the referral notice, as the parties to the dispute may, after receipt of the referral notice, so consent (Section 26v).
- The adjudicator’s decision shall be in writing, containing reasons, if so requested by either of the parties (Section 26v 3). The adjudicator shall determine the adjudicator’s

amount to be paid and other matters in dispute on rights and obligations of the parties. The decision of adjudicator constitutes a liquid document or, in the case where it orders the payment of an amount of money, a liquid amount as contemplated in rule 32 (1) of the SA High Court rules.

- The adjudicator may, on his own initiative or on application of any of the parties, correct any typographical or clerical errors within 5 days of the delivery of the decision to the party. The adjudicator shall deliver the corrected decision to each of the parties to the contract as soon as possible after the correction. Any correction forms part of the decision.
- The adjudicator's decision is binding and the parties must give effect to it within 10 days of the delivery of that decision, notwithstanding any intention to take the decision of the adjudicator on review or on arbitration (Section 26R clause 1).
- If a party refuses to effect the adjudicator's decision, the aggrieved party may apply to court to enforce the adjudicator's decision, either by summary judgement or order for specific performance.
- These provisions in the draft regulations require that there be the availability of trained and experienced adjudicators, the creation of an Adjudicator Nominating Body (ANB) which is responsible for appointing adjudicators, as well as a strong institutional support for the effective implementation of the provisions.

2.11. Summary

In this chapter, an investigation into the meaning, purpose and practice of adjudication was presented. The current implementation of adjudication in SA, that is, contractual adjudication, was discussed and the recent provisions for statutory adjudication were also explained. The chapter then highlighted the main features of the draft regulation for statutory adjudication in light of similar provisions in other jurisdictions. The features within the proposed CIDB payment and adjudication regulations seem encompassing to encourage wide usage. For instance, the provision that the legislation covers oral and written contracts, and also applies for the supply of goods and services is significant as no one would be able to contract out of the legislation. Thus, it is hoped that the legal framework provided for in the legislation would enhance effective statutory adjudication performance in South Africa, if adequately implemented.

CHAPTER THREE

REVIEW OF RELATED LITERATURE: INSTITUTIONAL ROLES IN ADJUDICATION PROCESS

3.1. Introduction

In this chapter, a discussion of the meanings, significance and the key roles that institutions commonly play in the development process is carried out. The purpose of this chapter is to provide clarity to the meaning attached to the term 'institution' as used in the context of this study. The chapter starts with the definition of institutions and thereafter establish the importance of institutions in the adjudication development process.

3.2. Definition of institutions

Over the years there has been increased attention on institutional development, institutional building and organizational strengthening. This is largely due to institutions being a major building block for the successful deployment of policy objectives and fundamental to the development process. From a review of literature from the field of institutional development, this fact has been severally and consistently confirmed (Blase, 1986; McDermott and Quinn, 1995; McGill, 1995). Yet there is no standard definition of "an institution" in the literature (McGill, 1995: 65). Blase (1986: 329) suggests that "while a single, all-purpose definition of an institution would be convenient, it does not exist, and the literature is not mature enough for its formulation at this time". Hence a variety of terms is used to describe an institution. Clarity of definition will therefore assist in ensuring consistent interpretation and usage (Blunt and Collins, 1994: 112).

McDermott and Quinn (1995: 151) define an institution in the broadest sense as established law or custom. This definition is akin to that of Keohane (1989: 3) who describes institutions as "persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activities and shape expectations". These definitions accord with the most cited definition of an institution proposed by Uphoff, in which institutions are "complexes of norms and behaviours that persist over time by serving some collectively valued purposes" (Uphoff, 1986). The views of the various authors cited above can be summarised in the North (1990: 5) definition that refers to institutions as "rule of the game" or "humanly devised

constraints" that shape human interaction. According to TACSO (2015) the nature of an institution's definition is classified as abstract.

Abstract institutions are informal types of institutions that focus on customs and practices (Cortner *et al.,* (1998: 160). They are durable and generally accepted. The acceptance may be based on an agreement, common understanding in society, a contract, or even force. Abstract institutions usually influence the organized settings and assist in establishing boundaries for development activities. In designing development interventions, they are to be given serious consideration, as their effects on development activities can be of great importance.

Shifting away from viewing an institution in the broader sense, the term "institution", on the other hand, can be used in a more specific way to imply some form of purposive organisation, consciously formed for a definite purpose. Thus, the term "institution" and "organisation" are commonly used interchangeably. There are three ways in which these two terms are used interchangeably. These ways are (i) organisations that are not institutions, (ii) institutions that are not organisations, and (iii) organisations that are institutions (and vice versa) (Uphoff, 1986:8; MCGill, 1995, 64; MCDermott, 1995: 151). Blase (1986:323), acknowledging the earlier work of Philip (1969) defines the term "institutions," as "organizations staffed with personnel capable of carrying out defined but evolving programs contributing to social and economic development and having enough continuing resources to assure a sustained effort for establishment, acceptance, and application of new methods and values". In addition to this definition, Esman (1967: 1) had earlier described an institution as "a formal organization which helps in inducing and protecting change". These types of institutions are referred to as concrete institutions.

Concrete institutions are those which have organised structures. Cortner *et al.,* (1998: 160) consider this type of institution as "formal institutions which have administrative structures". They are entities that are commonly valued and have durability. These institutions vary and are diverse, and may include government institutions, education or academic institutions, legal institutions, professional institutions and voluntary organizations (TACSO, 2015 online: 12). They are referred to as "actors involved in a development". These institutions acquire a certain degree of value and stability, and promote a particular cause. The importance of these institutions cannot be overestimated.

From the above definitions, it may be deduced that there are variations in the connotation of the term "institutions". Thus, it can be inferred that there are formal or abstract institutions, (e.g. laws, rules, regulations, legislation), and there are informal or concrete institutions (e.g. formal organisations, court of law etc.). This implies that institutions have different meanings for different authors in the broader literature. The variation in turn requires that clarity to determining the meaning attached to its use in a particular context is needed.

It is, however, worthy of note that the term "institutions" as used in this study mainly focuses on concrete institutions (i.e. specific formal organizations that develop a capacity to act as agents for the larger society by providing valued functions and services). These organisations could be "a new or remodelled organization which induces and protects innovations". Institutions, for the purpose of this work, would therefore refer to well-established organizations (formal organisations, court of law, authorised nominating authority, government institutions as well as independent institutions responsible for the adjudication implementation) which fulfil certain purposes for the effective functioning of adjudication practices.

3.3. Importance of institutions

Literatures, especially in the field of institutional development, have provided strong support for the overwhelming importance of institutions in predicting the level of development around the world and their significance in the realisation of policy objectives (Hall and Jones, 1999; Ferrini, 2012; Blase, 1986). In the words of Blase (1986: 321) "Institutions play a strategic role in development". Development in this sense means "qualitative new phenomenon". Thus, developing and enhancing the capacity of various institutions is fundamental to the development of the construction industry (McDermott and Quinn, 1995: 150). This is because, within the industry, many ideas are conceived and conceptualised. It therefore requires a great deal of effort by various institutions to put mechanisms in motion for the realization of such dreams and ideas or concepts.

The proper functioning of any ADR mechanism depends on two aspects of regulatory frameworks – (i) legislative and (ii) the institutional supports. In fact, there have been reports of poor implementation of policy and rifeness of non-compliance with regulations where institutional frameworks have been inadequate or non-existent to support such legislative

framework (Ilter, Lees & Dikbas, 2007: 1153; Ilter and Dikbas, 2009: 152). Therefore the successful deployment of new practices or policies depends on the planning and realization of the related institutional framework as much as the adoption of legislation. However, this important infrastructure is often neglected (Ilter *et al.*, 2007: 1157). It is herein noted and stressed too, that there are genuine and undisputable reasons to investigate the necessary institutional framework that can govern the policies and rules associated with adjudication, particularly in SA, where the growing interest is already evident.

In the construction industry there are many institutions whose activities influence the running and functioning of the industry. Some of these institutions are constituted by regulation or legislation. Some other institutions are also formed to represent the interests of individual practitioners, to act as natural persons in their capacity, and also serve as advisory bodies to the institutions that are constituted through legislation or regulation. There are also various associations which represent special interest groups within the construction sector. These institutions, in one way or the other, help their members and also influence the activities of their members within the construction industry. The on-going research focuses on concrete institutions within SA and how their existence can influence statutory adjudication practice in SA. The various institutions to be considered are; (i) government institutions, (ii) professional institutions, (iii) legal institutions and (iii) voluntary/private institutions which have direct links with the construction industry and could influence the activities therein.

3.4. Roles of institutions

According to Adamolekun (1990: 5), "Institutional weakness constitutes a roadblock to development…." In reinforcing the pivotal role of institutions to development, Salmen, (1992: 11) noted that:

> *"Institutions are central to sustainable and beneficial economic growth. They create the policies, mobilize and manage the resources, and deliver the services which stimulate and sustain development. Growth and prosperity are unlikely to be maintained if institutions which guided them are dysfunctional"*

In effect, an institution appears to be the indispensable filter of, and guide to, the development process (McGill, 1995: 63).

A vibrant institution should be capable of providing effective administrative functions and of serving as a critical intervening factor through which economic resources and human skills can be utilized for promoting development. Shabbir (1993: 13) points out that an institution plays a crucial role in the development process, but could as well serve as impediments to progress.

In recent years in the field of institutional development, there has been a growing attention to the link between the quality of a country's institutions and its their level of economic development (Keefer and Knack, 1997; Hall and Jones, 1999; Glaeser *et al.,* 2004). The main idea behind this field of research is that institutions define the "rules of the game" and the conditions under which economic units operate in an economy. Hence, attention has focused predominantly on the role of institutions as a determinant of a country's economic growth. As a result, several empirical studies have emerged attempting to provide additional evidence of the influence of institutions and the mechanisms by which institutions may affect development (Osman, Alexiou and Tsaliki, 2011: 143).

However, there is still a relative lack of empirical research on institutional roles in the construction industry. Hence, it becomes imperative to explore the extent to which institutional features could facilitate effective statutory adjudicatory practices, and to find out other institutional factors required for the successful implementation and functionality of legislative-supporting statutory adjudication practices.

Internationally several institutions are involved in driving adjudication. These institutions include Dispute Resolution Board Foundation (DRBF), International Chamber of Commerce (ICC), Construction Umbrella Body (CUB, UK), KLRCA, American Arbitration Association (AAA) etc. Hence it is worth exploring how the performance of statutory adjudication as an ADR in different countries has been influenced by the activities of the various institutions involved in their implementation.

3.4.1. The government institution involvement in adjudication implementation

In many countries, including SA, the government is involved in the industry mainly as a client, regulator and facilitator (CIDB, 2004: 7, 9). The adoption of adjudication in many of the countries where it is currently being employed can be traced to a willing government supporting it. The government institutions and agencies in Table 2 below are found to be very instrumental in the development and effective functioning of adjudication in different jurisdictions.

TABLE 2 – GOVERNMENT DEPARTMENTS AND/OR AGENCIES RESPONSIBLE FOR THE SECURITY OF PAYMENT LEGISLATION

The Government department/ agency	The Act	Countries
Department of Trade and Industry	Housing Grant Const. and Regeneration Act	UK
Office of Public Works and Services	Building and Const. Industry Security of Payment Act 1999.	NSW
Building Commission Victoria	Building and Const. Industry Security of Payment Act 2002.	Victoria
Building and Construction Industry Payments Agency	Building and Const. Industry Security of Payment Act 2004	Queensland
Building Management & Works Division, Department of Treasury and Finance	Construction Contract Act, 2004	Western Australian
Department of Justice	Construction Contracts Security of Payment, Acts, 2004	Northern Territory

The Government department/ agency	The Act	Countries
Building and Construction Authority	Building and Construction Industry Security of Payment Act, 2004	Singapore
Ministry of works/ KLRCA	Construction Industry Payment and Adjudication Act	Malaysia

Source: Adapted from Coggins, 2009

3.4.2. The roles of courts in the adjudication process

Court support is pivotal to a successful implementation of adjudication. Basically, legal institutions are responsible for the enforcement of adjudicators' decisions. Literature revealed that the functionality of any ADR depends on the relationship between ADR and the legislation. Where this relationship is absent, the effectiveness is not guaranteed. For example, in the UK, following the enactment of HGCRA 1996 and its coming into force in May 1998, contracting parties were slow and skeptical in employing statutory adjudication in the resolution of their disputes. Two reasons were attributed to this action. First, the parties were unsure of the support that adjudication will receive from the court and secondly, they were also uncertain about the enforcement of adjudicators' decisions (Gaitskell, 2007: 778). Indeed, without a coercive method of enforcing adjudicators' decisions, a large proportion of awards granted will simply be ignored (Maritz, 2009: 1). It can be said then that for enforceability if nothing else, ADR had to form an alliance with the formal court system. In effect, Gaitskell (2007: 778) explained that an effective system of statutory adjudication that will actually achieve the objective of protecting subcontractors' periodic payment cash flow requires not only payment and adjudication provisions but also a court system which is ready, willing and able to enforce adjudication decisions.

Again, taking the UK as a case study, the effectiveness and successful application of adjudication in the UK construction industry has been widely reported (Dancaster, 2008: 208). However, this achievement has not been without the support of various institutions involved in the adjudication implementation process in the UK, and of importance is the court system. The UK courts are reported to be vigorous in enforcing adjudicators' decisions (Munaaim 2011: 41). This is one of the reasons why the adjudication in the UK construction industry has been reported to be effective. It has been noted that the firm decision taken by Mr Justice Dyson in the landmark cases of *Macob Civil Engineering Limited v Morrison Construction Ltd* [1999] BLR 93 and in *Bouygues Ltd v Dahl-Jensen Ltd* [2000] BLR 49 rapidly increased the take up of adjudication in the UK. The above mentioned cases did not only increase the take up of adjudication but raised the industry's awareness to adjudication as a swift and quick dispute resolution mechanism (Gould and Linneman, 2008: 298).

Apart from the role of courts in the enforcement of adjudication decisions, in the Singaporean context, the courts also perform a supervisory role in the appointment and conduct of the adjudicator in the adjudication process. In the case of *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*[14], which poses an interesting question of what exactly the court's powers are under section 27 of the Building and Construction Industry Security of Payment (BCISPA) Act (Cap 30B, 2006 Rev Ed,) Prakash J held that the role of the courts is limited to supervising the appointment and conduct of the adjudicator—to ensure that the provisions concerning these are complied with—as opposed to revisiting the merits of a case. Effectively, this means that courts' perform a supervisory role in the effective adjudication implementation.

Additionally, in the Singaporean context, the courts can set aside the decision of an adjudicator in a situation where there are errors that are jurisdictional in nature. For instance, in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd*[15], Lee Seiu Kin J held that the courts have the power to set aside an adjudicator's determination if it is found that the adjudication process was not properly followed.

[14] [2009] SGHC 257
[15] [2010] SGHC 105

This implies that the role of determining whether a procedural step has been followed in adjudication also lies with the courts.

Courts as well perform specific roles in providing judicial interpretations whenever there is uncertainty within the legislation that requires clarifications. For instance in Malaysia, many disputants were uncertain if they could at all adjudicate their disputes due to absence of any clear provisions in the CIIPA as to whether it was prospective or retrospective in its ambit. The High Court's decision in UDA Holdings Bhd v Bisraya Construction Sdn. Bhd. & Anor and another case[16] on 31st October which ruled that CIPAA applies retrospectives provided the needed interpretation to the nebulous provision thereby clearing doubts of industry players as to the ambit of the CIIPA legislation.

3.4.3. The roles of legislatures in the adjudication process

Legislatures are critical institutions in the policy making process (Saiegh, 2005: 1). As such, the key roles that the legislators play in the drafting and adoption of a proposed adjudication statute cannot be overstated. As with any proposed legislation, a sufficient number of legislators must be convinced that there is a need for legislation on the subject matter and that the proposed form of legislation adequately addresses the need in a manner that is consistent with sound public policy considerations.

Usually, key drivers of legislative action on statutory adjudication schemes consist of the recognition of (i) the importance of the construction industry in the national economy; (ii) current weaknesses in the payment and dispute resolution mechanisms operating in the construction industry; (iii) the disparity in bargaining power between employers on the one hand and contractors on the other hand and, most particularly, subcontractors and suppliers; (iv) the prevalence of cash flow issues affecting contractors and, most particularly subcontractors, due to "pay when paid" and other forms of conditional payment that impose cash flow obstacles on

[16] [24C-5-09, 2014]

contractors; and (v) the sound public policy considerations underlying an adjudication scheme that quickly and relatively inexpensively resolve disputes – particularly payment disputes – in the construction industry and that thereby strengthen the industry and its role in the national economy and promote fairness among the stakeholders in the industry.

Past studies on analysis of the security of payment legislation identifies two leading models in operation which are those of the UK Act and the NSW Act. These two models have different operational mechanisms, attributable to the different objectives underpinning each Act. For instance the objectives of the UK Act which were in two fold were outlined by the Minister in charge, Nick Raynsford, at its first parliamentary reading in April, 1998. The first objective of the UK Act was to address serious payment problems affecting their industry and the second objective was to address the problem of excessive costs and delays in the resolution of the construction disputes. However in the NSW context, the Minister of public work in his second reading clarified that the main purpose of the Bill is to reform payment behaviour in the construction industry. Thus, the principal objective of the NSW Act is confined to the improvement of payment practices in the NSW construction industry. Other jurisdictions have also enacted their legislation which is underpinned with specific policy reason(s) considered important in each jurisdiction.

For instance, in the Malaysia context, CIPAA legislation has a comparatively modest scope contrasted to the UK and Singaporean statutes. The Malaysian act is limited to "payment disputes." Most other statutory construction adjudication schemes have broader coverage. Nonetheless, the legislative purpose and goals of the Malaysian act are quite similar to other statutory adjudication acts. The Parliament of Malaysia declared in the opening paragraph of Act 746, the Construction Industry Payment and Adjudication Act 2012 that it was:

An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.

It can then be simply put that legislatures play a fundamental role in recognizing these types of goals and purposes. If convinced of their merit, then they have the public responsibility and authority to propose and pass a statutory framework with which the purposes of improving the payment process and the dispute resolution process in an important national industrial sector: the construction industry.

3.4.4. The professional institutions

The construction industry operates along many lines. The CIDB report entitled "SA construction industry status report" explains that the construction industry delivers its products in a uniquely project-specific environment that continuously involves different combinations of investors, clients, contractual arrangement and consulting professionals (CIDB, 2004). In addition, the construction process involves the coalition of many professionals who assemble during the execution of a particular project in order to achieve a defined objective. These key players are from different disciplines and belong to different professional bodies. The professional bodies provide support to professional development and also provide a network for professionals to meet and discuss their field of expertise. Literature reveals that, apart from government and ANAs, the promotion of the legislation/Act falls upon the professional bodies and trade associations (Munaaim, 2011: 68). The professional institutions are helpful in constituting ANAs which are usually responsible for recruiting adjudicators that can serve on a panel. In the UK, the report from Caledonian University on adjudication practices indicates that many professional bodies and trades associations contribute immensely to the establishment of Adjudicating Nominating Bodies (ANBs) and in the training of adjudicators. It seems necessary that each of the professional bodies has its own ANB. Some of the ANBs that have been constituted by the various professional and trade institutions are;

- Association of Independent Construction Adjudicators (AICA)
- Chartered Institute of Arbitrators (CIA)
- Confederation of Construction Specialist (CCS)
- Construction Industry Council
- Institution of Civil Engineers

- Institution of Chemical Engineers
- Royal Institute of British Architects
- Royal Institution of Architects etc.

3.5. The authorizing nominating authorities

The appointment process is the first step in starting the process of adjudication. It is expected that an adjudicator be appointed as soon as a dispute arises. Thus the nomination of the adjudicator is usually made in different ways. It can be made by agreement between parties, or by an ANB jointly chosen by the parties, or by any ANB. The practice of nomination of an adjudicator through a nominating body has been viewed to be advantageous, especially in accelerating the whole process of adjudication (Uher and Brand, 2007: 766).

Under certain conditions of contract, parties are allowed to jointly appoint the adjudicator or Dispute Adjudication Board (DAB) by mutual agreement or by a named authority, either at the beginning of the contract (standing adjudicator) or when disputes have arisen (*ad hoc* adjudication). However, the practice of nominating an adjudicator by the agreement between parties has been criticised on the ground that it has a way of tarnishing the impartiality of the adjudicator (Munaaim, (2010). The point of argument is that allowing the parties to choose their own adjudicator may create room for the financially dominant party to make a prior selection before a dispute arises, and this will put into question the impartiality of the adjudicator towards the weaker party. Consequently, the acceptability of the adjudicators' decisions may become compromised and thereby denigrate on the whole system of adjudication.

Literature reveals that, the process and manner of appointing the adjudicator by the ANB differs. Notwithstanding, the ANB is expected to carry out the following roles: (Wallance, 2013:128)

i. Accept adjudication applications from claimants;
ii. Provide advice and assistance to parties regarding the adjudication process;
iii. Nominate an appropriate adjudicator to decide an adjudication matter; and
iv. Where approved to do so by an implementing institution, conduct courses for adjudicators and issue certificate to adjudicators after completion of the course.

The findings from literatures further reveal that, some ANAs provide what may be referred to as full service, while some do little more than accept applications, nominate the adjudicator and issue adjudication certificates (Wallance, 2013: 128).

3.6. Adjudicator appointment

As previously mentioned in section 3.5, analysis of the security and payment legislation reveals three methods by which an adjudicator may be selected. The mode and manner by which these selections are carried out differs from one jurisdiction to another. Under both the NSW and Singapore (SG) Act, an adjudication application must be made to an ANA which is chosen solely by the claimant and copied to the respondent. The ANA accepts application from the claimant and appoints an adjudicator. The adjudicator may accept the application by causing notice of acceptance to be served on both parties, in which the adjudicator is deemed to have been appointed to determine the application. The UK regime allows for all the three methods of selection. Under the Malaysian Act, upon receipt by the respondent of the notice of adjudication, an adjudicator shall be appointed either by the agreement between the parties in dispute within 10 working days from the services of the notice of adjudication by the claimant. If the parties could not agree to choose an adjudicator the Director of the KLRCA is empowered under the Act to appoint an adjudicator. Under the proposed SA regulations, the board will accredit an ANB or ANBs who will select an adjudicator when requested to do so by a referring party.

The major difference in the selection process of each of the jurisdictions mentioned above is that the UK Act permit both parties to choose their adjudicator, whereas the NSW and SG provides only for a sole nomination of adjudicators by any ANB chosen by the claimant. The fact that the UK allows both parties to pre-select the adjudicator provides the parties with the liberty to have their dispute decided by the adjudicator in whom, from previous experience, they have confidence (Munaaim, 2012). In this way, the decision of the adjudicator is likely to be accepted, obviating the need for further arbitration or litigation. On the other hand the practice of appointing an adjudicator chosen by the claimant has caused much concern in the industry. Thus, the influence of each of the selection methods on the effective statutory adjudication implementation needs to be investigated.

3.7. Summary

In this chapter, an investigation into the diverse meaning of institutions has been explained. Institutions as used in this study mainly focus on concrete institutions. The importance of these institutions as well as the specific roles they are required to perform in order to be effective in implementation process of a particular legislation described. The mode and process of nomination of adjudication were also explained. It was discovered that the mode of selection of adjudicator differs from one jurisdiction to another. On one hand adjudicators cannot operate outside of ANAs and parties in disputes are barred from directly nominating the adjudicator of their choice. On the other hand, the adjudicator could be nominated by either agreement between parties, by a nominating authority jointly chosen by the parties or by an ANAs. Both methods have prons and cons, hence the need for further investigation on the impact of each of the methods on effective adjudication implementation.

CHAPTER FOUR

REVIEW OF RELATED LITERATURE: IMPLEMENTATION OF ADJUDICATION

4.1. Introduction

This chapter focuses on the implementation procedure within the policy circle. The chapter starts with an overview of what a policy circle constitutes. A discourse on implementation processes follows, after which common implementation challenges and implementation gaps are identified. The chapter finally reviews the critical implementation factors that should be considered for the effective implementation and functionality of any legislation.

Several countries have introduced and implemented adjudication as discussed in the previous chapters. The legislation in all these countries fundamentally has common objectives of expediting payment and getting the cash flow pumping through the chain of contractors until the project is completed. However, the mode and manner of implementation differs from one jurisdiction to another. As such, the level of successes achieved also differs from one jurisdiction to another as the initial take-up of adjudication in some of these countries was reported to be confronted with diverse challenges. It is therefore important to review the pre-implementation and implementation approaches in these jurisdictions in order to learn from their experiences and identify the challenges that usually threaten the successful implementation of statutory adjudication.

4.2. Policy circle

In any field, whether education, health, business, construction, management and even in government, policies are made in order to promote and sustain high-quality living. A policy may be used by a government, business or organisation to influence or determine the course of action that an organization can take in certain situations. It contains the vision of the goals to be attained and the plan of action or ways of administration by which those goals are to be accomplished. Muhammad, (2015) defines policy as “a deliberate plan of action to guide decisions and achieve rational outcomes”. It could apply to individuals, groups, organisations or government. The Cambridge Dictionary defines policy as “a set of ideas or a plan of what to do in particular situations that has been agreed officially by a group of people, a business

organisation, a government or a political party" (Foxell and Cooper, 2015: 400). By implication, these definitions suggest that policies are specifically made to achieve a definite purpose.

Legislation supporting adjudication was enacted with specific policy objectives which will expedite payment, improve cash flow and provide quick means of resolving construction disputes (Fenn and O'Shea, 2008: 203; Teo, 2008: 224; Kennedy, 2006: 247). The introduction of the security-of-payment legislation which outlaws "pay when paid", "paid if paid" and "back to back" was purposefully designed to help businesses in the construction industry by freeing up much needed cash flow (South African Construction News, 2015). Consequently, the new laws are expected to benefit various construction stakeholders especially the smaller construction companies and subcontractors, which usually find it more difficult to operate when payment is delayed. For this to happen, it then demands that a lot of factors within the policy circle that can facilitate successful implementation have to be adequately considered and put into practice if the desired outcome is to be realised.

Policy circle involves a lot of processes which contain quite a number of stages, including issue identification, policy analysis, policy instruments development, consultation, decision, implementation and evaluation (Muhammad, 2015). All these steps are crucial to effective realisation of policy goals. Several authors have attempted classifying policy processes into different stages. Capturing the dynamism of policy making, Grindle and Thomas (1991) identified three phases of policy development which are (i) agenda, (ii) decision and (iii) implementation phases. Fixsel (2005) states that at any of these three stages a policy either moves towards successful implementation or fails.

Going through literature, the previous studies suggest that all the stages of a policy process can be broadly classified into policy formulation and policy implementation. According to Foxell and Cooper (2015: 400), the first aspect involves the intention to act (policy framing, policy objectives and policy decision), while the second aspect involves the means to do so (policy instrument and implementation). For a policy to be effective these two aspects of the policy process must be adequately planned and carried out. Unfortunately, investigations have revealed that policy planners often spend more resources on the first aspect of policy making and give little or no attention to the implementation aspect of such policies (Rahman,

Naz and Nand, 2013: 982). Unsurprisingly, this attitude has not only resulted in policy failure but also in dashed hopes and wastage of resources used in the formulation of such policies.

Although implementation aspects of the policy circle are widely considered to be very crucial to the realisation of policy goals, it has been discovered that this aspect often comes to the forefront only when the experts are trying to explain why policy fails (Rahman, Naz and Nand, 2013: 983). Policy failure occurs in different ways; Carlos and Sergio (2015: 237) define failure as a "situation where a new strategy is planned but not implemented or implemented but with poor results". One of the major reasons for poor results has been attributed to the lack of a well-prepared implementation framework. This failure and its effects have therefore called for serious attention to implementation strategies. In fact, anecdotal evidence has revealed that programmes that lacked strategies and guidelines for effective implementation usually tend to fail. While noting that the management of implementation is a complex endeavour, coupled with the fact that several factors facilitate or impede successful implementation, Young and Lewis (2015:4) emphasised the importance of expanding understanding of managing implementation in order to improve outcome. In similar vein, Maritz and Hattingh, (2015: 46) assert that thorough knowledge of adjudication procedures, practice and implementation is essential for any construction profession playing a certifying, advisory or commercial role in a construction project.

4.3. Policy process

Figure 2 illustrates the string of phases through which a policy travels to translate ideas into solutions and outcomes. Though the figure may suggest that the policy circle is rather simple, the reality is quite different because of the complexities associated with the implementation processes. Generally, because the expectations of built environment policy are usually high, it is therefore apparent that the built environment professionals need to develop and maintain an informed knowledge based on why and how policy initiatives work (Foxell and Cooper, 2015: 400). This knowledge base is vital in the built environment. In their paper 'Closing the Policy gap' Foxell and Cooper (2015: 400) stated that:

> *"the knowledge base would assist professionals to input into and work directly and effectively with policy processes that define their ability to deliver successful projects and enable professional bodies to fulfil*

better their public interest obligations in relation to build environment policy"

The stages within the policy circle are very important for a policy decision to turn into satisfactory outcome. The agenda phase is the stage where the problems are identified, and the nature of the problems described in order to take decisions on the kind of attention to be given to the identified problems. The next stage involves setting objectives and choosing from a list of solutions and selecting the policy instruments. This second stage is referred to as the policy formulation stage. Following this is the legitimisation stage where support for the policy instrument used must be guaranteed. This can involve legislative approval or consent-seeking through consultation with interest groups.

The implementation stage remains an important stage within the circle. It involves establishing a new organisation or equipping the existing organisation to take responsibility for backing decisions with necessary action. It is required that the organisation have adequate resources such as staffing, money and legal authority for it to perform effectively. Evaluation and maintenance stages are the last two stages in the policy circle. They involve the assessment of the degree to which the established policy was successful and how to sustain or improve that policy.

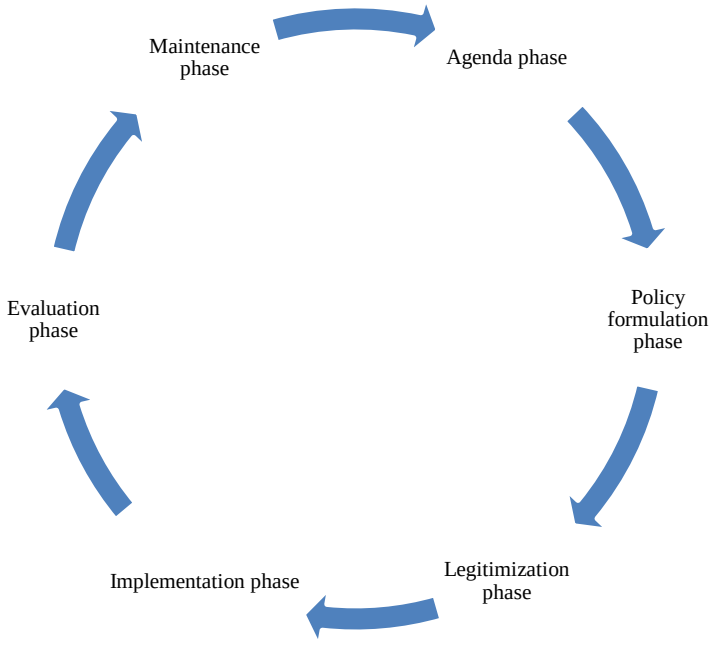

FIGURE 2 – THE POLICY CIRCLE: SOURCE CARNEY, 2015: 9

4.4. Policies implementation

As stated earlier, implementation is an important element within the policy circle. Fixsen *et al.,* (2005: 5) define implementation as "a specified set of activities designed to put into practice an activity or programme of known dimensions". It is the process of developing detailed plans, procedures and mechanisms needed to ensure that legislative and regulatory requirements are achieved. According to Adamolekun (1983) cited in Makinde (2005: 63) implementation involves all the activities as well as the actions that are carried out in the light of established policies. It encompasses all the processes of turning policy into practice. Generally, implementation refers not only to the variety of actions involved in issuing and enforcing directives in relation to the enacted law, but also to a diverse array of processes of converting financial, material, and technical inputs into output (Egonwan, 1991). The above definitions of implementation and the observations of various researchers on implementation suggest that implementation impacts on the realisation of planned goals, and could contribute significantly to its success or failure (Makinde 2005: 63; Young and Lewis, 2015:4).

The focus of experts has more often been on planning and designing than on the implementation of the formulated policies (Rahman, Naz and Nand, 2013: 983). Haig and Addisson (2013: 1) observe that there have been lots of frustrations when organisations well-defined initiatives fall far short of their intended goals because of a deficient implementation plan. Many programmes have failed because of lack of understanding of implementation process, procedure and practice. Crosby, (1996:1403) contends that programme failure results from lack of attention to how implementation is organised (Crosby, 1996: 1403). It is therefore evident that many regulations are ineffective, not because they are not good enough in their own cause, but due to faulty implementation plans (Haig and Addisson, 2013: 1). The implication of this evidence is that, no matter how viable a particular policy or programme is, a defective implementation of such programme or policy will make nonsense of the whole policy (Makinde, 2005: 65). This then gives an indication that, though the motive for enacting a particular legislation may be very good with fascinating goals, the purpose may never be realised in the absence of adequate implementation strategies. This corroborates Gary *et al.,* (2012: 341) finding that statutory intervention in payment flow chain alone may not sufficiently bring solution to industry payment problems in the absence of complementary measures (Gary *et al.,* 2012: 341). As such, the application of adjudication in the construction industry requires a huge effort in terms of implementation plans.

4.5. Critical factors for effective implementation strategies

Previous studies have revealed that, whether a policy is new or reformed, its effectiveness in achieving the desired goals relies on the process of implementation. As such, the existence of any policy will have little effect unless a realistic implementation plan is developed and executed.

Durlak and DuPre (2008: 237) carried out a research which focuses on the impact of implementation on programme outcome and the factors affecting the implementation process. The findings from their studies provided a strong empirical support to the conclusion that the level of implementation influences outcomes of a programme, and that implementation process are affected by many contextual factors.

Findings from past studies in literature suggest that the successful implementation and sustainability of statutory adjudication in construction requires that an enabling platform should be in place. This is because the backbone of sustainability of any programme actually depends on the ability to improve its processes through strategic planning. Kennedy (2008: 218) was of the opinion that, in the context of the adjudication process, there are several threats to its survival or at very least for adjudication's continued good health. In line with this view, the requirements for effective statutory adjudication implementation and sustainability should become a crucial issue to the construction stakeholders.

4.6. Implementation challenges

The expectation of every policy-maker is to see that the purpose of making policies is realised on target beneficiaries and a desired result achieved. However, implementation problems do occur and create a gap between policy conception and outcome. Globally, reported gaps between the formulation and outcome of policies, especially in the built environment and urban-regional development, are not a new phenomenon (Muller, 2015: 1). Regrettably, this gap often leads to frustrations when planned goals are not achieved. Thus, it has been realised that whenever enabling factors that are critical to efficient implementation of policies are missing, implementation problems are always inevitable. Edwards and Gearge (1980) as cited in Makinde, (2005) identified four critical factors to be considered if implementation problems are to be avoided. These factors are (i) communication, (ii) resources, (iii) attitudes and (iv) bureaucratic structure. Makinde (2005: 63) opines that these

factors interact with each other and operate simultaneously to either impede or aid an effective implementation process. In the same vein, Nah and Delgado (2006: 99) emphasised four factors which are (i) strong commitment, (ii) open and clear communication, (iii) leadership, and (iv) empowered implementation team as necessary antecedents to a successful implementation.

According to Cartwright, (2015: 1) there exist systematic problems which make the gap between policy theory and practice hard to close. As such, it is important to recognise systematic source of trouble and design the ways to cope with the gap through planning prediction, planning decision, monitoring and provision of fall back and failsafe plans. Literature reveals that there are many challenges that could impede successful implementation. One of the critical challenges is the degree of ambiguity of the policy itself (Moncaster and Simmons, 2015: 453). The degree of ambiguity in the content of any legislation has been linked with problem of diverse interpretation, multiple perspectives and interpretative flexibility (Moncaster and Simmons, 2015: 453). For instance, the problem of crystallisation of payment debt under the UK regime was attributed to the problem of ambiguity surrounding Section 110(a) of the HGCR Act as to what constitutes an adequate mechanism for the purposes of the HGCR Act (Munaaim, 2012: 14). Thus, Lord MacFadyen in *Maxi Construction Management Limited* v *Mortons Rolls Limited*[17] held that a payment mechanism that fails to provide a clear timescale for dealing with and resolving payment issues is not considered as an adequate mechanism.

Literature also suggests that the lack of awareness, insufficient knowledge of a new legislation, accessibility problems, inadequate understanding of the contents of a legislation could be impediments to the efficient execution of a policy. In addition, insufficient resources, unavailability of required combination of resources, lawyers' involvement, and excessive cost of adjudication are likewise recognized as major challenges that require attention if the purpose of introducing the legislation would be achieved Agapiou, (2011).

Another major challenge recognised in the literature that usually obstruct full participation in adjudication schemes is the reluctance of some contractors - particularly smaller contractors - to make claims in adjudication because of the concern that making claims may have the

[17] [2001] CILL 1784 - 7

consequence that retaliation in the form of rejecting them for future jobs may occur. A successful adjudication scheme must therefore have an adequate planning decision that can prevent these challenges or overcome them in a situation where they occur.

4.7. Summary

In this chapter, the strategic implementation position within the policy circle has been discussed. The chapter starts with an overview of what a policy circle constitutes, then a discourse on implementation processes follows, after which common implementation challenges and implementation gaps are identified. The chapter reveals that the effectiveness in achieving the desired goals relies on the process of implementation.

CHAPTER FIVE

RESEARCH METHODOLOGY

5.1. Introduction

This chapter presents the research methodology used in this study and the rationale for using it. The chapter is divided into two parts. The first part presents literature related to the methodology used in the study. It begins with the philosophical assumptions underpinning the research and then provides a brief explanation of various research approaches available with a focus on methodological choices for this study. The second part outlines the research design, as well as detailing the research methods. Ethical issues and the criteria for judging the quality of research design and of validation of the research quotations were also presented.

The philosophical assumptions underpinning this study come from the interpretive position. Thus, the study utilised a qualitative research approach in both the collection and analysis of data, due to the vividness of information and novel solutions that this approach provides. The quantitative research approach, though scientific and prevalent in the built environment, is not used in this study due to the fact that it lacks richness of information. Hence, the study adopted the combinations of qualitative experts' interviews and examination of relevant documents, the sources of which include journals, books, theses, conference proceedings and industry reports.

5.2. Philosophy underlying the research

All research is undertaken within a philosophical assumption or interpretative framework which is channelled by "a set of beliefs and feelings about the world and how it should be understood and studied" (Lincoln, Lynham and Guba, 2011; Guba and Lincoln, 1994). As such, close attention is expected to be given to philosophical assumptions underpinning any research study. Generally, a good research undertaking begins with the selection of the topic, the problem definition as well as the paradigm (Mason, 1996; Creswell, 1994). The research paradigm is defined as a set of beliefs that guide action (Groenewald, 2004: 6; Denzin and Lincoln, 2000: 157). Therefore, the paradigm and rationale for conducting a research influence the research methods to be employed as well as investigating processes to be

utilised in the collection, analysis and interpretation of data. Consequently, several researchers have identified different categories of philosophical beliefs. Crotty, (1998) named four different philosophical dimensions to research which are (i) ontology, (ii) epistemology, (iii) methodology and (iv) methods. On the other hand, Mertens (1999) recognised five categories of philosophical beliefs namely; (i) ontology, (ii) epistemology, (iii) methodology, (iv) axiology and (v) generalisations. Methodology signifies the general research strategy that outlines the way in which research is to be undertaken and, among other things, identifies the methods to be used in it. It examines how the world is known or how knowledge of it can be acquired. Methods focus on the means or modes of data collection or, sometimes, how a specific result is to be calculated. Ontology refers to the existential aspect of knowledge which reflects beliefs about what exists and defines the ways or sense of being (Niglas *et al.*, 2008: 176; Collins, 2010: 36). Epistemology is primarily linked with the conceptions of reality and as such, has its focus on the relationship between the researcher and the known (Dainty, 2008: 3; Knight and Turnbull, 2008: 65). Axiology deals with the inquiry aspect of research while generalisation has its focus on the context of inquiry and whether it can be extended from specific situations to other circumstances.

Khan (2014: 225) generally viewed the philosophical assumptions in three different perspectives which are (i) epistemology, (ii) ontology and (iii) methodology. Each of these research perspectives is based on different concepts and incorporates the use of different research methodologies and methods. However, detailed explanation of each of these concepts is outside the scope of this study. Notwithstanding the above, a brief description of the interpretive epistemological position that has been chosen for this study and the rationale behind its choice in this research is explained in section 5.2.1 For the purpose of clarity, the interpretive stance is discussed in parallel with positivism positions.

5.2.1. The interpretive epistemological position

Based on philosophical assumptions, research can be categorised as positivist, interpretivist, and critical paradigms (Khan, 2014: 224). The positivists believe that true knowledge can be confirmed by senses. As such, the positivist theory of knowledge is rooted in the natural sciences where reality is held to be relatively straightforward to access from observation and a researcher's stance of neutrality (Neuman, 2003; Bryman, 2008). The positivists further believe that there is a reality

which can be studied through experiments, observation and other scientific methods. Consequently, the positivist methodology is directed at explaining relationships (Scotland, 2012: 12). It attempts to identify causes which influence outcomes (Creswell, 2009: 7). The aim of the positivist is to formulate laws, consequently yielding a basis for prediction and generalization. According to Bryman (2008) a researcher employing a positivist approach is expected to remain detached, neutral and objective as he/she measures aspects of social life. However, issues have been raised concerning the difficulties of humans; objectively studying humans, hence the shift toward a post-positivist stance that strives for objectivity and accepts the difficulty of achieving it fully. This shift led to the realisation that interpretation plays a crucial role in both data collection and data analysis. As such, much qualitative research has come to be framed as interpretive, this is embedded in a naturalistic approach.

The epistemological stance on interpretive approach is that the social world can only be understood from the position of individuals who are taking part in it (Cohen, Manion and Morrison, 2007: 19). Also, the interpretivists believe that knowledge of reality is gained only through social constructs. In effect, there are no predefined dependent and independent variables in an interpretive research study; rather the focus is on the complexity of human sense-making as the situation emerges. Thus, interpretivism is inductive-oriented and aims at understanding social life and discovering how people construct meanings. The researchers are therefore saddled with the task of revealing the processes and effects of such construction. This research is thus based on an interpretivist epistemological position. The research method is qualitative in nature and it is perfectly in line with interpretivist tradition. It conforms appropriately to interpretive theory, which is usually grounded (inductive) and based on theory building rather than empirical testing of theory. Thus, the approach generates qualitative data, yields insight and understandings of behaviour and explains actions from the participant's perspective (Scotland, 2012: 10).

5.3. Research approaches

Research involves the studying of problems through the use of scientific principles and procedures, with the purpose of discovering new knowledge, enabling innovative predictions, developing new theories and advancing an understanding of new phenomenon (Goddard and Melville, 2001; Mutai, 2000). Generally, there are three paradigms of research approaches which are: (i) the qualitative approach to research; (ii) the quantitative approach to research and (iii) the mixed methods approach to research. Each of these approaches is unique and has been widely used by different researchers in solving research problems. Under suitable circumstances, the first two (independent) approaches are combined to solve complex research questions, where either of the two approaches is insufficient to provide a solution to the identified research problems. Where this is done, the combination of both qualitative and quantitative approaches is what is referred to as "mixed methods" (Creswell, 2003:3). The choice between the qualitative, quantitative or a combination of both approaches depends on the nature of the problem(s) that a researcher seeks to solve.

The quantitative research approach is employed for testing objective theories by examining the relationship among variables. These variables, in turn, can be measured, typically on instruments, so that numbered data can be analysed using statistical procedures. This approach has been used by social scientists for years (Creswell, 2003:3). Its basic features, which include cause-and-effect thinking, hypotheses, questions and the use of measurements, are deductive. Thus, its emphasis is placed on theory testing, and as such, the findings of the research can be generalised. Generally, the quantitative research approach is linked with the positivist philosophy of research. Positivists believe that reality is fixed and directly measureable. In effect, the quantitative approach seeks to confirm hypotheses about a phenomenon, quantify variation and predict causal relationships. The quantitative research approach is most suitable in explorative research where a research question focuses on finding a state/particular condition of something at a specific time and the research in question demands a quantitative answer.

In contrast to the quantitative approach which relies on analysis of numerical data, the qualitative approach to research has its focus on exploring and understanding social and human phenomena (Creswell, 2003: 4). The qualitative approach emerged primarily during the last three or four decades (Creswell, 2003:5). It is a type of scientific research which

focuses on an investigation that seeks answers to a question through the use of systematic predetermined set procedures. In this type of approach, evidence is collected in order to provide findings (that are not predetermined) which are applicable beyond the immediate boundary of the research (FHI, 2011: 1). Contrary to the quantitative approach which is deductive-oriented, the qualitative approach is inductive and as such, the researcher builds a complex, holistic picture of the object or process under study, analyses words, reports, detailed views of information, and conducts the study in a natural setting (Stanslaus, 2011: 16; Guba and Lincoln 1994; Creswell, 1998: 15). As such, the qualitative approach is linked with the naturalist philosophy of research. The naturalists believe in reality-variation. They assume that reality constantly changes and can only be known or studied indirectly. Consequently, the qualitative approach has its strength in its ability to provide complex textual descriptions of how people experience a given research issue. Thus, the qualitative approach gives information about the "human" side of an issue. It describes the often contradictory behaviours, beliefs, opinions, emotions and relationships of individuals in relation to a given research problem. The approach employs different strategies of enquiry and methods of data collection and analysis. Some of the strategies include: grounded theory, ethnographic, case study, phenomenology, narrative, participant's observation, in-depth interview, focus group, dyad and triad (these are further explained in section 5.3).

As noted earlier, both qualitative and quantitative research approaches are acceptable scientific research methods, but they lend themselves to different applications (Tashakkori and Teddie, 1998). According to Uma (2011) both approaches represent different points on a continuum. The third research approach, that is, the mixed method, resides in the middle of this continuum because it incorporates elements of both qualitative and quantitative approaches. Combining the best of both approaches for the purpose of complementarity, expansion, triangulation, initiation and development is mainly the focus of the mixed method approach.

5.4. Research methodologies

Crotty, (1998: 3) defines research methods as: "the specific procedures and techniques used to collect and analyse data". These methods do not exist in isolation, but sit within a framework termed methodology, which serves as link between the philosophical assumptions underlining a study and the methods for the collection and analysis of data for that study. As

such, methodology is recognised as a general research strategy or an action plan that lies behind the choice of a particular method(s), and generally outlines the way in which research is to be undertaken (Crotty, 1998:3). As noted earlier, there are many research methodologies associated with qualitative research; example of which include: case studies, phenomenology, hermeneutics, ethnography, narrative research and grounded theory.

Phenomenology as a methodology is the study of direct experience of phenomenon without allowing the interference of existing preconceptions (Scotland, 2012: 12). It is used when a researcher attempts to understand the essence of a phenomenon by examining the views of people who have experienced that phenomenon. It is focused on 'lived experience' of participants in relation to a particular situation/phenomenon through the use of in-depth and extensive engagement with the participants (Scotland, 2012; Creswell, 2009; Descombe, 2007). Phenomenology is based on the concept of 'Dasein' or 'being there' (Groenewald, 2004: 4). As such, a researcher utilising the approach is concerned with the lived experiences of the people who were involved in the issue that is being researched (Kruger, 1988; Maypole and Davies, 2001 in Groenewald, 2004: 4). Phenomenology therefore focuses on certainty. Groenewald, (2004: 4) profoundly captures this vividly, and sums up the idea of phenomenology in the following words:

> *People can be certain about how things appear in, or present themselves to, their consciousness. To arrive at certainty, anything outside immediate experience must be ignored, and in this way the external world is reduced to the contents of personal consciousness. Realities are thus treated as pure 'phenomena' and the only absolute data from where to begin.*

In recognition of this truth, coupled with the fact that phenomenology offers various advantages, among which are: in-depth understanding of individual phenomena and availability of rich data from the experiences of individuals involved in that phenomenon, the conduction of the qualitative study was through interview in accordance with the phenomenological approach.

Hermeneutics as a research methodology derives hidden meaning from language. Ethnography or field research involves the study of cultural groups over a prolonged period. This form of qualitative research methodology usually studies a subject within its natural

setting and is fundamentally based on observational data. Case study is defined as an empirical inquiry that investigates a contemporary phenomenon within its real-life context (Yin, 2003: 13). It is a form of qualitative research methodology that is used to conduct in-depth investigation of events or processes over a prolonged period (Scotland, 2012: 12). It focuses on one or a few instances of a phenomenon in its natural context and provides an in-depth account of relationships and processes occurring in that particular instance (Denscombe, 2007: 54). Grounded theory is another qualitative research methodology which primarily aims at discovering and generation of theory from systematically obtained data.

5.5. Research methods

Research methods refer to the varied sources of data collection and diverse approaches to data analysis. For the purpose of clarity, the data collection and analysis approaches are further explained.

5.5.1. Data collection methods

Data is defined as "bits and pieces of information found in the environment" (Merriam 1998: 70). Accessibility to the subjects of research is very important in data gathering in order to obtain credible data (Seabi, 2012: 88). Creswell (2007) identifies four common sources of data in qualitative research namely (i) interviews, (ii) observation, (iii) audio-visual materials and (iv) documents. Among the four sources identified, documents and interviews are mostly used across all qualitative methods. Documents are materials that give information about an investigated phenomenon. They are mostly produced for a specific purpose or a particular reason other than those of the research, but can be used by researchers for cognitive purposes. There are different forms of documents that can be assessed and used when conducting research. These documents are categorised based on the nature and the sources from where they are retrieved. Some common types of documents include published laws, law reports, parliamentary proceedings and policy documents. The most important use of documents in qualitative research is to corroborate and augment evidence from other sources (Yin, 2003: 87).

There are quite a number of advantages to using documents over other methods in qualitative research. As identified by different authors such as Denscombe, (1998) and Creswell, (2009), some of these advantages are (i) the information provided in a document is not subject to a possible distortion. As such it is a non-reactive technique; (ii) documents help in providing information about the past; (iii) they are cost effective in that information needed are already been produced; (iv) they carry the words and language of the authors thoughtfully assembled; (v) they are time effective as they save researchers time for transcription; and finally (vi) the information provided is capable of being assessed and reviewed at any time.

Notwithstanding the above highlighted advantages, documents may sometimes be faced with some limitations, among which are: (i) lack of carrying a complete picture of the phenomenon the researcher wants to assess (Yin, 2009); (ii) inaccessibility to relevant and useful documents due to confidentiality (Creswell, 2009); and (iii) limitations in terms of the completeness of data and accuracy. Thus, combining interviews with documents search in this study has its focus in overcoming the highlighted documents-analysis limitations. As such, the information which could not be gathered from documents can be provided by the interviewee.

An Interview as a data source in qualitative research provides the opportunity of having an in-depth insight of the study through exchanges from the interviewee's experience. Qualitative interviewing relies largely on an interpretivist approach. It is premised on understanding the meaning of the interviewee's knowledge regarding the phenomenon under study (Gubrium and Holstein, 2002). The purpose of qualitative interviews is to get first-hand information from selected knowledgeable informants (Zohrabi, 2013:255). Interview may be semi-structured, in-depth or focused.

Techniques for open-ended or semi-structured interviewing vary. There are four different approaches, namely: (i) informal conversation interview, (ii) interview guide approach, (iii) structured open-ended interview and (iv) closed, fixed open-ended interview (Patton, 1990: 288-289). The decision on which one to choose depends on the phenomenon under study, the type of data expected, the purpose of

the research and the type of structure desired (Merriam, 1998: 72; Zohrabi 2013: 256).

According to Patton (1990: 280), interview techniques differ in terms of the preparation required and also in terms of conceptualisation and instrumentation. The informal conversational interviews are usually conducted without any predetermined questions. In this approach, the questions are generated from the interaction and natural flow of conversation between the interviewer and the interviewee. Contrariwise to a conversational interview, the structured open-ended or standardised open-ended interview demands that questions are predetermined and pre-arranged in a particular order. The disadvantage with this approach is that predetermined questions may not allow the researcher to access a participant's perspectives and understanding of the phenomenon studied (Merriam, 1998: 74). The closed, fixed response interview is very similar to the second approach discussed. Under the closed, fixed response approach, the respondent hardly gets the opportunity to express his/her opinion. In effect, the approach is usually viewed as too mechanical (Zohrabi, 2013:256).

The fourth interview technique is the interview guide approach. In this type of interview, topics and questions are specified and can be reworded in any sequence based on the situation. The characteristics of this approach as described by Patton (1990:280) are: (i) it outlines a set of issues to be investigated in advance before the actual interview takes place; (ii) it does not require that the issues in the outline should be dealt with in a particular order; (iii) it does not require that the actual wording of questions used to elicit responses about the issues be pre-arranged or pre-determined; (iv) the interview guide basically serves as a checklist to ascertain that all relevant topics and themes are covered, and (v) it allows the interviewer to adjust the wording and the sequencing of questions to specific interviewees in the context of the actual interview. The major advantage of this interviewing technique is that data collection is rather systematic and conventional (Zohrabi, 2013: 256). It also allows relevant topics to be covered by interviewers while at the same time providing the flexibility to probe and ask follow-on questions in relation to specific topics (Zohrabi, 2013: 256; Mante, 2014: 89). This last technique, because of its obvious advantages, has been adopted in this research.

5.5.2. Data analysis methods

Quantitative and qualitative researchers adopt different approaches to data analysis. Quantitative research depends greatly on statistical analysis using both descriptive and inferential statistical tests. The qualitative data analysis basically entails taking the data apart, so as to understand the components and how they are related to each other (Stake, 1995). As such, data analysis is unarguably the most complex of all the phases of qualitative study. What makes a study qualitative is the reliance on the inductive reasoning processes of the researcher to interpret and structure the meaning that can be derived from data. There are different data analysis methods in qualitative research, some of which include narrative analysis, heuristic analysis, contents analysis, semiotics, discourse analysis, domain analysis, logic analysis, analytical induction, quasi-statistics, constant comparison, grounded theory, thematic analysis and many others. The thematic analysis is used in the study. The detailed analytic procedure is given in chapter six.

5.6. Research design for the study

According to Creswell, (2003: 4) researchers need to be satisfied that the information requirements are being met by adopting the most suitable research methodology. Thus, the importance of selecting an appropriate research design cannot be overemphasised. The objectives of this study informed the choice of qualitative research approach and the interpretive epistemological stance, which seeks to uncover truth by understanding the phenomenon in their real-life context (Creswell, 1998: 15). Following on from the above choices, the qualitative interview was used in primary data gathering in accordance with the phenomenological approach (Flick, 2014). This approach allows the researcher to collect information from experts who have direct experiences with the phenomenon under study. Thus, the data for this study were collected from recognised professionals who were directly involved in adjudication implementation in the jurisdictions where statutory adjudication as an ADR mechanism is currently being practised. There are two reasons for the choice of the qualitative approach that was used in this study.

The first is that the research questions considered in this study are types that generate open-ended problems which require novel solutions that are not predetermined by the researcher.

As a result, the study requires examination of the views of professionals in jurisdiction(s) where such phenomenon is in operation in order to obtain rich, meaningful, reliable, comprehensive and useful information. Most discourses on research design reveal that the qualitative research approach is always the best and most appropriate for a study of this nature (Creswell, 2009; Yin, 2009; Bryman, 2008; Guba and Lincoln, 1994). This is because qualitative research focuses on exploring what individuals or groups make of a social phenomenon or interactions in the context of the real world (Creswell, 2009). Hence, complex questions which can be impossible with the quantitative approach can easily be dealt with under the qualitative approach due to its flexibility. In addition, qualitative research provides a host of opportunities for new and innovative discoveries, especially in a situation where there is a lack of prior empirical research.

The second reason for the selection of the qualitative approach in this study was a matter of the advantages that this method provides. For instance, the approach is very useful for describing complex phenomena and provides individual case information. It provides understanding and description of people's personal experiences of phenomena, thereby making cross-case comparisons and analysis possible. In effect, the researcher depends on participants' view rather than imposing the researcher's own preconceptions on the participants (Creswell, 2013). In addition, the hidden knowledge situated in history can be easily revealed (Scotland, 2012: 12). According to Cohen *et al.*, (2007: 19) the social world can only be understood from the standpoint of individuals who are participating in it. Therefore, the adoption of the qualitative approach in this research allows the researcher to ask probing questions in order to bring into consciousness hidden facts. Figure 3 provides details of the research process.

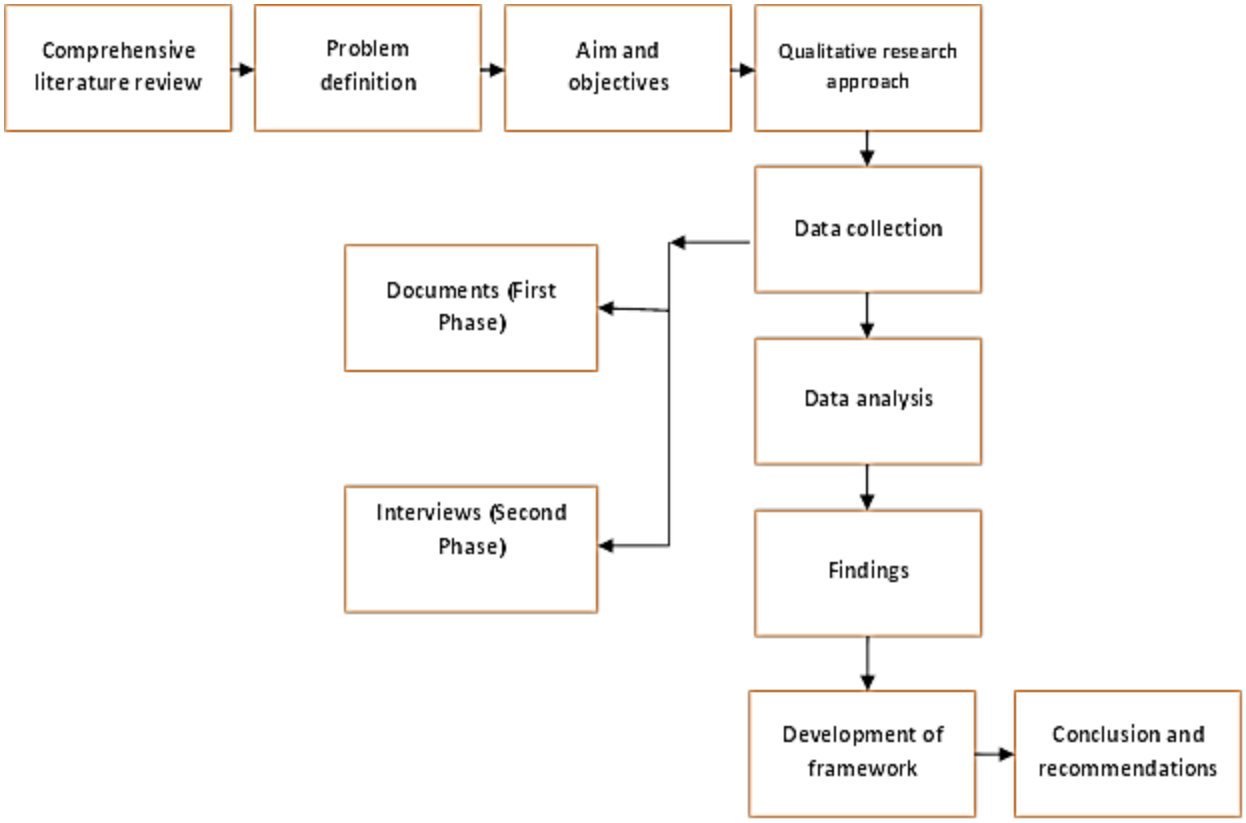

FIGURE 3 – RESEARCH PROCESS

5.6.1. Unit of analysis

Guided by the research objectives of this study, the units of analysis considered appropriate for this study are the institutions or agencies involved in statutory adjudication implementation in the jurisdictions where adjudication is currently being practiced. The participants within the institutions/agencies as well as individuals involved in adjudication implementation such as adjudicators, trainers, legal advisers, legal representatives and industry representatives are regarded as embedded units of analysis within the unit institutions. The meaning of institutions as adopted in this study has been explained in chapter three.

Only four countries were selected for this study. These countries are the UK, Australia (Queensland and NSW), Singapore and Malaysia. These countries were selected on the following basis:

The UK experts are selected due to the fact that the UK construction industry is regarded as the pioneer of adjudication and has the longest history and significant

case laws in the implementation thereof. In addition, the various challenges experienced during the implementation of adjudication in the UK construction industry have led to the amendment of the original Act. To this end, the experiences of the relevant participants in the UK who were involved in the adjudication implementation are crucial to the provision of in-depth information that this research required. NSW construction experts were also selected because the NSW Act is regarded as the main alternative version to the UK adjudication regime. Thus, the mode of implementation in the UK is different from that of NSW. Contrary to the implementation process in NSW, Queensland has a specific agency in charge of adjudication implementation. Studying the significance of this agency to the effective adjudication implementation is important to this study. Thus, the contributions from the experts in both Queensland and NSW are very relevant to this study. Singapore was selected because their adjudication regime has unique features (Munaaim, 2012: 35). Some salient features from the existing legislations were put into consideration during the formulation of their own legislation. By contacting experts in Singapore, the effect of the improvement in their legislation on the implementation process could be discovered. Thus, contributions from Singapore experts are also very necessary. Malaysia was also one of the countries selected as a case study. Presently, Malaysia is the latest country that has brought into force legislation providing for the mandatory adjudication of construction payment disputes. Moreover, Malaysia is the only country that named an independent institution as an implementing authority in charge of adjudication administration in their legislation. Over all, specific contributions from the experts working in these institutions are precisely what are required to meet the objectives of this study.

5.6.2. Sampling technique

Considering the nature of this study, a purposive and snowballing sampling method was chosen to identify the potential interviewees in the four jurisdictions selected for this study. The choice of purposive sampling was based on the recognition of the fact that it is the most important kind of non-probability sampling to identify primary participants suitable for the research. Thus, the participants were selected on

their specific involvements and experiences central to the phenomenon being studied.

The selection of a sample was based on a judgemental approach (Greig and Taylor, 1999), looking for those who have had experience relating to the phenomenon under consideration (Kruger, 1988: 150). Thus, the methodology employed for this study assumes that, what people have experienced is true for them, and that by sharing these experiences, the researcher can enter the interviewee's world (Rubin and Rubin, 2012: 7). The purposive and snowballing techniques are selected for this aspect. This approach has been considered appropriate and relevant due to the need to select the most knowledgeable personnel with richness of information who meets the criteria for the interview. In addition to the purposive/judgemental technique, snowballing methods were also employed. The rationale behind the inclusion of the snowballing technique is that the participants selected through purposive sampling would volunteer information on other personnel or individuals who meet the set criteria for selection, and as such, more useful data would emerge that might lead to greater discovery of additional information.

The institution in charge of adjudication implementation in Malaysia was the first to be contacted in September, 2015. The reason behind this move was based on the fact that Malaysia is the only jurisdiction that requires the administration and implementation of adjudication to be handled by an independent, neutral organisation. Thereafter, individuals who were involved in adjudication processes and implementation from other selected countries were also contacted.

The names of the individuals from those agencies and institutions who were involved in both the drafting and implementation of their legislations were given. Access to the interviewees was negotiated through a letter of request and interviews were arranged with the identified individuals.

The experience and knowledge of the participants are crucial to the quality of information gathered. Thus, the interviewees for this study were selected for their relevance to the conceptual questions rather than their representativeness. Involvement in the statutory adjudication administration and implementation in the jurisdictions where adjudication is currently being practised was a crucial criterion

for the interviewee to be a participant. In addition, the participants were to conform to the following criteria:

- Senior adjudicators who have professional background in the construction industry (that is, architects, engineers, surveyors and construction lawyers who have been appointed as adjudicators for at least five cases);
- Senior adjudicators who have represented either of the contracting parties (claimants or respondents) in adjudication matters; and
- Senior legal advisors to construction participants with a minimum of ten years of experience in the construction field.

Similar criteria have been used by many researchers such as Chan and Tse, (2003); Harmon, (2003) and Munaaim, (2012). The above criteria were adopted and put into consideration in this study.

5.6.3. Data collection

The data were collected through primary and secondary sources. Semi-structured interview was the main source of primary data, while the secondary data was obtained through document sources. The two methods were selected on the basis of their potential to provide in-depth information about the phenomenon being studied (see the explanation in section 5.4).

The use of documents in this study was to provide answers to objectives one and two (see section 1.5). The sources of the documents examined were varied and diverse. They covered regulations, government's reports, journals, books, theses, conference proceedings, and contemporary documents on internal procedures of institutions involved in adjudication implementation in both SA and other jurisdictions where adjudication is being practiced. The information from the examined documents helped to establish the depth and breadth of the existing body of knowledge in this area and thus provided a theoretical basis for the research. The findings from the document review provided an essential preparation for the interviews and were used to develop the interview questions. The most important advantage in the use of documents in this study is to validate and augment evidence from other sources

(Yin, 2003: 87). Thus, combining interviews with documents search in this study provided credibility to the research findings.

Since object one and two have been dealt with through the use of document reviews, the design of the interview guide was organised into four sections covering objectives three, four and five of this study. Section 1 focused on securing background information of the interviewee and their involvement in adjudication. The essence of this section is to obtain information on who the interviewee is and whether he/she meets the criteria identified by the researcher. Section 2 had its focus on finding out the specific roles of institutions in the effective implementation of the legislation supporting statutory adjudication. The information sought in this section is expected to help address the research objective three on institutional roles in effective adjudication practice. Section 3 focused on finding out the teething problems and critical challenges that can impair the effective adjudicatory practices together with possible ways to prevent them and also seek to know how they can be resolved in cases where they occur. The focus of section 3 is to provide answers to objective four. Section 4 was at the core of the data collection process. It centres on getting information on what should be done to enhance the effectiveness of the adjudication practice in SA. The questions asked under this theme revolved around what should be done to enhance the maximum usage of the legislation by the intended beneficiaries and the provisions that should be made for the pragmatic functionality of the legislation (see Appendix 'B1' for a copy of the interview guide). The data collected in this section were used in the development of a framework for the effective functioning of the adjudication practice in the SA construction industry. Thus, this section focused on providing answers to objective five.

5.6.4. The interview process

Four major interview processes were followed in this research work. These are (i) the identification process; (ii) the information process; (iii) the participation process; and lastly (iv) the interpretation and integration process. Identification process involves the steps taken in locating the participants relevant to the study (this has been discussed in section 5.6.3). Identification and selection of the participants

relevant to the study requires that the participants conformed to the research criteria used by the researcher (these criteria have been spelled out in section 5.5.4). The next process is information stage, where the identified participants were informed about the research and then invited to participate in the research.

At the information stage, letters of request were sent to the identified individuals who were deemed to be qualified to participate in the research based on the set criteria. The letter contains six information aspects. These are: (i) brief introduction of the researcher and his/her research, (ii) aim and objectives of the research, (iii) the reason why a particular interviewee was selected, (iv) the nature of the interview and the likely duration, (v) assurance of confidentiality, anonymity and other ethical issues involved and (vi) request to participate (see appendix 'C' for sample of letter of request). Those who accepted the invitation to participate were sent an informed consent document which was signed by each of them and returned to the researcher. The participation process involves all the preparation toward conducting and recording of the interview. Some of the preparations included; sending reminder mails to the interviewees before the actual day scheduled for the interview to take place, clarifying time zone for the scheduled interview time and sending a thank-you mail immediately after the interview. In addition to the aforementioned, the interview guide was sent to the interviewees prior to the day the interview was to take place. All the interviews except one were conducted through Skype and were audio-recorded. The interviews lasted on average thirty eight minutes, with the shortest and longest durations being 29.40mins and one hour nine minutes respectively. A total of 15 people participated in the interviews. The interviews took place between November, 12th, 2015 and February 1st, 2016. The final process is interpretation and integration of the result from different participants' perspectives and this is discussed in detail in chapter six.

5.6.5. Pilot study

A pilot test is considered an important element to the interview preparation and it is expected to be conducted with participants that have knowledge of the research focus and who will also participate in the implemented study (Turner, 2010: 757). Regarding this fact, the interview guide was sent earlier to one of the identified

participants in Australia for necessary comments in order for the researcher to be able to make revision and refinements to the questions prior to the implementation (See appendix 'B2' for the initial interview guide). In addition, the opening two interviews were used as additional pilot testing to test the appropriateness of the questions. This provided an opportunity for the questions which lacked clarity to be streamlined as well as giving room for rearrangement of the questions for the purpose of proper flow. Thus, improvements and refinement were made to the final interview guide (see Appendix 'B3' – for the adjusted interview guide).

5.6.6. Sample size

Fifteen (15) interviewees participated in this research. A typical sample size for interviews is from 5 to 25 individuals (Leedy and Ormrod, 2009; Bertaux, 1981: 35; Creswell, 1998: 64; Morse, 1994: 225). This number is deemed appropriate because the selection of participants in qualitative research is not intended to count opinions or people as is done in quantitative research, but to explore the range of opinions and different representations of an issue (Gaskell, 2000).

Based on this fact, the participants in this study were selected on the basis of their closeness to the research topic and the level of experience and involvement in adjudication implementation. Those who participated are regarded as experienced and leading adjudicators in their jurisdictions. Some of these interviewees have engaged in adjudication as legal advisers, legal representatives and construction lawyers. In addition, some of the participants have also written books and journal articles on adjudication and payment legislation in their countries and internationally.

In total, twenty seven experts were contacted to participate in this study; fifteen of them agreed and were interviewed. The Table 3 below illustrates the number of participants by each jurisdiction.

TABLE 3 – NUMBER OF PARTICIPANTS IN THE RESEARCH

Country	Number of experts contacted	Number of participants
United Kingdom	4	3
Australia (NSW and Queensland)	5	3
Singapore	4	1
Malaysia	14	8
Total	27	15

Literature reveals that the number of the participants in this research commensurate with the at least fifteen acceptable sample size for qualitative research (Bertaux, 1981: 35). The number as well falls within five and twenty five sample size for a research of this nature as established by Creswell, (1998: 64) and Morse, (1994:225).

5.6.7. Data storing methods

Skype interview approach was employed in this research. With kind permission of the interviewees, the research interviews were audio-recorded using 'MP3 Skype Recorder'. The software produced small audio files in MP3 format ensuring portability of recording. In addition to the audio-recording of the interviews, the researcher opened a file with different divisions and filed the hard copy documents received from the interviewees. The documents filed are:

- The informed consent form agreement;
- The notes jotted during conversation with the interviewees;
- The notes and sketches received from one of the participants;
- Notes made during transcriptions of the interview; and
- The draft transcriptions of the interviewees

The interview transcriptions have been stored electronically on multiple hard drives and securely pass-worded.

5.7. Data analysis

The thematic analysis of data was based on established principles of qualitative analysis in an attempt to comprehend interviewees' contributions on effective adjudication practices (Strauss & Corbin 1998; Tuckett, 2004: 48). The analysis followed the principle of qualitative analysis which includes; transcribing, coding, memoing, constant comparison and diagramming (The detail is given in chapter six). Using this approach, the transcripts were first read through to obtain general sense of information contained in them. The process was done manually by the researcher for the purpose of getting comprehensive ideas of the data. During this process, key ideas were identified and highlighted. Thereafter, the transcribed data were coded, then the coded data were categorised and relationships were built among the categories. The principles in the analysis accords squarely with the principles underpinning the research that is in the interpretive epistemology tradition. In effect, the approach provides the opportunity for systematic examination, meaning and interpretations of diverse experiences and views of the research participants.

5.8. Ethical considerations

The ethics approval for this research project (see Appendix 'D') required that:

- The nature and objectives of the research should be explained to the participants;
- Participants participation be voluntary; and
- Information supplied should be handled confidentially.

Following the ethics approval, the potential participants were sent an official "letter of request to participate in the research" (Appendix 'C') as well as interview protocol detailing the nature and the objective of the research (Appendix 'E' – interview protocol). The participants that were interested to participate in the research responded to the researcher in writing via email. Thereafter, the research informed consent form and interview guide were sent to those participants that agreed to participate (Appendix 'B1' and F). The informed consent form documented the participants' consent to take part in the interview. The informed consent form was then signed by the researcher and the interviewee and a witness. The duly signed informed consent form was duplicated with one copy for the researcher and the other copy for each of the participants.

The interview date and time were arranged around the convenience of the participants. One important factor that was put into consideration was confirmation of the time of the interview with the participant. This was necessary because all the participants are in different locations with different time zones to that of the researcher. In effect, a letter of reminder and confirmation was sent to each of the participants two days before the date of interview agreed. In addition, a follow up email was sent a few hours before the time that the interview would be conducted.

All the participants except one agreed to a Skype interview and also consented that the interview could be audio- recorded. The remaining interview was conducted face-to-face with an interviewee who happened to be in SA during the interview period. At the start of each interview, participants were asked to reconfirm their willingness to participate and have the interview recorded, transcribed and quoted. Issue of confidentiality of information supplied as well as anonymity of the participants were re-emphasised and were managed by anonymisation of the transcripts. Each interview was assigned a code, for example "Participant 1, Participant 2". Key words and phrases were noted during transcription of the interview scripts. In addition, relevant interview statements "quotations" were lifted from the scripts in order to allow the voice of the participants to speak as well as to provide evidence and clarity to the reader of the findings. Finally, each participant was sent an email to appreciate his or her participation in the research.

5.9. Criteria for judging the quality of research design and validation of interview quotations

The following steps were taken in order to ensure the quality of the research findings: (i) interview transcription was checked to ensure accuracy; (ii) the themes were generated by two individuals and the results were compared for accuracy; (iii) the findings were scrutinised by an external qualitative research analyst to ensure credibility (iv) the database of research materials are kept from the beginning to the end of the research; (v) two different sources of data were used to arrive at the outcome (document and interview); (vi) the high level of experience of the research participants increases the credibility of the research (see Appendix 'A'). The participants that were involved in the study are considered leading expert in their jurisdiction. They were particularly involved in the adjudication implementation process in their jurisdiction. Thus, their contributions can be viewed as holistic and genuine.

In order to improve the internal validity of the research findings, the interview quotations were sent to the interviewees for their confirmation (see Appendix 'L' – Letter of request for validation of the research quotations). The response rate from the interviewees contacted for validation was encouraging. The researcher was able to validate the quotations with thirteen of the interviewees'. This constitutes a response rate of eighty-six per cent (86%). Six of the interviewees made some changes to the interview's quotations while the remaining interviewees confirmed the accuracy of the extracts as sent. All the changes made to the interview extracts by the interviewees were adequately incorporated into the research and used. This method of validation has been considered to be "*the most critical for establishing credibility"* in qualitative research (Lincoln and Guba, 1985).

5.10. Summary

Grounded within the epistemology of social constructivism, the research data were collected through the use of documents and semi-structured interviews. The focus of this research informed the choice of the qualitative research approach and interpretive philosophical stance. The study adopted a purposive/snowballing technique in the selection of research participants. The data collected were analysed and carefully interpreted using established thematic analysis principles. The analysis of the data is explained in the next chapter.

CHAPTER SIX

DATA ANALYSIS

6.1. Introduction

This chapter presents a general overview of the data analysis strategy employed in this study. Based on the established qualitative data analysis principles, the study employed procedures such as data coding, constant comparison, diagramming and data categorisation to generate themes from the transcriptions of the interviews conducted and from the documents selected for the study. As a prelude to the presentation of the analytic procedures, information on the interviewees' backgrounds is presented first. This is important in order to highlight the credibility of the interviewees for the purpose of validity and reliability of the research.

6.2. Analysis of interviewees' backgrounds

The interviewees who participated in this research are from the UK, Australia, Malaysia and Singapore. The largest number participants are from Malaysia, with 8 interviewees, followed by Australia and the UK with 3 interviewees each. Singapore with only one interviewee has the least. The large number of participants from Malaysia is not unexpected as Malaysia is the only jurisdiction with an established independent institution in charge of adjudication implementation (see section 1.6). It should be noted that the majority of the interviewees who participated in this study are considered highly experienced professionals and leading adjudicators in their jurisdictions due to their heavy involvement in the implementation of the security of payment and adjudication legislation. Specifically, one of the interviewees may be considered as a primary force behind the enactment of security of payment and adjudication legislation in his jurisdiction. Further, one of the interviewees has been an adjudicator since the start of statutory adjudication in the UK and three of the interviewees have also practiced as adjudicators in more than one country (the detail of the interviewees' profiles is attached as Appendix 'A'). In summary, the participants for this study comprised a variety of people that have primary contact with the adjudication process and have also interacted with the process at different levels. Among the participants are construction lawyers, scholars, tutors, adjudicators and industry representatives. The caliber of the interviewees therefore provides very good ground for getting a rich and diverse range of information on the research

objectives. This will ultimately enhance the understanding of the key determinants of an effective statutory adjudication process. Figure 4 below shows the percentage distribution of participants for the study.

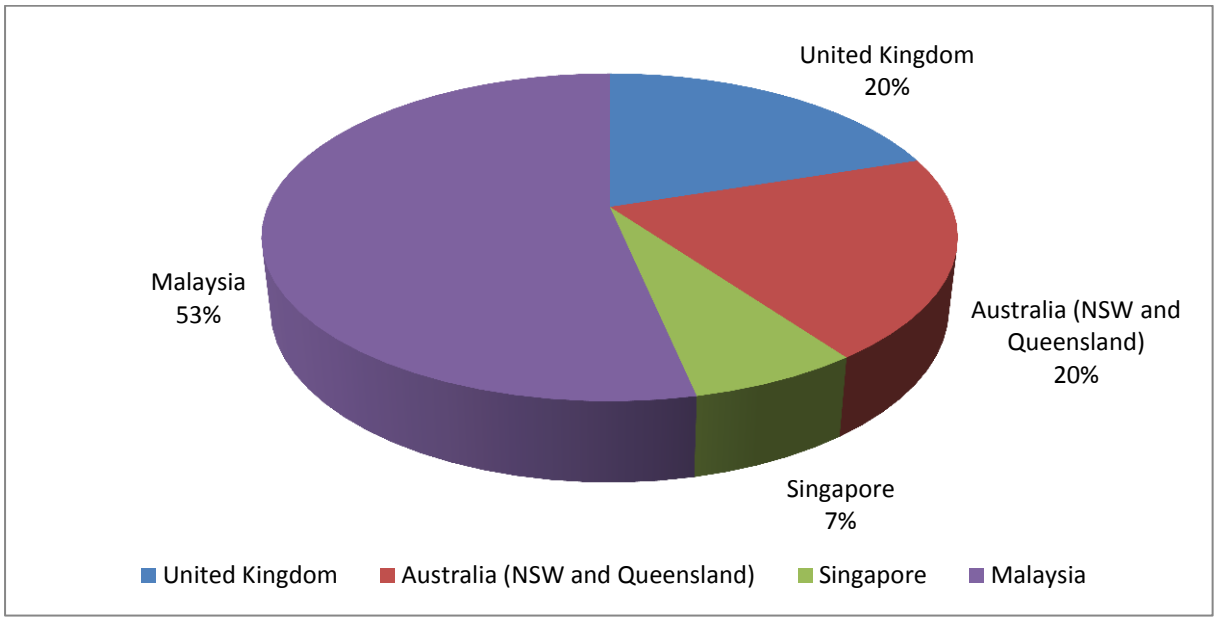

FIGURE 4 – PARTICIPANTS FOR THE STUDY (SOURCE: FIELD DATA)

6.3. Professional background of the participants

In terms of the professional spread, a large majority of the interviewees were persons with legal background (n= 8, 53.33%). This is unsurprising due to the legal nature of the research and the processes that are usually involved in policy formulation and implementation. Interviewees with quantity surveying backgrounds were 4, yielding 26.67%. The rest of the interviewees had backgrounds in engineering and building construction (see Figure 5). It is important to note that some of the interviewees have multiple professional backgrounds; for example, law and quantity surveying, law and engineering, law and building construction (see Appendix 'G3'- interviewees with multiple professional backgrounds). The multiple professional backgrounds possessed by some of the interviewees are viewed as added advantage as information from the participants would be a product of diverse experiences.

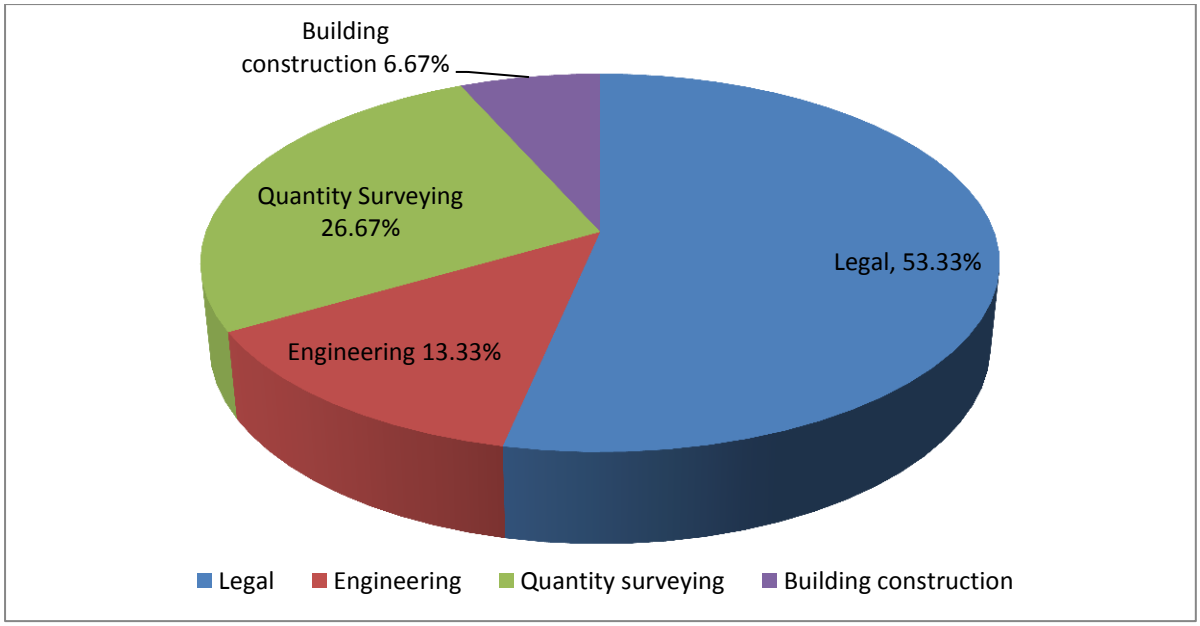

FIGURE 5 – PROFESSIONAL BACKGROUND OF THE PARTICIPANTS (SOURCE: FIELD DATA)

6.4. Interviewees' involvement in the security of payment and adjudication legislation

With regards to the interviewees' involvement in security of payment and adjudication legislation, the trainers (tutors) represent the largest groups with 5 (33.33%) interviewees. Other interviewees' involvements in the legislation implementation are distributed equally - 3 interviewees, each representing 20%, are involved as adjudicators, legal advisers and academics respectively. Only 1 interviewee, representing (6.67%), was involved as an industry representative. The analysis further revealed that some of the interviewees have multiple roles in the adjudication implementation. As evident in Appendix 'G4', the interviewees are involved either as tutor and adjudicator, academic and adjudicator, tutor and legal representative, or as industry representative and adjudicator. In addition, two of the three academics that participated in the research were also involved as adjudicators in the industry. The caliber of the interviewees that participated in this research is that of those who are commonly referred to as elite participants (Marshall and Rossman, 2006). With diverse professional backgrounds and multiple involvements in the adjudication legislation, the interviewees occupied key positions within their various organisations and professional bodies and were well-placed to provide first-hand information needed for this study. Four of the interviewees sent their responses to the research questions in written form. Figure 6 shows the participants primary involvement in the payment and adjudication legislation.

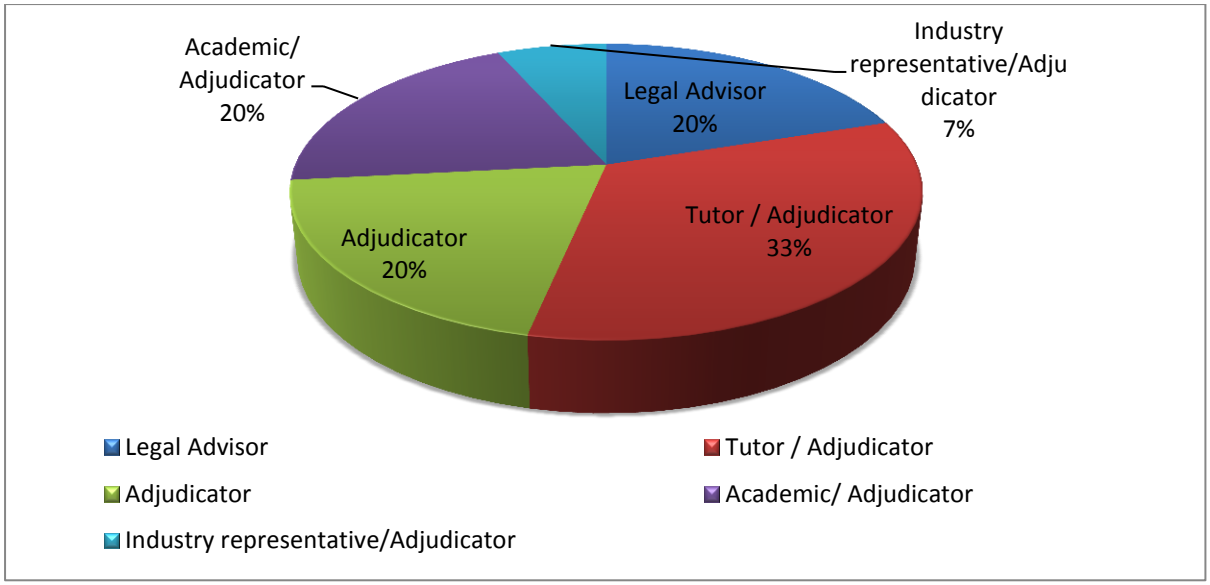

FIGURE 6 – INTERVIEWEES' INVOLVEMENT IN ADJUDICATION (SOURCE: FIELD DATA)

6.5. Interviewees years of experience

As is evident in the chart presented in Figure 7, the majority of the interviewees are highly experienced professionals, with 5 interviewees (33.33%) having 20-29 years of experience, 3 interviewees (20.00%) having 30-39 years of experience and 7 interviewees having 10-19 years of experience group while none of the interviewees had less than 10 years of experience.

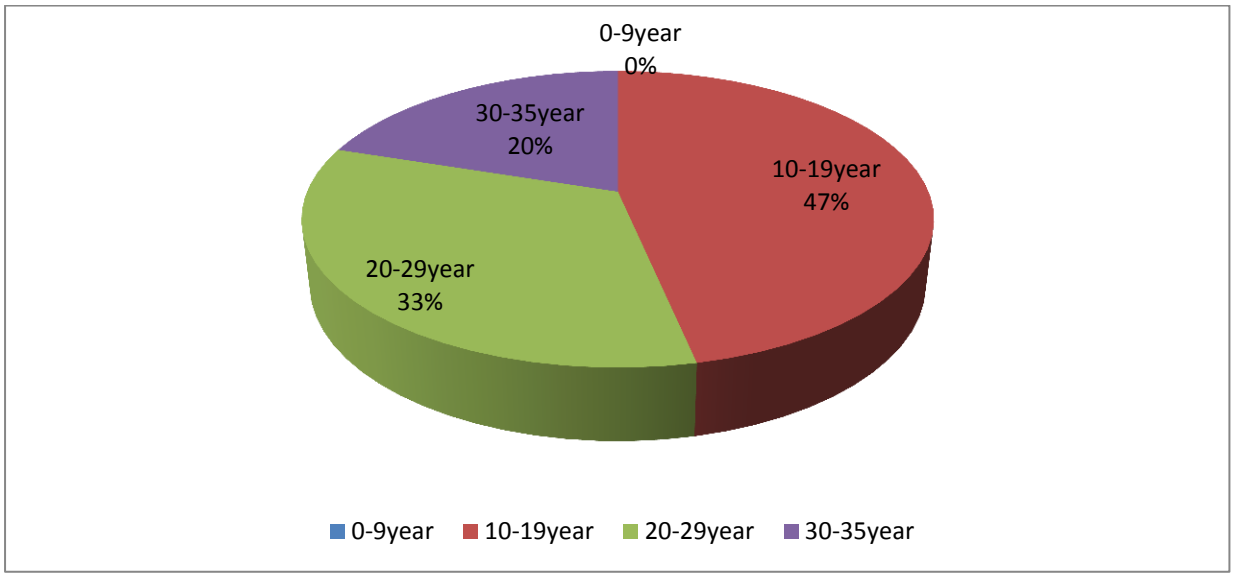

FIGURE 7 – INTERVIEWEES' YEARS OF EXPERIENCE (SOURCE: FIELD DATA)

6.6. Synopsis of the data analysis strategy

It has been argued that while the general qualities associated with analysis are often alluded to, the specific procedures used in the organisation and interpretation of data are not always explained (Watt, 2007: 96). Thus, Constas (1992: 254) contends that researchers should describe their methods of analysis and identify the origin of categories. Since each qualitative study is unique, the analytic approach used will be unique (Mile and Huberman, 1994: 433). Accordingly, this study relies on established qualitative analysis procedure such as coding, constant comparison and diagramming to generate subcategories, categories and themes from the interviews and documents. Firstly, the interviews conducted were transcribed and edited. The interview transcripts contain hundreds of pages and the large quantity of raw data was handled by physical sorting and manual coding due to the degree of conceptualisation required in transforming the data into meaningful findings.

Three types of coding systems were utilized: (i) the open coding (identification of theme from the raw data and formulation of categories), (ii) the axial coding (re-examination of categories) and (iii) the selective coding which involves data integration. The details of the steps taken during the coding process are discussed in section 6.7.

Overall, based on the research objectives, a total of four hundred and twelve codes were generated (See Appendix 'H'). Using Strauss and Corbin's (1998) coding paradigm, the codes generated were further re-organised into categories and subcategories (See Appendix 'J'). After the re-organisation of the initial codes, two hundred and eighteen of the four hundred and twelve initial codes generated were retained. In all, a total of four themes, eleven categories and forty one subcategories were created (See Appendix 'J' for details of the individual themes and their associated categories and subcategories). The four themes generated are (i) 'relevant institutions and their specific roles in effective statutory adjudication implementation', (ii) 'implementation challenges and how they could be prevented or overcome', (iii) 'institutional requirements for effective implementation' and (iv) 'enabler of effective statutory adjudication implementation'. These themes formed the basis of the explanations and discussions provided in subsequent chapters of the thesis.

A detailed account of the analytic procedures is presented next. Two categories, namely categories one and five ("critical challenges to effective implementation" and" relevant

institutions to effective statutory adjudication implementation"), are selected out of the eleven categories and used in providing the illustrations.

6.7. Steps taken in the data analysis process

As previously mentioned, the large quantity of qualitative data was handled manually by the researcher and two qualitative analysis experts. The database consists of interview transcripts from open-ended exploratory interviews and documents. Documents such as industry reports, theses, consultation reports, conference proceedings and journal articles were used in conjunction with the interview transcripts. Attention was given to the quality of the databases. All the audio-recorded interviews were transcribed verbatim and partly edited. Editing was carried out with the aim of ensuring that the integrity of the recording was preserved in the transcripts. As part of the editing process, descriptions and labels which could be used to identify interviewees were deleted to ensure the anonymity of the interviewees. The names of the interviewees were also deleted for confidentiality and ethical reasons. In addition, each interviewee was assigned a specific code identifier. The code identifier used was P1, P2, P3...P15, meaning participant 1, participant 2, participant 3…participant 15. In order to allow the use of *voice* text in the research report and to ensure that the integrity of the information provided by the interviewees was not compromised, the interviewees' responses were only slightly edited. The edited quotations were subsequently sent to the interviewees in order to confirm the accuracy of the extracts and agree on the substance of the quotations. The analysis process consisted of three phases, namely, the coding phase, the categorisation phase and the integration phase.

6.8. The coding phase

To enhance better understanding of this section, a brief explanation of the terms used during coding is first provided before detailing how the coding process was carried out. Coding is a systematic way of condensing extensive data sets into smaller analysable units through the creation of categories and concepts derived from the data (Lockyer, 2004). Thus, a code represents the smallest unit into which data is divided. Codes are usually created on the basis of information communicated within the broader scope of the research objectives. It should be noted that codes are not the same thing as categories and themes. While codes signify isolated individual concepts which could be obtained from the raw data, categories contain

clusters of coded data. Sometimes, larger categories which merit further refinements had subcategories. This is important in order to group the findings into a more manageable storyline. At a certain stage, the major categories are compared with each other and consolidated into themes. Thus, the themes bring together all concepts including categories, subcategories and codes representing data which met the research objectives. Figure 8 illustrates the process described above.

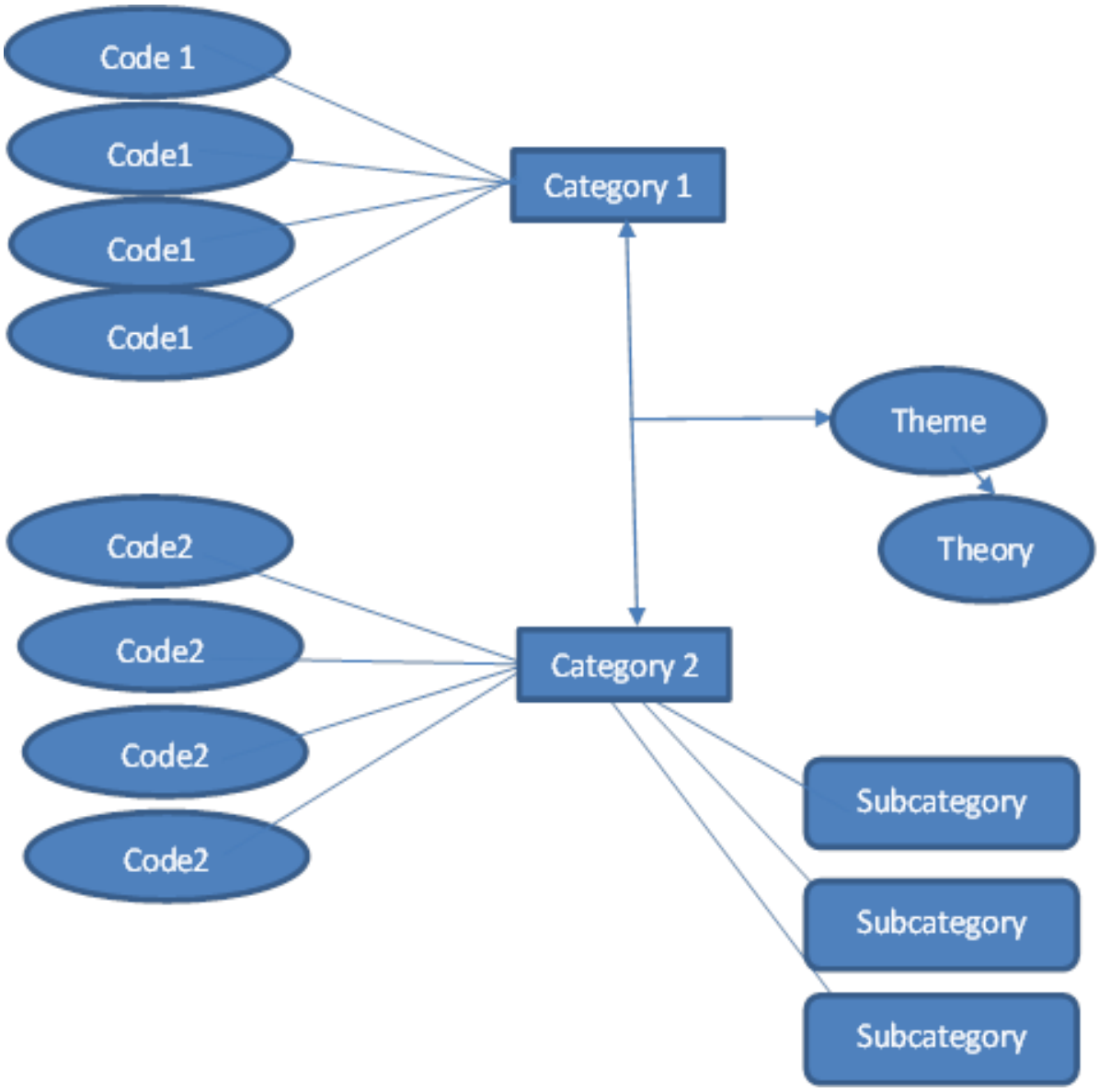

FIGURE 8 – SAMPLE OF CODING PROCESS (Adapted from Saldana, 2008)

Using the approach illustrated above, a total of four hundred and twelve codes, forty one subcategories, eleven categories and four themes were generated in the study. Thus, it is

obvious that whilst codes created were many, the number of categories was relatively smaller. In the same vein, the number themes formulated was smaller than the number of categories. Figure 9 presents the visual summary of the codes, categories and themes generated in this study.

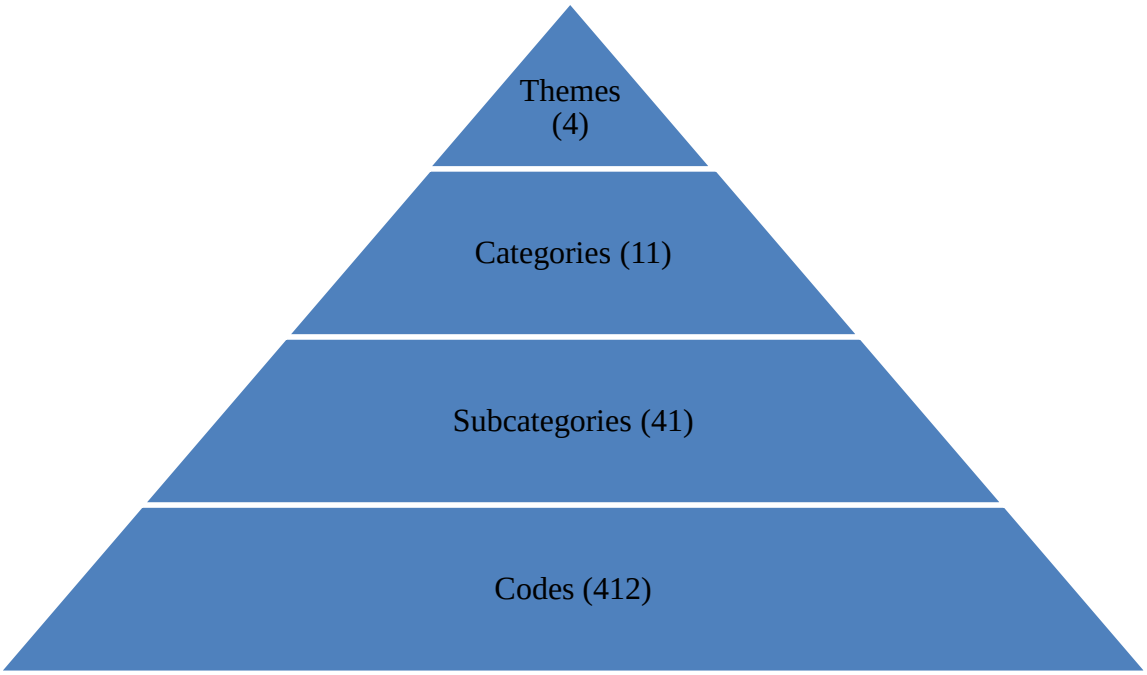

FIGURE 9 – SUMMARY OF CODES GENERATED IN THE STUDY (SOURCE: FIELD DATA)

Three distinct coding strategies were employed to achieve the coding summary described in Figure 9. These were open coding, axial coding and selective coding. These coding systems are further explained in section 6.8.1.

6.8.1. Open coding

Open coding involved the creation of codes from the raw data. In this study, codes were generated freely using combination of incident-by-incident and paragraph-by-paragraph coding procedures to identify the themes emerging from the raw data. Raw data were only coded and classified as a theme when they cut across a preponderance of the data. During the open coding process, the researcher identified and tentatively named the conceptual categories into which the phenomenon observed would be grouped. The purpose was to create descriptive, multi-dimensional categories which formed a preliminary framework for the analysis. Words, phrases or expressions that appeared similar were grouped into the same

category. These categories were gradually reconstructed, modified or replaced during the subsequent stages of analysis that followed. It should be noted that the decision to code an idea hinged on its relevance to the research objectives. For example, during the interviews the participants were requested to mention and explain the critical challenges that could impair or threaten the realization of the benefits of statutory adjudication. All through the open coding, responses to this question from the fifteen participants were identified and allotted codes. Using responses from participants 7 and 12 as examples, in response to this question P7 commented as follows:

"One of the critical challenges is the adverse court decisions…court decisions which nullify the effect and efficiency of how adjudication is intended to operate can stultify the significance of adjudication. For instance, Court decisions which enable the opening up and judicially reviewing adjudicators'' decisions can bring the system to a standstill, thereby, circumventing the objects of the legislation

This statement was coded as a problem relating to 'legal technicalities and adverse court decisions due to lack of proper understanding of object of adjudication legislation'. In response to the same question, participant 12 also stated as follows:

"I will say, the problem comes from the courts. They have no clue what adjudication is. That is always the case when an adjudication act is being introduced. The judge do not have a clue what adjudication is and see adjudication as a full fledge dispute resolution akin to arbitration whereas in actuality, adjudication is not arbitration. Arbitration is very much different from adjudication. So when we have this kind of problem, the judges start to introduce complicated procedures which are applicable in arbitration or litigation into adjudication".

This was also coded under the issue relating to 'legal technicalities and adverse court decisions due to lack of proper understanding of the object of adjudication legislation''.

Other interviewees provided additional information on different situations which are critical challenges that could threaten successful statutory adjudication. These pieces of information were assigned codes such as 'ignorance of the Act and failure to

understand requirements of the Act', 'lack of understanding by the users', 'lack of knowledge', 'capacity challenge', 'fees challenges', 'procedural complexity challenges', 'challenges relating to the contents of the legislation' and so on. Several hundreds of participants' statements were coded in the same manner (see appendix 'H' for a list of codes generated).

The coding and labelling of data was iterative. Thus, some codes that had been identified earlier were later relabelled or merged under common labels. For instance, in relation to the earlier example of questions on the critical institutional challenges that can threaten the realisation of the benefit of statutory adjudication, both 'ignorance of the Act and failure to understand requirements of the Act', 'lack of understanding by the users', 'lack of knowledge' and lack of awareness were identified separately as teething factors that can affect statutory adjudication. A closer scrutiny of each of the four codes subsequently revealed that all the factors are associated with assimilation of innovation and change process problems and can lead to slow adoption. Consequently, all the codes were eventually merged into the code called 'change process challenges'. In some instances, initial codes or labels were replaced or modified. For instance, the codes 'adjudication cost challenge' and 'adjudicator's fees challenge' were initially coded under a common label called 'fees challenge'. However, reading through the statements of P1 and P5 where clear explanation and distinction were made on challenges associated with adjudication fees and cost of adjudication, a decision was made to separate fees challenges into 'challenges related to adjudication fee' and 'challenges related to adjudicator fees'. In all, forty four codes were generated from the responses to the question on teething problems and critical challenges to effective statutory adjudication implementation (see Table 4). In order to have a more manageable storyline, the codes were further subdivided into seven smaller groups. Table 4 reveals the coding summary of the responses and its associated subcategories.

TABLE 4 – CODES ON THE QUESTIONS REGARDING THE TEETHING PROBLEMS AND CRITICAL CHALLENGES TO EFFECTIVE IMPLEMENTATION OF ADJUDICATION

S/N	Codes	Sub categories
1	Drafting inconsistencies within the legislation	Challenges relating to technical provisions and contents of the legislation (Technical provision and content challenges). (**12 codes**)
2	The technical provision within the Act	
3	Lack of clarity on transitional provisions	
4	Lacuna in our adjudication legislation	
5	Interpretation problem with part of the legislation	
6	The Act being silent on how some issues should be carried out	
7	Interpretation problem with some of the contents of the Act	
8	Considerable confusion of pursuing and realising the contractual remedies of work slow-down/suspension	
9	The Act is rather ambiguous on some issues	
10	Problem with application of the legislation (retrospective or not)	
11	The Act has general framework, no detail procedure on what to do	
12	Lack of understanding by users, adjudicators and lawyers	
13	Lack of clarity on provisions and application of the Act	Procedural challenges (**5 codes**)
14	Procedural complexity	
15	The Act has general framework, no detail procedure on what to do	
16	Ignorance of subcontractors, suppliers, etc. of the Act, and their entitlements under the Act	
17	Degree of accessibility	
18	Ignorance of the Act and failure to understand requirements of the Act	Change process issues (Assimilation of innovation challenges) (**7 codes**)
19	Lack of understanding by users and lawyers	
20	Users' ignorance of their entitlement under the Act	
21	Users' ignorance of the Act provision	
22	Lack of proper understanding of what the adjudication is all about by court	
23	Lack of familiarity with the process and procedure	
24	Lack of awareness and low level of knowledge	
25	Slow usage due to lack of resources	Capacity challenges (**4 codes**)
26	Problem with the type of training given to adjudicators	
27	No formal requirement for adjudicators' training, resulting in different standard affecting quality	
28	Inadequate resources in term of number of adjudicators available, quality of adjudicator and discipline of adjudicators	
29	Strict interpretation of the rules of adjudication	(**5** Legal
30	Legal technicalities	technicalities

S/N	Codes	Sub categories
31	Issue relating to technical breaches	challenges **codes**)
32	Adverse court decision	
33	Introduction of complicated issues that are applicable to arbitration	
34	Adjudication fees	Cost/fees challenges (**2 codes**)
35	Adjudicator's fees	
36	Power of adjudicators	Jurisdictional challenges (**2 codes**)
37	Problem relating to the rules of natural justice	
38	Problem relating to who should administer the process	Others (**7 codes**)
39	Inappropriate conduct e.g. problem of financial incentives	
40	Problem of interference	
41	Lack of training/understanding by users, adjudicators, lawyers	
42	Fear and intimidation that is used in the industry	
43	Problem of adjudication shopping	
44	Slow start due to administrative issues	
	Total	**44 codes**

This coding approach was utilised throughout the analysis stage to generate all the codes in this study. The discrete categories identified in open coding were combined at the next stage called axial coding.

6.8.2. Axial coding and development of categories

This stage involves the re-assembling of codes to generate categories. It covers all the processes, taking in the formation of subcategories, categories as well as the clustering of the various categories created around a core theme. Basically, the open coding process broke up the data into smaller chunks. The four hundred and twelve codes carried bits and pieces of larger information from the whole data. For instance, 'adjudicator fees challenge', as an isolated concept, gave very little information on how it could be a critical challenge to the effective implementation of statutory adjudication and how it could be overcome. Consequently, re-assembling the broken-up data into meaningful categories and themes becomes very necessary after open coding. At this stage, the researcher determined whether enough data exist to support each of the categories identified. In order to develop a single storyline around the categories formulated, selective coding process was utilised to choose

one category to be the core category, and relating all other categories to that category. It is important to note that this process of developing categories was also guided by the research objectives. Returning to the earlier example of concepts such as 'change process issues', 'lack of understanding by users', 'lack of awareness', and 'slow acceptance of the legislation', there was the need to find a more abstract concept which was capable of representing these other concepts. 'Assimilation of innovation challenges' satisfied this requirement because it was a fitting rallying point for all codes which could cause challenges as a result of change in a process. It reflected the likely causes of those challenges. For instance, lack of awareness of innovation could lead to low usage and slow adoption. Similarly, ignorance of the Act and failure to understand requirements of the Act could threaten the adoption, and as such affect its effective implementation. The same logic informed the rallying of other individual codes such as 'content challenges', 'procedural challenges', 'jurisdictional challenges', and 'capacity challenges' around a core category named critical implementation challenges to effective implementation'. Table 5 below shows the category 'critical implementation challenges to effective implementation' and its codes.

TABLE 5 – THE CATEGORY 'TEETHING PROBLEMS AND CRITICAL CHALLENGES TO EFFECTIVE STATUTORY ADJUDICATION IMPLEMENTATION' AND ITS CODES.

Categories	Subcategories	Codes
Teething problems and critical challenges to effective implementation	Challenges relating to technical provisions and contents of the legislation (Technical provision and content challenges).	12 codes (see Table 4)
	Procedural challenges	5 codes (see Table 4)
	Change process issues (Assimilation of innovation challenges)	7 codes (see Table 4)
	Capacity challenges	4 codes (see Table 4)
	Challenges relating to adverse court decision	5 codes (see Table 4)
	Cost/fees challenges	2 codes (see Table 4)
	Jurisdictional challenges	2 codes

Categories	Subcategories	Codes
		(see Table 4)
	Other challenges	7 codes (see Table 4)
Total		44 codes

6.9. Categorization phase

Generally, in qualitative analysis there are different reasons for linking different codes to a particular category. For instance, some codes represent the state of affairs of a particular phenomenon. Others may capture what actor(s) involved with that condition/state of affairs did or was/were doing in response to that condition/state of affair. Further, some other codes may reflect the consequences of the actions or inactions of the actors in relation to that state of affair. For each of the codes which were found to manifest these qualities, the Corbin and Strauss (1990) coding paradigm of conditions, actions, interaction and consequences was used to regroup them under identified categories.

For instance, taking category 2 as an example to illustrate this process of developing categories, going through the interviews transcripts all the information relating to court, whether high court, specialist court or technical construction court were labelled under the code ‘legal institutions’. Likewise, information about the nominating authorities or authorising agencies/bodies was also labelled under the code ‘authorising institutions’. Information provided by the interviewees on the involvement of government and professional organisations in the adjudication legislation was similarly coded under ‘government institutions’ and ‘professional institutions’ respectively. All other organisations identified are coded under ‘other institutions’. There was a need to identify a category under which all the codes identified on institutions’ involvement will fit logically. Thus, the category, ‘relevant institutions in effective statutory adjudication implementation’ captured all the information provided under these codes. Thus, the five codes were linked to the category, because they described the institutions and their involvement (action and interaction) in the implementation process. Figure 10 shows the link between the category termed ‘Relevant institution’ and its constituent codes.

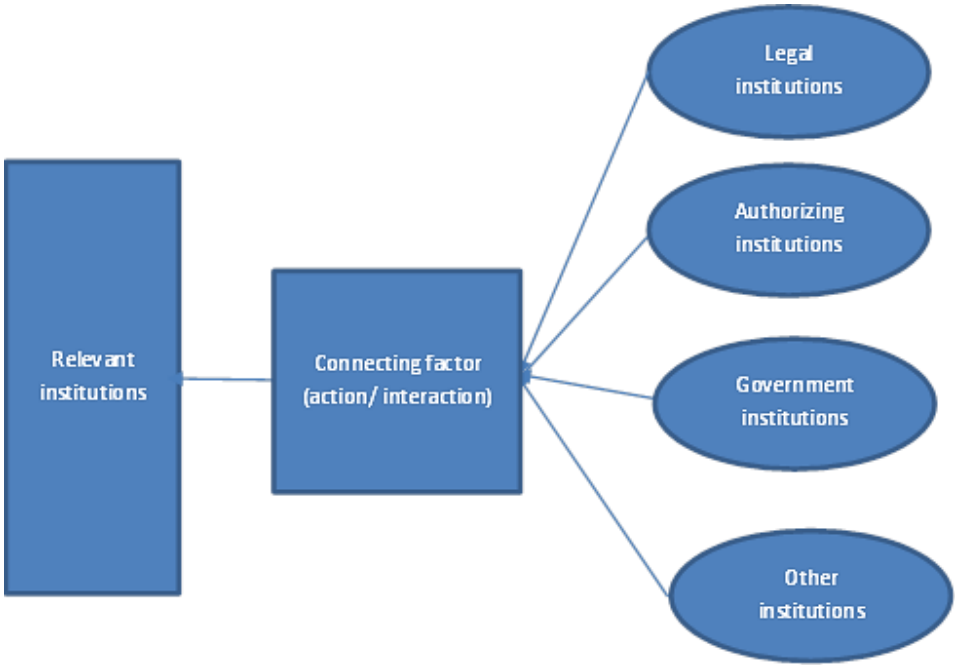

FIGURE 10 – LINK BETWEEN THE CATEGORY 'RELEVANT INSTITUTIONAL' AND ITS CONSTITUENT CODES

Apart from the strategy used in linking the above category to its constituent codes, other codes may be linked to a particular category on the basis of context, circumstances/condition and consequences as a connecting factor to the identified category. Using the approach described above, a total of eleven categories were developed at various analysis stages in this study. Table 6 shows a list of all the categories generated in this study.

TABLE 6 – LIST OF CATEGORIES GENERATED

List of categories			
1	Relevant institutions to effective statutory adjudication implementation	7	Institutional position in effective implementation
2	Institutional roles in effective statutory adjudication implementation	8	Institutional supports needed for effective statutory adjudication practice.
3	Types and features of authorising nominating bodies	9	Practical efforts that were put in place to enhance effectiveness
4	Teething problems and critical challenges to effective implementation of statutory adjudication	10	Enabler of an effective statutory adjudication implementation
5	Causes of teething problems and critical challenges to effective statutory adjudication practice	11	Implementation process structured to enhance compliances by industry stakeholders
6	Avoidance strategies and preventive measures to the identified challenges		

6.10. Integration phase

As open coding and creation of categories proceeded simultaneously and iteratively, the last phase of the analysis, termed "integration phase", was introduced. This phase is important in order to enable the clustering of various categories created around a core theme. Accordingly, there was a need to identify a core theme on which the categories generated can be clustered. One of the eleven categories identified earlier namely, 'enabler of an effective statutory adjudication implementation' was selected as the core theme. The reason behind this choice is that, as one of the sensitising concepts which drove the data collection process, the requirements for the effective statutory adjudication implementation remained at the heart of the study. The aim of the study is to determine the institutional requirements of an effective statutory adjudication practice and to develop a framework that will support the pragmatic functionality of statutory adjudication in the SA construction industry. One of the objectives was to discover and develop a framework that will enhance the effectiveness of the statutory adjudication practice in SA (section 1.4). The question in the interview guide mainly focused on obtaining information on what should be in place to enable successful statutory adjudicatory practice in the SA construction industry. Thus, the category called 'enabler of effective statutory adjudication implementation' was the convergent point for a considerable portion of the data and was subsequently selected as the core theme. Under the core theme were three categories namely, 'practices that can enhance successful implementation', 'attributes that can promote effective implementation', and 'processes that can enhance compliance and maximum participation by the contracting parties'.

In addition to the core theme, three other themes emerged from the study namely: (i) 'relevant institutions and their specific roles', (ii) 'critical challenges to effective implementation and how they can be prevented or overcome', and (iii) 'institutional requirements for effective implementation.' During the creation of all the themes, emphasis was placed on identifying categories which were relevant to the various research objectives. Questioning was used as an analytical tool to generate ideas and data. Accordingly, the following questions guided the analysis at this stage: (i) which categories provided information on the relevant institutions in adjudication practice? (ii) which categories identified provided information on the roles of the institutions involved? (iii) which categories provided information on the challenges to effective implementation? (iv) which categories provided information on the possible means to overcoming the various identified

challenges? (v) which categories contained information on the requirements for the effective statutory adjudication practice?

Throughout the analysis process, this procedure helped in generating data and linking the core theme and other categories. Taking the category labelled 'relevant institutions to effective implementation' as an example, this category contained information on legal institutions, nominating/authorising institutions, government institutions and others supporting organisations. The information provided insights into the nature, importance and roles of institutions in the successful implementation of statutory adjudication. The category named 'relevant institutions to effective adjudication' also represented data which disclosed that some institutions are critical to effective functioning of statutory adjudication and perform critical roles without which the adjudication process will fail, while some other institutions only perform a supportive role. This information on institutions that are relevant to effective adjudication and their respective roles constituted part of the context within which institutions function in adjudication implementation.

Other categories that are providing information on the context or condition for a successful statutory adjudication practice are also identified. Taking one of the categories named "Teething problems and critical challenges to effective implementation as an example. This category provided information on three areas, (i) it provided information on challenges to effective implementation, (ii) the root causes of the identified challenges and (iii) the possible avoidance or preventive measures (See Figure 11). Challenges to effective implementation' represented data on what could constitute failure in the implementation process. In addition, factors such as poor drafting style, unnecessary interference, low level of knowledge by the users and degree of accessibility to the legislation are listed under the causes of critical challenges. Likewise, the possible avoidance and preventive measures such as accessibility, training and education, institutional interventions are highlighted (see Figure 11). There is need for a theme that can unite all the three categories. Thus, a theme called 'implementation challenges and how they could be overcome' was created to unite all the categories identified above (see Table 7 theme 2).

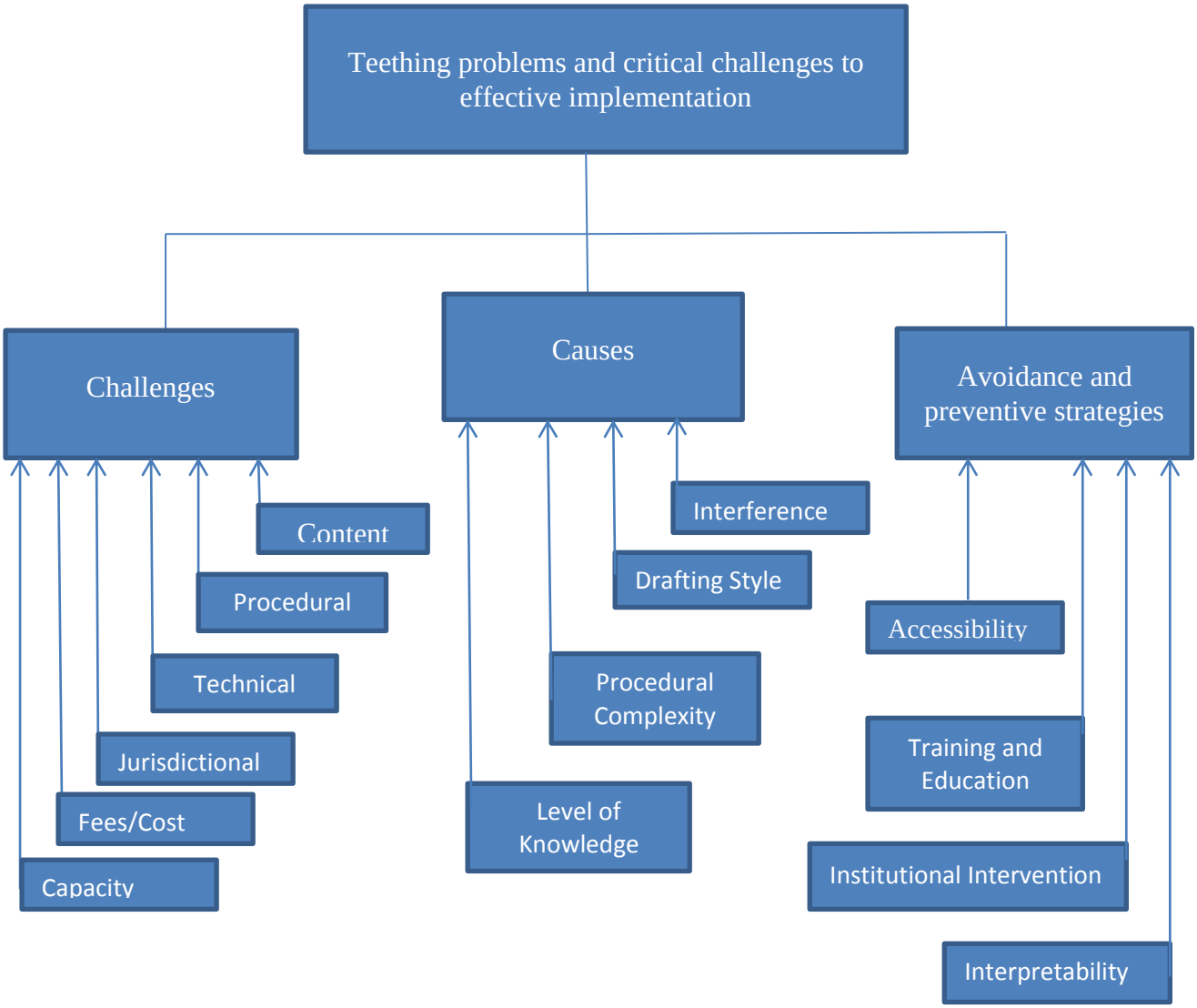

FIGURE 11 – THE THEME "TEETHING PROBLEMS AND CRITICAL CHALLENGES TO EFFECTIVE IMPLEMENTATION"

Categories which represented data on the importance of institutions to effective implementation were captured under institutional requirements for effective implementation. Categories on factors that influence effective functioning of the legislation were classified under the theme 'enabler of effective statutory adjudication' (see Figure 12).

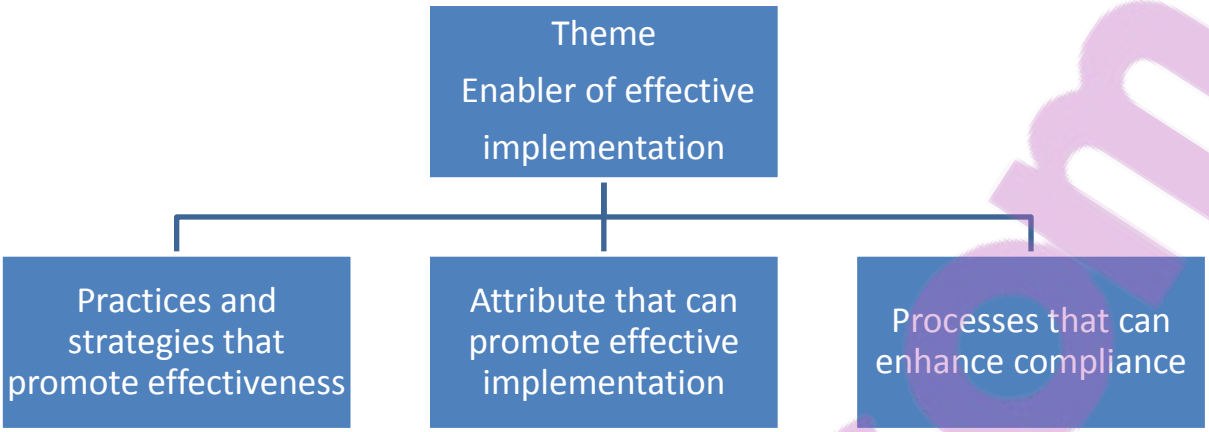

FIGURE 12 – THE THEME "ENABLERS OF EFFECTIVE IMPLEMENTATION"

In summary, the three other categories developed during the regrouping stage of the coding process were clustered around the core theme, 'enabler of effective statutory adjudication practice'. Thus, the outcomes of the clustering process were four themes representing data on various concepts, subcategories and categories as shown in Figure 13. In addition, Table 7 below illustrates how the themes generated during the analysis corresponded to the research objectives.

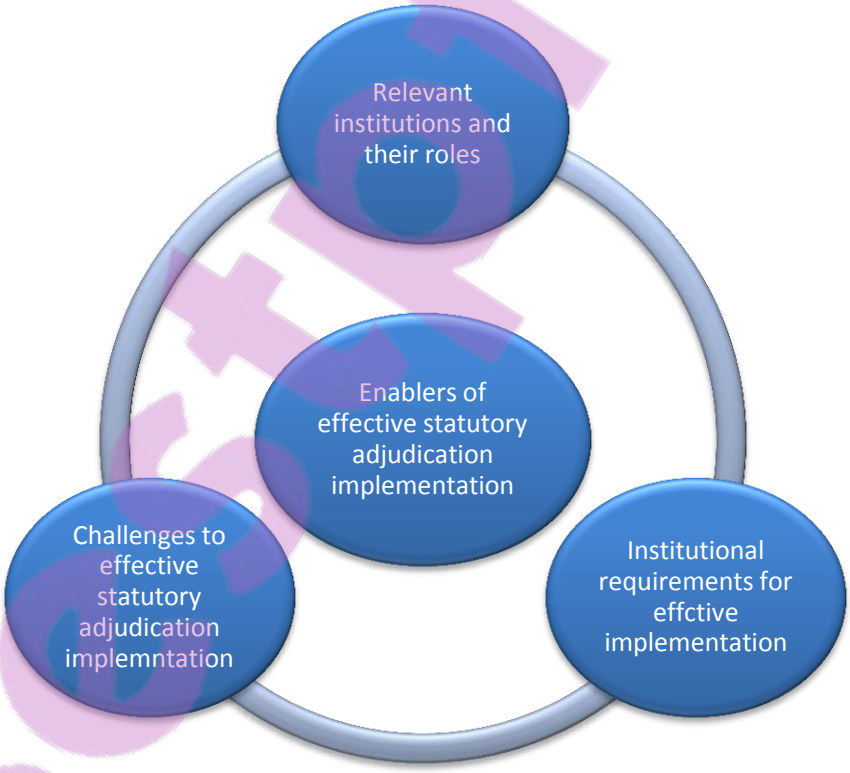

FIGURE 13 – THE FOUR THEMES GENERATED IN THE STUDY THROUGH THE PROCESS OF CLUSTERING

TABLE 7 – RESEARCH OBJECTIVES AND THEIR CORRESPONDING THEMES AND CATEGORIES

No	Objectives	Themes	Categories
1	Objective 3: identify institutions that are relevant and responsible for the successful statutory adjudication implementation and highlight their specific roles**.**	Theme1: Relevant institutions and their specific roles in effective statutory adjudication practice	Category 1: Relevant institutions to effective statutory adjudication implementation Category 2: Institutional roles in effective statutory adjudication implementation Category 3: Types and features of authorised nominating bodies
2	**Objective 4:** identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of statutory adjudication.	**Theme 2:** Implementation challenges and how they could be prevented or overcome.	Category 4:Teething problems and critical challenges to effective implementation Category 5: Causes of teething problems and critical challenges to effective implementation Category 6: Avoidance strategies and preventive measures to the possible challenges
3	**Objective 5**: to determine institutional requirements and develop an implementation model that will enhance the effectiveness of statutory adjudication in SA	**Theme 3:** Institutional requirements for effective implementation	Category 7: Institutional position in effective implementation Category 8: Institutional supports needed for effective statutory adjudication practice**.**
		Theme 4: Enablers of effective statutory adjudication implementation	Category 10: Attributes that can promote effective implementation Category 11: Implementation process and measures that can enhance compliance and maximum participation by the government and other industry stakeholders

6.11. Visual display of research findings

Diagrams, Tables and Figures were used in this study to illustrate ideas and provide visual displays of findings. All the diagrams produced were generated with software such as Microsoft Visio and SmartDraw using information from the data analysis. The diagrams were developed as part of the efforts to capture the emerging story the data was telling. They were particularly useful where processes and procedures were complex and needed a means of making the huge data easily comprehensible. Thus, they constituted supplements or visual expressions of the ideas which were captured during the analysis process. In summary, the utilization of diagramming and other visual data display tools aided the analytical work by providing visual dimensions to the cognitive process, thereby allowing whole processes and procedures to be explained in a simple, easy-to-follow manner. Several of such diagrams generated during the analysis were used to supplement narratives throughout the reporting process.

6.12. Summary

This chapter details all the data analytic procedures employed in this study. The database consists of interview transcripts from open-ended exploratory interviews, and from documents. Based on the established qualitative data analysis principles, the study employed procedures such as data coding, constant comparison, diagramming and data categorisation to generate themes from the transcriptions of the interviews conducted and the documents selected for the study. In addition, documents collected were analysed to support the findings from the qualitative interviews. During the analysis, raw data was broken down to smaller chunks and labelled as codes under the process of open coding. A total of four hundred and twelve codes were generated. These codes were further explored, leading to the development of forty one subcategories and eleven categories. Afterward, the categories and subcategories were developed into four themes which addressed the research objectives. One of the four themes, 'the enabler of effective statutory adjudication practice' became the core theme because it represented the central focus of the study. All the other themes were explored for their connection to the central theme. In order to communicate the findings of the study more effectively, data were displayed through the use of Diagrams, Tables and Figures. In addition to providing fresh insights into the subject matter of the study, output from the documents

also corroborated the outcome of the analysis. It is this analytic framework which underpins all the findings and representations contained in subsequent chapters of this study.

CHAPTER SEVEN

RESULTS AND DISCUSSION

7.1. Introduction

This chapter is divided into two main parts. The first part presents the results of data analysis while the second part discusses the findings. Within each part, the outcomes are organised under four themes, namely:

- Relevant institutions and their roles in effective statutory adjudication implementation.
- Critical challenges to effective implementation of statutory adjudication and suggested ways of combating them.
- Institutional requirements for effective implementation of statutory adjudication, and
- Enablers of successful statutory adjudication practice.

These themes are discussed with their codes, and supported by verbatim extracts from data collected, to highlight the important issues. The discussions of the findings are carried out in two levels. Level one is a basic discussion on the various themes and categories that emerged during the analysis and document search. Level two's discussion searches for patterns that emerged, as well as the interplay between categories. It is important to note that the analyses reported and the discussions of findings in this section were based on the semi-structured interviews conducted and on documents selected for the study.

Objectives one and two of this study were achieved through the review of literature, as reported in chapter two of this thesis. Thus, this chapter presents the outcome of research analysis as required by objectives three to five of this study (see section 1.5).

7.2. Theme 1: Relevant institutions and their specific roles in effective statutory adjudication practice

Theme 1 provides the information as required by objective 3 by identifying the relevant institutions for the effective implementation of statutory adjudication practice. This first theme is centered on identifying the institutions that are involved in the implementation of the

statutory adjudication and their relevance to the successful implementation of the statutory adjudication process. To enable quick comprehension of the outcome of the analysis under this theme, the results of the analysis are grouped into four perceptions identified as shown in Table 8.

TABLE 8 – FRAMEWORK OF ANALYSES ON RELEVANT INSTITUTIONS AND THEIR SPECIFIC ROLES IN EFFECTIVE STATUTORY ADJUDICATION PRACTICE

Theme 1	Perceptions
Relevant institutions and their specific roles in effective statutory adjudication practice	• Interviewees' perception on the relevant institutions to effective implementation • Interviewees' perception on institutional roles in effective statutory adjudication process • Interviewees' perception on the institutional involvement in adjudicators' nomination • Interviewees' perception on government involvement in adjudication implementation

7.2.1. Perception on the relevant institutions in effective statutory adjudication practice

All the interviewees (n=15, 100%) in the UK, Malaysia, Singapore and Australia confirmed the relevance of institutions in the effective statutory adjudication implementation. Corroborating this fact, participant 1 confirmed that: *An institution plays a major role because the body of ADR knowledge sits with the institution.* In support of this view, participant 12 also asserted that the importance of institutions cannot be overemphasized in the successful implementation of statutory adjudication. In his response, he explained that:

"…their roles (referring to ANAs) are very crucial because they are the first organisation that parties go to when they have disputes and they want their disputes to be resolved by adjudication. When you want to refer your dispute to adjudication, they (referring to ANAs) will do the selection and they have to make sure that the people they put on the panel are highly qualified and experienced and they should be able to produce quality decisions as this will impact on the adjudication process."

The interviewees provided more information by identifying the institutions that are involved in the implementation of statutory adjudication processes from various jurisdictions. Several of the institutions that were mentioned by the participants are listed in Appendix 'K'. The identified institutions were then grouped into five, namely: (i) legal institutions, (ii) authorizing/implementing institutions, (iii) government institutions, (iv) professional institutions and (v) academic institutions (see Appendix 'K'1). The outcome of the data analysis under this category revealed that roles are divided among the institutions and each institution's involvement in the implementation is at varying degrees.

The general observation from the data is that some institutions are critical to the successful implementation of the statutory adjudication. These institutions are believed to be performing critical and indispensable roles without which the adjudication process will fail. For instance, all the interviewees from all the jurisdictions (n=15, 100%) assert that the legal institutions (court or specialist court, as the case may be) and the authorising/implementing institutions are the most critical institutions in effective statutory adjudication implementation. The following quotations from the various jurisdictions support the statement:

From the UK*:* Participant 4, who is an experienced adjudicator and has been practicing since the HGRCA came into force in the UK, in 1998, commented that:

"The most important institution is the court because they have to support the system. … and if you don't have a supportive court system on ground, the whole process is going to fail".

From Australia*:* participant 7, an experienced legal representative and a trainer in adjudication, pointed out:

"If a statutory form of adjudication is selected, then the three most important factors are an authorised neutral nominating authority, a good reputable training organisation that can train adjudicators and users, and supportive courts".

From Singapore: participant 9, a scholar who also is an adjudicator in the industry and has about 30 years of experience in the construction industry, highlighted that:

"The institutions that are involved in the successful implementation of statutory adjudication are the government department/ministry in charge of implementation (implementing institution), the Authority Nominating Board (ANB) and the court".

From Malaysia: participant 6, an experience adjudication expert, who was also deeply involved in the legislative process of CIPAA 2012 noted that: *"Institutions play major roles in effective statutory adjudication implementation.*

For instance the roles of the KLRCA and the High Court, especially the Construction Courts in Kuala Lumpur and Shah Alam are expressly spelt out in the CIPAA Act and Regulations made thereunder".

In addition, participant 10, who is a tutor and an adjudicator noted:

"Basically, those are the two main institutions. If you look at statutory adjudication in Malaysia, on the one hand, there is KLRCA (an implementing institution) which acts as the secretariat and on the other hand, is the specialist court which is the construction court where decisions are taken to be enforced".

Some of the interviewees (n=6, 40%) specifically mentioned that, all other institutions that were identified namely: the professional institutions, academic institutions, and government institutions, have supportive and non-statutory roles toward a successful implementation. The general observation from the data analysis of the interviewees' responses is that, both legal and authorizing institutions have statutory roles which are critical to effective implementation, while other institutions' roles are viewed as non-statutory roles which mainly provide needed support for effective implementation. According to participant 13:

"Other professional institutions do not perform special roles in the administration of statutory adjudication. You cannot have too many organisations in the implementation of statutory adjudication. In the UK, there are many organisations administering statutory adjudication, but in my opinion, it is advisable to have one single body to administer it…. other professional bodies should be supporters because the engineers, architects, quantity surveyors, are the key professionals in the construction industry and they should also be trained to become adjudicators".

The majority (n= 9, 60%) of the participants intimated that government institutions perform a huge role in providing support that will aid effective implementation. According to participant 15:

"The government agencies and the government departments obviously have a huge role to play in actually publicizing and helping the industry use the Act and understand the Act..."

However, opinions of the participants were divided on what the extent of government involvement should be in the implementation process. The interviewees' views on this perception are fully discussed under section 7.2.4.

7.2.2. Perception on institutional roles in effective statutory adjudication process

The second perception identified within the data is the variety of roles performed by the identified institutions in the effective implementation of the adjudication process. The participants were particularly forthcoming in this regard. Initial open coding resulted in sixty eight different institutional roles. These were later refined and grouped under seven classes which are: (i) administrative roles; (ii) publicity and awareness roles; (iii) education and training roles; (iv) information dissemination roles; (v) technical support roles; (vi) financial support roles; and (vii) enforcement roles. The descriptions of how the institutions perform these roles are detailed in Table 9.

TABLE 9 – DESCRIPTIONS OF INSTITUTIONAL ROLES IN EFFECTIVE STATUTORY ADJUDICATION PROCESS

Roles	Description
General administrative and secretariat roles	These roles include: registering and regulating the ANAs and adjudicators, selection and appointment of qualified adjudicators, setting standards in order to ensure quality, keeping files relating to the adjudication process, having a data base where information can be accessed, maintaining a panel of qualified adjudicators, mentoring adjudicators, monitoring adjudication process and ensuring compliance in terms of standard timeline and procedures.

Roles	Description
Publicity and awareness roles	Creating awareness through evening talks, road shows, workshops, seminars on how the process will work and how it will impact on the construction industry.
Education and training roles	Training users on adjudication procedures, including training the adjudicators, educating government representatives, running of practical courses for interested stakeholders in the construction industry.
Information dissemination roles	Dissemination of information in the form of feedback on previous court interpretations and decisions, and updating the industry on current interpretation of the legislation.
Technical support roles	Provision of procedural clarity, provision of regulations to support the legislation, provision of miscellaneous matters that are not captured in the Act, provision of guidelines that will enhance proper adaptation of the adjudication process, ensuring compliance, resolution of ambiguities and uncertainties in the legislation.
Financial, sponsoring and approval support roles	Sponsoring and giving approval to the adjudication policy, provision of funds to conduct seminars and general awareness. This role is specific to government institutions.
Enforcement role	Upholding the parliament's decision by enforcing the adjudication decision and ensuring that stay/setting aside applications are sparingly entertained. This role is viewed as critical and it is specific to the legal institutions.

To reiterate the importance of the roles of institutions in information dissemination, participant 1, who was specifically involved in the implementation of statutory adjudication in Malaysia narrated that:

"We provide statistics and information and the public are not kept in the dark about the progress and effectiveness of adjudication as an ADR mechanism. Also, whenever there is a change in a case law, such cases are discussed explicitly and necessary information is provided on how the adjudicator handled the case and the outcome of the case in the court... this is to better equip the construction industry

players with the relevant knowledge on statutory adjudication. So, the information by the institution is very important."

In addition, participant 2 talked extensively about the supportive roles of government in providing funds for public awareness and the importance of human capacity development for successful implementation of adjudication, According to her:

"…the government provides funds to conduct seminars and awareness road-shows with the contractors".

For any adjudication regime to be deemed effective it is expected that the disputants have their disputes readily and properly resolved and remedies effectively realized in a relatively cheap and quick manner. The analysis revealed that the institution provides a technical support role to aid effective implementation by the use of templates/forms which can easily be adapted for use by all parties to adjudication claim as well as the adjudicators themselves. In support of this finding, participant 2 provided additional information on how the implementing institutions in her country provided technical support roles that aided effective implementation. She noted that:

"They produced a guidebook which contains a lot of information on the adjudication process. The institution has also been very proactive because they realized that there are lots of gaps between the Act and the regulations. So they created rules and sample forms that parties can follow, this provides an opportunity for any unpaid party to be able to easily and readily initiate the process of adjudication irrespective of its status."

Participant 3 explained that one other significant role of the institution is to educate the industry stakeholders about the process and procedure of adjudication as well as its legal framework. According to him,

"The implementing institution has to engage in very aggressive and proactive educational efforts to explain the adjudication process and its legal framework to all the industry stakeholders, to put into plain and easily understood language the steps

needed to conduct an adjudication, to present examples or models of how an adjudication is conducted, and to demonstrate what is expected from the disputing parties when they are making submissions to an adjudicator".

Where the institutions that are supposed to perform the above-listed roles are non-performing or under-performing, the likely consequences are slow adoption, lack of knowledge of the Act and failure of the entire legislation implementation process.

7.2.3. Perception on the institutional involvement in the adjudicators' nomination

The appointment of an adjudicator is often the first step in starting the process of adjudication. Claimants who have a dispute over payment can lodge an adjudication application with an Adjudicator or Authorised Nomination Authority (ANA). A question was asked to elicit responses from the interviewees on the manner in which the nomination is carried out. Data analysis reveals that the practices and processes of nomination differ from one jurisdiction to another.

Going through the analysis, two types of nomination system emerged; (i) the nomination through a sole, neutral independent institution (single authorised nominating authority system or a sole ANA system), and (ii) nomination by any of the available ANAs (nomination through multiple nominating institutions - multiple authorised nominating authorities system). The single adjudication nominating system is one where a single government agency (as practiced in Queensland) or a sole, neutral independent institution (as practiced in Malaysia) is responsible for the appointment, training and monitoring of adjudicators and for the adjudication process. On the other hand, multiple ANA systems involve many organizations administering the statutory adjudication process and the appointment of adjudicators.

During the interviews, a question was asked in order to determine the preferred choice of system. The majority of the interviewees (n=12, 80%) support that having a single appointing body is better than having many nominating bodies. The interviewees that supported this view are from Malaysia (n=8), Australia (n=3) and Singapore (n=1). The three interviewees from the UK opine that there are pros and cons in both nominating systems and as such there is no preferred method. The

views expressed by the interviewees may be construed to mean that there is mixed feeling as to the preferred mechanism. A second level analysis of the interview data revealed that the supporter of the single nominating authority are from the jurisdictions where the selection methods is through a single nominating institution (ANA) (Malaysia =8, Australia = 3 and Singapore =3). Similarly, the supporters of the multiple nominating system are from the UK where the legislation allows multiple nominating mechanism.

Based on the analysis of data, there was a perception among the supporter of the sole nominating system that the single nominating system would be more beneficial. Several reasons were highlighted for having a preference for the single nominating authority system. One of the arguments is that multiple adjudication authorities might lead to confusion and inconsistencies in adjudication determinations. According to participant 9 from Singapore:

"Single adjudication authority would be beneficial. Having many adjudication authorities may lead to confusion and inconsistencies in adjudication determinations. It is already not easy to have adjudicators within the same authority to pass determinations which are consistent with each other, let alone decisions arising from multiple adjudication authorities".

The supporters of the sole nomination system by an independent institution or an "ANA" in word of one of the interviewees from Australia opine that the use of multiple nominating system can lead to practices such as ANA shopping and adjudicator shopping as well as lead to the perception of bias or unfair adjudication determinations. Participant 15 intimated that:

"I can just tell you that South Australia had a review of their Act at the end of last year. The review recommended that they move to a single government registry instead of ANAs. Furthermore, after a thorough review, in 2014 the Queensland Parliament decided to change their adjudicator appointment system from multiple nominating authorities to appointment by a single central government registrar. If I'm talking from the Australian context, from a perceived fairness perspective, I prefer the single registry".

Participant 14 from Australia further added that:

"Well, I cannot stress to you enough the importance of having an independent adjudicator and independent appointment process of the adjudicator. If you don't get that mechanism right, what you do is you create a potential for corruption".

All the interviewees from Malaysia likewise concurred with the view that having a single nominating authority is preferable. However, the interviewees' from the UK (n = 3) preferred the multiple nominating system that their legislation allows. Participants from the UK, in the word of one of the interviewees' – participant 4- argued that:

"The fact that there are different nominating bodies in the UK that operate under different training schemes and arrangement can lead to having different standard of adjudicators, notwithstanding, the system has its own advantages… But the down side of implementing adjudication through one body is that, that body may become overly strong and very powerful which could lead to abuse of power. So there is no definitive preference, there are pros and cons in both".

In line with the above view, participant 5 envisaged the possibility of total failure if, perhaps, a single system is adopted and the administering authority is incompetent, incapable and non-performing to expectation. In this regard, he submitted that:

"…the downside of having one authority administering the process is that if the administering authority is not doing well, then the whole system will collapse which is a danger for the adjudication system".

Many more arguments were made by the interviewees on the problems associated with multiple nominating systems. Some of the problems identified include: issues relating to variability in standards and criteria used in recruiting adjudicators – resulting in different qualities of adjudicators; problems of competition and adjudication shopping were also highlighted.

The problems associated with having multiple ANAs being involved in adjudication raise a question as to why there should be so many issues associated with the use of such an arrangement. In response to the question, participants 15 explained that:

"In Queensland, before they moved to a single registry, there used to be about seven registered ANAs, they (referring to the ANAs) apply to become an ANA to the relevant Minister under the adjudication legislation. Out of these ANAs, there are not for profit professional bodies or organisations (Group 1) and then you also have two or three private ANAs (Group 2) who operate as for-profit private companies". There is anecdotal evidence from the Government commissioned review of the legislation in Queensland (known as the 'Wallace Report') that such a multiple ANA system encourages practices such as ANA shopping and adjudicator shopping. This is because, under the relevant Australian legislation, it is the claimant alone who gets to choose which ANA to approach in order to appoint an adjudicator for the payment dispute. Therefore, there is incentive for the claimant to choose the ANA who it thinks will give them the most favourable decision or outcome".

Participant 15 further stated that:

"Although I'm not an expert in the UK, I haven't heard of any big issues coming out of adjudication appointment through the ANBs there"

From the statements above, it can be deduced that while the use of the multiple ANAs leads to problems such as adjudication shopping and unfairness in Queensland, it does not appear to create a serious problems in the UK. The statements of participant 14 suggest that problems associated with the issue of multiple nominating system may have underlying structural and cultural factors. The data analysis further revealed that the absence of uniform standard for the recruitment and selection adjudicators leads to variability in the quality of adjudicators, According to participant 12:

"…There are many professional bodies and they have a list of adjudicators on their panel. Many people in the industry believe that some of the adjudication nominating bodies in the UK are very commercial in nature. They just want to get money at the end of the day and do not mind the kinds of people they put on their panel as long as the people are willing to pay money for attending the courses".

In summary, the interview analysis revealed that the system of profit motivated ANAs appointing adjudicators undermines the policy objective of the Act. The use

of commercial ANA should therefore be discouraged. The excerpt from participant 7 sums up this view:

"In my view, a single nominating authority works best. In my experience, having 'commercial' nominating authorities has caused difficulties with perceptions that, certain nominating authorities are or have become 'pro-contractor' or 'pro-claimant'. If the statute enables the claimant to choose the nominating authority (as in parts of Australia), then, they tend to choose those nominating authorities that are perceived as likely to find in their favour. If the nominating authority is named in the statute (as in Malaysia), then, certain regimes for appointment can be implemented, such as a roster system or the more careful assessment of which adjudicator is available and who can deal with the complexities of that particular adjudication. As a rough and ready form of justice, it is even more important that there is a greater semblance of fairness. Improved fairness will make it more acceptable. Greater acknowledged acceptance will lead to greater efficiency".

7.2.4. Perception on government involvement in adjudication implementation

The interviewees were asked about their views on whether the administration of adjudication should be an independent institution or should be under existing government institutions in charge of construction issues. The interviewees had mixed opinions. Based on the responses, some of the participants (n=7, 47%) were of the opinion that government institutions should not be involved in the administration of the adjudication process. The perception of some of these interviewees is that a negative perception of government interference in adjudication determinations might develop among the public and construction stakeholders. Participant 9 from Singapore explained that:

"In my view, the organization in charge of adjudication implementation should be independent of the government institution in charge of construction issues. Being part of a government institution in charge of construction issues gives a perception to the public that adjudication determinations may be influenced by government policies of the day. Naturally, adjudication determinations should be decided based on the merit of the claim and not government policies".

In addition, one of the interviewees (participant 2) opines that a government institution in charge of construction issues may lack the skills to handle and administer adjudication effectively. Further, there is the perception that government institutions may not have sufficient resources to handle the initial workload, because initial take-up requires a considerable number of qualified adjudicators who can handle disputes discretely. Using Malaysia as an example, participant 2 explained that:

"My comment may be specific to Malaysia, but I do think that in Malaysia, the better model is to use the independent body like KLRCA to do this. This is because I don't think we have the skill and perhaps the know-how in the government to handle and administer adjudication effectively. The number of adjudications is increasing exponentially and quite high, and I don't think our government will be able to handle that load, within the very tight time frame that the statutory adjudication has".

Participants 3 and participant 13 were of the opinion that there is a need for an institution that is proactive who can appraise the industry of the impending Act and can train a sizable number of adjudicators to take on the task of adjudication immediately. According to participant 13:

"If you don't have enough adjudicators, you will be unable to cope because of a lot of claims coming in".

Participant 3 also added that:

"You need an institution that is proactive and credible. That institution must train qualified individuals to become adjudicators who are credible, ethical, incorruptible and experienced in the subject matters of construction disputes".

Three participants (n=3, 20%) are of the view that using an independent institution in the implementation process can instil confidence in the users. In line with this view, participants 5, 9 and 10 pointed to the fact that it is important that the body administering the adjudication process is seen to be independent and neutral. Thus, issues of confidence, impartiality, neutrality and integrity were mentioned by some

of the participants as some of the advantages of using independent institutions in administering the adjudication process. With regard to this, participant 5 stated as follows:

"…these are the things you have to consider. Because the KLRCA is non-governmental, it is an independent organization, so it seems independent, so sometimes, all these organizations not only have to act independently, they must also be seen to act independently and impartially. Then it will instil confidence in the users".

Elucidating further on this perception, participant 10 explained that:

"It is important that the body administering the adjudication is seen to be independent and neutral, this is significant because, it means that there is no interference by any national body".

Participant 14 from Australia was strongly of the opinion that government should be actively involved in the implementation process. His argument is captured thus:

"This concept of governments not being involved in the dispute resolution mechanism is very wrong. In those states where they have a relaxed government intervention, the implementation of the legislation has been quite poor".

The same interviewee further clarified that neutrality of the adjudication process is the main issue. As such, the construction industry stakeholders should not doubt the system regardless of whether the dispute involves government or not, because it is a neutral institution and should be viewed as neutral. He explained that:

"The adjudication registry is entirely neutral. The government is the only nominating authority. If a claimant wants to bring an adjudication application, they have to come to the registry and the registry will appoint adjudicators ...adjudicators should act independently of the government. They are not employed by the government, they don't get paid by the government, they get paid by the parties to the dispute".

7.3. Theme 2: Implementation challenges and how they could be prevented or overcome

This section achieves objective 4 of this research. It reports the findings of the data analysis captured under the theme: Critical challenges to effective statutory adjudication implementation and the suggested ways of combating the challenges.

This theme captured the outcomes of the data analysis on the challenges to effective implementation, the causes and consequences of the identified challenges, and a suggested approach to prevent or combat the identified challenges. The framework of the data analysis for this section is shown in Table 10.

TABLE 10 – FRAMEWORK OF ANALYSES ON CRITICAL CHALLENGES TO EFFECTIVE STATUTORY ADJUDICATION IMPLEMENTATION AND WAYS OF COMBATING THE CHALLENGES

Theme 2	Categories
Implementation challenges and how they could be prevented or overcome.	• Teething problems and critical challenges to effective implementation • Causes of teething problems and critical challenges to effective implementation • Consequences of identified challenges for the implementation process • Avoidance strategies and preventive measures to the possible challenges

7.3.1. Teething problems and critical challenges to effective implementation

Based on the analysis of the interview data, the majority of the participants noted that the existence of statutory adjudication has largely improved cash-flow and dispute resolution process within the construction industry. In addition, the interviewees assert that, although these statutory interventions are viewed to be generally successful, their effectiveness could be undermined when there are challenges. Thus, the interviewees identified several challenges that could impair the effective implementation of the legislation. This section reports the findings of

the data analysis on the critical challenges to effective implementation. It is important to recognize that all the challenges that are identified in this study are not specific to a particular jurisdiction, but rather, they are a summary of all the identified challenges from various jurisdictions. The challenges identified are grouped under seven categories namely: (i) challenges relating to change process; (ii) challenges relating to technical provisions and contents of the legislation; (iii) challenges relating to the issue of procedure and process; (iv) challenges relating adverse court decisions ; (v) challenges relating to cost of adjudication and adjudicator's fees; (vi) capacity challenges; and (vii) jurisdictional challenges.

7.3.1.1. Challenges relating to change process issues

The challenges relating to change process refer to the teething problems or difficulties that arise during the initial stages of the implementation process. Although managing change is tough, the lack of adequate preparatory arrangements to influence transformation initiatives compounds the teething problems. The analysis of the data revealed that ignorance and poor drafting style are the two main factors causing teething problems. According to participant 7 from Australia:

"The two most significant reasons for the teething problems are: lack of training/understanding by users, adjudicators, lawyers etc. and drafting inconsistencies within the legislation".

Participant 9 from Singapore also noted that*:* "*Teething problems also arose in the way Acts were drafted and the technical provisions in the Act".*

The other teething problems that were identified are: (i) industry's slow acceptance of the Act, (ii) ignorance about the provisions of the Act and failure to understand the requirements of the Act, (iii) lack of understanding by users and lawyers, (iv) users' ignorance of their entitlement under the Act, (v) users' ignorance of the provisions of the Act, (vi) lack of awareness and (vii) low level of knowledge. These problems are viewed by the participants as potential factors that could undermine the effectiveness of the Act if not properly handled.

7.3.1.2. Challenges relating to technical provisions and contents of the legislation

More than ten of the participants independently observed that problems relating to the contents of the Act are critical. According to the views expressed by the participants, challenges relating to the technical provisions and contents of the Act usually arise when there is a lacuna in the legislation. The two most significant reasons for challenges with the contents of the Act include: (i) lack of clarity on the provisions of the legislation (ambiguities) and (ii) drafting inconsistencies within the legislation. It appears that the manner in which a particular legislation is drafted has a way of influencing the outcome of that legislation. The majority of the interviewees stressed that drafting inconsistencies and ambiguities in legislation have led to critical interpretation problems in many jurisdictions.

The views of participants 6 and 2 were particularly revealing. Participant 6, for instance, stated that:

"The major teething problem, in my view, is the interpretation of some of the provisions of the Act and this has to be sorted out by the High Court. To date, there are more than 15 cases that have been referred to the High Court".

Similarly, participant 2 is of the view that there would always be confusion whenever the Act is silent on how some issues should be carried out. According to her, the way the act is worded can influence the interpretation and understanding of the contents of the legislation. Gaps/lacunae in the legislation, or when the Act is silent on some issues will definitely result in a condition which may undermine the legislation's effectiveness. In support of this fact, participant 2 stated that:

"One of the critical challenges that can impair the effectiveness is when there are gaps, which I call lacunae, in the adjudication legislation."

The implication of the views expressed above is that challenges relating to the content and technical provisions of the Act give rise to uncertainty on some important issues within the Act. This will not only undermine the effectiveness of legislation but increase litigation.

7.3.1.3. Challenges relating to issue of procedure and process

The challenges identified from the interviews under these categories are mainly (i) ignorance of subcontractors, suppliers, etc. of the various provisions of the Act, and their entitlements under the Act, (ii) procedural complexity and (iii) the level of accessibility. One particular interviewee explained that one contributing factor to the procedural challenges is that the Act provides only a general framework but provides no detailed procedure as to how and what to do. The excerpt from participant two in section 7.3.1.2 also reflects this submission.

7.3.1.4. Challenges relating to legal technicalities

The opinion of the interviewees on what constitutes legal technicalities challenges include: (i) the strict interpretation of the rules of adjudication, (ii) the introduction of complicated issues that is applicable to arbitration, and (iii) adverse court decisions due to lack of proper understanding of the object of the legislation.

According to participant 9 from Singapore "*In my view, one of the critical challenges is that lawyers tend to approach adjudication with a strict interpretation of the rules of adjudication. As a result, many technical breaches have led to applications being rejected. In my view, it is not only a waste of time and resources, but also a failure to meet the justice of the claim, when a good claim was thrown out due to technical breaches of the Act*".

It is important to know that the word "technicality" as used under this category does not in any way refer to any breach of natural justice or serious procedural issues. It captures trifling matters which are supposed to be dealt with under the *de minimis* rule for adjudication to be effective. For instance, in the Singapore Security of Payment Act ("Act"), the contractor must make a valid Payment Claim in accordance with the Act. Regulation 5 of the Security of Payment regulation provides:

"*(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a*

payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made.

(2) every payment claim shall –

(a) be in writing;

(b) identify the contract to which the progress payment that is the subject of the payment claim relates; and

(c) contain details of the claimed amount, including -

(i) a breakdown of the items constituting the claimed amount;
(ii) a description of these items;
(iii) the quantity or quantum of each item;
(iv) the calculations which show how the claimed amount is derived."

If a Payment Claim fails to provide in accordance with regulation 5(2) above, it may be deemed an invalid Payment Claim. In addition, there is an important section on the timing for the submission of the Payment Claim and Payment Response. Failure to submit in accordance with the specific timing may also invalidate the Payment Claim or Payment Response. Under this circumstance, it is expected that the issue of breaches in technical procedures should be dealt with under the *de minimis* rule. However, when the judges choose not to apply *de minimis* rules and a good claim is thrown out due to technical breaches of the Act, it will have an adverse effect on the effectiveness of the legislation.

Participant 7 from Australia also noted that "*the courts' decisions which nullify the effect and efficiency of how adjudication is intended to operate can stultify the significance of adjudication and bring the system to a standstill, thereby circumventing the objects of the legislation".*

7.3.1.5. Challenges relating to cost of adjudication and adjudicator's fees

The challenges relating to issues of cost and fees are viewed from two perspectives. On one hand, a large proportion of the interviewees agreed that if the cost of adjudication is excessively high, this may be a limiting factor to its wider usage and thus affect the impact of the legislation. In this regard, one of the interviewees with considerable experience explained that the excessive cost of adjudication may be a

significant barrier to subcontractors in pursuing adjudication. On the other hand, two interviewees raised concern about the government's and industry's viewpoint that adjudication is intended to help the category of stakeholders in the lower rung of the ladder of the contractual chain, and, as such the cost of adjudication should be very low. The data analysis revealed that balancing the cost of adjudication and adjudicators' fees is a critical issue that needs to be handled with care. On one hand, if the cost of adjudication is very high, it defeats the purpose of cheap and swift resolution. On the other hand, if the adjudicators' fees are too low, it could discourage the experienced adjudicators and lead to inadequate capacity, as they may not want to practice adjudication. Indeed, the remark from participant 5 sums up the views from the interviews in this regard.

"The fact is that, if you are looking from the position that the purpose of adjudication is to provide a speedy and cheap proceeding, by setting the adjudicators' fees too high, it defeats the purpose of promoting it as a cheap and speedy resolution. On the other hand, if you are keeping it too low, then, all those adjudicators who are experienced would not be willing to accept an adjudication appointment".

7.3.1.6. Capacity challenges

The issue of quality is fundamental to an effective adjudication process. The analysis of the interview data revealed that capacity challenge could come in the form of:

- Inadequate resources in terms of number of adjudicators available to kick-start the adjudication process;
- Inadequate resources in terms of the quality of the available adjudicators; and
- Inadequate resources in terms of the discipline and experience of the available adjudicators.

Participant 5 explained that, for an adjudication regime to be successful, it requires highly experienced adjudicators that can produce quality decisions. This implies that the quality of decisions produced by such adjudicators is likely to be high, and unlikely to be reopened at other levels of dispute resolution, such as arbitration and litigation. Some of the interviewees also believe that when there is availability of

adequate capacity, then careful assessment of which adjudicator is available and can deal with the complexities of a particular case would be possible. Thus, matching the right sort of adjudicator with the right sort of dispute would not be too difficult.

7.3.1.7. Jurisdictional challenges

Data analysis reveals that adjudication regime has become too legalistic with numerous jurisdictional challenges and applications for stays/setting-aside of adjudication decisions. Participant 6 specifically intimated that the quality of the adjudication decisions made within a tight time frame and the enforceability of the decisions is one area of challenge. The quality of adjudication decisions is primarily dependent on the pool of the available adjudicators and the competency of the adjudicators. It is required that the competency of adjudicators be improved through adequate training and mentoring in order for the adjudicator to be able to produce a quality decision that is enforceable. According to participant 7,

"Having well trained adjudicators means that there are likely to be fewer problems that have arisen with adjudicators who know little about the regime and whose adjudication decisions are likely or be challenged by parties in courts".

Further analysis revealed several grounds on which a jurisdictional challenge might be brought into adjudication. The grounds for challenging an adjudicator's determination include (i) jurisdictional errors by the adjudicators (ii) breach of natural justice (iii) where one of the parties feels that the adjudicator was not validly appointed (iv) where either of the parties feels that he has not been given a fair hearing. The study further revealed that all these factors are fundamental grounds at which adjudicators' decisions would not be enforced. Participant 8 gave an example of an adjudication decision that has been struck down by the courts due to errors/non-conformance on the adjudicator's part. This support the statement of participants 6 and 12 that:

Participant 6: "*The enforcement of the adjudication decisions should be rigorously supported by the High Court save for plain and obvious cases where the adjudication decisions must be set aside where there is demonstration of a serious jurisdictional error"*

Participant 12: *"The decision of the adjudicator should stand regardless of the errors unless the errors were jurisdictional in nature"*

The opinion of most of the interviewees is that, if all the factors that can cause jurisdictional challenge are not dealt with, the adjudicator's decision would be challenged in the court and the decision of the adjudicator will not be enforced if there is demonstration of breach of natural justice and jurisdictional error. It can therefore be inferred that jurisdictional error is capable of defeating the very core objective of the Act of making adjudication summary, simple, fast and relatively cheap so as to ensure that cash flows and to allow the construction work to proceed smoothly without delay/interruption.

Thus participant 3 advices that adjudicators should be properly trained to fully understand ethical, technical and substantive legal standards. According to him:

"Training is very important. A core focus of the training programme has to be directed at the pool of individuals who will serve as adjudicators. Ethical, technical and substantive legal standards, knowledge, and principles ought to be communicated and the candidates for inclusion in the pool of adjudicators tested for an adequate understanding of the relevant standards, knowledge and principles".

7.3.2. Causes of teething problems and critical challenges to effective implementation

The interviewees provided a lot of information on the various causes of implementation challenges as shown in Table 11 below. The data analysis revealed that these challenges are caused by:

- Poor drafting style and drafting inconsistency within the legislation itself;
- Unnecessary judicial interference or adverse court involvement in the adjudication process; and
- Ignorance or lack of familiarity with the process and procedure etc.

As revealed by the data, the drafting inconsistencies within the legislation provide a basis for interpretation problems with parts of the legislation. One of the participants

observed that the ambiguities within the legislation have led to considerable confusion in pursuing the contractual remedies stated in the Act.

The role of the Courts is basically to support the implementation of the Act by not actively interfering in the proceedings, but by ensuring that the adjudication decisions are readily enforced and stays/setting-aside applications being sparingly employed. However, court decisions which repress the effect and efficiency of how adjudication is intended to operate can negate the significance of adjudication. As such, a participant noted that court decisions which enable the opening-up and the judicial reviewing of adjudicators' decisions can bring the system to a standstill, thereby, circumventing the objects of the legislation.

In addition, some of the interviewees observe that failure by the court to understand the intended nature of adjudication had in some instances led to adverse interpretation and setting aside of adjudication decisions. In fact, this action had in some instances resulted in a flood of jurisdictional challenges. Thus, it was observed that the losing party in adjudication may use this avenue to challenge the adjudication determination with the hope of delaying or avoiding payment to the winning party.

The interviewees also observed that the user's (contractors/subcontractors) low level of knowledge, users' ignorance of the legislation provision and degree of accessibility to the legislation are the factors that are responsible for some of the problems associated with the implementation process.

7.3.3. Avoidance strategies and preventive measures to the possible challenges

The participants suggested certain strategies that could be used as a measure to prevent various challenges identified in this study. The participants' suggestions are shown in Table 11. Some of the suggested preventive measures include: raising awareness of different construction stakeholders through different means, such as road shows, seminars, workshops and conferences etc. According to participant 3:

"For a statutory adjudication scheme to be successful, an institution is required that can create and conduct a wide range of road-shows, talks and conferences to

acquaint the industry and its stakeholders with the impending legislation and to train a sizable number of adjudicators who can take on the task of adjudication".

In addition, it was suggested that various construction stakeholders should be well educated. In addition, few participants (n=3, 20%) also advised that the judges should be informed about the purpose of the legislation. According to participant 3:

"There were seminars and educational presentations made to the judiciary by the KLRCA and its panel of speakers. Meetings were held with the Chief Justice and other members of the judiciary to communicate to the judiciary the purposes, goals, and elements of the statutory adjudication scheme and the role of the KLRCA in implementing and administering the statute. As a consequence, the judiciary was very knowledgeable and quite well prepared when adjudication matters were brought to court".

Paricipant 1 from Malaysia also noted: "…when there are areas of doubt in the Act, we do not step in but we encourage a party to refer those provisions to court to provide interpretation. Also we communicate our judiciary because the court should understand that adjudication is a short process and shouldn't take a long time to come back with the decision on a point of law"

Further, in order to achieve a desired result in the implementation of adjudication, participant 12 suggested that it is important to create awareness in the judges to be involved in the consultation process.

"I think, it is by creating awareness in the judges of how arbitration is different from adjudication. It will be good for the judges to be involved in the consultation process as well, so that the judges may be well informed of what adjudication is and what the legislation wants to achieve when it is introduced in the future. Thus, it will be good to create and increase awareness to let the judges be involved from the very beginning".

Some interviewees also suggested that institutional interventions will go a long way in preventing the identified challenges. These interventions include: (i) the regulation of adjudication fees, (ii) information dissemination and (iii) maintaining a

high standard of adjudicators through the introduction of a quality control system and rigorous training and assessment programmes. All these institutional interventions and other suggested preventive approaches are presented in Table 12.

TABLE 11 – SUMMARY OF POTENTIAL CHALLENGES TO STATUTORY ADJUDICATION IMPLEMENTATION, AND SUGGESTIONS ON WAYS TO COMBAT THEM

Challenges	Causes	Consequences	Suggested preventive measure
Interpretation problems	Judges' ignorance of the object of the legislation and the intended nature of the adjudication system	Can lead to more jurisdictional challenges to adjudicators determinations	Institutional intervention in terms of educating the judiciary
Lack of clear guidance on some issues within the legislation	Poor drafting/inconsistency in drafting style	Confusion	Institutional intervention in terms of producing clear guide-lines and advice to the users. Terms used must be simple, clear and understandable
Interference by the judiciary	Introduction of complicated procedures that are applicable to arbitration Failure of the court to understand the intended nature of adjudication	Could lead to jurisdictional challenges and hinder the effectiveness of the Act	Judges should be trained and well-informed or construction courts could be established where construction cases could be handled. Limiting the right of judicial intervention to merely breaches of law, natural justice and excess/lack of jurisdiction and no more. Adjudication should be subject to minimum court involvement
Adjudication shopping	Adjudication shopping is caused when there are multiple ANAs and it is only the claimants that have a right to unilaterally select adjudicators or ANAs	Acceptability of the adjudicators decision may become compromised	Restriction of appointment responsibility to an approved ANA and giving equal rights to both parties to jointly appoint the adjudicator
Variability in the quality of the adjudicators	Variability in the quality of ANAs	Loss of confidence in the process of adjudication	Operating an internal review system

Challenges	Causes	Consequences	Suggested preventive measure
	Variability in the training given to adjudicators Lack of uniformity in the recruiting criteria	The decision of the adjudicators may be set aside by the court	Operating a mentoring system Have a code of conduct for adjudicators Provision of standard criteria for recruiting adjudicators Proper match-making by ANA's i.e. nominating an adjudicator according to their expertise and ability to handle a particular dispute Introduction of a quality control system and a rigorous training and assessment programme
Lack of knowledge and slow adoption	Inadequate publicity	Slow adoption	Means of promoting users knowledge should be devised e.g. seminars, road shows etc.
Ignorance of the Act and failure to understand its requirements	Inadequate publicity or accessibility problems	Industry's slow acceptance of the Act	Creating more awareness using different strategies
Users ignorance of their entitlement under the Act	Inadequate education	Industry's slow adoption	Education
Lack of familiarity with the process and procedure	Inadequate education	Industry's slow adoption	Education
Content challenge or gaps/lacunae in the legislation	Poor drafting style Drafting inconsistencies within the legislation	Ambiguities and confusion in pursuing contractual remedies	Institutional intervention through clear interpretation and provision of advice and guidelines to the users.

Challenges	Causes	Consequences	Suggested preventive measure
Fees challenges	Industry's varied viewpoints	If fees are too low experienced adjudicators would not want to take up adjudication If fees are too high smaller contractors/subcontractors would not use adjudication due to excessive cost	Regulated schedule fees/cost Reasonable adjudication fees should he applied
Fear of intimidation	Ignorance of their entitlement under the Act.	Low usage	Encouraging the sub-contractor to use it more. The head contractor will have nowhere to go since everyone is using it
Interpretation issue	Inconsistent drafting	Increased litigation	Judicial guidance
Procedural challenges	No clear guidelines in the legislation	Decision being set aside	Institutional guidelines through provisions of guidelines
Procedural complexity	Poor drafting	Slow usage	Institutional intervention through provisions of guidelines and advice
Procedural challenges	No clear guidelines in the legislation Act being silent on some issues Lack or inefficiency of enforcement route	Decision can be set aside	Institutional intervention through provisions of guidelines
Jurisdictional challenges	Jurisdictional error Breaching the rules of natural justice	The adjudicator's decision may be challenged and not enforced	The adjudicator should receive adequate training. It was noted that most of jurisdictional challenges are usually advanced by the respondents to resist

Challenges	Causes	Consequences	Suggested preventive measure
			payment. Therefore it was suggested that adjudicators should have the power to investigate whether or not he has jurisdiction

TABLE 12 – SUMMARY OF SUGGESTED AVOIDANCE STRATEGIES TO THE IDENTIFIED CHALLENGES

Suggested avoidance strategies to the identified challenges	
Accessibility	Publicity and public awareness
	Accessibility and clear understanding through the use of modern approach in writing
Interpretability	Content clarity
	Good and clear interpretation by judges and court support
Training and education	Training of judges
	Training of adjudicators
	Training of users
Institutional intervention	Regulated fees structure
	Open debate
	Informing judges about the purpose of adjudication legislation and carrying them along during the drafting process
	Use of independent institution
	Capacity building

7.4. Theme 3: Institutional requirements for effective implementation

This section reports the findings of the data analysis on institutional positions in effective implementation and institutional support needed for an effective practice. The framework of the data analysis for this section is shown in Table 13.

TABLE 13 – INSTITUTIONAL REQUIREMENTS FOR EFFECTIVE IMPLEMENTATION

Theme 3	Categories
Institutional requirements for effective implementation	• Institutional position in effective implementation • Institutional supports needed for effective practice of statutory adjudication.

7.4.1. Institutional position in effective implementation

The analysis of both documents and interview data reveals that institutions occupy a central position in effective statutory adjudication implementation. The court and the implementing/authorising institutions are perceived to be the most critical institutions needed for effective implementation. These two institutions are viewed by the interviewees to be performing critical roles and each of them has primary or

fundamental roles to play in the implementation process. To buttress this point, one of the interviewees, who happens to be a legal advisor, stressed that:

"The primary role of the implementing institution would be to appoint the adjudicators and set up panels of adjudicators, as well as to administer the adjudication process. Now, there are other organisations, which play important roles. Maybe not statutory roles, but nevertheless, from a social perspective point of view, they do have roles".

The implication of this statement is that all the identified institutions within this study can be classified into two broad categories: (i) the institutional group and (ii) the organisational group. Courts and implementing institutions fall into the institutional group, while other institutions, such as the professional institutions and the academic institutions fall, into the organisational group. The institutional group are believed to have primary and statutory roles in the effective implementation of adjudication, while the organisational group have non-statutory roles and as such they only perform supportive roles in the realisation of statutory adjudication. The findings from the data revealed that the roles of an implementing institution in the appointment of adjudicators and general administration of adjudication processes are critical. Similarly, the roles of courts in the enforcement of adjudication decisions are crucial to successful implementation. As noted by one the interviewees, participant 6,

"To enable effective implementation, enforcement of the adjudication decisions should be rigorously supported by the High Court, save for plain and obvious cases where the adjudication decisions must be set aside as provided for in the Act".

In addition, participant 7, referring to the centrality of implementation institution, noted that:

"In some jurisdictions, the nominating authority is a dispute resolution institution, such as an existing arbitral institution that is used to making appointments of this kind. In most regimes, the appointment process needs to run smoothly and efficiently

as it is often the first step in starting the process and therefore the usually tight and prescribed timeline".

The implication of the two participants' statements is that these roles are critical to the effective functioning and implementation of statutory adjudication, and cannot be transferred to or shared by another institution. For instance, an academic institution cannot perform the role of enforcement of the adjudication decision. Thus, all the identified roles are classified into three groups which are: critical roles, (ii) supportive roles and (iii) common roles (CR), as shown in Table 14. In the table, PR represents primary roles while SR represents supportive roles.

TABLE 14 – CATEGORISATION OF ROLES CARRIED OUT BY INSTITUTIONS

Roles/institutions	**Implementing institution**		**Legal institution**		**Government institution**		**Professional institution**		**Academic institution**	
	PR	**CR**	**PR**	**CR**	**PR**	**CR**	**PR**	**CR**	**PR**	**CR**
Administrative roles	✓									
Publicity and awareness roles		✓				✓		✓		✓
Education and training roles	✓							**SR**		**SR**
Information dissemination roles	✓					**SR**		**SR**		**SR**
Technical support roles	✓		✓							
Financial support roles					✓					
Enforcement roles			✓							

As revealed by the analysis, the critical roles refer to the roles that have the most impact, and are key to effective implementation, without which the whole process will fail. For instance, administrative roles, which involve registering and regulating the ANAs and adjudicators, selection and appointment of qualified adjudicators, setting standards in order to ensure quality, keeping files relating to the adjudication processes, maintaining a panel of qualified adjudicators, mentoring adjudicators and monitoring adjudication processes and ensuring compliance in terms of standard timelines and procedures are all key to effective implementation and are elements of the primary role of the implementing authority, as shown in Table 14 and Figure 14.

The supportive roles are secondary roles which enhance or enable successful implementation. For instance, the education and training role is one of the primary

roles of an implementing authority. However, the analysis revealed that the professional institutions can be of help in educating their members on the process and procedures of adjudication, and also disseminate information that will help promote the adjudication process.

Figure 14 shows the interplay of roles among the identified institutions. From Figure 14, PRL means primary role of legal institutions, PRA means primary role of authorising institutions, PRG means primary role of government institutions and PRO means primary role of other organisations. The CRR within the circle of legal institutions and implementation institutions indicates that their roles are critical to effective implementation.

The SPR within the circle of other supporting organisations indicates that other organisations are playing supportive roles to enhance the successful implementation.

CR indicates common roles among two or more institutions. For instance, keeping of adjudication statistics is classified under common roles because it can be performed by the implementing agency; likewise, it can also be performed by academic institutions. Dissemination of information falls under common roles because anyone of the four institutions can perform this function.

During the interviews, none of the interviewees mentioned the involvement of academic institutions in the effective implementation of adjudication. When a specific question was asked to find out if there are any roles performed by the academic institutions in the implementation process, the view of the participants is that the academic institutions do not perform any major/significant roles in the implementation process. To them, in any of the jurisdictions, the academic institution roles can be classified as common roles; which can easily be performed by the implementation agencies. Participant 15 responded in relation to this question thus:

"I am not aware of any special role that an academic institution performs in the adjudication implementation process. The only way that the university can be involved with the adjudication is by keeping adjudication usage statistics. For instance in NSW, the University of New South Wales (UNSW) are now supporting

the NSW Procurement, the government department by collating all the adjudication statistics every quarter. The UK (Caledonian University) also keeps the statistics for the UK Act. However, the role of keeping statistics of adjudication usage is done in-house through the adjudication registry or implementing authorities in some jurisdictions".

Thus, it could be summarised that the role of academic institutions is a supportive and common role that can equally be carried out by other institutions as shown in the Figure 14 below.

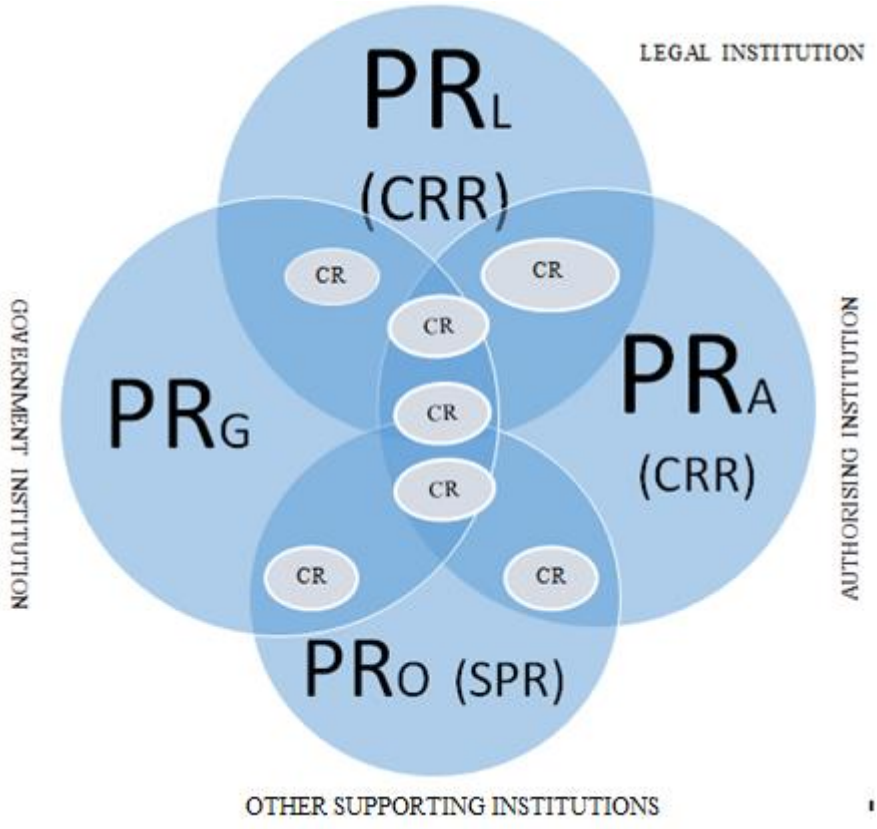

FIGURE 14 – INTERPLAY OF ROLES AMONG INSTITUTIONS (SOURCE: FIELD DATA)

7.4.2. Institutional supports needed for effective practice of statutory adjudication

This section achieves the first part of objective five (5) of this research. It identifies the institutional framework that will enhance the effectiveness of the statutory adjudication practice in SA. The analysis of data revealed four major institutional supports that are critical to effective implementation. These are: (i) the object of the

legislation, (ii) government support, (iii) the default nominating authorities and, (iv) a supportive court. The elements which constitute the institutional supports required for an effective statutory adjudication regime are the combinations of factors from the contributions of all the interviewees'. All the interviewees' without exception asserted to the fact that supportive court for the purpose of enforcement as well as default nominating institutions are critical institution support for the effective statutory adjudication practice. The excerpts from participants 3, 14 and 15 are evidence supporting this finding: According to participant 3,

"Well, I think in large part, you need an implementing or administrative institution that has unquestioned credibility and an acknowledged expertise in dispute resolution and in the subject matter of the disputes to be resolved, in this instance construction disputes. Equally fundamental to a successful adjudication system is a court system that understands and supports the legislative goals of adjudication and appropriately enforces adjudication decisions".

Participant 14 also stated*:*

"You need to have those two things operating in tandem. You need to have an effective Act, You need to have the policy settings right and you need to have government on board because it's is in government's best interest to promote the legislation".

7.4.2.1. Supportive court system

All the interviewees re-affirmed the importance of a supportive court system. The perception of the interviewees is that a supportive court system would catapult adjudication into the preferable dispute resolution process even in the presence of some unavoidable challenges. Recalling the import and impact of institutional support provided by the court in the early days of HGCRA, participant 12 explained that:

"I think in the UK, they were very fortunate, I think the legislation, the Housing Grant, was badly drafted but the court system was very ready, willing and able to enforce adjudication decisions. After that there were problems; there were errors in

the decisions, but the decision should stand regardless of the errors unless the errors were jurisdictional in nature".

As noted earlier, all the interviewees agreed that the support of court is very important to successful implementation and enforcement of adjudicators' decisions. That the English courts were prepared to enforce adjudication decisions was made clear by Mr Justice Dyson. This was evident in the first enforcement action relating to the adjudicators decision in *Macob Civil Engineering Ltd v. Morrison Construction Ltd*[18]. In this landmark case the judge –Mr Justice Dyson- held that the adjudicator's decision was binding and enforceable in the courts. Consequently, the take up of the adjudication process rapidly increased in the UK construction industry (Gaitskell, 2007: 778). The subsequent case in *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd*[19] was also a landmark case which further enabled adjudication to flourish in the UK. In this case, Dahl-Jensen sought summary judgement for the sum in an adjudication decision, notwithstanding that there appeared to be an error in the decision. The judge refused to interfere with an arithmetic error made by an adjudicator and gave summary judgement for Dahl-Jensen and said the adjudicator had plainly made an arithmetic error notwithstanding; the court would not impinge with this error because it was within the adjudication jurisdiction to make. This decision brought certainty as to the support that adjudication would receive in court and from the moment the decision was issued the future of adjudication process in the UK was assured.

Similarly, the initial take-up rate of statutory adjudication under CIIPA was rather slow and cautious. However, following the High Court's decision in *UDA Holding Bhds v Bisraya Construction Sdn. Bhd. & Anor and another case*[20], which ruled that CIIPA applies retrospectively, the slow take up rate accelerated appreciably in Malaysia. Thus, it may be inferred that the courts supports in the abovementioned cases acted as the needed catalyst for adjudication process to thrive in those jurisdictions. For adjudication process to flourish in SA, an interviewee (participant 4) emphasised that court support is crucial and thus advised that the judges in the SA

[18] [1999] BLR 93
[19] [2000] BRL 49
[20] *(24C-5-09, 2014)*

High Courts should be informed about the purpose of adjudication, so that they can provide the supports needed for adjudication effectiveness in SA.

7.4.2.2. The default nominating authority/authorities

Apart from supportive courts, a default nominating authority was the second factor deemed to be essential for effective implementation. One of the interviewees explained that the implementation institutions should be proactive and ensure that they first of all control the adjudicators who they put on the panel. In addition, there should be some form of monitoring system. So, with senior adjudicators guiding or monitoring junior adjudicators, they can develop a kind of mentoring or coaching system, and meet on a regular basis to discuss pertinent issues.

Participant 3 explained that a nominating authority should possess certain features such as unquestionable credibility and acknowledged expertise to ensure effectiveness in the implementation process. In this regard, he stated as follows:

"You need an institution that is proactive and credible. That institution must train qualified individuals to become adjudicators who are credible, ethical, incorruptible and experienced in the subject matters of construction disputes".

7.4.2.3. Object of the legislation

Clarity on the object of the legislation was mentioned as one of the institutional supports needed in effective adjudication. According to participants 7 and 12, the policy objectives and the application must be clearly stated for the purpose of cooperation among stakeholders for effectiveness of implementation.

"The other important element is the reading of the speeches given by the relevant Minister when the Bill is introduced into Parliament. The speech must be clear on the objects of the legislation".

Participant 14 likewise added that in order for the adjudication process to be successful, it is important that the problem is properly defined, the purpose of the legislation properly stated and a good plan to achieve the objective should be in existence. Recognising the object of the legislation is very important because each

security of payment act has a particular objective that drives its enactment. For instance, the NSW Act is only aimed at improving cash flow. Although adjudication is part and parcel of the NSW Act its role is limited to being a remedy to secure payment and is not a dispute resolution mechanism *per se*. It is more like a certification process but being carried out by an adjudicator. In fact, the scope of adjudication legislation differs from one jurisdiction to another. In the Malaysia context, CIPAA legislation has a comparatively modest scope contrasted to the UK and Singaporean statutes. The Malaysian act is limited to "payment disputes." Most other statutory construction adjudication schemes have broader coverage. It is then clear, that though the goals and purpose of enacting adjudication legislation may be similar, each jurisdiction has a policy objective that propelled their enactment. As such, participant 12 advised that:

"The last thing which is very important as well when you want to introduce an adjudication system, you have to be clear on the objectives. Do you want to improve payment practices within your construction industry or is there something else you want to achieve? So it is key that the legislators find out what the problems are and the objective they want to achieve and plan their solutions accordingly because the legislators should be mindful that there are two systems in place. Make sure you have the right system to introduce in your country that can improve the performance of your country in terms of payment practices or dispute resolution or both".

7.4.2.4. Government support

The analysis revealed that the support of the government is needed. An experienced adjudicator, participant 14 commented that:

"It is in government's best interest to ensure that industry players be it contractors, subcontractors or further subcontractors down the construction chain are paid promptly and properly. Governments have a very important role to play in creating an effective mechanism and setting policy parameters correctly so that people would use the Act".

In addition, participant 8 suggested that the government and contracting parties must raise their levels of good governance, transparency and professionalism to obviate the

need to resort to adjudication in the first place. After all parties who pay promptly should not fear the Act. The whole aim of the Act after all is to change the current adverse payment culture that permeates all facets of the local construction industry. Likewise, participant 2 and participant 7 also advised that government should provide funds for creating awareness, they should be bound by the legislation, they should set examples and should not seek for exemptions. By this act, the legislation will be effective.

7.5. Theme 4: Enablers of effective statutory adjudication implementation

The final theme centres on the factors that can facilitate the effective implementation of statutory adjudication within the SA construction industry. Based on the survey analysis, four major areas emerged that must be considered (as suggested by the interviewees) if an implementation process would be successful. These are: (i) the practices that can enhance successful implementation, (ii) the attributes that can promote effectiveness, (iii) the features in the legislation that can enhance effectiveness and (iv) the process that can enhance maximum compliance and participation by the various stakeholders involved. These categories are shown in Table 15.

TABLE 15 – ENABLERS OF EFFECTIVE STATUTORY ADJUDICATION IMPLEMENTATION

Theme 4	Categories
Enablers of effective statutory adjudication implementation	• Perceptions on the practices and strategies that can enhance successful implementation • Perceptions on the attributes that can promote effective implementation • Perceptions on specific features in the legislation that can enhance effectiveness • Perceptions on the process that can enhance compliance and maximum participation

7.5.1. Perceptions on the practices and strategies that can enhance successful implementation

Having identified the various challenges to effective implementation, the interviewees provided suggestions that can possibly enhance successful implementation in the SA construction industry. The suggestions provided by the interviewees were largely based on their professional experiences from their involvement with matters pertaining to legislation supporting payment security and adjudication of construction disputes. The interviewees' suggestions on practices that can enhance effective implementation were grouped into five. These are: (i) training and education, (ii) publicity and creation of awareness, (iii) adequate and prompt dissemination of information to the industry stakeholders, (iv) provisions of forms and (v) use of special materials to help parties and institutional interventions.

7.5.1.1. Education and training

Most of the interviewees noted that the reasons for numerous teething problems and procedural challenges experienced in the past during adjudication implementation are largely due to lack of knowledge. Participant 8 reflecting on the Malaysian experience explained that:

"So far, adjudications under the CIIPA Act are limited only to the principal players, i.e., main contractors, subcontractors and consultants. The other parties lower in the contractual chain for whom the Act has been intended for, i.e., sub-subcontractors, suppliers, etc., are generally ignorant of the Act and their entitlements under the Act despite the extensive coverage in the media and in the road shows/talks undertaken by KLRCA and the various institutional bodies. This needs to be addressed since these parties represent the bigger proportion of the construction industry".

Thus, there was consensus among all the interviewees that priority should be given to educating and training of all the different categories of industry stakeholders. As observed by participant 7:

"Having well trained adjudicators mean that there are likely to be fewer problems that have arisen with adjudicators who know little about the regime and whose

adjudication decisions are likely to be challenged by parties in courts. In addition, training users also means that they have better understanding of how the Act is intended to operate and therefore make the most of what it has to offer".

The observations made by these interviewees should be seen as carrying a very significant weight, given that they have been actively involved in the implementation process of their respective jurisdiction's legislation. The findings from the data analysis also revealed that training should be done in an effective way, and should cover different categories of the industry stakeholders to achieve all-round success. Participant 2 also highlighted that adequate training must be provided for professionals who wish to become adjudicators.

7.5.1.2. Publicity and creation of awareness

All the participants (n=15, 100%) from the four jurisdictions unanimously confirmed that the first point of connection to various stakeholders is through publicity and creation of awareness. Participant 8 from Malaysia observed that the lack of familiarity with the legislation (especially by the contractors and subcontractors) reduces its effectiveness. Thus, various means of creating awareness are suggested by the interviewees. These included publicity through seminars, workshops, talks, conferences, road shows and public sessions. The use of procedural workshops, debate discussions, and open discussion on the new legislation, as well as free evening talks, were also suggested as possible means of creating awareness.

Participant 12 specifically explained that the problem of lack of understanding of the policy objectives and purpose of adjudication legislation by the judges can be overcome by creating awareness among the judges. He further advised that government bodies, private bodies and all construction stakeholders, including the professional bodies, must be made aware of the purpose of adjudication and how it can benefit them. Participant 12 statement in section 7.3.3 sums up this view.

7.5.1.3. Report and information dissemination

The analysis also reveals that (i) updating the industry through information dissemination and (ii) reporting on the issues about the effectiveness of adjudication

are practices that can enhance effectiveness. The findings from the analysis revealed that this role is very critical and must be performed by all relevant institutions. Different examples of strategies for raising awareness were identified throughout the analysis. These include: (i) provision of statistics on use and success rate, (ii) reviewing of statistics, (iii) provision of information on case law, (iv) reporting on current issues on certain points of law, (v) learning from past judicial interpretation of the legislation by the court and (vi) sending information to professionals through their institutions. The excerpt from participant 1 as previously quoted in section 7.2.2 sums up this view.

7.5.1.4. Provision of forms and use of special materials

Participants, 1, 2, 8 and 10 independently intimated that the use of special materials such as templates/forms that can be easily used by all the parties to adjudication claim (be it the contractors, consultants, suppliers and other sub-subcontractors down the construction chain) can enhance effectiveness. The importance of these materials is to ensure that any unpaid party can easily initiate the adjudication process regardless its status. An adjudicator with considerable professional experience in the construction industry in Malaysia explained that one of the strategies that helped in maximum usage of adjudication by the construction industry role-players in Malaysia is the use of special forms and materials. He explained that:

"There is actually a published set of forms for every stage of the adjudication. So, there is a form for payment claim, a form for payment response to the adjudication claim, the adjudication response, a form for adjudication reply and a form for the decision, there is where this can be inserted. Because of that, it becomes accessible to any member of the public. In Malaysia we found out that even the very small contractors and suppliers who are very low down the supply chain are able to avail themselves with the provisions of the Act because the forms have been made available and they can even commence the adjudication without the advice of lawyers because they could do it by themselves".

For the materials to be more effective, it was likewise advised that the materials should be published in different languages. This will be very useful for any contractors whose does not have the good knowledge of the English. In addition,

institution should be devoted to conducting training, special courses, workshops to educate parties on the right use of the template and forms and the proper way of drafting the various documents required in the adjudication process.

7.5.1.5. Institutional interventions

As revealed from the analysis, institutional interventions are very necessary in providing solutions to complex cases that can undermine the effectiveness of statutory adjudication. Both documents and data analysis revealed that institutional interventions are needed in the area of resolution of ambiguities within the contents of the legislation, provision of procedural clarity and advice to the parties on process and procedure of adjudication, protection of adjudicators fees, monitoring performance of adjudicators and the adjudication process.

Participant 3 explained that one of the critical challenges obstructing full participation in adjudication schemes is the reluctance of some contractors - particularly smaller contractors - to make claims in adjudication because of the concern that making claims may have the consequence that retaliation in the form of rejecting them for future jobs may occur. As such he advised that:

" *A successful adjudication scheme must overcome this obstacle by (1) educating all stakeholders that retaliation of this nature is improper and should be rejected by all parties and (2) monitoring this situation to identify additional steps that may be appropriate to encourage adjudication and discourage retaliation*".

7.5.2. Perceptions on the attributes that can promote effective implementation

Several attributes that can promote effective implementation of statutory analysis were revealed from the analysis of interview data. A closer evaluation of the analysis revealed that some of the identified factors encourage successful implementation and reinforce effectiveness, while the availability of some other factors will basically help to prevent or overcome potential barriers. The identified attributes were then grouped into two. The factors that encourage or reinforce the effective implementation were grouped under "drivers of an effective implementation", while

those factors which can help in overcoming the potential barriers are grouped under "enablers of an effective statutory implementation".

TABLE 16 – DRIVERS OF AN EFFECTIVE STATUTORY ADJUDICATION

Drivers of an effective statutory adjudication	
Drivers	**Descriptions**
Reasonable time frames and procedural clarity	There should be strict timelines for the adjudication process. For adjudication to be embraced by the industry stakeholders, it must be speedy and avoid unnecessary procedural complexities.
Cost of adjudication	The cost of adjudication and adjudicators fees shall be kept reasonable to encourage both the disputing parties and the adjudicators. Cost-effectiveness is one of the preferable features for selecting a dispute resolution process.
Quality of adjudicator	Availability of experienced and qualified adjudicators to help in kick-starting the process is deemed vital for effective implementation. A good decision made within a minimum time-frame will encourage more usage and increase users' confidence in the system. Young adjudicators should be mentored to help develop them; accurate matching of disputes with suitable qualified adjudicators will enhance the production of a quality decision and thereby increase the level of acceptability of the decision.
Accessibility	Accessibility in terms of the right of both parties to initiate adjudication will encourage better participation. Making the procedure easy through provision of advice to the parties and the use of forms (such as payment claim form, payment response form, notice of adjudication form etc.) will encourage more usage.
Enforceability	Assurance of enforceability of the adjudicators' decision will encourage more usage. The provision of built-in mechanisms in enforcing the adjudicators' decision is a good driver to effective implementation.
Regulations and government support	Regulations and governments' support promote confidence of the users in the mechanism in relation to the conduct of the parties and enforceability of the adjudicators' decision.
Impartiality and procedure fairness	The perception of a fair process is often acknowledged to be as important as the reality of impartiality. There would be more willingness by parties to accept decisions when the parties believe that the dispute resolution process has been fair. This will encourage better usage by the parties.
Clear understanding of the legislation provision	Provision of training to various industry stakeholders to ensure they are knowledgeable about the conduct and

Drivers of an effective statutory adjudication	
by the intended beneficiaries	the policy objectives of the legislation will help to clarify misconceptions and promote maximum usage.
Procedural clarity and good comprehensibility of the legislation	The procedure must be clear, simple and easily comprehensible to the users. Complex and unnecessary procedures can constitute a hindrance to acceptability of adjudication.
Vibrant nominating authority	The swift nomination of adjudicators by the adjudication nominating authority when disputes arise will help to accelerate the whole process of adjudication and then encourage other parties to use it.
Adequate resources	Adequate resources in terms of human resources, facilities, variety of adjudicators from different professional backgrounds, are essential factors for effective implementation.
Professionalism	This involves the professionals helping the parties to resolve their dispute efficiently with less procedural problems. They (adjudicators) must be fully qualified and experience. They must be neutral, impartial, fair and independent in performing their duties.

As previously explained, success drivers are those factors that encourage successful implementation while the enablers are those factors or elements that help to overcome potential barriers that can undermine the effectiveness of the process. Thus the enablers involve the following:

- institutional support;
- good coordination;
- good practices;
- good management;
- procedural and substantive justice in the adjudication scheme; and
- fairness in the appointment of the adjudicator.

7.5.3. Perceptions on specific features in the legislation that can enhance effectiveness

A question was asked to determine the specific features in the Payment and Adjudication legislation of other jurisdictions' that aided effective implementation and encouraged more usage. The analysis reveals that strict time-frames and reasonable cost of adjudication are indeed critical to making adjudication work. The

interviewees assert that the adjudication time frame is relatively speedy when compared to the final processes of arbitration and court litigation. The fees of adjudicators are also kept reasonable when compared to those of arbitration and court process. In addition, the interviewees from Malaysia noted that the naming of an administrator to implement the implementation process also enhanced its effectiveness.

7.5.4. Perceptions on the process that can enhance compliance and maximum participation

A question was asked to determine what could be done to enhance maximum cooperation to make the legislation work. Varieties of suggestions were made by the respondents. These included:

i. Appeals for review of cases based on grounds of technicalities should be sparingly entertained by the court. (participant 9, participant 7)
ii. The enforcement of the adjudication decisions should be rigorously supported by the High Court, and there should be cheap, easy and quick enforcements. (participant 6)
iii. It must be strongly and clearly stated that the regulations in the Act applies to both public and private sectors. (participant 4)
iv. The government should be bound by the legislation; there should be no contracting out. (participant 7, participant 5, participant 2)
v. The body administering the Act must be independent, impartial and neutral. (participant 10, participant 1)
vi. The content of the Act must be clear and the Act must also be so water-tight that no one can delay proceedings. (participant 13)
vii. There should be ways of controlling, mentoring and managing adjudicators' performance. (participant 15, participant 12)

7.6. Discussions

This section discusses the results of the data analysis reported in the first part of this chapter. The discussion is organised under four themes, namely:

- Evaluation of the relevant institutions and their roles in effective statutory adjudication implementation;
- Critical challenges to effective implementation of statutory adjudication and suggested ways of combating the challenges;
- Institutional requirements for effective statutory adjudication implementation; and
- Enablers of successful statutory adjudication practice.

From the data analysis, it can be deduced that institutions play strategic roles in promoting the effective implementation of the legislation supporting statutory adjudication. Further, it was discovered that the effectiveness of statutory adjudication and the realisation of the benefits it has to offer hinged on four factors which are:

- The feature of the legislation itself (i.e., policy objectives and the application of the legislation);
- The process of implementation;
- Institutional support; and
- The presence of success factors (i.e. the drivers and enablers of successful implementation). The enablers of effective implementation took account of the factors for success that can impact on the successful implementation of the legislation supporting statutory adjudication. Their presence encourages and reinforces successful implementation and helps overcome potential barriers.

7.6.1. Evaluation of the relevant institutions and their roles in effective statutory adjudication

Analysis from both documents and interviewees revealed that legal institutions, implementing institutions, professional institutions, government institutions and academic institutions have certain roles in the implementation process (section 7.2.1). Each institution's involvement in the implementation is at varying degrees.

Of course, the extent to which an institution functions effectively will depend entirely on the wording of the statute.

The importance of institutions cannot be overemphasised. Literature, especially in the field of institutional development, has provided strong evidence for the overwhelming importance of institutions in predicting the level of development around the world and their significance in the realisation of policy objectives (Hall and Jones, 1999; Ferrini, 2012; Blase, 1986). In the words of Blase (1986: 321) "institutions play a strategic role in development". Thus, developing and enhancing the capacity of various institutions is fundamental to the development of the construction industry (McDermott and Quinn, 1995: 150). Within the industry, many ideas are conceptualised. It therefore requires a great deal of effort of various institutions to put mechanisms in motion for the realisation of such dreams, ideas and concepts.

A closer scrutiny of the data analysis classified the identified institutions into two groups; (i) the institutional group, and (ii) the organisational group. The perception of the participants is that the institutional groups have critical roles to play in the effective delivery of the adjudication process, while the organisation groups have supportive roles to play. The perception of the interviewees on institutions and organisations was perfectly in line with the view of several authors such as Uphoff, (1986:8), McGill, (1995, 64) and McDermott & Quinn, (1995: 151) who have placed institutions into three categories which are (i) organisations that are not institutions, (ii) institutions that are not organisations, and (iii) organisations that are institutions. Thus, on the one hand, the institutional group in this study falls under the category of organisations that are institutions, and they perform critical roles in the implementation process. On the other hand, the organisation group are the organisations that are not institutions, and they perform supportive roles in realising the policy objectives of established legislation. Belonging to either of the groups identified depends on the legislation provisions.

The findings from the analysis revealed that the roles of implementing institutions (authorising nominating institutions) and courts are critical to effective implementation. The accomplishment of the policy objectives of the legislation

depends on the proper performance of these institutions. The implication is that where there is under-performance, non-performance or malfunctioning of the institutions, the successful implementation of that legislation is not guaranteed. Salmen, (1992: 11) holds a similar view and noted that: *"Institutions are central to sustainable and beneficial economic growth. They create the policies, mobilize and manage the resources, and deliver the services which stimulate and sustain development. Growth and prosperity are unlikely to be maintained if institutions which guided them are dysfunctional".* In effect, an institution appears to be the indispensable filter of, and guide to, the development process (McGill, 1995: 63).

7.6.1.1. Roles and importance of legal institutions

Both documents and data analysis in this study have established the necessity and importance of legal institutions in the effective functioning of statutory adjudication. All the interviewees unanimously confirmed that court support is pivotal to a successful implementation of statutory adjudication. As evident from this study, legal institutions perform three roles to promote effective operation. First, the legal institutions are responsible for the enforcement of adjudicators' decisions. This role is very important for the purpose of ensuring that the policy objectives behind the introduction of statutory adjudication are not thwarted. As revealed from the literature, the functionality of any ADR depends on the relationship between the ADR and the legislation. Where this relationship is absent, the effectiveness is not guaranteed. According to Gaitskell (2007: 778), an effective system of statutory adjudication that will actually achieve the objective of protecting subcontractors' periodic payment cash flow requires not only payment and adjudication provisions, but also a court system which is ready, willing and able to enforce adjudication decisions. This opinion was in tandem with Maritz (2007: 1), who noted that, without a coercive method of enforcing decisions, a large proportion of awards granted will simply be ignored. Thus, it is apparent from the findings that the effectiveness of statutory adjudication depends largely, among other things, on legal institutions.

The second and third roles of legal institutions, as revealed in this study, involve the function of courts in providing correct interpretations to the fundamental issues

within the Act, as well as resolution of ambiguities that may arise from the legislation. These roles are equally very important if a statutory adjudication regime is to be successful. For instance, during this study all the interviewees (100%) from Malaysia independently intimated that there was a fundamental issue with a particular section of their legislation, which has to do with retrospective application of their Act. This became a critical challenge until the courts provided an appropriate interpretation to solve the problem. Participant 1 from Malaysia specifically explained that:

"…when there are areas of doubt in the Act, we do not step in but we encourage a party to refer those provisions to court to provide interpretation. Also we communicate our judiciary because the court should understand that adjudication is a short process and shouldn't take a long time to come back with the decision on a point of law"

From the statement above it is observed that communicating the judiciary about the purpose of the legislation is very important. This is because, the judiciary is the exclusive body with responsibility for interpretation. Their good knowledge of the object of the legislation and the purpose of the legislation will positively impact the implementation process. It is good that the judges provide the right interpretation. Conflicting judicial interpretations do not promote clarity and certainty and can stultify the efficiency of adjudication. For instance, the first case of *Rothnere v Quasar*[21] in NSW where McDougall J held that the submission of a second claim identical to the first claim to another adjudicator did not offend the provisions of the NSW Act and was therefore acceptable resulted in the flourishing of adjudication shopping in NSW and thereby created problem rather than supporting effectiveness. Shabbir (1993: 13) points out that an institution plays a crucial role in the development process, but could well serve as impediments to progress. Thus, courts may constitute an impediment rather than helping the process if interpretation is not clear and certain.

[21] [2006] NSWSC 798

Participant 3 explained that seminar made to the judiciary in Malaysia and as such, they were quite aware of the purpose of the legislation and were well prepared to handle adjudication matters.

"There were seminars and educational presentations made to the judiciary by the KLRCA and its panel of speakers. Meetings were held with the Chief Justice and other members of the judiciary to communicate to the judiciary the purposes, goals, and elements of the statutory adjudication scheme and the role of the KLRCA in implementing and administering the statute. As a consequence, the judiciary was very knowledgeable and quite well prepared when adjudication matters were brought to court"

Latham (1994) recommends that adjudication decisions should be enforced immediately and also made a plea to the court to support the adjudication system. Findings from the literature revealed that the success of the adjudication regime in the UK could be attributed to a supporting court. In similar vein, a number of interviewees in Malaysia confirmed that the consistent support of the construction courts in Kuala Lumpur and Shah Alam in Malaysia has been one of the major contributing factors to effective statutory adjudication implementation in Malaysia. For this benefit to be achieved, it was suggested that judges should be well informed and made aware of the purpose and policy objective of adjudication legislation. Their level of knowledge will influence their decisions in dealing with adjudication cases.

7.6.1.2. Roles and importance of implementing institutions

With regards to the roles of implementing institutions, all the interviewees agreed that the roles of authorising/implementing institution(s) are critical to effective statutory adjudication practice. The nominating authorities are always the first point of contact if parties agreed to settle their disputes by adjudication. As such, they are expected to perform some important roles, including accepting adjudication applications from the claimants, providing advice and assistance to parties regarding the adjudication process, nominating an adjudicator to decide adjudication matters, issue adjudication certificates to claimants upon request, and, where approved, to conduct courses for adjudicators.

Based on the analysis of the interviews, two types of nominating systems were revealed. As previously mentioned, these nominating systems are: (i) a single nominating authority system and (ii) a multiple nominating authority system.

The majority of the participants (n=10, 67%) demonstrated high preference for a single/sole nominating authority. It is important to note that these 10 interviewees who are the supporter for a single/sole nominating authority are mainly from Malaysia (n=7), Australia (n= 2) and (Singapore n=1) where the adjudication administration is carried out by an independent institution or through government Agency. In their opinion, the use of a single nominating system has a lot of advantages. These advantages include:

- Uniformity in standard of recruiting adjudicators;
- Adequate resources and possibility of matching the right sort of dispute with the right sort of adjudicator;
- Avoidance of adjudicator shopping and ANA shopping;
- Avoidance of the problem of bias, as to which ANA is good or bad;
- Increased fairness; and
- Increased level of acceptability of adjudication determination.

As revealed in section 7.2.3, the problems associated with multiple nominating system can be linked with underlying structural and cultural factors. A cursory evaluation of nominating procedure from the UK revealed that there are three methods of selecting an adjudicator under the UK regime. These three selection methods provide flexibility in the adjudication process, as it enables the parties to decide which method, or which combination of methods, to deploy when selecting an adjudicator. One of the methods allows the parties to jointly agree in appointing an adjudicator. Under certain condition, where the parties do not agree to jointly select an adjudicator, the other methods can then be employed. Under the NSW and Queensland Acts, there is no provision allowing the selection of adjudication by agreement by both parties. Under the Queensland Act, the claimant is provided with exclusive right to unilaterally make an application to an ANA and copy the respondent. Thus, under both the NSW and Queensland Acts, it is possible for a claimant to be involved in adjudication shopping whereby a claimant or its

representative demands that an ANA either appoint or not appoint certain adjudicators failing which the claimant would refer its adjudication application to another ANA. It is thus understandable the reason why the participants from the Australian construction industry associate the use of multiple ANAs with problem of adjudication shopping and perception of unfairness. Literature reveals that in Queensland there is:

" (i) a perception that profit-driven ANAs are biased towards claimants, as they stand to gain financially from future referrals by claimants; (Wallance, 2013: 131-145 and Coggins and Bell, 2015).

(ii) allegations of adjudicator shopping whereby a claimant or its representative demands that an ANA either appoint or not appoint certain adjudicators failing which the claimant would refer its adjudication application to another ANA;

(iii) accusations, or potential accusations, that some ANAs maintain an unhealthy relationship with claims preparers, whereby preparers are recommended to claimants by an ANA with the expectation that the preparer will direct the adjudication application to the ANA, or in expectation of receiving future appointments as an adjudicator from the ANA".

These practices revealed the reasons why the participants from Queensland favour the appointment by a single Adjudication Registry in order to overcome the possible problems associated with the use of multiple ANAs. Therefore, it may be inferred that the choice of nominating system would depend on the nature of the adjudication regime and provisions of the legislation in each jurisdiction. If the adjudication regime allows joint agreement by parties in the nomination process as exist in the UK then it is reasonable to suggest that any of the methods is good and accurate. In a situation where the claimant is the only one that has right to put in adjudication application the use of an independent institution in the process would be more beneficial. In line with this view participant 7 explained that:

"In my experience, having 'commercial' nominating authorities has caused difficulties with perceptions that certain nominating authorities are or have become 'pro-contractor' or 'pro-claimant". If the statute enables the claimant to choose the

nominating authority (as in parts of Australia), then, they tend to choose those nominating authorities that are perceived as likely to find in their favour. If the nominating authority is named in the statute (as in Malaysia), then, certain regimes for appointment can be implemented, such as a roster system or the more careful assessment of which adjudicator is available who can deal with the complexities of that particular adjudication. As a rough and ready form of justice, it is even more important that there is a greater semblance of fairness. Improved fairness will make it more acceptable. Greater acknowledged acceptance will lead to greater efficiency".

7.6.2. Challenges to effective implementation and possible ways of combating the challenges

Challenges are not uncommon to an implementation process. The expectation of every policy maker is to see that the purpose of making policies is realised and desired results are achieved. However, implementation problems do occur and create a gap between policy conceptions and outcomes. Globally, reported gaps between the formulation and outcome of policies, especially in the built environment and urban-regional development, are not a new phenomenon (Muller, 2015: 1). Regrettably, this gap often leads to frustrations when planned goals are not achieved. Thus, it has been realised that whenever enabling factors that are very critical to efficient implementation of policies are missing implementation problems are always inevitable. Both documents and data analysis from this study established seven critical challenges that could undermine the effectiveness of statutory adjudication. These are: (i) challenges relating to change process; (ii) challenges relating to content of the legislation; (iii) the procedural challenges; (iv) challenges relating to adverse court decision; (v) cost/fees challenges; (vi) capacity challenges: and (vii) jurisdictional challenges. During the study, the causes, the consequences and the possible ways of combating the identified challenges are explored. The summary of these findings is presented in Table 11.

As indicated in Table 11, one of the major challenges to effective implementation is the degree of ambiguity within the legislation. The challenge of ambiguity usually

leads to diverse interpretation, multiple perspectives and interpretative flexibility (Moncaster and Simmons, 2015: 453). The issues of ambiguities which arise from poor drafting, drafting inconsistency and procedural complexity are critical issues that could defeat the purpose of any legislation. In addition, challenges relating to accessibility, level of knowledge and understanding of the contents of the legislation, inadequate information dissemination, insufficient resources, lawyers' attitude, and cost of adjudication are critical challenges that could constitute impediments to the efficient implementation of the statutory adjudication legislation.

Kennedy (2008: 218) observes that in the context of the adjudication process, there are several threats to its survival, or, at the very least, for adjudication's continued good health. Thus, adequate attention should be given to overcoming the identified challenges and the factors that can enhance effective statutory adjudication implementation and sustainability should become a crucial issue to the construction stakeholders.

7.6.3. Institutional requirements for effective implementation

Data analysis revealed that the effectiveness of statutory adjudication and the realisation of the benefits it has to offer depends on certain institutional requirements which are:

- Object of the legislation (i.e., policy objectives and the application of the legislation);
- Default nominating authority/ authorities;
- Court support; and
- Government support

7.6.3.1. Object of the legislation

As previously mentioned in section 7.4.2.3 the main area of divergence in the adjudication legislation is the scope of its application and its policy objective. While some jurisdictions include certain types of contracts in their Acts, some exclude them. Thus, the recognition of the types of contracts included in the Act on which the legislation applies is crucial in determining the beneficiaries that the legislation

attempts to protect, and thereby the legislation's scope of application. So the object of legislation should focus on two main areas, which are the applicability and the policy objective. The applicability refers to the vulnerable parties that the adjudication system intends to protect. Contractors and subcontractors are the main intended beneficiaries in all the jurisdictions where it has been adopted. The consultants, suppliers and employers are not uniformly protected in all the jurisdictions. As such, the intended beneficiaries of the legislation should be stated clearly in the legislation. Some of the interviewees advised that:

i. The legislation should clearly state the scope of application. Participant 4 stresses that: *"…the legislation has to say that it applies to both public and private sectors"*, and for the legislation to be more effective
ii. It should cover both written and oral contracts. This will help to protect the smaller contractors who are most often involved in oral contracts.

7.6.3.2. Default nominating authority/authorities

It was established that a default nominating authority is required for the effective implementation of adjudication. The finding reveals that both a sole nominating authority and multiple nominating authorities have their own advantages and disadvantages. As such, it was recommended that if a single nominating authority is chosen, the following should be considered:

- The expertness of the institution;
- The integrity credibility of the institution;
- The resources available;
- The prospect of continuity;
- Possibility of continual good performance; and
- Competency.

In the opinion of the interviewees, a single nominating authority is preferable, but in a situation where the single appointing authority is not performing its duties, it will hinder the success of the adjudication process. The participants also suggested that where a multiple ANAs system is chosen, the commercial ANAs should not be allowed to participate. One main advantage of using a multiple ANA system is the

flexibility it has to offer. Thus, it was suggested that high standards for recruiting adjudicators into each ANA should be centrally provided in order to ensure the quality of the adjudicators on the panel of each ANA.

7.6.3.3. Government support

The analysis of data revealed that support of government in realizing effective implementation is very important. This finding is in line with Mohd Danuri *et al.*, (2012) who noted government support as one of the essential elements that is needed to promote a well-received dispute resolution mechanism. The comment of participant 15 as previously quoted in section 7.4.2.4 also support this view.

7.6.4. Enablers of successful statutory adjudication

The findings reveal that there are, (i) drivers of effective implementation and there are (ii) enablers of effective implementation. Both drivers and enablers are jointly referred to as factors for success. Gichoya, (2005: 179) approached the critical factors for effective implementation in the field of information technology from two perspectives. According to him, it is very important to clarify the "opposite" effect of critical factors for success, especially while discussing factors for success or failure. According to him, the presence of a factor encourages success while its absence promotes failure. In effect, the factors for success can either be termed enablers of success or success drivers. In this study, success drivers are those factors that encourage successful implementation, while the enablers are those factors or elements that help to overcome potential barriers that can undermine the effectiveness of the program. Based on the analysis, the following factors emerged on drivers of effective implementation; (i) easy accessibility, (ii) procedural clarity, (iii) increased knowledge, (iv) availability of adequate and qualified adjudicators, (V) vibrant institutions, (vi) procedural fairness, (vii) reasonable cost, (viii) strict timeline, (ix) supportive court and (xi) default nominating body/bodies. The enablers are (i) good coordination; (ii) good practices; (iii) good management of innovation processes; (iv) procedural justice; and (v) creation of good impression through consistent good performance.

Looking at the trend of data and linkages between variables, it was discovered that institutions cut across the preponderance of data. This indicates that legislation alone is not enough, but that the system needs the support of institutions for it to thrive and work efficiently. Thus, the arguments of Gaitskell (2007: 778); and Gary et al., (2012: 341) that payment and adjudication provisions require institution supports (such as court support) and other facilitating factors for it to be effective and efficient is verified as valid. Thus the presence of the enabling factors identified in this study would go a long way in enhancing the effective implementation of statutory adjudication in SA.

7.7 Development of a framework for effective statutory adjudication implementation in SA

Based on the findings, a framework for effective implementation of statutory adjudication in SA was developed. This is depicted in Figure 15. From the illustrated framework, two factors were identified as key requirements for the effective statutory adjudication implementation in SA. The first factor is institutional while the other is facilitatory. Under the institutional factors, there are four important components, namely: (i) the object of the legislation; (ii) default nominating authority; (iii) legal institutional support; and (iv) government support. Without these four key significant factors, the statutory adjudication implementation will not be effective. The facilitatory factors include the drivers and enablers which are equally important for the effective implementation of statutory adjudication in SA. Both the drivers and enablers are also jointly referred to as success factors. The detailed description of how the framework could impact effective implementation of the adjudication system in SA is discussed below.

7.7.1 Institutional factors

i. **Legal institution support**: Legal institution support is widely acknowledged as one of the indispensable elements in effective implementation of statutory adjudication system. As revealed from the data analysis and evident in the framework, the legal institution is a key element required for successful implementation of statutory adjudication in SA. The importance and roles of legal institution has been fully discussed in section 7.6.1.1. For legal institution to perform effectively and facilitate

the achievement of a successful adjudication implementation in SA, there is need to establish a construction court similar to TCC in the UK or the construction courts in Kuala Lumpur and Shah Alam in Malaysia. The court would be responsible for the enforcement of adjudication decisions and ensures that the purpose of parliament in enacting the legislation is not compromised. For the initial take up where it is not feasible to set up a construction court, the following key actions could be considered:

- Some specific high court may be selected where the construction cases could be referred to.
- The high court judges in those selected courts must be informed and made fully aware of the purpose and intended nature of adjudication. With this arrangement, those high court judges would become specialists in handling construction cases and other construction matters.
- The implementing institution should conduct awareness programmes for judges on how adjudication is different from other dispute resolution mechanisms. This would help overcome potential adverse court decisions that could nullify the efficiency of the adjudication system.
- The right of judicial interference and intervention should be limited to mere breaches of law, natural justice and excess/lack of jurisdiction. These would lead to decrease in the number of applications for review and setting aside of adjudicators' decisions being made to court, therefore leading to more effective use of adjudication.
- Court interference which allows for the opening up and judicial review of adjudicators' decisions that can bring the adjudication system to a standstil and circumvent the objects of the legislation should be discouraged.

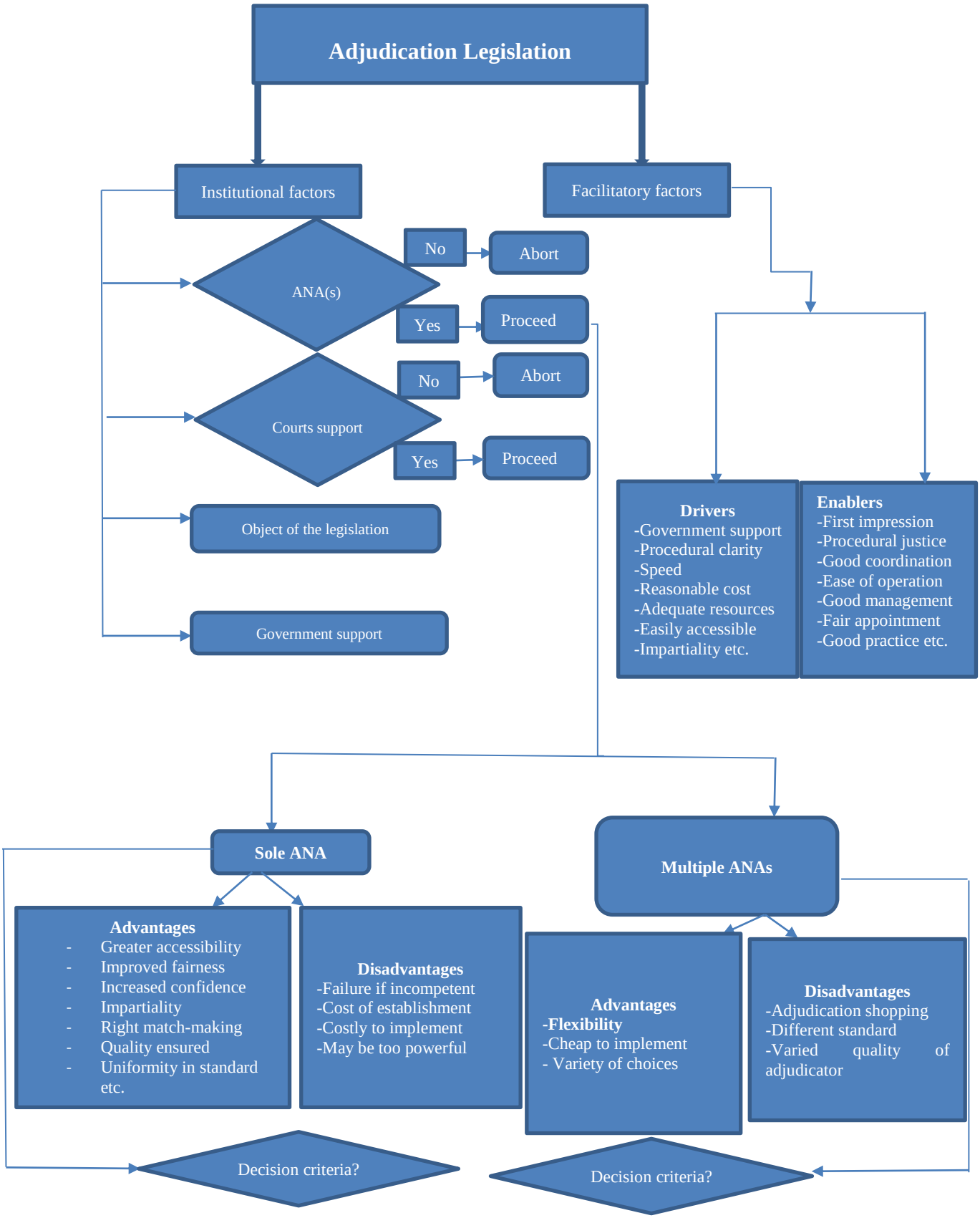

FIGURE 15 - FRAMEWORK FOR EFFECTIVE ADJUDICATION LEGISLATION IMPLEMENTATION IN SOUTH AFRICA

ii. **Default Authorised Nominating Authority/Authorities (ANAs)**

Default ANA was unanimously affirmed by all the participants as a crucial element for effective implementation of statutory adjudication. The importance of ANAs has been discussed in section 7.6.1.2. As previously mentioned, the appointment of an adjudicator through the involvement of ANAs is perceived to be advantageous in terms of accelerating the whole process of adjudication as well as ensuring the quality of adjudicators (Uher and Brand, 2007; Munaaim, 2010). Thus the parties in disputes rely much on the competence of the nominating institutions in making a right choice of adjudicator and provide needed guidance throughout the adjudication process. As discussed in section 7.2.3 and shown in Figure 15, two types of nominating systems were revealed under this study: (i) the single nominating authority system; and (ii) the multiple nominating authorities' system.

Single nominating authority system appears much preferred over the multiple nominating authorities. The perceived advantages of the single nominating system over the multiple nominating bodies are outlined:

- Uniformity in standard;
- Avoidance of confusion and inconsistencies in adjudication determination;
- Quality is ensured due to single standard of training;
- Prevention of adjudication shopping;
- Availability of competent resources to handle complex cases;
- Prevention of ANAs shopping;
- Greater efficiency;
- Possibility of roster system for choosing an adjudicator and possibility of match-making the right adjudicator with the right dispute;
- High integrity and impartiality in dealing with adjudication process; and
- Improved fairness in the appointment of adjudication,

Nonetheless the above-listed advantages, single nominating authority system might lead to the adjudication process failure if the sole implementing institution is incompetent, inexperienced and lack expertise. Thus making a right choice of which institution would be capable for the efficient administration of the statutory

adjudication process is very important. It is important to note that the administration of the adjudication process through a single institution can be carried out by a sole independent institution such as existing arbitral institution (as exist in Malaysia through the KLRCA) or under a particular government agency (as exist in Queensland). Both types of single nominating systems have been found to be effective.

However, there is perception that the administration of adjudication process through the involvement of a single independent non-profit body would offer more advantages than the government agencies.

Some of the perceived advantages are:

- Availability of already existing pool of adjudicators within the independent institution who can be used to kick-start the adjudication process;
- The neutrality and the independent nature of the institutions are perceived as added advantage; and
- The use of independent institutions instils more confidence on parties in the adjudication process, especially in a dispute which involve a government project;

Findings from this study revealed that the use of multiple nominating system is associated with some problems. The perceived problems associated with the multiple nominating system include:

- Perceived unfairness in adjudicator appointment;
- Adjudication shopping;
- Variability in the quality of adjudication;

These problems may be prevented if the legislation allows both parties to jointly appoint ANA or an adjudicator in the resolution of their disputes.

Based on the aforementioned facts, there is need to take a proactive decision on which type of nominating system would be of greater advantage in the context of SA socio-economic settings. Given the pros and cons of the different types of nominating institutions, it is pertinent to develop decision criteria factors for choosing a vibrant

implementing institution for effective adjudication application in SA. Thus the following criteria were formulated from the findings:

a) If the desired implementing institution is a single independent institution, the criteria listed in section 7.6.3.2 are to be considered before selecting the single institution. These criteria include:
   - Expertise of the proposed nominating institution;
   - The integrity and reliability of the proposed institution;
   - The resources available within the proposed institution;
   - The prospect of continual good performance of the proposed institution;
   - Skill and competence of the experts within the proposed institution;
   - Neutrality and impartiality of the proposed institution;
   - The leadership capability of the proposed institution; and
   - The credibility of the proposed institution.

These factors are very essential because the underperformance or non-performance of the institution chosen could hamper the effectiveness of adjudication and cause failure in the implementation process.

b) If the preferred single nominating system is a government institution, then the following criteria should be considered:
   - There should be means of building confidence in the industry stakeholders, that although, the implementing institution is under government, it is be neutral, impartial and independent;
   - It may be necessary to set up an agency similar to that in Queensland who would solely be in charge of adjudication implementation and ensure that effective strategies are in place to promote its efficient operation; and
   - The agency that is set up would be responsible for recruiting adjudicators, nominating adjudicators, setting standards for adjudication and monitors the implementation process.

c) If a multiple ANAs system is preferred, the following decision criteria for effectiveness should be considered:
   - The commercial (for-profit) system should not be allowed;

- There should be a government agency in charge who would oversee the activities of the various ANAs;
- There should be uniform criteria for recruiting adjudicators into the panel. This is necessary in order to ensure quality of the adjudicators;
- It should be considered where the legislation allows both disputing parties to jointly agree to choose an ANA. This is necessary in order to prevent adjudication shopping or an ANA shopping;
- It should not be considered where only the claimant has a right to choose ANA in order to prevent corruption and adjudicator or ANA shopping;
- An agency similar to that in Queensland could be set up. Such agency would be responsible for registering adjudicators and ANAs and also see to the total administration of the adjudication process including imposing standard criteria in recruiting and training of adjudicators on all the ANAs; and
- The approach taken by the Queensland government in setting out the administrative matters of the ANAs in the body of the legislation could be adopted. This will enhance consistency in terms of the operation of the ANAs.

iii. **Object of the legislation**

Object of the legislation is the third key element that is required for effective implementation. As explained in section 7.6.3.1 the scope of application and the policy objective of the legislation are necessary for effective implementation. Thus, the recognition of the types of contracts included in the Act on which the legislation applies is very crucial in determining the beneficiaries that the legislation attempts to protect and thereby the legislation's scope of application. So the object of legislation should focus on the following:

- The applicability;
- The policy objective;
- The provisions within the Act; and
- The type of contract and people to whom the legislative applied.

This has been fully discussed in section 7.6.3.1.

iv. **Government support**

In the analysis, government support was found to be one of the key institutional requirements for the successful implementation of the adjudication system. For instance, the number of adjudication applications in the UK, NSW, and Queensland grew rapidly within two to three years after the commencement of the respective legislations (Coggings, 2015; Munaaim, 2011). Similarly, Malaysia experienced a steady rise in the number of cases filed with KLRCA since the commencement of their legislation (KLRCA report, 2015). The rapid acceleration was attributed to the publicising, promotion and facilitation of the use of the Acts by the government. In all these jurisdictions, the challenge of publicising awareness of the legislation throughout the construction industry was reported (Coggins, 2015). It appears SA may face similar challenge as the level of knowledge is still very low. In order for the legislation to have maximum effect on the payment culture of the construction industry, it is recommended that the implementation institution be funded by government in order to effectively publicise, promote and educate the construction industry as to the existence of the Act and how it should operate.

One of the interviewees commented that:

"…the implementation of the legislation has been quite poor in those states that have nationally relaxed government intervention".

Thus, it is necessary that the government provide needed support for the effective implementation of the legislation. Where this institutional support is not provided, the effectiveness of the legislation may be undermined.

In summary, the above-mentioned institutional factors are critical to effective statutory adjudication implementation. Where these four key significant factors are absent, the statutory adjudication implementation cannot be successful.

7.7.2 The facilitatory factors

Apart from the institutional factors, other enabling elements for successful implementation of statutory adjudication legislation have been categorised under the drivers and enablers of effective implementation. The drivers are those factors that

encourage successful implementation while the enablers are those factors that help to overcome potential barriers that can undermine the effectiveness of the legislation. Based on the analysis, the following factors emerged as drivers of effective implementation: (i) easy accessibility; (ii) procedural clarity; (iii) adequate knowledge of the legislation by the users; (iv) availability of adequate and qualified adjudicators; (v) vibrant institutions; (vi) procedural fairness; (vii) reasonable cost; (viii) reasonable time-frame; (ix) supportive court for easy enforceability; and (x) vibrant implementing institution for the general administration process. These factors have been explained in Table 16 and section 7.6.4.

Participant 3 advised that: *"It is important that the adjudication process result in the conclusion that the processes and procedures are fair. Win or lose, prevail or fail, a party should never be able to viably claim - or have the internal belief - that the processes and procedures were unfair or not done right. The parties should have the feeling that the adjudication was done right, that the process was fair, and that the adjudicator reached a just result. If these views prevail, confidence in the statutory scheme should grow within the construction industry and among industry stakeholders. As a result, more and more people will feel comfortable taking their dispute to adjudication and voluntary compliance with adjudication decision should follow".*

The statement made in *Balfour Beatty Construction Ltd v the Mayor and Burgesses of the London Borough of Lambeth*[22] support the fact that fairness would instil confidence in user. The following comments were made:

"It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself a considerable weight and impact that in practice goes beyond the legal requirement that the decision for the time being has to be observed. Lack of impartiality or fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still

[22] [2002] BLR 288

made in a basically fair manner so that the system itself continues to enjoy the confidence it has apparently earn".

It is clear from the above statement that fairness, impartiality and other drivers of effective implementation already mentioned are capable of building confidence in people, enhance voluntary compliance with adjudication decisions and thereby guarantee effective statutory adjudication implementation.

The other success factors are termed enablers. These are the factors that must be available for continual effective functioning of the adjudication system and which would also help to prevent barriers to continuous usage. They are explained below.

i. **Creation of good impression through quality decision**

First impression can be created through production of a quality decision that is enforceable in the Court. Gary *et al*., (2012) referring to the work of Rabin and Schrag (1999) advice that the initial reactions of key stakeholders around new measures provide very good indicators of its future performance. Thus, to maintain the standard of the adjudication process and adjudicator quality, some of the recommendations from the Wallance (2013) and Colllins (2012) report may be adopted:

"An intensive and detailed training course should be successfully completed before any person can qualify to act as an adjudicator and exercise functions under the legislation"

"Adjudicators' training and refresher courses should be devised and conducted by an independent neutral and competent body qualified to do so"

"In consultation with industry stakeholders, the elements necessary to obtain an adjudication qualification,… should contain at least the following elements:

- *Overview of the law of contract;*
- *Analysis of common standard form building contracts;*
- *Analysis of costs and claims in the building and construction industry;*
- *Detailed analysis of building construction claims and contractor entitlements;*
- *An overview of the law of building and construction; and*
- *A detailed analysis of the ethical obligations of an adjudicator.*

"Adjudicators should be registered and appropriately graded according to their skills, experience and qualifications".

In addition, there is adjudicator code of conduct in which an adjudicator may be suspended in the event that:

- *An adjudicator has been found by a Court to have made a jurisdictional error or denied the parties procedural fairness. In that instance the adjudicator must advise the registrar in writing within 7 days of receipt of the Court decision and the registrar will not further appoint the adjudicator unless satisfied that the cause of the error has been resolved.*
- *Any adjudicator found by a Court to have acted not in good faith in performing the role of an adjudicator, must advise the registrar in writing within 7 days of receipt of the Court decision and shall be called upon by the registrar to show cause why their registration should not be suspended or cancelled; and*
- *Any adjudicator found by a Court to have acted not in good faith in performing the role of an adjudicator twice in a 5 year period, must advise the registrar in writing within 7 days of receipt of the Court decision and shall be called upon by the registrar to show cause under the Act why their registration should not be cancelled.*

Adopting some of these recommendations may go a long way in preserving the integrity of the adjudication system in SA.

ii. **Good coordination -** Proper coordination of the adjudicator, proper coordination of ANAs and effective administration of adjudication processes are key enablers that can prevent barriers to continuous usage of adjudication process.

iii. **Good practices -** Ensuring good practices that can prevent barriers include; (i) continual capacity building; (ii) constant education and training; (iii) publicity and awareness creation; (iv) reports on statistics and general information dissemination; (v) provision of constant information on any change in case law; and (vi) provision of information on use and success rates.

iv. **Good management** - This involve maintaining the standard of the adjudication process, ensuring that the quality of the adjudicators are not compromised through

mentoring and monitoring, ensuring reasonable cost of adjudication and creation of facility for effective implementation.

v. **Procedural and substantive justice in the adjudication scheme - Procedural** justice is a key enabler in successful implementation of adjudication. Coggings (2010) refers to procedural justice as the justice of the processes or methods used to arrive at outcome or determination. The perception of justice in an adjudication process has a long way in promoting its effectiveness. In fact, mere perception of procedural and substantive justice has a way of encouraging more usage. Some of the outcomes of procedural justice as highlighted in Coggings (2011) are:

- A mutual satisfaction of the parties with the adjudication determination;
- A willingness of the disputing parties to settle;
- Feeling of trust;
- Cooperation;
- Commitment towards outcome.

Thus, procedural justice is one of the essential elements needed for a successful statutory adjudication implementation. Perceived fairness in the adjudicators' appointment and greater transparency in the administration process would enhance greater acceptability of adjudication determination and encourage more usage.

Thus, the availability of both the institutional and facilitatory factors are the driving forces for the realization of effective statutory adjudication practice in SA. On the one hand where the facilitatory and institutional factors are not present the decision to implement adjudication should be aborted. On the other hands, the presence of these factors guarantees effective statutory adjudication implementation.

7.8 Summary

In this chapter, the outcomes of the analysis and the discussion of findings have been presented. Both presentation of results and discussions were done under four themes namely: (i) relevant institutions and their roles in effective statutory adjudication implementation; (ii) critical challenges to effective implementation and ways of combating the challenges; (iii) institutional requirements for effective statutory adjudication implementation; and (iv) enablers of successful statutory adjudication practice.

The findings reveal that institutions play a critical role in the effectiveness of statutory adjudication. The nature and roles of relevant institutions involved in the implementation have been discussed. It was revealed that where these roles are non-performed or under-performed, the effectiveness of the legislation is not guaranteed. Several challenges that can impinge upon the effective functioning of adjudication and possible ways of combating the challenges were also identified in the study. Finally, the drivers and enablers that can promote a successful statutory adjudication implementation were also highlighted. The findings led to the development of an effective framework for a successful implementation of statutory adjudication in SA.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1. Introduction

The entire study has been undertaken purposely to examine the requirements for the effective statutory adjudication practice in the SA construction industry. In this chapter, a summary of the conclusions and recommendations is presented. The chapter starts with a brief overview of the study objectives and how the objectives were achieved. This is followed by an outline of the summary of the research findings. A number of contributions that the research has made to knowledge are also discussed. Finally, recommendations for further research are made.

8.2. Research overview

The focus of this study was to determine the institutional requirements for an effective statutory adjudication practice, and to develop a framework that will support the pragmatic functionality of statutory adjudication in the SA construction industry. To achieve this aim the following objectives were set:

1. To critically review the current industry status in relation to adjudication practice in SA.
2. To examine the features of the proposed CIDB Payment and Adjudication regulations in comparison with the existing legislations from other jurisdictions.
3. To identify institutions that are relevant and responsible for the successful statutory adjudication implementation, and to highlight their specific roles in the effective implementation of the legislation supporting statutory adjudication.
4. To identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of statutory adjudication.
5. To discover and develop the institutional framework that will enhance the effectiveness of statutory adjudication practice in SA.

Subsections 8.2.1 and 8.2.2 outline how the research objectives were achieved. This is followed by a summary of the research findings in section 8.3.

8.2.1. Objectives one and two

Objectives one and two were achieved through review of previous studies and document analysis, as reported in chapter two of this thesis. Chapter two examined the current SA construction industry status in relation to adjudication practice and also explored the adjudication provisions in the various construction contracts agreements in use in SA. The review disclosed that contractual adjudication has long found acceptance in the SA construction industry. This is evident in the fact that all the forms of contract endorsed by the CIDB incorporated adjudication as an ADR process. Regarding the examination of the adjudication provisions in the endorsed forms of contracts, the findings indicate sufficient contractual provisions, for effective practice of contractual adjudication in SA.

However, despite these provisions in the recommended forms of contracts, it was found that the level of usage of adjudication to resolve disputes is still very low and as such the potential of adjudication has not been fully realised in SA. Certain challenges were identified from the review on the reasons behind the low usage of adjudication provisions in the standard conditions of contract. These challenges are contractual, institutional, legislative and the lack of knowledge of adjudication concepts among industry practitioners. In order to overcome some of these challenges, the industry proposed draft regulations to provide a necessary legal framework for effective adjudication practice in South Africa. The draft regulations, which is believed to provide needed support for increased utilization of adjudication in SA has already been gazzeted for public comments. Hence, the challenge of translating the ideas and policies provided for in the draft regulations into actual execution for the expected outcome now looms large in the SA construction industry.

In the latter part of chapter two, an examination of the key features of the proposed draft regulations in comparison with the existing legislation in the four jurisdictions selected was carried out. It was established that the SA security for payment and adjudication regulation was uniquely different from other jurisdictions legislation in that it is effectively tagged to existing legislation and not to a separate new Act, as practiced in other jurisdictions. The findings reveal that the scope of the legislation,

the application of the legislation, the object of the legislation as well as policy objectives behind the enactment of payment and adjudication legislation differ from one jurisdiction to another. The variability in the scope of application is attributable to policy distinctions regarding the operation of adjudication imposed by each act. One of the common objectives of all the legislation is to get cash flowing in as fair a manner as possible down the hierarchical contractual chains that exist on commercial construction projects as well as providing cheap and speedy resolution to construction disputes through adjudication. From the comparative analysis of the various provisions in the legislation from other jurisdiction, it was discovered that the features within the proposed CIDB payment and adjudication regulations are encompassing enough to provide the necessary legal framework needed for effective statutory adjudication performance in South Africa, if adequately implemented. Thus establishing an appropriate climate for its successful implementation has become crucial, hence the need for this research to inquire into the necessary requirement that will enhance the effective functioning of the proposed regulations.

8.2.2. Objectives three to five

These objectives were achieved through collection and analysis of field data. Using a qualitative research approach informed by the interpretivist paradigm, the qualitative data were collected through interviews and documents. The results of data analysis using the thematic approach were presented in chapter six. Thus, objectives three to five were addressed by themes that emerged from the outcome of the data analysis. Objective three was addressed under theme one, captioned ‘relevant institutions and their roles in the effective implementation’. The theme, ‘critical challenges to effective statutory adjudication practices’ addressed the fourth objective of this study. The last objective, which is objective five, was addressed under themes three and four captioned ‘institutional support for effective implementation’ and ‘enablers of effective statutory adjudication practice’ respectively.

8.3. Findings

The findings of the study were divided into four parts namely, (i) institutions relevance and roles in the effective statutory adjudication practice; (ii) challenges to effective implementation of statutory adjudication; (iii) institutional requirements for effective implementation of statutory adjudication; and (iv) enablers of effective statutory adjudication implementation.

8.3.1. Institutions' relevance and roles in the effective statutory adjudication practice

All the interviewees unanimously agreed that institutions are relevant and their roles are critical to effective implementation of statutory adjudication implementation. The findings revealed that the institutions that are involved in the implementation can be grouped into two groups. The first group is the institutional group and the second group is the organisational group. The institutional group is composed of institutions that perform statutory roles in the implementation process. The organisational group is composed of organisations which have no statutory role in the implementation process but perform supportive roles to enhance effectiveness during implementation.

With regards to perceptions of the participants on the relevance of the identified institutions in the implementation process, all the interviewees agreed that the two most critical institutions in the implementation phases are legal institutions and implementing/authorising institutions. These two institutions are believed to be performing critical roles in the effective implementation of statutory adjudication. The common opinion is that non-performance of any of the two institutions is regarded to be critical and will undermine the effectiveness of the legislation.

Several roles were identified during the research. These roles were classified into seven namely: (i) general administrative and secretarial roles, (ii) publicity and awareness roles, (iii) education and training roles, (iv) information dissemination roles, (v) technical support roles, (vi) financial, sponsoring and approval support roles and (vii) enforcement roles. Each of the classes of roles was seen to have a lot of functions to perform and each must be performed effectively (see section 7.2.2). It

was discovered that some roles are primary roles and are specific to a particular institution while some roles are common to all the institutions. For instance, an enforcement role is specific to a legal institution and cannot be performed by any of the other institutions.

Publicity and awareness were viewed as roles common to all the institutions, and they are significant to effective implementation of statutory adjudication. This is because it is through publicity that important information can be disseminated to stakeholders so that they can make good and proper decisions. The findings revealed that these roles, because of their critical nature, must be performed by all institutions. Different examples of strategies for raising awareness were identified throughout the analysis. These include evening talks, road shows, workshops and seminars on how the adjudication process will work and impact positively on the construction industry. It was also suggested that for the awareness to have an impact on the various stakeholders, different methods must be adopted at different times over a long period of time, rather than creating large, short-term campaigns that would not have a long-lasting impact.

Further, the findings indicate that the rapid acceleration of adjudication implementation in most of the jurisdictions selected for this study was attributed to the publicising, promotion and facilitation of the use of the Acts by the respective governments. Thus, it is recommended that the implementation institution be funded by government in order to effectively publicise, promote and educate the construction industry as to the existence of the Act and how it should operate.

With regard to the perception of the participants on the practices relating to the nomination of adjudicators, the findings revealed that the mode of selection of adjudicators varied from one jurisdiction to another. The study first established that the adjudicator could be selected in one of the following three ways: (i) by direct agreement between parties, (ii) by an ANB chosen by agreement between parties or (iii) by any ANB.

Often, if parties are not able to reach an agreement on the selection of an adjudicator when a dispute arises, nomination through an ANA becomes crucial. Two types of nominating systems were revealed under this study: (i) the single nominating

authority system; and (ii) the multiple nominating authorities' system. Both systems were found to be effective but the single nominating authority system appears much preferred than the multiple nominating authorities. The perceived advantages of the single nominating system over the multiple nominating bodies are outlined in section 7.2.2.

Information was gathered on the views of the interviewees on whether the implementing institution should be under an existing government institution or be outsourced to an independent organisation such as an existing arbitral organisation. Most of the responses favoured the use of independent institutions. Certain advantages were highlighted by the interviewees having preference for independent institutions. The perceptions of the interviewees were that the independent institutions are well equipped with good professional experience, high competency levels, expertise, qualified and adequate resources, etc. These qualities are believed to increase the users' confidence in the process, and lead to greater acceptability. In addition, there was the perception that government institutions may not be suitable for disputes that involve the government. As such, there was the perception that independent institutions will also improve fairness, there would be neutrality and impartiality, transparency in nominating adjudicators, the possibility of using a roster system and availability of competent resources (experienced adjudicators to handle complex cases). The participants, however, noted the possibility of failure if the single authority is inefficient, ineffective and/or incompetent. This, according to some of the interviewees, should be carefully considered in SA when choosing the type of nominating authority.

8.3.2. Critical challenges to effective implementation and ways of combating them

All the interviewees noted that the effective implementation of statutory adjudication could be threatened when there are challenges. Various challenges were reported that could impair the effectiveness of the adjudication process. These challenges identified were (i) lack of familiarity with the legislation; (ii) challenges relating to contents of the Act; (iii) procedural challenges; (iv) jurisdictional challenges; (v) capacity challenges; and (vi) legal technicalities challenges (see section 7.3). The

perception of the participants is that some of these challenges arise from poor drafting, court interference, drafting inconsistency and low level of knowledge.

Possible ways of avoiding these aforementioned challenges were suggested. For instance, to prevent fees challenges, the use of regulated standard schedule of fees was suggested. This standard schedule would take into account (i) the quality of professionalism required; (ii) timeline required to complete the adjudication; and (iii) the claim amount required. In the same vein, various means to prevent other identified challenges were suggested including: (i) good accessibility to the legislation; (ii) provision of interpretation by court (iii) training and education; and lastly (iv) institutional intervention (see Table 11).

8.3.3. Institutional support needed for effective implementation of adjudication practice

The findings revealed four institutional supports that must always be extant for successful implementation. These are: (i) the object of the legislation; (ii) the court support; (iii) default nominating authority and (iv) government support. The consensus was that absence of any of these four institutional supports will negatively influence the effective implementation of statutory adjudication.

8.3.4. Enablers of effective statutory adjudication

Several factors that could promote effective implementation of statutory adjudication were revealed from the analysis of the interview data. The identified factors were then grouped into two. The factors that encourage or reinforce effective implementation were grouped under "drivers of an effective implementation", while those factors which can assist in overcoming the potential barriers were grouped under "enablers of an effective statutory implementation". The factors that came under the drivers of effective implementation were: (i) easy accessibility; (ii) procedural clarity; (iii) increased knowledge; (iv) availability of adequate and qualified adjudicators; (v) vibrant institutions; (vi) procedural fairness; (vii) reasonable cost; (viii) fairness; (ix) strict timeline; (x) availability of facilities when hearing; and (xi) supportive court and default nominating body/bodies.

The findings revealed that the presence of success factors termed drivers would encourage and reinforced maximum participation from the industry stakeholders. Thus attributes such as speed, reasonable adjudication cost, quick and easy enforcement etc. would go a long way in reinforcing the effectiveness of statutory adjudication practice. Also, the participants suggested success factors that can prevent barriers to continuous usage. This success factor is termed enabler and it includes: (i) good coordination; (ii) good practices; (iv) good management of innovation process; (v) procedural and substantive fairness and (v) creation of good impression through consistence performance.

The suggestions were that both enablers and drivers are key factors to successful implementation of statutory adjudication and where these are absence the successful implementation is not guaranteed.

8.3.5. The framework for effective statutory adjudication practice in the SA construction industry

One major contribution of this study is the development of a framework for effective statutory adjudication practice in SA. The development of the framework was based on the findings from the analysis. Thus, two factors were identified as key requirements for the effective statutory adjudication implementation in SA. The first factor is institutional while the other is facilitatory. Under the institutional factor, there are four important components, namely: (i) the object of the legislation; (ii) default nominating authority; (iii) legal institutional support; and (iv) government support. This has been explained in detail under section 7.7. Without these four key significant factors, the statutory adjudication implementation will not be effective. The facilitatory factor includes the drivers and enablers which are equally important for the effective implementation of statutory adjudication in SA. Both the drivers and enablers are also jointly referred to as success factors. In order to use the framework effectively, the decision criteria stated under each factor in section 7.7 should be carefully considered.

8.4. Contribution to knowledge

Mante (2014) referring to the study of Wellington (2010) explained that an original contribution to knowledge is a key criterion in judging doctoral research. Several ways of demonstrating originality in research include: (i) conducting an empirical study that has not been previously done; (ii) applying a new approach to existing areas; (iii) employing a well-known technique to studying a new subject; or (iv) using a combination of different methods in a study or replicating an earlier study. This study has contributed substantively to the body of knowledge on construction dispute resolution practice, particularly in SA. Prior to this inquiry, there was no known empirical research which specifically examined the institutional roles in the effective statutory adjudication practice. This study has provided empirical evidence which addresses some of the gaps identified in the literature. For instance, the literature identified institutional challenge as a potential barrier to effective implementation of statutory adjudication in SA. There was a dearth of information on what those institutional barriers are and the possible ways of avoiding them. By investigating the institutional relevance and roles in effective statutory adjudication implementation, this study has made available new insight into the relevance of institutions and criteria for choosing a suitable institution for effective practice.

Again, this study has provided a critical evaluation of major challenges that can threaten the effective statutory adjudication implementation. It was found that drafting inconsistency (legislation content issues), unnecessary interference and ignorance are main causes of challenge to effective implementation. This implies that, if priority is given to proper drafting of the legislation in a clear, simple and understandable manner, and the issues of ignorance is dealt with through rigorous publicity and creation of awareness, adjudication becoming the most effective dispute resolution in the SA construction industry has great possibilities.

The interviewees who participated in this study (drawn from the UK, Malaysia, Singapore and Australia) are all experienced professionals, and have been particularly involved in the implementation of statutory adjudication in their jurisdictions. These professionals are considered experts with in-depth knowledge of the adjudication process and procedure. Thus, their contributions could be viewed as holistic, which add credibility to the research findings. Through the contributions of these professional, the study has been able to explore the institutional and facilitatory factors for effective implementation. Thus their contributions

have indicated that the realisation of the potential of statutory adjudication depends not only on legislative framework but requires institutional and facillitatory factors for it to thrive.

The study has employed the use of combined methodology (interviews and literature) to identify the factors that can enable the successful implementation of statutory adjudication practice in the SA construction industry. The findings led to the development of framework for successful implementation of adjudication in South Africa. Thus, this study has hopefully provided useful empirical evidence with regard to the effective operation of statutory adjudication practice in SA. The findings in this research should benefit the SA construction industry and may also serve as a guide to other jurisdictions contemplating introducing statutory adjudication.

8.5. Recommendations for future research

This study has been conducted on the roles of institutions in the successful adjudication practice. It is recommended that a comparative analysis of institutional impact be carried out on the adjudication implementation process from different jurisdictions. It is also recommended that the qualitative findings of this research be carried out with a larger sample of users of prompt payment and adjudication legislation. With this, the findings may be used as a guide by other jurisdictions in their adjudication implementation process.

The study further recommended that the proposed SA draft regulations should be critically reviewed in the light of the framework for the effective statutory adjudication implementation that was developed in this study in order to establish the extent to which the proposed draft regulations meet the identified institutional and facilitatory requirements.

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APPENDIX 'A': INTERVIEWEES PROFILES

Participant 1

This interviewee holds a bachelor's degree in law and a graduate diploma in International Commercial Arbitration. With over 15 years of experience as a practicing solicitor, she holds a key position in the institution that deals specifically with statutory adjudication implementation in Malaysia. She practices as an arbitrator, a construction law barrister and as a legal advisor to contractors' and subcontractors' organisations on the practice and procedure of adjudication. She frequently talks at seminars, conferences and evening lectures on construction law and dispute resolution.

Participant 2

This interviewee holds a bachelor degree in law and has 15 years of experience in ADR processes. She is a practicing lawyer and was actively involved in the implementation of CIPAA 2012 in Malaysia. She has written a number of papers on construction adjudication and she is a regular speaker at seminars, evening talks and conferences.

Participant 3

This interviewee holds a bachelor's degree in Art and a diploma certificate in International Commercial Arbitration. He has 15 years of experience in the construction industry and practices as arbitrator, mediator and adjudicator. He holds several professional memberships including: Member International Bar Association (MIBA), Member International Centre for Dispute Resolution and Chartered Institute of Arbitrators. He is an adjudicator with the KLRCA adjudication panel and was actively involved in the CIPAA 2012 implementation. . He is on the Approved Faculty List of CIArb for Tutors, Examiners, Assessors, and Moderators and active in the KLRCA's Adjudication Training Programme for CIPAA, 2012.

Participant 4

This interviewee may be regarded as a leading adjudicator due to his vast experience in adjudication. He holds a bachelor's degree in quantity surveying and a master's degree in construction law and dispute resolution. He is a legally qualified (LLM) Chartered Quantity Surveyor and Chartered Project Management Surveyor with over 35 years industry experience. He is a sole practitioner, a full time arbitrator and adjudicator. He is a practising international arbitrator and an accredited Adjudicator in both the UK and Malaysia and has been an adjudicator since the UK started adjudication in 1998. He has been involved in more than 100 adjudications either as Adjudicator or as Party Representative. He is a fellow and council member of the Malaysian Society of Adjudicators (MSA). He is also an adjudicator with a number of adjudication panels.

Participant 5

This interviewee holds a bachelor's degree in law and a master's degree in Business Administration. He is an advocate and solicitor in Malaysia and has been practising for 13 years. His practice mainly focuses on arbitration, adjudication and litigation in construction and engineering related disputes. He regularly sits as an arbitrator and adjudicator, and is on the KLRCA's panel of arbitrators and adjudicators. In addition, he is also a selected Tutor for the KLRCA CIPAA Adjudication Training Courses and is a fellow of the Malaysian Society of Adjudicators (MSA). He occupies a key position from different professional bodies. In adjudication he acts primarily as a party representative in adjudication proceedings and legal advisor to his client on the various strategies in pursuing construction claims. He has recently co-authored a book on construction adjudication.

Participant 6

This interviewee is a prominent construction contract specialist in Malaysia. He holds bachelor's degree in quantity surveying and has over 30 years of experience in construction law. He is an adjudication expert and he was deeply involved in the legislative process of CIPAA 2012. He has published numerous books on construction law and articles in trade journals.

Participant 7

This interviewee holds a bachelor's degree in philosophy and a diploma certificate in law. She practices as barrister and arbitrator as well as mediator. She is a trainer in ADR including adjudication and arbitration with over 25 years of professional experience. As a professional in ADR, she has worked in many countries including the UK, Singapore, Hong Kong, Malaysia and several states in Australia. She is mainly involved in adjudication as legal representative and also involved in the training of adjudicators as trainer and mentor. She is an active member of a number of significant industry associations, including the Australian Branch of the Chartered Institute of Arbitrators (CIArb), the Australian Centre for International Commercial Arbitration (ACICA), Fellow of the Institute of Arbitrators and Mediators Australia (IAMA), Fellow of the Chartered Institute of Arbitrators (CIArb) and Fellow of the Commercial Law Association of Australia (CLAA). She is a regular speaker on construction law, arbitration and adjudication issues at conferences and seminars. She has more than 60 published books and papers on construction law and adjudication.

Participant 8

This interviewee holds bachelor's degree in Mechanical engineering and law. He is a registered professional and chartered engineer and practices as a mediator/conciliator, adjudicator and arbitrator with 20 years of experience in the construction industry. He was a key player in the legislative process and implementation of CIPAA 2012. He is also involved in the training of adjudicators in Malaysia. He is a regular contributor to professional publications and a regular speaker at courses, seminars and conferences. He has authored a number of books on construction law and dispute resolution.

Participant 9

This interviewee holds bachelor's degree in building and law. He is an associate professor at a University in Singapore, where he handles courses on contract law and project dispute management. In addition to his academic duty, he practices as an advocate and solicitor, and quantity surveyor. He has about 30 years' experience in the construction claim industry in

Singapore and is involved in adjudication mainly as adjudicator, legal representative and legal advisor. As an academic, he has published 2 books on construction law and dispute resolution.

Participant 10

This interviewee holds a bachelor's degree in law and diploma in International Arbitration and has 15 years of experience in ADR. He practices as an adjudicator, arbitrator and mediator. He is on the panel of adjudicators of the KLRCA. He is also a selected Tutor for the KLRCA CIPAA in Adjudication Training and practical courses. He is a regular speaker on ADR in conferences, workshops and adjudication seminars. He has authored several publications on construction law and dispute resolution. He also lectures on construction law and dispute resolution at a college in Kuala Lumpur, Malaysia.

Participant 11

This interviewee holds a bachelor's degree in law and has 10 years of professional experience. He is primarily involved in the administration of the adjudication process in his country. In addition to his administration works, he regularly conducts research, draws out papers and presentations for continued education, training and development of the institution dealing with the implementation of statutory adjudication in his country.

Participant 12

This interviewee is a highly experienced professional with exemplary academic and professional qualifications. He holds a bachelor's degree in quantity surveying, and also holds a master's degree in construction management and a PhD degree in construction law and dispute resolution. He is a qualified Chartered Quantity Surveyor and Chartered Construction Manager (UK) and Registered Quantity Surveyor (Malaysia). He also holds various professional memberships, namely MRICS, MCIArb, MCIOB and MRISM. As an academic, he has specifically handled and taught various causes on contract administration, claims and disputes settlement, standard forms of contracts, arbitration and adjudication at both undergraduate and post graduate levels. He also conducts research in construction law

and dispute resolution (mainly on statutory adjudication). Besides his academic duty, he practices as an adjudicator and has about 10 years of experience in adjudication. He has published several papers on construction law and dispute resolution (specifically adjudication) in leading academic and trade journals.

Participant 13

This interviewee holds a bachelor's degree in civil engineering and a master's degree in construction law and arbitration. He specializes in construction related disputes and commercial disputes. He is a chartered arbitrator with CIArb and practices as an arbitrator and an adjudicator. He has 25 years of experience and has been an active consultant in dispute resolution to the construction industry of his country due to the recognition of his deep understanding of the dispute resolution process together with his construction law and commercial law knowledge. He holds membership of various professional bodies including FCIArb and FMIArb. He is a regular speaker at conferences, seminars and evening talks.

Participant 14

This interviewee may be regarded as a key figure and leading adjudicator in the Australian construction industry due to his active involvement in the implementation of statutory adjudication in Australia. He is a barrister-at-law and an accredited adjudicator under the Building and Construction Industry Security of Payment Act 1999 (NSW), Building and Construction Industry Security of Payment Act 2002 (VIC), Building and Construction Industry (Security of Payment) Act 2009 (ACT), Building and Construction Industry Security of Payment Act 2009 (TAS) and registered adjudicator under the Building and Construction Industry Payments Act 2004 (Qld). He holds a bachelor's degree in law and has over 25 years of experience in the construction industry. He practices as a construction law barrister, mediator and adjudicator. He played a key role in the government/ industry review of the security of payment legislation contained in the Building and Construction Industry Payment Act 2004 (BCIPA). He has presented several papers (predominantly on statutory adjudication) in seminars and conferences and also holds a membership of several professional bodies.

Participant 15

This interviewee holds a bachelor's degree in quantity surveying, a master's degree in building and construction law and a PhD in law. He is an academic at an Australian university, where he teaches contract administration. He has over 27 years of experience and he is a member of a number of professional organisations including, the Royal Institution of Chartered Surveyors (RICS), Society of Construction Law Australia (SCL) and the Australian Institute of Quantity Surveyors (AAIQS). He is an active researcher with specific research interest on statutory adjudication. He has conducted several research studies on statutory adjudication from different jurisdictions including Australia, Malaysia, UK and Singapore. He has published numerous papers on statutory adjudication in leading academic journals.

APPENDIX 'B1': SAMPLE OF INTERVIEW GUIDE

Research Topic: Requirements for the Effective Statutory Adjudication practice in the South African Construction Industry

Objectives:

1. To identify institutions that are relevant and responsible for the successful statutory adjudication implementation and highlight their specific roles in the effective implementation of the legislation supporting statutory adjudication;
2. To identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of adjudication in the SA construction industry; and
3. To determine institutional requirements and develop an implementation model that will enhance the effectiveness of statutory adjudication in SA

Background information

Position of the interviewee:

Number of years of experience:

Date of interview:

Profession of the interviewee:

Section 1: Institutional roles

1. A close look at the practice of adjudication in countries where it has been adopted as an alternative dispute resolution process and where it has proved effective reveals that one of the key indispensable elements for its success is vibrant institutional support. Based on your experience, what are the specific roles of institutions in the effective implementation of the legislation supporting statutory adjudication?

2. Are there any specific agency/ agencies involved in the implementation of the legislation in your country? If yes, what specific roles are performed by this agency or these agencies in the realisation of the provisions of the legislation and in sensitising industry stakeholders in order to ensure implementation of the legislation?

Section 2: Implementation challenges

3. Past studies in some of the countries where a Payment and Adjudication Act has been in place revealed that the initial stages of the implementation of statutory adjudication face a lot of teething problems and certain challenges. Based on your knowledge and experience, what would you say are the teething problems to the effective implementation of the legislation and how can they be overcome?

4. Apart from the teething problems, what are the critical challenges that could impair or threaten the realisation of the benefit of statutory adjudication? How can these challenges be prevented or in cases where they occur, how can they be resolved?

Section 3: Institutional support and implementation requirements

5. The interpretation, accessibility and understanding of a policy are essential elements in any policy implementation. What practical efforts were put in place in order to ensure the correct interpretation, easy accessibility and practical understanding of the Act by the industry stakeholders who are the intended beneficiaries of the Act?

6. What impacts do the above elements have in the effective implementation, acceptance and usage of the provisions in the Act by the industry stakeholders?

7. What institutional support and implementation requirements do you think must be in place for the effective realisation of adjudication practice?

8. What impacts do the following play in the implementation and usage of the provisions of the legislation: (i) awareness about the Act by various industry stakeholders; (ii) provision for skill and training of adjudication and; (iii) institutional networking?

9. Are there specific features in your country's Payments and Adjudication Act that aid effective implementation and more effective usage?

10. What do you think must be done in order to make government and contracting parties cooperate in making payment and adjudication regulations work?

11. Are there any implementation processes structured to enhance compliance by the industry stakeholders (e.g. sanctions).

12. Is there anything else the interviewee would like to share which can generally aid the maximum cooperation of construction stakeholders with the proposed regulations and also ensure the effectiveness of statutory adjudication in South Africa?

Thank you for sparing your time despite the very tight schedule of your workday!

APPENDIX 'B2': INITIAL INTERVIEW GUIDE

Requirements for the Effective Statutory Adjudication practice in the South African Construction Industry

Objectives:

1. To identify the roles of institutions in the effective implementation of adjudication;
2. To identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of adjudication in the SA construction industry; and
3. To determine institutional requirements and develop an implementation model that will enhance the effectiveness of statutory adjudication in SA

Section 1: Background information

Position of the interviewee:

Number of years of experience:

Date of interview:

Profession of the interviewee:

Section 1: Institutional roles

1. A close look at the practice of adjudication in countries where it has been adopted as an alternative dispute resolution process and where it has proved effective reveals that one of the key indispensable elements for its success is vibrant institutional support. Based on your experience, what are the specific roles of institutions in the effective implementation of the legislation supporting statutory adjudication?

2. Are there any specific agency/ agencies involved in the implementation of the legislation? If yes, what specific roles are performed by this agency or these agencies in the realisation of the provisions of the legislation and in sensitising industry stakeholders in order to ensure implementation of the legislation?

Section 2: Implementation challenges

3. Past studies in some of the countries where Payment and Adjudication Act has been in place revealed that the initial stages of the implementation of statutory adjudication face a lot of teething problems and certain challenges. Based on your knowledge and experience, what would you say are the teething problems to the effective implementation of the legislation and how can they be overcome?
4. Apart from the teething problems, what are the critical challenges that could impair or threaten the realisation of the benefit of statutory adjudication? How can these challenges be prevented or in cases where they occur, how can they be resolved?

Section 3: Institutional support and implementation requirements

5. The interpretation, accessibility and understanding of a policy is essential elements in any policy implementation. What practical efforts were put in place in order to ensure the correct interpretation, easy accessibility and practical understanding of the Act by the industry stakeholders who are the intended beneficiary of the Act?

6. What impacts do the above elements play in the effective implementation, acceptance and usage of the provisions in the Act by the industry stakeholders?

7. What institutional supports do you think must be in place for the effective realisation of adjudication practice?

8. What impacts do the following play in the implementation and usage of the provisions of the legislation: (i) awareness about the Act by various industry stakeholders; (ii) provision for skill and training of adjudication and; (iii) institutional networking?

9. What are other key elements (requirements) that are to be put into consideration for effective statutory adjudication practice?

10. Are there specific features in your country's Payments and Adjudication Act that aid effective implementation and more usage?

11. What do you think must be done in order to make government and contracting parties cooperate in making payment and adjudication regulation work?

12. Are there any implementation processes structured to enhance compliance by the industry stakeholders (e.g. sanctions).

13. Is there anything else the interviewee would like to share which can generally aid the maximum cooperation of construction stakeholders with the proposed regulations and also ensure the effectiveness of statutory adjudication in South Africa?

Thank you for sparing your time despite the very tight schedule of your workday!

APPENDIX 'B3': ADJUSTED INTERVIEW GUIDE

Research Topic: Requirements for the Effective Statutory Adjudication practice in the South African Construction Industry

Objectives:

1. To identify institutions that are relevant and responsible for the successful statutory adjudication implementation and highlight their specific roles in the effective implementation of the legislation supporting statutory adjudication;

2. To identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of adjudication in the SA construction industry; and

3. To determine institutional requirements and develop an implementation model that will enhance the effectiveness of statutory adjudication in SA

Background information:

Position of the interviewee:

Number of years of experience:

Professional background of the interviewee:

Interviewee involvement in adjudication (e.g. as adjudicator, as legal representative etc.):

Section 1: Institutional roles

1. A close look at the practice of adjudication in countries where it has been adopted as an alternative dispute resolution process and where it has proved effective reveals that one of the key indispensable elements for its success is vibrant institutional support. Based on your experience, what are the specific roles of institutions (e.g. implementation institution such as nominating authorities, government institution such as Construction Industry Development Board (CIDB); Legal Institutions e.g. Court and Professional Institutions) in the effective implementation of the legislation supporting statutory adjudication?
2. In your view, which one do you think would be much beneficial (i) A single adjudication authority (that is, having only one institution in charge of adjudication

implementation); (ii) Multiple adjudication authorities (that is, having more than one adjudication nominating authorities)? Please comment on your answer.

3. In your view, should the organization in charge of adjudication implementation be an independent institution or should it be under existing government institution in charge of construction issues? Please comment on your answer.

Section 2: Implementation challenges

4. Past studies in some of the countries where a Payment and Adjudication Act has been in place revealed that the initial stages of the implementation of statutory adjudication face a lot of teething problems and certain challenges. Based on your knowledge and experience, what would you say are the teething problems to the effective implementation of the legislation and how can they be overcome?

5. Apart from the teething problems, what are the critical challenges that could impair or threaten the realisation of the benefit of statutory adjudication? How can these challenges be prevented or in cases where they occur, how can they be resolved?

Section 3: Institutional support and implementation requirements

6. The interpretation, accessibility and understanding of a policy are essential elements in any policy implementation. What practical efforts were put in place in order to ensure the correct interpretation, easy accessibility and practical understanding of the Payment and Adjudication Act by the industry stakeholders who are the intended beneficiaries of the Act?

7. What institutional support and implementation requirements do you think must be in place for the effective realisation of adjudication practice?

8. Are there specific features in your country's Payments and Adjudication Act that aid effective implementation and more effective usage? 9. What do you think must be done in order to make government and contracting parties cooperate in making payment and adjudication regulations work?

9. Are there any implementation processes structured to enhance compliance by the industry stakeholders (e.g. sanctions).

10. Is there anything else the interviewee would like to share which can generally aid the maximum cooperation of construction stakeholders with the proposed regulations and also ensure the effectiveness of statutory adjudication in South Africa?

Thank you for sparing your time despite the very tight schedule of your workday!

APPENDIX 'C': SAMPLE OF LETTER OF REQUEST

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Department of Construction Economics
Tel: 012-420 4972
Fax: 012-420 3598

13 November 2015

Dear Sir,

Mewomo, Modupe is a PhD student in Quantity Surveying at the Department of Construction Economics in the University of Pretoria, South Africa. She is currently undertaking a research on **"Requirements for the Effective Statutory Adjudication Practice in the South African Construction Industry".** The purpose of the research is to determine the institutional requirements that will support adjudication and to also develop an implementation model that can ensure the effective functioning of statutory adjudication in the South African construction industry.

The research requires that she conducts interview with experts in jurisdictions where statutory adjudication is in existence, preferably through Skype. In recognition of your expertise in relation to statutory adjudication implementation and as someone who has actively involved to a great extent as far as adjudication is concerned in Australian construction industry, you have been recognised as someone who can give full insight and provide first-hand information for this research and as such, we kindly request your participation in this research.

We will be appreciative if you could spare about 30 minutes of your time to share your invaluable knowledge and experience through one-on-one interview to be guided by the interview protocol.

With regards to any queries, please do not hesitate to contact modupe.mewomo@up.ac.za

Thank you in advance for your favourable consideration of this request

Professor M.J. Maritz
Head of Department/ Supervisor
Email: Tinus.Maritz@up.ac.za
+27 12 4202581

APPENDIX 'D': ETHICAL APPROVAL

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Reference Number: EBIT/97/2015 02-Nov-2015

Modupe MC Mewomo
Construction Economics
UNIVERSITY OF PRETORIA

Dear Mewomo,

FACULTY COMMITTEE FOR RESEARCH ETHICS AND INTEGRITY

Your recent application to the EBIT Ethics Committee refers.

1. I hereby wish to inform you that the research project titled *"Requirements for the effective statutory Adjudication Practice in the South African construction Industry"* has been approved by the Committee.

   This approval does not imply that the researcher, student or lecturer is relieved of any accountability in terms of the Codes of Research Ethics of the University of Pretoria, if action is taken beyond the approved proposal.

2. According to the regulations, any problem arising from the study or research methodology must be brought to the attention of the Faculty Ethics Committee via the Faculty Ethics Office.
3. The Committee must be notified on completion of the project.
   Approval is granted for the duration of the project or for a period of two years from the date of this letter, whichever is shorter. Please note that any amendments or changes must be approved by the Ethics Committee, and that the applicant should apply for these via the online ethics system.

   The Committee wishes you every success with the research project.

(System-generated letter without signature. Please contact the EBIT Ethics Office should you need a papercopy with signature)

Prof. J.J. Hanekom
Chair: Faculty Committee for Research Ethics and Integrity
FACULTY OF ENGINEERING, BUILT ENVIRONMENT AND INFORMATION TECHNOLOGY

APPENDIX 'E': INTERVIEW PROTOCOL

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Department of Construction Economics

Tel: 012-420 4972

Fax: 012-420 3598

29 October 2015

Interview protocol

This section is part of an on-going PhD research on **"Requirements for the Effective Implementation of Statutory Adjudication in South Africa"**. The concept of adjudication was introduced into the South African construction industry as a result of payment default which is one of the crippling constraints to effective project delivery as well as a major cause of disputes within the South African construction industry.

Failure by clients to pay contractors within the stipulated time has, in certain instances, resulted in slow service delivery, poor quality of infrastructure, poor performance of contractors, demise of contractors due to severe negative cash flow, risk of unfinished projects and interest charges being incurred and not properly accounted for in the project cost. In effect, the general poor payment practices and unpredictability of payments in the industry has not only given rise to substantial additional financing and transactional cost but has also generated an extremely negative contracting environment. As such, disputes are not uncommon within the construction industry.

In recognition of the negative consequences of default payment and the fact that the problem of dispute within the construction industry in South Africa is an acute reality that requires a timeous and durable solution, Prompt Payment Regulations and Adjudication Standards were proposed by the CIDB. The introduction of the regulations into the South African construction industry was premised on the need to facilitate payments, outlaw unfair payment terms and establish a cheaper, swifter and binding alternative dispute resolution. Recent events in the industry reveals that the draft regulations prepared in support of adjudication practice in South Africa has been gazetted for public comment and may soon receive final approval. The aim of this research therefore is to determine the institutional requirements that will support the pragmatic functionality and effectiveness of statutory adjudication in the South African construction industry. To achieve the aim, the study focuses on identifying the roles of institutions in the effective implementation of adjudication; identifying and characterizing critical implementation challenges that could impair or threaten the realization of the benefits of adjudication; determining institutional requirements for its efficiency and finally developing an implementation model that will enhance the effectiveness of statutory adjudication practice in South Africa.

This research being qualitative in nature generated open ended questions which require novel solutions from key knowledgeable stakeholders in a country where similar legislation has been implemented. The Malaysian construction industry has been chosen due to the fact that it is the latest country that has brought into force legislation providing for the mandatory adjudication of construction payment disputes and had also undergone several challenges before the legislation eventually came into force in April 15, 2014.

In recognition of your key position in the Malaysian construction industry and especially as someone who has been actively involved to a great extent as far as adjudication is concerned in Malaysian construction industry, you have been recognised as someone who can provide first-hand information for this research and as such, we request your kind participation in this research.

We will be appreciative if you could spare about 30 minutes of your time to share your invaluable knowledge and experience through a one-on-one interview to be guided by this protocol. Attached are the informed consent form and an interview guide. The informed consent form contains additional information about this research. There is a portion in the

consent form that requires the signature of both the student and the interviewee. You may kindly append your signature after going through the consent form.

The plan is to conduct the interview via Skype. However, you may choose to send specific information by way of reports or answers to those questions in the interview guide preceding the day of the interview. Soon after, the Skype interview can be conducted where some more general questions on statutory adjudication practice will be asked. Based on the research schedule, the interview is expected to be conducted between 10th November and 31st December 2015. We request that you check on your schedule for the most appropriate date and time for you which the interview can be arranged for and kindly communicate this to me via my email. With your permission, the said interview will be audio-recorded and subsequently transcribed. This is to ensure that the interviewee's contributions are accurately captured. The interviewee's right to refuse to answer any of the questions remains intact and shall be respected. Parts of the data collected (the source of which shall remain anonymous) may be used for the purposes of academic publications. There are no known risks, current or anticipated, to you as a participant in this research.

Be assured that your participation is highly valued and will be treated with utmost confidentiality. Should you require a copy of the research, it would be an honour to share it with you upon your request.

Thank you in advance for your cooperation.

Best regards,

Modupe Mewomo
PhD student

Professor M. J. Maritz
Head of Department/Supervisor

APPENDIX 'F': INFORMED CONSENT FORM

(Form for research subject's permission)

(Must be signed by each research subject, and must be kept on record by the researcher)

1 Title of research project: **Requirements for the effective statutory adjudication practice in the South African construction industry.** The aim of this research is to determine the institutional requirements that will support the pragmatic functionality and effectiveness of statutory adjudication in the South African construction industry.

2 I …… hereby voluntarily grant my permission for participation in the project as explained to me by Mewomo Modupe Cecilia

……..

3 The nature and objectives have been explained to me and I understand them (see the interview protocol).

4 I understand my right to choose whether to participate in the project and that the information furnished will be handled confidentially. I am aware that the results of the investigation may be used for the purposes of publication.

6 Upon signature of this form, you will be provided with a copy.

Signed: _____ Date: _____

Witness: _____ Date: _____

Researcher: _____ Date: _____

APPENDIX 'G': SURVEY ANALYSIS OF THE INTERVIEWEES' BACKGROUND AND INVOLVEMENT IN THE SECURITY OF PAYMENT AND ADJUDICATION LEGISLATION

Designation	Country	Years of Experience	Professional background	Involvement in the legislation implementation
P1	Malaysia	15 years	Legal	Legal advisor
P2	Malaysia	15 years	Legal	Legal advisor
P3	Malaysia	15 years	Legal	Tutor/Adjudicator
P4	UK	35 years	Quantity Surveying/Legal	Adjudicator
P5	Malaysia	13 years	Legal	Tutor/Adjudicator
P6	Malaysia	30 years	Quantity Surveying/Legal	Legal
P7	Australia	25 years	Legal	Tutor/Legal representative
P8	Malaysia	20 years	Engineering/Legal	Tutor/Adjudicator
P9	Singapore	30 years	Construction/Legal	Academic/Adjudicator

Designation	Country	Years of Experience	Professional background	Involvement in the legislation implementation
P10	UK	15 years	Legal	Tutor/Adjudicator
P11	Malaysia	10 years	Legal	Legal advisor
P12	UK	10 years	Quantity Surveying/Legal	Academic/Adjudicator
P13	Malaysia	25 years	Engineering/Legal	Tutor/Adjudicator
P14	Australia	26 years	Legal	Industry representative/Adjudicator
P15	Australia	27 years	Quantity Surveying/Legal	Academic

APPENDIX 'G1': PERCENTAGE DISTRIBUTION OF THE STUDY PARTICIPANTS

Country	Number of participants	%
United Kingdom	3	20
Australia (New South Wales and Queensland)	3	20
Singapore	1	7
Malaysia	8	53
Total	**15**	**100**

APPENDIX 'G2': PROFESSIONAL BACKGROUNDS OF THE INTERVIEWEE

Profession	Number of participants	%
Legal	8	53.33
Engineering	2	13.33
Quantity surveying	4	26.67
Building construction	1	6.67
Total	**15**	**100.00**

APPENDIX 'G3': INTERVIEWEES' WITH MULTIPLE PROFESSIONAL BACKGROUNDS

Profession	Number of participants	%
Law and Quantity Surveying	4	26.67
Law and Engineering	2	13.33
Law and Building construction	1	6.67
Others (single profession)	8	53.33
Total	**15**	**100.00**

APPENDIX 'G4': INTERVIEWEES' INVOLVEMENT IN THE PAYMENT AND ADJUDICATION LEGISLATION IMPLEMENTATION

Involvement	Number of participants	%
Construction lawyer/Legal advisor	3	20.00
Tutor/Adjudicator	5	33.33
Adjudicator	3	20.00
Academic/Adjudicator	3	20.00
Industry representative/Adjudicator	1	6.66%
Total	**15**	**100.00**

APPENDIX 'G5': YEARS OF EXPERIENCE

Years of experience	Number of participants	%
0-9	0	0
10-19	7	46.67
20-29	5	33.33
30-35	3	20.00
Total	**15**	**100.00**

APPENDIX 'H' – LIST OF FREE CODES

S/N	FREE CODES
1.	Authorised, neutral nominating authority
2.	Authority Nominating Board (ANB)
3.	Kuala Lumpur Regional Centre for Arbitration (KLRCA)
4.	A good reputable training organisation is needed
5.	Nominating body is important
6.	Appointing authority is very relevant
7.	Key central body that deals with adjudication
8.	Adjudication appointing bodies
9.	Adjudicators Nominating Authorities (ANA)
10.	Independent body
11.	Sole administrator
12.	Sole, independent neutral institutions
13.	Multiple nominating institutions
14.	Commercial nominating authorities
15.	Adjudicating nominating bodies (ANBs)
16.	Court
17.	Bar council
18.	Specialist court
19.	Supportive courts are needed for effective implementation
20.	Construction court is very relevant
21.	Government institutions
22.	Ministry for National Development
23.	Building and Construction Authority
24.	Singapore Mediation Centre
25.	Small business commission
26.	Institutional bodies representing the Engineering/Construction Industry Professionals

S/N	FREE CODES
27.	Construction Industry Development Board (CIDB)
28.	Adjudication picked up quickly due to the involvement of government agency in Queensland
29.	Adjudication Registry - governmental body
30.	Building commission
31.	Independent institutions
32.	Academic institutions
33.	Professional institutions
34.	Malaysia Society of Adjudication
35.	Association of lawyers
36.	To make sure lawyers know how to handle adjudication ethically, e.g. Bar council
37.	Making recommendations to improve the system
38.	Training members on ethics and procedures
39.	Supportive role in provision of education, training, information, awareness and ethical issues
40.	They can make recommendations to the nominating authorities
41.	They disseminate information to their members
42.	To raise awareness and ensure that the parties in need have the benefit of the Act
43.	Educating the member on the importance and application of the legislation
44.	Involvement in supportive role of promoting adjudication process
45.	Authorizing institutions
46.	Responsible for general administration of adjudication process
47.	Responsible for the selection/nomination of qualified adjudicators
48.	Informing parties of the appointment of adjudicators
49.	Performs secretarial role where files are kept
50.	Maintaining panel of adjudicators
51.	They train the users on adjudication procedure practice and process
52.	Administration of the rules and fees.
53.	Setting up the competency standard and criteria of the Adjudicators

S/N	FREE CODES
54.	Training of Adjudicators
55.	Determining the standard terms and fees of Adjudicators
56.	Administrative support of Adjudication proceedings
57.	Acting as a stake-holder of the Adjudicator's fees
58.	Helping to draft the Regulations under the Act
59.	Making recommendations to governments and industry where necessary
60.	Create awareness (seminars, workshops, conferences, road shows, evening talks)
61.	Mentoring
62.	Monitoring
63.	Ensure that the timeline is adhered to by reminding the adjudicators of the deadlines
64.	Collect and keep fees and distribute it once the adjudicator finishes the job
65.	Educating and certifying adjudicators
66.	Ensure compliance to timeline
67.	Keep fees of adjudicator and protect the adjudicator's right to payment
68.	General administration of adjudication process
69.	Production of publications to actually create awareness
70.	Building capacity and training people to support the system
71.	Providing procedural clarity
72.	Review the draft and make suggestions
73.	Register adjudicators
74.	Provision of regulations to support the Act
75.	Run practical course on adjudication for the public
76.	Provision of miscellaneous matters that are not captured in the Act
77.	Making regulations in relation to effective functioning of the Act
78.	Promoting forum and training
79.	Organising communication forum for other organisations
80.	Provides guidelines that will enhance proper adaptation of adjudication procedure

S/N	FREE CODES
81.	Monitoring of adjudicators during adjudication process
82.	Providing training for the adjudicators
83.	Providing training for judges
84.	Providing training for government people
85.	Providing invoicing for adjudication fees
86.	Government institutions
87.	Publishing and helping the industry use and understand the act
88.	Monitoring the implementation of the adjudication process
89.	Sponsoring and giving approval to the adjudication policy
90.	Implement the policy of an adjudication process
91.	Create awareness among industry stakeholders on the importance of statutory adjudication in dispute resolution
92.	Make industry stakeholders aware of what is required
93.	Educating the industry on how the process will work and how it will impact on the industry
94.	Provide continuous study as to the effectiveness of adjudication
95.	Provide information to the government on how adjudication is being implemented and how it is affecting their industry
96.	They are the voice of the users of adjudication
97.	Government is responsible to ensure compliance with the adjudication award and also to encourage dispute avoidance
98.	To promote the whole process of the adjudication Act
99.	Registering and regulating the adjudication as well as the ANAs
100.	Provision of funds by the government to conduct seminars and awareness road shows with the contractors
101.	Enforcement of adjudicator's decision
102.	Interpretation of the statutes
103.	Uphold the parliament decision
104.	Resolution of ambiguities and uncertainty that arise from the legislation
105.	Court should ensure that stay/setting aside applications are sparingly entertained
106.	Competency ensured
107.	Choosing of adjudicator based on the complexity of issue at hand

S/N	FREE CODES
108.	Acceptability
109.	Improved fairness
110.	Greater efficiency
111.	Possibility of roster system in single adjudication authority
112.	In single nominating authority system there is possibility of getting too strong and abusing power
113.	Having many adjudication authorities may lead to confusion and inconsistencies in adjudication determinations
114.	There are perceptions that certain nominating authorities are or have become 'pro-contractor' or 'pro–claimant'
115.	There are problems with having many/multiple nominating authorities
116.	Different standards of adjudicators
117.	For profit ANA leads to unhappiness
118.	For profit ANA has potential for corruption
119.	Possibility of inadequate resources by government to handle the high work load of adjudication
120.	Inadequate resources may undermine the effectiveness
121.	Separate/independent institution may be better
122.	Use of an independent institution increases users confidence
123.	Impartiality is guaranteed
124.	Expertise
125.	Adequate resources
126.	Neutrality is an added advantage of neutral organization
127.	Drafting inconsistencies within the legislation
128.	Unnecessary interference
129.	Lack of familiarity with the process and procedure
130.	Degree of accessibility
131.	Inadequate resources
132.	Slow start
133.	Issues with having private-for-profit ANAs
134.	Problem of adjudication shopping

S/N	FREE CODES
135.	Nonprofit ANAs vs private-for-profit ANAs
136.	Challenge of cost of setting out an independent body
137.	The complexity of the legislation
138.	Intimidation feeling for the smaller contractors
139.	Nominating challenge
140.	A lot of inappropriate conduct with private ANA model
141.	Problem of financial commercial incentive for ANAs to appoint an adjudicator
142.	The fear and intimidation that is used in the industry
143.	Corruption
144.	Industry's slow acceptance of the Act
145.	Ignorance of the Act and failure to understand requirements of the Act
146.	The technical provision within the Act
147.	Lack of understanding by users and lawyers
148.	Clarity/ambiguities
149.	Gaps/lacunae in adjudication legislation (Acts being silent on or not clearly stating some issues
150.	Ignorance of subcontractors, suppliers, etc. of the Act, and their entitlements under the Act
151.	Lack of clarity on transitional provisions
152.	Lack of clarity on application of the Act
153.	Adjudication fees
154.	Adjudicator's fees
155.	Quality of adjudicators
156.	Discipline of the adjudicators
157.	Number of adjudicators available
158.	Rules of natural justice
159.	Power of adjudication
160.	Teething problems also arose in the way Acts were drafted (the technical provisions in the Act)
161.	Lack of training/understanding by users, adjudicators, lawyers

S/N	FREE CODES
162.	Drafting inconsistencies within the legislation
163.	Lacuna in our adjudication legislation
164.	Interpretation problem with part of the legislation
165.	Content issue can lead to jurisdictional challenge
166.	Challenge of whether or not the adjudicator has jurisdiction
167.	Adjudicator does not have jurisdiction to deal with your claim
168.	The Act's silence on how some issue should be carried out
169.	Interpretation of some of the content of the Act
170.	Users' ignorance of their entitlement under the Act
171.	Users' ignorance of the Act provisions
172.	Slow usage due to lack of resources
173.	Problem with the type of training given to adjudicators
174.	No formal requirement for adjudicators' training resulting in different standards affecting quality
175.	Inappropriate conduct and corruption
176.	Lawyers tend to approach adjudication with a strict interpretation of the rules of adjudication
177.	Legal technicalities
178.	Issue relating to technical breaches
179.	Adverse court decision
180.	Possibility of bad faith and corruption
181.	Problem relating to who should administer the process
182.	Procedural complexity
183.	Problem of balancing adjudication fees and adjudicators' fees
184.	Quality of adjudicator's decision within the tight time frame
185.	Implementation of the Act has become too legalistic with numerous jurisdictional challenges
186.	Considerable confusion of pursuing and realizing the contractual remedies of work slow-down/suspension
187.	The Act is rather ambiguous on some issues
188.	Problem with application of the legislation (retrospective or not)

S/N	FREE CODES
189.	The Act has general framework; no detail procedure on what to do
190.	Lack of proper understanding of what adjudication is all about
191.	Introduction of complicated issues that are applicable to arbitration
192.	Court involvement and interference may be a challenge
193.	Ignorance
194.	Solving problems through education process, e.g. seminars, workshops, publicity
195.	Intervention of high court in the interpretation
196.	Clarity on the content of the legislation
197.	Good interpretation by judges and court support
198.	Having a structure to put standard scale to overcome fees issues
199.	Negotiation through the provision of two scale fees
200.	Government should open debate to discuss clauses in the legislation
201.	The neutrality issue being an ADR institution that is not particularly supporting any industry may solve the problem of who should be in charge of administration
202.	Provision of adequate resources
203.	Single standard and centre of training could help overcome quality and capacity challenge
204.	Provision of very clear guidelines
205.	Creation of alternative fees schedule
206.	Training and education (training of users, adjudicators and judges)
207.	Creating awareness to the judges of how arbitration is different from adjudication
208.	Judges should be informed on what adjudication is and what it intends to achieve
209.	Involvement of judges from the beginning
210.	Court support is very crucial to overcoming the challenges
211.	Seminars
212.	Evening talks
213.	Industry stakeholders to hold seminars and workshops to explain the Act
214.	Referring to court interpretation
215.	Quarterly and yearly reviews

S/N	FREE CODES
216.	Provision of statistics and information to the public
217.	Provide information on any change in case law
218.	Workshops
219.	Public section
220.	Report on current issues on certain points of law
221.	Training
222.	Clarity on current issues in the implementation of the Act
223.	Inform the judiciary of the purpose of the legislation
224.	Build in an internal review mechanism in legislation
225.	Course to legislation
226.	Annual conference
227.	Evening talk (free) to encourage maximum participation
228.	Sending information to professionals through their institutions
229.	Organise statutory and procedure workshops
230.	The Act should clearly state that it includes both private and public sector for it to be effective - there should be no exemption
231.	Provision of circulars or practice direction and general guidelines
232.	Road shows with contractors to create awareness
233.	Training for the high court judges
234.	Training the attorney general chambers so that government people are trained; they produce the guide book
235.	Provision of simple sample forms e.g adjudication claim fom, adjudication response form, adjudication reply form to make procedure simple
236.	Resolution of the ambiguities or uncertainties that arise by the High Court
237.	Creation of construction court
238.	The use of practice direction will help
239.	Provision of facilities such as hearing rooms
240.	Protection of adjudication fees
241.	Trained enough adjudicators before the Act came into force
242.	Provision of a published set of forms for every stage of the adjudication

S/N	FREE CODES
243.	Must train enough competent adjudicators
244.	General claim form
245.	The adjudication response form
246.	Decision and award form
247.	Inaugural graduation
248.	Publicise the Act
249.	Debate, discussion and consultation
250.	Reading speeches given by the Minister on the Bill
251.	Training of adjudicators
252.	Educating the judiciary
253.	Provision of statistics and information through various means
254.	Review of statistics
255.	Talks
256.	Provisions of information by the institutions
257.	Learning from past interpretations and decisions
258.	Provide information on the interpretation of the legislations by the court
259.	Overcoming lacuna through adequate information
260.	Provision of circulars
261.	Provision of guidelines
262.	Provision of practice directions
263.	Applicability of the legislation
264.	Road shows
265.	Training for high court judges
266.	Training for attorney general chambers
267.	Training for government people
268.	Provision of guide books
269.	Provision of sample forms
270.	Updating industry stakeholders knowledge on current interpretation of the legislation

S/N	FREE CODES
271.	Open discussion of the new legislation
272.	Awareness
273.	Creation of rules to help parties
274.	Drafting of the legislation
275.	Provision of explanatory material
276.	Provision of facilities
277.	Ensuring compliance to timeline
278.	Ensuring compliance to procedures
279.	Educating and certifying adjudicators
280.	Training programmes
281.	Practical course for public on adjudication
282.	Published set of forms for every stage of adjudication
283.	Provision of statistics and information through various means
284.	Provision of information by the institution
285.	Support of the Court for review and enforcement
286.	Object of the legislation very important
287.	Most important thing you need is to get a default nominating body
288.	The applicability of the legislation
289.	The policy objectives of the legislation
290.	Regulations should be updated/fine-tuned to keep up with the developments on the ground.
291.	Supportive court
292.	Procedural ease
293.	Quick and easy enforcement of adjudication decisions
294.	Availability of competent adjudicators that can deal with the complexities of that particular adjudication
295.	A greater semblance of fairness
296.	Need a trained start adjudicators
297.	Need a trained start of advocates that can represent parties

S/N	FREE CODES
298.	Easy accessibility
299.	Procedural clarity
300.	Interpretability
301.	Clear understanding
302.	Increased knowledge
303.	Variety of adjudicators in terms of discipline
304.	Quality of adjudicators
305.	Number of adjudicators
306.	Vibrant institution
307.	Fairness
308.	Two ways fair fees/cost
309.	Time
310.	Facility
311.	Better understanding
312.	Default nominating body/bodies
313.	Availability of competent and experienced adjudicators on ground
314.	Strict time line for adjudication process
315.	Power of adjudicator
316.	Remedy provided for successful claimant
317.	Reasonable adjudicators' fees
318.	Contractual remedies prescribed statutorily in case of the losing party's default in compliance with an Adjudication Decision
319.	Act facilitate a particular body to be the administrator
320.	Strict time frame
321.	Cost of adjudication
322.	Sanction
323.	I think there must be an avenue for the CIDB to discipline errant contractors like this who don't allow the industry to mature
324.	Frown upon unnecessary appeal on review on technicalities

S/N	FREE CODES
325.	Wordings of the legislation must be strong and clear on its application
326.	Implementation process that can enhance compliance by both government and industry stakeholders
327.	Government projects to be bound by the legislation
328.	Legislation to cover both oral and written contracts
329.	Bureaucracy and documents issue on government contracts
330.	Government must set tone for the legislation
331.	The need for sanction to enhance compliance
332.	The problem of blacklisting subcontractors must be dealt with
333.	Ways of disciplining errant contractors
334.	Frowning on the review of cases on the ground of technicalities
335.	Rule should apply to both public and private sector projects
336.	Awareness on the positive benefit of the Act is very important
337.	Instil fear on the consequence of default
338.	Tight time limit on every stage of the process
339.	Institution administering the legislation should be independent of government
340.	Clarity on the contents of the legislation
341.	Introduction of sanction
342.	Tight time limit on every stage of the process
343.	Involvement of neutral independent institution
344.	Have a water tight Act so that they cannot delay the proceedings
345.	Fixed timeline to make submissions
346.	Power of adjudicators – allow adjudicator to derive power on some issues
347.	Adjudication as first tier dispute resolution process
348.	Recovery of past debts/damages and limitation of further exposure
349.	Enabling withholding of the amount of the adjudication
350.	Make payment response a must
351.	Court enforceable order
352.	Statutory imposed contractual sanction

S/N	FREE CODES
353.	Transparency is an issue
354.	The Government and contracting parties must raise their levels of good governance, transparency & professionalism to obviate the need to resort to adjudication in the first place
355.	There should be no contracting out
356.	Ensuring that enforcement of the interim decision is quick and easy
357.	There are default payment rules
358.	Recovery of past debts/damages and limitation of further exposure
359.	Mandatory furnishing payment bond
360.	Quick, easy and cheap enforcement
361.	Enabling withholding of the amount of the adjudication
362.	Payment Response form
363.	Court enforceable orders as well as statutorily imposed contractual sanctions
364.	Capacity building
365.	Training of adjudicators
366.	Educating the judiciary
367.	Training for government people
368.	Training for lawyers
369.	Training for attorney general chamber
370.	Awareness
371.	Vibrant institution
372.	Fairness
373.	Time
374.	Facility
375.	Better understanding
376.	Supportive court
377.	Procedural ease
378.	Authorised, neutral nominating authority
379.	A reputable training organisation

S/N	FREE CODES
380.	Commercial nominating authorities
381.	Roster system
382.	Availability of well-trained adjudicators
383.	Training users to have better understanding of the process
384.	Independent centre
385.	Accessibility
386.	Procedural clarity
387.	Interpretability
388.	Clear understanding
389.	Increased knowledge
390.	Variety of adjudicators in terms of discipline
391.	Quality of adjudicators
392.	Number of adjudicators
393.	Strict time frame
394.	Cost of adjudication
395.	Remedies for successful claimants
396.	Reasonable adjudicators' fees
397.	Content clarity
398.	Introduction of sanctions
399.	Involvement of neutral independent organisation
400.	Compliance
401.	Tight time frame measure
402.	There is need for dedicated agency to implement the Act
403.	Court not familiar with adjudication process
404.	Statutory roles
405.	Non-statutory roles
406.	Adjudication registry basically monitors in order to ensure quality
407.	Procedural justice issue

S/N	FREE CODES
408.	Natural justice issue
409.	Institutions performs critical roles
410.	Court to provide interpretation
411.	Suspension of work for non-payment
412.	Barring of adjudicator for technical error

APPENDIX 'J': THEMES, CATEGORIES, SUBCATEGORIES AND CODES

Objective 3: Identify institutions that are relevant and responsible for the successful statutory adjudication implementation and highlight their specific roles

Themes	Categories and *Subcategories*	Codes
Theme 1: Relevant institutions and their specific roles in effective statutory adjudication practice	**Category 1: Relevant institutions to effect statutory adjudication implementation**	Legal institutions
		Authorising institutions
		Government institutions
		Other supportive organisations
	Legal institutions	Courts
		Construction court
	Authorising institutions	ANAs or ANBs
		An independent institution
		Neutral nominating bodies
		Government Agencies
	Government institutions	Construction Board
		Government Agencies in charge of adjudication implementation
	Other supporting organisations	Academic institutions
		Professional institutions
	Category 2: Institutional roles in effective statutory adjudication implementation	
	Role and importance of government institutions in effective implementation	Sponsorship (financial support) and approval roles
		Administrative roles
		Monitoring roles
		Publicity and awareness
		Information dissemination roles
	Role and importance of legal institutions in effective implementation	Role of the court in the enforcement of adjudication decisions

Themes	Categories and *Subcategories*	Codes
		Role of the court in upholding the parliament decision
		Role of the court in the interpretation of the statutes
		Role of the court in the resolution of ambiguities and uncertainty that arise from the legislation
	Role and importance of statutory appointed authorizing institution in effective implementation	Appointment and nominating roles
		General coordination and administrative roles
		Capacity building
		Education and training
		Technical support roles
		Secretariat roles
		Training and education roles
		Information dissemination roles
		Awareness and procedural clarity roles
		Advisory roles (recommendation)
	Role and importance of professional institutions and other organisations in effective implementation	Publicity and awareness
		Provision of general supportive role on professional ethical issues
		Advisory role
		Education and training
		General supportive roles
		Information dissemination
	Consequences of inefficient institutions	Slow adoption
		Lack of knowledge
		Failure

	Category 3: Types and features of authorised nominating bodies	
	Types of nominating institutions	Sole, neutral independent nominating institution system
		Multiple commercial nominating institutions system
		Multiple non-commercial nominating institutions system
		Perceptions on government involvement in the implementation process
	Advantages and disadvantages of sole, neutral independent nominating institution system	Competency, expertness and adequate resources
		Availability of competent resources to handle complex cases
		Acceptability and increased confidences
		Greater efficiency
		Possibility of roster system
		Improved fairness
		Uniformity in standard
		Avoidance of confusion and inconsistencies in adjudication determination
		Integrity, impartiality and neutrality
		If effective, quality is ensured
	Disadvantages of multiple commercial nominating authorities institution system	Possibility of being too strong and powerful and therefore becoming too proud
		Failure if the institution is inefficient
		Cost of establishing the institutions
		Different standards of criteria and training
		Variability in adjudicator's quality
		Problem of adjudicator shopping
		Confusion and inconsistencies in determination
		Potential for corruption

	Perceptions on government involvement in the implementation process	Possibility of inadequate resources
		Perception of bias
		Low confidence
		Necessary for effective monitoring and adequate support
		Necessary for regulation and improved standard of the system

Objective 4: Identify and characterize critical implementation challenges that could impair or threaten the realization of the benefits of statutory adjudication

Themes	Categories and *Subcategories*	Codes
Theme 2: Implementation challenges and how they could be prevented or overcome	**Category 4: Teething problems and critical challenges to effective implementation**	
	Change process issues (Assimilation of innovation challenges)	Industry's slow acceptance of the Act
		Ignorance of the Act and failure to understand requirements of the Act
		Lack of understanding by users and lawyers
		Users' ignorance of their entitlement under the Act
		Users' ignorance of the Act's provisions
		Lack of proper understanding of what adjudication is all about by the court
		Lack of familiarity with the process and procedure
		Lack of awareness and low level of knowledge
	Technical provision and content challenges	Drafting inconsistencies within the legislation
		The technical provision within the Act
		Lack of clarity on transitional provisions
		Lacuna in our adjudication legislation
		Interpretation problem with part of the legislation
		The Act being silent on how some issues should be carried out

Themes	Categories and *Subcategories*	Codes
	Technical provision and content challenges (continued)	Interpretation with some of the content of the Act
		Considerable confusion of pursuing and realizing the contractual remedies of work slow-down/suspension
		The Act is rather ambiguous on some issues
		Problem with application of the legislation
		The Act has general framework; no detail procedure on what to do
		Gaps/lacuna in adjudication legislation/Acts not clearly stating or being silent on some issues
	Procedural challenges	Ignorance of subcontractors, suppliers, etc. of the Act, and their entitlements under the Act
		Lack of clarity on provisions and application of the Act
		Procedural complexity
		Degree of accessibility
	Legal technicalities challenges	Strict interpretation of the rules of adjudication
		Legal technicalities
		Issues relating to technical breaches
		Adverse court decisions
		Introduction of complicated issues that are applicable to arbitration
	Cost/Fees challenges	Adjudication fees
		Adjudicator's fees
	Capacity challenges	Slow usage due to lack of resources
		Problem with the type of training given to adjudicators
		No formal requirement for adjudicators' training resulting in different standards affecting quality
		Inadequate resources in term of number of adjudicators available, quality of adjudicators and

Themes	Categories and *Subcategories*	Codes
		discipline of adjudicators
	Jurisdictional challenges	Power of adjudicators
		Challenges relating to the rules of natural justice
	Other challenges	Problem relating to who should administer the process
		Inappropriate conduct and corruption e.g. problem of financial incentives
		Problem of interference
		Lack of training/understanding by users, adjudicators and lawyers
		The fear and intimidation that is used in the industry
		Problem of adjudication shopping
		Slow start due to administrative issues
	Category 5: Causes of teething problems and critical challenges to effective implementation	
	Drafting style	Drafting inconsistencies within the legislation
	Interference	Unnecessary interference
	Level of knowledge	Lack of familiarity with the process and procedure
	Accessibility	Degree of accessibility
	Category 6: Avoidance strategies and preventive measures to the possible challenges	
	Accessibility	Publicity and public awareness
		Accessibility and clear understanding
	Interpretability	Content clarity
		Good and clear interpretation by judges and court support
	Training and education	Training of judges
		Training of adjudicators
		Training of users
	Institutional intervention	Regulated fees structure
		Open debate
		Court support

Themes	Categories and *Subcategories*	Codes
		Use of independent institution
		Capacity building

Objective 5: To determine institutional requirements and develop an implementation model that will enhance the effectiveness of statutory adjudication in SA

Theme 3: Institutional requirements for effective implementation	**Category 7: Institutional position in effective implementation (Institutional vs. Organisation**	
	Critical roles	Criticality of legal institutions to effective implementation
		Criticality of authorised institutions to effective implementation
		Enforcement of adjudication decisions
		Interpretation of the legislation
		Appointment of adjudicators
		Setting adjudicators standards
		Administration of adjudication processes
		Secretariat functions
	Supportive roles and overlapping roles	Supportive roles of other organisations in effective implementation
		Information dissemination
		Education
		Awareness
	Category 8: Institutional supports needed for effective implementation	
	Object of the legislation	The policy objectives
		Applicability of the legislation
	Court support	For enforceability
	Default nominating authority/authorities	In-sourcing or out-sourcing
		Multiple vs sole authorising institutions
	Procedural ease	Clarity of procedures
Theme 4: Enablers of effective statutory adjudication implementation	**Category 9: Practices and strategies that can enhance successful implementation**	

	Training and education	Capacity building
		Training of adjudicators
		Educating the judiciary
	Training and education (cont.)	Training for government people
		Training for lawyers
		Training for attorney general chamber
		Mentoring
		Setting standard and ensuring compliance
		Awareness
	General awareness	Publicity through seminars, workshop, talks & annual conferences
		Road shows and public sections
		Reference to court interpretation
		Quarterly/yearly review
		Free evening talks to encourage maximum participation
		The use of statutory and procedures workshops
		Debate, discussion and consultations
		Open discussion on new legislation
	Report and information dissemination	Provision of statistics and information on use and success rate
		Review of statistics
		Provision of information on any change in case law
		Report on current issues on certain point of law
		Learning from past judicial interpretation of the legislations by the court
		Sending information to professional trough their institutions
	Provision of forms and use of special materials	General claim form
		The adjudication response form

		Decision and award form
		Provision of circulars, practice directions and general guidelines
	Institutional intervention	Resolution of ambiguities by the court
		Creation and provision of facilities such as hearing rooms, resting rooms
		Protection of adjudicators fees
		Monitoring of adjudicators' performance
	Category 10: Attributes that can promote effective implementation	Drivers and enablers of effective implementation
	Drivers of effective implementation	Easy accessibility
		Procedural clarity
		Interpretability
		Clear understanding
		Increased knowledge
		Variety of adjudicators in terms of discipline
		Quality of adjudicators
		Number of adjudications
		Vibrant institution
		Fairness
		Reasonable cost
		Better understanding
		Adequate resources
		Fairness
		Time
		Facility
		Supportive court
		Procedural easiness
		Default nominating body/bodies
	Enablers of effective implementation	Vibrant implementing institution
		Good coordination

		Good practice
		Good management of innovation process
	Specific features in the legislation that can enable effective performance	Strict time frame
		Cost of adjudication
		Remedies for successful claimants
		Reasonable adjudicators fees
	Category 11: Process that can enhance compliance and maximum participation	Content clarity
		Introduction of sanctions
		Involvement of neutral independent organisation
		Compliance
		Tight time frame measure
		Power of adjudicator
		Cheap, easy and quick enforcement

APPENDIX 'K': LEVEL 1 ANALYSIS OF VARIOUS INSTITUTIONS THAT ARE INVOLVED IN THE IMPLEMENTATION FROM VARIOUS JURISDICTIONS

Question: Identify institutions that are relevant and responsible for the successful statutory adjudication implementation and highlight their specific roles

COUNTRIES	INSTITUTIONS	ROLES
Malaysia	KLRCA	A body designated by CIPAA Act and Regulations in Malaysia, responsible for administering adjudication. The roles are prescribed in Part IV, Sections 32 & 33 of the Act They are named in the adjudication Act itself as adjudication appointing body. KLRCA is the key/central body that deals with adjudication The Act delegates KLRCA through the Minister of Works to make certain regulations, to support or to supplement the entire Act Roles include: • To administer the adjudication process • To train the adjudicators • To appoint an adjudicators for adjudication process • To create awareness in construction industry through seminars, workshops, conferences They collect and hold the fees and distribute the fees once the adjudicator finishes the job They keep in touch with the adjudicators and remind them when meetings will take place, when submissions are due and inform them of the rules To make sure lawyers know how to handle adjudication ethically
	The Bar council - Association for Malaysian lawyers	Enforcing adjudication decisions. The role of the Court is basically to support the implementation of the Act by not actively interfering in the proceedings but by ensuring that the Adjudication Decisions are readily enforced and Stays/Setting Aside Applications are sparingly entertained

COUNTRIES	INSTITUTIONS	ROLES
	CIDB	The organization which actually started the ball rolling in 2006. They create awareness in the industry on how to get through an adjudication process
	CIDB (Construction Industry Development Board)	Disseminating relevant information to their respective members by holding road shows, talks, courses, etc. with KLRCA's support
	Other professional bodies e.g. MSA	They do not make appointments or nominations They are a group of adjudicators that meet on a regular basis to discuss issues pertaining to adjudication. They may make recommendations to the KLRCA or to the government to improve the system. They are not nominating bodies
Singapore	Singapore Mediation Centre	This is the only nominating body
	Ministry for National Development	Ministry for National Development – Government ministry that sponsors and approves the adjudication policy
	Building and Construction Authority	Building and Construction Authority – This is the government statutory board that would implement the policy of an adjudication process
	Authority Nominating Board (ANB)	Authority Nominating Board (ANB) – A secretariat that performs the administrative duties of appointing adjudicators and other administrative functions for the adjudication process, e.g. claimant to apply to the ANB for adjudication, ANB requests member of adjudication panel to accept appointment as adjudicator, informing parties of appointment of adjudicator, maintain panel of adjudicators, etc.

COUNTRIES	INSTITUTIONS	ROLES
	Court	Court – For purpose of enforcement and review for setting aside Adjudication Determination.
Australia	Queensland Adjudication Registry	This is a governmental body which monitors ANAs in Queensland in order to ensure their quality. They are the first organization that parties go to when they have disputes - appointment can only come from the ANA They make sure that the people they put on the adjudication panel are highly qualified and experienced and capable of producing quality decisions that will help adjudication in general
United Kingdom	Adjudicating Nominating Bodies (ANBs) The Courts	There are about 25 such bodies in the UK. Parties can go to any one of these Nominating Bodies in the UK to get an adjudicator appointed Appointment can also come through agreement between the parties in dispute Support the system and ensure that there is no failure

SUMMARY OF IDENTIFIED INSTITUTIONS (APPENDIX 'K' CONTD)	
MALAYSIA	• KLRCA - an independent implementation institution • Courts • Institutional support from professional bodies • CIDB – Government institution
SINGAPORE	• Singapore Mediation Centre – Main adjudication appointing body • Ministry for National Development • Building & Construction Authority • Authority Nominating Board (ANB) • Courts • Roles are divided among the bodies
UNITED KINGDOM	• About 25 Adjudicating nominating bodies (ANBs) • Courts • Adjudication reporting centre that monitors the progress of adjudication by

SUMMARY OF IDENTIFIED INSTITUTIONS (APPENDIX 'K' CONTD)	
	keeping statistics
AUSTRALIA	• Queensland Adjudication Registry (in Queensland) • South Australia - Small Business Commission • Courts • NSW - Adjudicators Nominating Authorities

APPENDIX 'K1': LEVEL 2 ANALYSIS – RE-GROUPING OF THE IDENTIFIED INSTITUTIONS

RE-GROUPING	
Legal institutions	Courts
	Technical Construction court
Authorising/Implementing institutions	ANAs or ANBs
	An independent institution
	Neutral nominating bodies
	Government Agencies
Government institutions	Construction Boards from different jurisdictions, e.g. CIDB
	Government Agencies in charge of adjudication implementation
Other supporting organisations	Academic institutions
	Professional institutions

APPENDIX 'L': LETTER OF REQUEST FOR VALIDATION OF INTERVIEW QUOTATIONS

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Department of Construction Economics
Tel: 012-420 4972
Fax: 012-420 3598

1 July, 2016

Dear Sir,

Requirements for the Effective Statutory Adjudication Practice in the South African Construction Industry. Request for Validation of Interview Quotations

We wish to express our appreciation to you once again for your participation in the data collection process that took place sometime between November, 2015 and February, 2016 as part of PhD research on the above-mentioned subject. As you will recall, the aim of the study is to determine the institutional requirements of an effective statutory adjudication practice and to develop a framework that will support the effectiveness of statutory adjudication in the South African construction industry. A number of findings have since been made on the basis of analysis of the data collected. The findings identify the critical challenges that can impair the effective statutory adjudication practice and the possible ways to prevent them. It also provides information on the institutional and facillitatory factors that can enhance the successful implementation of statutory adjudication in the South African construction industry.

In order to justify the findings, some of your contributions during the interview have been quoted in the thesis. It is therefore necessary that the accuracy of the quotations be confirmed before the thesis is published.

Consequently, we humbly request that you help validate the correctness of the excerpt from the transcriptions of the candidate interview with you as contained in the attached document. Your response will help establish the internal validity and trustworthiness of the research outcome. Kindly send your response to the candidate by electronic mail at modupe.mewomo@up.ac.za or modupemewomo@yahoo.com or modupemewomo@gmail.com .

Thank you in advance for your favourable consideration of this request

Best regards,

Modupe Mewomo
PhD student

Professor M. J. Maritz
Head of Department/Supervisor

APPENDIX 'M': COMPARATIVE ANALYSIS OF THE KEY FEATURES IN THE UK, NSW, SINGAPORE (SG) AND MALAYSIAN ACTS AND THE SA'S DRAFT REGULATIONS (DRAFT REG.)

Key features	UK Act	NSW Act	SG Act	Malaysian Act	SA (Draft Reg.)
SCOPE OF APPLICATION					
Applies to contracts for supply of goods related to construction work	No (Does not apply for supply of goods)	Yes	Yes	Yes	Yes
Applies to contracts for professional services related to construction work	Yes	Yes	Yes	Yes	Yes
Apply to both oral and written contract	Yes (section 107 has been repealed)	Yes	Apply to contract in writing	No	Yes
Type of dispute covered	Payment claim for construction work done or services No (No provision for supply of goods)	Yes. Payment claim for construction work done or goods and services	Yes. Payment claim for construction work done or goods and services	Payment claim for construction work done or services	Payment claim for construction work done or goods and services
Excluded construction work	Does not apply to construction contract with a residential	Excluded Construction contracts with "residential	Excluded residential property within the limit of employment CAP. 91)	Excluded construction work for building less than four storeys)	Excluding a home building contract as contemplated in the Housing Consumer Protection Measure

Key features	UK Act	NSW Act	SG Act	Malaysian Act	SA (Draft Reg.)
	occupier	occupiers"			Act , 1998
'Pay when paid' provisions prohibited	Yes	Yes	Yes	Yes	Yes
Statutory procedure for making application	Yes	Yes	Yes	Yes	Yes
Who appoint adjudicators?	Any of the ANAs	An ANA	The sole ANB (Singarpore Mediation Centre)	KLRCA	The Board shall accredit an adjudicator nominating body or bodies
Do adjudicators have to be registered?	They will be registered with their professional institutions	No	Yes	Yes	Not explicitly addressed yet
Time for adjudicator to make his or her determination	Within 28 days but may be extended with 14 days with parties consent	10 business days after the adjudicator notified acceptance of the application	Within 7 days after the commencement of adjudication	45 working days from the service of the adjudication response or reply to the adjudication response, whichever is the later	Within 28 days but may be extended with 14 days with parties consent
Can an adjudicator act inquisitorially in determining the dispute by taking the initiative to ascertain the facts and	Yes	No, the adjudicator is limited to a consideration of the documents duly submitted by the	Yes	Yes	Yes

Key features	UK Act	NSW Act	SG Act	Malaysian Act	SA (Draft Reg.)
the law required for the decision?		parties.			
Can the adjudicator's determination be enforced as a court judgment?	Yes	Yes	Yes	Yes	Yes
Can the claimant suspend works if the adjudicated amount is not paid by the due date?	Yes	Yes	Yes	Yes	Yes