Large construction projects provide significant scope for disputes of various types to arise between contractors and employers. An essential aspect to resolving the parties’ disagreements, both in the course of executing the works and after the works have been completed, is the determination of the existence of a dispute and the mechanisms available to the parties to resolve such dispute.

Very often, parties to a contract will deliberate their disagreements over a protracted period without raising opposing versions or defining the issues sufficiently for determination, which does not elevate these disagreements to disputes capable of determination by way of adjudication or arbitration proceedings. Unless the underlying contract determines when a disagreement constitutes a dispute, capable of resolution by way of adjudication or arbitration proceedings, it is not always clear when a party may refer a disagreement to an adjudicator or arbitrator for determination.

In South Africa, the Supreme Court of Appeal has opined, in the case of *Telecall (Pty) Limited v John Logan* that, before there can be a reference to arbitration a dispute must exist. The court went on to state that:

"I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointment, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such dispute. It follows that some care must be exercised in one's use of the word 'dispute'. If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon."

Under English law, Mr Justice Jackson, in the case of *Amec Civil Engineering Limited v Secretary of State for Transport*, formulated seven propositions that he took to be
the current law of England on the existence of a dispute. The propositions can be summarised as follows:

- The word “dispute” should be given its ordinary meaning.
- Litigation has not generated any hard-edged legal rules as to what a dispute is, it merely offers helpful guidance.
- The mere fact that a party notifies the other party of a claim does not automatically and immediately give rise to a dispute. A dispute does not arise unless and until it emerges that the claim is not admitted.
- There are many circumstances which emerge that a claim is not admitted. For example, there may be an express rejection of the claim or there may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted.
- The period of time for which a respondent may remain silent before a dispute is to be inferred depends upon the facts of the case and the contractual structure.
- If there is a deadline imposed by the claimant upon the respondent within which to respond to the claim, this does not have an automatic effect of curtailing what would be a reasonable time for responding.
- If the claim is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent, nor an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

In both jurisdictions referred to above, the existence of a dispute is required before a disagreement may be referred to adjudication or arbitration.

It follows that if a disagreement has not yet become a dispute, an objection may be raised by a party to the jurisdiction of the adjudicator or arbitrator to decide the issue at hand. In both jurisdictions, it has been held that if the adjudicator's jurisdiction is challenged, he is not precluded from enquiring into the scope of his jurisdiction, and even ruling upon it, when a jurisdictional objection is raised, until such time that it has been determined by some other dispute resolution body or court, whichever applicable, which has power to determine it finally. The determination as to whether or not a dispute has arisen between the parties very often gives rise to ancillary disputes.

It is therefore imperative that a party, who wishes to invoke the contract's dispute resolution mechanism, has careful regard to the provisions of the contract and
contentions put forward by the parties so as to determine whether a disagreement has become a dispute that may be subject to adjudication or arbitration proceedings.

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