The Adjudication of Construction Disputes - New Dawn or False Hope?

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Abstract: The UK Construction industry appears at times conflict driven. Claims based on time and money abound. Contractors do not look for ‘win-win’ solutions and use their lawyers to reach the position they desire through litigation or arbitration. Arbitration, at least in England, has come to resemble litigation with full use of lawyers, the legal rules of discovery and evidence and lengthy and expensive oral hearings. Sir Michael Latham was commissioned to review the practices of the UK construction industry and made a number of recommendations - greater partnering, a departure from the ‘lowest tender wins’ mentality, less adversarialism in dispute resolution. For Sir Michael, dispute resolution should principally be via adjudication (a term he never defined) and should be used regularly through the course of a project to deal with problems as and when they arose to prevent them becoming festering sores. The UK government enthusiastically embraced adjudication and rushed through hasty and, to some minds, ill thought out legislation. This paper considers the background to statutory adjudication, identifies what adjudication is and explores some of the merits and defects inherent in such a system. Adjudicative decisions must be interlocutory (although the parties may treat them as final and binding) not to offend against English arbitral law. Enforcement of adjudicator decisions may be difficult because of the wording of English standard form construction contracts and the provisions of the Arbitration Act 1996. How successful will be adjudication be? With little empirical data, the jury will remain out.

Key words: adjudication, arbitration, Arbitration Act 1996, Conflict, decision, enforcement, final and binding, Housing Grants, Construction Regeneration Act 1996, litigation, natural justice, Sir Michael Latham
1 Why litigation and arbitration are failing

A former Chief Justice of the United States of America, the late Warren Burger, once said:

“The obligation of our profession is... to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the participants. That is what justice is all about.”[1]

Leaving to one side the possibly conflicting emotions of those involved in the dispute resolution business, where certain lawyers need to question the value of a “litigation client who is not litigating” and thereby doing his ‘duty’ in creating billable hours, no sensible person could dissent from Warren Burger’s comments. Dispute resolution is a service industry and must recognise client needs. Clients who believe they can abdicate their responsibility for decision making by passing a ‘problem’ to their lawyers have a rude shock when witness statements need to be produced and a court hearing beckons. Only then do they ‘reality test’ with the result the litigation implodes and the cost in terms of management time and money either disregarded or explained away. The need for client centred dispute resolution has been taken up by many leading members of the judiciary and was a cornerstone of Lord Woolf’s interim and final reviews of civil litigation[2], Access to Justice. Another very senior judge, the former Lord Chief Justice, the late Lord Taylor, rightly said in identifying the obligation of the legal profession to be responsible in plying its trade:

“A trial is not a game. The role of a judge should not be restricted to that of an umpire sitting well above the play, intervening only to restrain intemperate language and racket throwing.”[3]

Lord Taylor’s remark echoed earlier words of Warren Burger who on one occasion said:

“Trials by the adversarial contest must in time go the way of ancient trial by battle and blood”[4].

1.1 Criticism of Litigation

Increasingly, litigation, the legal process and the ways of lawyers and expert witnesses have attracted a very poor press. Particularly in the United States lawyers are the butt of savage jokes which emphasise their reputed avarice and self interest[5]. Even in the United Kingdom, when the City law firm, Herbert Smith, surveyed the top 400 companies in The Times Top 1000 for their views on litigation the lawyers found widespread criticism of the length, complexity and cost of civil justice:

“A substantial majority (70%) suggested the whole system takes too long, whilst almost 40% suggested that the costs of litigation are far too high.”[6]

Companies apparently support a shift away from oral advocacy in civil trials and a greater emphasis on written submissions. They want judges, not the parties to the dispute, to control the pace of proceedings and to determine how long cases should take. More than 60% of the firms questioned favoured a paper trial instead of one based on oral argument and evidence; and a substantial majority wanted control of the timetable of cases given to a procedural judge. On the face of it, this appeared to equate with a more inquisitorial approach rather than the painstaking, lengthy and costly Anglo-American example of testing evidence through an adversarial model with lawyers caught in the role of medieval knights in a joust.
Over the years various “captains of industry” have criticised the legal process. For instance, Ian Dixon, Chairman of Wilmott Dixon and the then Chairman of the Construction Industry Council, was quoted on one occasion as saying:

“You can’t win if you go to court. The high legal costs are part of it. Litigation is long and repetitive. The legal system is abysmal and inefficient.”[7]

Such stated dissatisfaction with litigation does not explain the continued willingness of UK parties to embrace adversarial methods of dispute resolution.

1.2 Criticism of Arbitration
Arbitration, traditionally promoted by its proponents as a no nonsense method of dispute resolution, relying more on technical assessment than on the application of judicial nuances, has for a number of years been regarded as legalistic in the United Kingdom unlike in the United States where it is categorised as an ADR method of dispute resolution. In *Northern Regional Health Authority -v- Derek Crouch Construction Company Limited* Sir John Donaldson MR stated:

“Arbitration is usually no more and no less than litigation in the private sector.”[8]

Similarly overseas, the conclusion reached in an Australian research report into claims and disputes in the construction industry, *Strategies for the Reduction of Claims and Disputes in the Construction Industry - a Research Report* (various authors) was that:

“… arbitration has broken down as a cheap and efficient means of resolving construction disputes, albeit that the cause may be the strenuously adversarial manner in which the disputants themselves pursue the arbitral process.”[9]

1.3 Arbitration Act 1996
Whether or not the Arbitration Act 1996 will improve the position and rehabilitate arbitration as a cost effective means of resolving commercial disputes in England time will tell.

The Arbitration Act 1996, the purpose of which is to breathe fresh life into arbitration, has had a long period of gestation. The Departmental Advisory Committee (DAC), latterly with governmental involvement, produced two draft Bills, the second of which went out to public consultation in July 1995. The aim was to restate English arbitration law in clear and user-friendly language. Some commentators supported the incorporation into English law of the UNCITRAL Model Law as had occurred in Scotland a few years ago. Decisions of the English courts, exercising their supervisory jurisdiction, had caused disquiet amongst foreign parties who chose London for their arbitration. The promoters of new English legislation decided that although the UNCITRAL Model Law had many useful lessons, English law and practice were too well developed by case law precedents to justify the wholesale adoption of the Model Law. The exercise became one of consolidating the Arbitration Acts 1950-1979, modernising their language and inserting apposite features from the Model Law.

Some of the key provisions in the English legislation are found in sections 33, 34 and 48. Under section 33(1)(b):

“[the tribunal shall] adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”.

Under section 34 the onus is on the tribunal to organise the arbitral reference and a checklist of appropriate considerations is included in sub-section (2). Important amongst these are (c) which attempts to address the English obsession with general discovery in litigation and arbitration and emphasise the point that discoverable documents should be limited to those which are pertinent to the issues in dispute. Further, and a major departure from English practice is the power found in (g) permitting the tribunal to decide “whether and to what
extent the tribunal should itself take the initiative in ascertaining the facts and the law”. English case law has long debated the power of arbitrators to adopt an inquisitorial approach and until the 1996 Act had given an equivocal response. Finally, the 1996 Act empowers the arbitrator to act as amiable compositeur. To what extent English arbitrators will be liberated from convention by the parties and invited to use the section 46(1)(b) powers remains to be seen.

2 The desire for change

The realisation that all was not well with the construction industry led to the Government/industry inspired appointment of Sir Michael Latham to review procurement and contractual arrangements in the construction industry. In his final report, Constructing the Team[10] he identified adversarial attitudes as a major cause of malaise in the English construction industry. One of the by-products was more expensive construction costs in the United Kingdom (30% higher than in the United States) which he wished to see reduced by the year 2000 (a view greeted with incredulity by the industry)[11]. For Sir Michael there were two responses to the industry’s problems: (1) partnering at the front end of projects and (2) adjudication throughout the project to nip problems in the bud and resolve issues when they arose, avoiding unnecessary involvement of lawyers and claims consultants.

3 Adjudication - a new beginning?

Adjudication is not a new concept for English lawyers. It has been an intrinsic, even if peripheral, part of construction sub-contracts since the mid-1970s to review main contractor set offs although it is frequently deleted by main contractors and, because of the wording of sub-contracts forms, has been held not to bite on main contractor claims in abatement.

The definition of adjudication is somewhat vague and the distinction between it and arbitration fuzzy. This is because adjudication (leading to an imposed decision and adversarial, although of a muted variety when compared to arbitration and more particularly litigation) closely resembles arbitration in many respects. It fundamentally differs from arbitration in that the adjudicator’s decision is interlocutory and not final. In effect, the adjudicator’s decision is binding on the parties if they choose to accept it, or until such time as one of the parties commences legal proceedings or arbitration to determine finally the dispute or the parties, of their own volition, come to their own agreement. Although a contractual mechanism for the resolution of disputes, adjudication is quasi-judicial and subject to intervention by the courts. In England, intervention correlates with the principles of natural justice (ie. giving each party the right to understand the case being made against it, put its own case in its own words and understand the thought processes of the person (a neutral outside the influence of either party) making a decision). The courts are reluctant to lay down hard and fast rules as to what constitutes natural justice. In Wiseman-v-Borneman[12], Lord Reid stated:

“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental principle degenerate into hard-and-fast rules”.
3.1 Categorising the parties: dispute mechanism

The tension between an adjudicative and an arbitral procedure is sometimes crucial. The English courts will look at the underlying fundamentals of the parties’ arrangements rather than simply be beguiled by their nomenclature: [13]

“The way in which the reference is described in the agreement to refer is not conclusive as to the character of the proceedings. Thus, even an explicit agreement that a matter be dealt with by arbitration does not mean that the parties intended the proceedings to be the type of arbitration which is the subject of the Arbitration Acts or the common law of arbitration. For example, the use of the word is consistent with any intention to invoke a process which involves a decision by any impartial body, but not one which is binding in law”.

The interpretation of particular clauses has been considered in the common law jurisdictions. In Sports Maska Inc -v- Zittrер[14] the Supreme Court of Canada considered that the language used was not definitive and what may be described by the parties as an expert determination may, on objective analysis, be an arbitration. The question was also considered in England[15] where the Official Referee decided that what purported to be an adjudication clause in a management contract derivative was in fact an arbitration clause, given that the result was final and binding.

3.2 Adjudication and arbitration - the interface

A further potential problem adjudication has in England is enforcement of the adjudicator’s decision where there is also an arbitration clause in the contract. A Cameron Limited -v- John Mowlem & Co plc[16] established that an adjudicator’s decision was not equivalent to an arbitrator’s award and was not registerable as an arbitral award under the Arbitration Act 1950 (now the Arbitration Act 1996). Typically, at the end of an adjudication, if one party refuses to comply with an adjudicator’s decision, the other party will commence court proceedings to enforce the decision. The traditional route has been to seek either summary judgment (which involves a short hearing in which evidence is adduced by way of affidavit, without any witnesses being heard), or an injunction requiring the recalcitrant party to comply with the adjudicator’s decision. For example, in Drake & Scull Engineering Limited -v- McLaughlin & Harvey plc[17] the Official Referee granted an injunction upholding the adjudicator’s decision that monies be paid to a trustee stakeholder pending the outcome of an arbitration.

However, if the parties’ contract contains an arbitration clause, alongside any adjudication clause, section 9 of the Arbitration Act 1996 would be triggered. This calls for a mandatory stay of any court proceedings brought if an arbitration clause exists in the parties’ contract. Thus, existence of the arbitration clause would deprive the court of jurisdiction to decide whether the adjudicator’s decision should be enforced (ie. either by summary judgment or by an injunction); the matter would then have to be arbitrated. The English Commercial Court has held itself unable to wriggle out of the mandatory stay[18]. This potential problem can be addressed by providing that the arbitration provisions in the agreement do not apply to enforcement of an interlocutory decision of the adjudicator. The Arbitration Act 1996 may be able to assist with enforcement of an adjudicator’s decision. This is because (unless the parties otherwise agree) section 39 permits provisional awards similar to summary judgment or interim payments and section 48(5) allows an arbitrator to grant injunctions. Thus, a claimant having obtained an adjudicator’s decision in his favour could immediately commence an arbitration and seek redress from the arbitrator at an interlocutory stage.
3.3 Statutory adjudication in the UK

Following Sir Michael’s report[19] the UK government enthusiastically embraced adjudication[20] and legislation was rushed through Parliament to regulate one distinctive sector of the UK economy deemed unable to put its own house in order. Although at the date of preparation of this paper a commencement date for the legislation is still awaited, the UK government has sought to institutionalise adjudication, making it applicable to a wide range of construction contracts for work within England, Scotland and Wales. Subject to the exclusion of certain process plant contracts and domestic building contracts[21] the Act applies to the full range of construction contracts[22]. The HGCRA gives any party to a construction contract the right (but without imposing the obligation) to refer a ‘dispute’ (which is defined as any difference) to adjudication[23]. This permits the adjudicator to exercise a wide brief extending beyond time and money claims to include a consideration of questions of law, such as: is there a contract? is there a claim in quantum meruit? has there been a repudatory breach or a wrongful termination of the contract? The term adjudication is not defined in the HGCRA although the HGCRA identifies one of the key features of adjudication by stating “the contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or if the parties otherwise agree to arbitration) or by agreement”[24].

Prior to the enactment of the HGCRA in July 1996, the Department of the Environment, which oversees construction in the United Kingdom, stated that statutory adjudication would not resemble arbitration as currently practised there since unlike UK arbitration, adjudication would be “quick and inexpensive”[25]. In order to make adjudication work, the Department of the Environment is putting in place a ‘Scheme for Construction Contracts’ which will set the benchmark if the parties’ contract is deficient in any regard. The first attempt at a Scheme for Construction Contracts[26] was almost universally condemned as a lawyers’ charter. This led to a further consultation paper[27]. A draft Scheme for Construction Contracts Regulations was published on the 14th of August 1997 but has been widely criticised.

3.4 Adjudication - success or failure?

Adjudication which trundled on for many years with little or no profile was catapulted into prominence by Sir Michael Latham, leading to the preparation of various sets of adjudication rules[28]. Adjudication will not deal of course with the waste of managerial resources in the construction industry without profound attitudinal changes. It may address genuine claims but will phoney and bloated claims still be taken to the courts and arbitration? How will adjudicators react to contractors who may have worked their claims up over many months and then expect client and adjudicator to respond in a matter of days - is this justice or cynical manipulation of the process? So long as the ‘cheapest tender secures the job’ mentality persists and contractors artificially suppress their bids to secure work, conflict will inevitably arise when contractors attempt to clawback their position through claims. Adjudication can provide a mechanism for common sense but only to the extent that contractors and clients let it work. Adjudication will not work if one of the parties does not believe in ‘truth will out’ or reaches for his lawyers in order to thwart the process. Adjudication does have the potential to provide an ideal framework for the sensible resolution of many construction industry disputes and will be facilitated if the English courts demonstrate reluctance to overturn adjudicator decisions. But in the absence currently of empirical data the jury must remain out as regards its efficacy.
REFERENCES


Quoted by Lord Alexander of Weedon QC, op. cit. at page 5.

By way of example, the writer’s favourite anti-lawyer joke goes - Why does New Jersey have all the toxic waste dumps and Washington DC all the lawyers? - New Jersey had first choice.

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