

ADJUDICATION

Resolution In Real Time

Shanthi Supramaniam

Adjudication is the new buzzword to sweep the construction industry of this region. In very brief terms, it is a form of interim dispute resolution on payment issues between contracting parties, targeted to get the cash flow pumping through the chain of contractors till the project is completed.

The key motivation behind the adjudication scheme is to improve the cash flow of contractors at the lower-end of the contractual chain who, all too often, were being financially squeezed by the conglomerate main contractors who refused or withheld progress payments in the knowledge that court/arbitration proceedings would offer too slow and too late a remedy for the contractor. As a result of these oppressive tactics, insolvency of these lower-chain players had become a disturbing upward trend. Adjudication was therefore conceived to provide quick relief to these cash-starved contractors.

Background

Over the past 2 decades, construction industry players did not warm up to the idea of consensual adjudication and so the idea of compulsory adjudication was mooted. Compulsory adjudication accommodates parties' choice to either treat adjudication:-

- (i) as the sole form of dispute resolution method to be used in the regulating their relationship; or alternatively

- (ii) as a supplementary method of dispute resolution to resolve the immediate cashflow issue, while the more traditional dispute resolution method of arbitration and Court litigation will be utilized to achieve an overall resolution of all issues at the end of the project.

The United Kingdom introduced compulsory adjudication for construction disputes in mid-1998 through section 108 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998.

Since the year 2000, Australia, New Zealand and Singapore have all jumped on the compulsory adjudication bandwagon by the following legislation:-

- The Building and Construction Industry Security for Payment Act 1999 No. 46 in New South Wales, which came into force on 26.3.2000¹;
- The Building and Construction Industry Payments Act (BCIPA) in Queensland which came into force on 1.10.2004²;
- The Construction Contracts Act 2004 (No. 16 of 2004) in Western Australia, which came into force on 1.1.2005³;
- The Construction Contracts Act 2002 (No 46 of 2002) of New Zealand which came into force on 1.4.2003⁴; and

¹ See Division 2 of the said Act

² This Act came into force in 2 stages. The administrative provisions came into force on 1.7.2004 and the adjudication regime on 1.10.2004.

³ See Part 3 of the said Act

⁴ See Part 3 of the said Act

- The Building and Construction Industry Security of Payments Act 2004 of Singapore which came into force on 1.4.2005⁵ (Singapore Act).

The word is that the Malaysian Construction Industry Development Board (CIDB) and the Institute of Surveyors Malaysia (ISM) are collaborating on a draft bill called the “Construction Industry Payment and Adjudication Bill” legislating compulsory adjudication for the Malaysian construction industry closely modelled on the New Zealand Act. The Bill was to have been passed last year but is now facing some delays (not unlike our construction industry).

Parties are not permitted to contract out of the provisions of this Act once passed.

Essence of the Adjudication Process

In essence, adjudication is a simple, straight-forward method of referring a payment dispute to an adjudicator who acts as an independent referee, by making an interim determination on the validity of payment claims. Unlike arbitration and Court litigation systems which normally only take place after the project has achieved completion, adjudication is envisaged to resolve the dispute *as and when they arise* during the course of the project; hence providing parties a resolution of the dispute in real time, without bringing the project to a stand still.

The adjudicator’s determination is interim, because parties are not prevented from referring the same dispute to arbitration or Court litigation for final resolution. Unless and until the arbitral tribunal or Court makes a final decision on the dispute, the adjudication determination is binding on the parties.

⁵ See Part III of the said Act

If the adjudicator has determined that a party (the respondent) is liable to pay an adjudicated amount, the amount must be paid within the period prescribed in the statute. If the respondent doesn't pay, the other party (the claimant) will be entitled to take prescribed measures such as enforcing a charging order over the project site (if the adjudicator had granted such an order), suspending or slowing down works or entering judgment in Court⁶. If the Court or arbitral tribunal later reverses the adjudicator's determination, the suspension or slowing down of works will not be regarded as a breach of contract or render the claimant liable for any loss or damage suffered by the respondent as a result of the suspension.

Briefly, the mechanics of the adjudication process prescribed by the New Zealand Act is as follows:

- At the end of every month of work, the contractor is entitled to serve a payment claim on the party commissioning the work (the payer);
- The payer has 20 days to either pay up on the claim, or alternatively, provide a payment schedule. The payment schedule may set out a lesser sum which he is willing to pay together with his reasons for his objections or refusal to pay. It is imperative that the payer sets out all his grounds for defence and set-off in the payment schedule as otherwise, he will not be allowed to rely on the same later, in defence to the adjudication claim;

⁶ The Consultation Forum organized by CIDB in respect of the Construction Industry Payment and Adjudication Bill indicates that under the Malaysian Act, contractors will also have the right to slow down work. A copy of the Consultation Forum paper is annexed as an Appendix to this paper.

- If the payer fails altogether to pay, provide a payment schedule or to keep to his payment schedule, then he automatically becomes liable to pay the claimed amount⁷;
- Once the payer becomes liable to pay the claimed amount, the contractor has 2 options: (i) he may immediately suspend work or (ii) he may go to Court armed with his payment claim to recover the sum as a debt due;
- If the payer provided a payment schedule which is less than the sum claimed, then either the payer or the contractor may commence the adjudication process by issuing a notice of intention to refer the dispute to adjudication;
- The appointment of the adjudicator must then be confirmed as soon as practicable;
- Within 5 days of the adjudicator's appointment, the claimant must issue an adjudication claim which sets out the substance of the claim and the supporting documents;
- The respondent then has 5 days to serve his adjudication response together with supporting documents. This time frame can be extended by agreement or if the adjudicator is of the view that the respondent will need more time;
- The adjudicator may set deadlines for submission of documents by the parties, appoint an expert adviser to report on technical issues, call a conference of the parties and issue other directions for the conduct of the adjudication;

⁷ This provision was conceived to force a reaction out of the respondent because all too often, the problem lies in a developer ignoring progress claims and failing altogether to certify payments or assess extensions of time claims or loss and expense in a timely manner.

- Within 20 to 30 days after the respondent serves his adjudication response, the adjudicator must make a determination on the adjudication claim. Parties may agree to extend this time frame;
- If the respondent fails to pay the sums determined to be due within 2 days of the adjudicator's decision, the claimant may recover the sum through the Courts as a debt due, apply to enter judgment summarily through the Courts or suspend works⁸.

Rough Justice

Adjudication has earned itself the nefarious description of dispensing “rough justice” and being a statutory “quick fix”. As you can see, the negative label stems from the fact that an adjudicator would hardly have had the opportunity to thoroughly consider all issues, weigh all the evidence (which are routinely bulky in a construction dispute) and give parties a fair hearing in the short window he has to reach a decision on the rights of the parties in the dispute.

Time Constraints & Procedural Fairness to Parties

Respondents are often disadvantaged by the truncated period allocated for them to respond to the claim, especially when compared to the claimants who, by virtue of being the initiator of the adjudication process, may have had the benefit of weeks or months of preparation time. Time constraints inherent in the adjudication process can severely dilute the respondent's rights of natural justice that entitle him to have a reasonable opportunity of presenting his case.

⁸ The CIDB Consultation Forum indicates that the Malaysian Act will allow the claimant to enforce the decided amount as a judgment debt, suspend or slow down work, ask the principal to make a direct payment, demand a payment bond or seek enforcement through the Courts via a declaration and injunction.

English Judges have ventured to hold that the need to uphold the principles of natural justice have to be tempered by the time restraints of the adjudication process and the provisional nature of the decision⁹. Whilst it may be so, a prudent adjudicator ought to, in determining the dispute, give due regard to the fact that respondent may not have had a sufficient opportunity to answer the case presented to him.

Complexity of Issues

A payment claim can relate to payment of progressive work achieved, liquidated and ascertained damages (LADs), payment for variation work and loss and expense. Validity of the latter types of payment claims cannot be determined without due verification of the propriety of extensions of time, critical or dominant delay factors and culpability between the parties for the delay. The task of determining these issues within the prescribed 30-day period in a construction project of sizeable portion hardly seems humanly possible. The propensity for error increases exponentially. The New Zealand Act seems to recognize this problem, and addresses it by stipulating that an adjudicator's decision on the non-monetary portion of the claim (i.e., rights and liabilities of parties not related to a monetary claim) is not enforceable, meaning to say parties will still have to engage in the final arbitration or Court litigation to determine the cause of delays and the contractor's right to an extension of time.

Even though his decision is not enforceable, the adjudicator is not exempt from making his determination on these complex programming issues as they would be linked to the payment dispute. To ease his burden, an adjudicator may direct the appointment of an independent expert to assist in difficult areas such as programming or methodology. However, it is doubted that even an expert will be able to make a sound assessment within such a short period.

⁹ *Try Construction Ltd v Eton Town House Group Ltd* [2003] BLR 286 at p. 292 para 50.

Evidence Management and Presentation Tools

The time restraint to complete adjudication imposes considerable pressure on an adjudicator to limit the quantity of documentation presented to him to consider. It is perhaps in this arena of speedy justice that it becomes critical for parties to utilise the best and most reliable tools available to put forward their evidence in a manner that is easily understood and which produces results that are concise, reliable and fast.

Programming software such as Primavera go along way in assisting parties to manage and update the work program when delaying events occur. Once information of the estimated delay is keyed in, the Primavera program charts out the necessary adjustments to the time floats and critical path of the construction. In large and complex projects which have hundreds of tasks and various concurrent delaying events during the construction stage, the software reduces substantially the complexity of updating the work program. Guess work is reduced and the adjudicator can be confident that any determination by him in reliance on such a program could not be inferior to a determination without such aids.

Unfair for Owner to Bear the Risk of a Wrong Decision

The scheme of adjudication is inherently pro-contractor. A successful claimant has the option of suspending works until the respondent pays the adjudicated sum. The New Zealand Act stipulates that the successful claimant will not be in breach of contract if he suspends works by reason of the respondent's non-payment of the adjudicated sum. Neither will he be liable for any loss or damage arising out of his suspension. In fact, he even becomes entitled to an extension of time to complete the contract. The sum total of these provisions is that the respondent (owner usually) has no option but to abide by the adjudicator's decision even if the arbitral tribunal or

Court may later reverse the adjudicator's determination on that particular issue. If he does not, he stands to incur far greater losses which will not be compensated by the claimant. Rough justice for the owner, in its clearest form.

Whither the Traditional Dispute Resolution Mechanisms?

In a survey conducted by Knowles, U.K., 78 parties answered that they had treated the adjudicator's decision as final as opposed to only 7 who went on to test the decision by final resolution in the Courts or the arbitration process¹⁰. This is a remarkable result considering a far greater number of parties recorded their dissatisfaction as to outcome of the adjudication¹¹. In other words, even though *X* number of parties may have been dissatisfied by the adjudicator's determination, a large majority of these parties were happy to live with the adjudicator's decision and didn't see the need to obtain final resolution from the Courts.

This statistic is perhaps the best testimony of the effectiveness of the adjudication scheme in not only providing immediate relief to the wronged party but also in preventing protracted and expensive litigation between the parties by reason of the "cooling-off" period between the adjudication and the completion of the project¹². Often times, sanity returns after the initial burst of anger and frustration over the unfair treatment suffered at the hands of the other party and the litigation that was thought to be the only vindication for the innocent party doesn't seem as compelling anymore when the project is completed and bottom lines drawn.

In the broad picture, adjudication has shown itself to be conducive to the overall purposes of justice. Granted that the full rights and wrongs may not be known

¹⁰ Extracted from "Adjudication – What do the Parties Think?" published by Knowles at www.jrknowles.com/global/news/legal_bulletins/legal_bull_res.php

¹¹ In the same survey, 60 answered they were satisfied while 24 answered they were not.

¹² Curiously, the advantage of the "cooling-off" period is unharnessed in the New Zealand Act as it allows parties to concurrently engage in adjudication and arbitration or Court litigation.

at the time the adjudicator is called upon to make his interim determination, but the interim decision goes a long way in moving a project along towards completion. Resources are saved and additional expenses caused by delay are avoided. The benefit is shared by all parties in the contractual chain.

