Adjudication since 1998: A paper based on a talk delivered at the 35th anniversary of the Centre of Construction Law & Dispute Resolution at King's College London on 18th November 2022.

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Abstract

This chapter traces the development of construction adjudication in the UK. It begins by canvassing the construction dispute resolution environment before May 1998 when the Housing Grants, Construction and Regeneration Act 1996 entered into force. Next, the chapter reflects on the pre-1996 opposition to adjudication and queries whether the distrust of the industry and the fear of contractor bias was justified. Furthermore, it contemplates the current position of adjudication which has become a deeply embedded and successful part of the dispute resolution landscape. The chapter also traces the role of the Technology and Construction Court in strengthening the role of adjudication. Finally, it reflects on the future of adjudication and the profession of adjudicators.

It is an honour to be invited to deliver a talk on adjudication since 1998 at the 35th anniversary conference of the King's College Centre of Construction Law. It is also a slightly daunting task to cover 25 years of adjudication in 25 minutes! I will therefore be necessarily brief and focus on some headline observations regarding three key areas. I start with a reflection on the pre May 1998 landscape before statutory adjudication was brought into force in the UK. I then consider how adjudication has evolved and where adjudication is now. Finally, I share my thoughts on what the future holds and where adjudication may be going.

The pre May 1998 landscape

The genesis of adjudication in the UK is well documented.[1] The concerns of the day were highlighted in Sir Michael Latham's 'Constructing the Team' ('the Latham Report') published in July 1994 which recommended a system of mandatory adjudication. That recommendation was realised through the Housing Grants Construction and Regeneration Act 1996 ('the Construction Act') which came into force on 1 May 1998. To the extent a construction contract did not provide for adjudication which complied with Section 108 of the Construction Act, then the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (or their equivalents in Scotland and Northern Ireland) ('the Scheme') would apply.

The options for resolving construction industry disputes prior to May 1998 were limited. In the event parties were unable to resolve their dispute amicably their choice was between litigation before an official referee or arbitration. Save for the fact that litigation was conducting with 'wigs and gowns' and in public, there was arguably little difference between the two options in terms of time and expense, ie they were typically both lengthy and expensive:

> From my experience as an advocate, both before official referees and arbitrators, I do not think that in most cases of complexity there was much difference in the length of a hearing of a dispute whether it was heard in court or in an arbitration. **It might be said that this is because, once counsel is briefed in an arbitration, he dictates the**

[1] For a good summary, see Peter Coulson, *Coulson on Construction Adjudication* (4th edn, OUP 2020), Ch 1.

> **manner in which the case will be presented and by training will follow court procedure**.[2]

Ten years prior to the publication of the Latham Report, the then Master of the Rolls, Sir John Donaldson, opined on the 'state of the official referees list' in the following terms:

> The delays in disposing of business before the official referees, through no fault of their own, [is] wholly unacceptable……..if this reduction in the length of the lists does not occur or seems unlikely to occur, urgent consideration should be given to conferring upon the official referees, a power analogous to that contemplated by section 92 of the County Courts Act 1959 (power to judge to refer to arbitration] to enable official referees, whether sitting as such or arbitrators, to refer, or sub-refer, the "nuts and bolts" of the suit to suitably qualified arbitrator for inquiry and report. This would result in the official referees becoming, in effect, the construction industry court, having the same relationship to the construction industry as the Commercial Court has to the financial and commercial activities of the City of London.[3]

Additionally, it was permissible for parties to constrain references to arbitration and litigation until the end of a project, eg after a final statement or certificate had been issued. Thus, the reality was that it was only those with 'deep pockets' and the means to fund arbitration or litigation who were able to pursue claims. The perception was that the odds were heavily stacked in favour of the larger organisations or those with access to limitless funds who had the ability to stay the course of litigation or arbitration.

In many ways the advent of adjudication can be seen as the product of successful lobbying on the part of the specialist contracting organisations and/or more general contracting bodies in order to redress that perceived imbalance of power. However, the proposed introduction of adjudication was not universally welcomed. Had I been delivering this talk as an aspiring adjudicator in this room 25 years ago, I suspect that I may not have received such a warm reception as I have today. I see in the audience some of those who took an active part in the debate at the time concerning the proposed introduction of statutory adjudication. The subtitle of a collection of papers published in 1997 and edited by the former Director of the King's College Centre of Construction Law, Professor John Uff KC, is informative of the opposition to the proposed reforms - Contemporary Issues in Construction Law Volume II – Construction Contract Reform: A plea for sanity ('Plea for Sanity').[4]

The papers in Plea for Sanity spanned the period 1995 to 1997 and were stated to represent a collection of papers in opposition to the reform proposals. In his editorial Professor Uff said that the

> publication is not a plea for abandonment of the reform programme started in 1992, but for a pause to allow proper debate. Particularly, the impending introduction of compulsory adjudication will have far-reaching and irreversible effects on all sides of the UK construction industry.

An article from the late Ian Norman Duncan Wallace QC published in the Construction Law Journal in 1997[5] also gives a flavour of the mood of the day with (for him) a characteristically

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[2] James Fox-Andrews, 'Construction industry disputes: Official Referee or technical arbitrator – the pros and cons' (1992) 8(1) Const LJ 2, 9 (emphasis added).
[3] *Northern RHA v Derek Crouch Construction Co Ltd* [1984] QB 644, 674-675.
[4] John Uff, *Contemporary Issues in Construction Law. Vol II A Plea for Sanity* (Construction Law Press 1997).
[5] Ian ND Wallace, 'HGRA adjudication: swarms of wannabes' (1997) Const LJ (emphasis added).

strong and colourful account of the perceived shortcomings of 'industry' arbitrators or adjudicators and their seeming bias against the client or 'paymaster parties':

> Even when adjudicators are nominated by those traditional institutions in the construction industry (including the Chartered Institute of Arbitrators) which currently nominate arbitrators failing agreement, **the present writer has already drawn attention in Hudson and elsewhere to the seeming bias of "industry" arbitrators against client or paymaster parties** (i.e. against the owner or, in a sub-contract setting, the main contractor), indicated by the reported misconduct cases, in England and Australia in particular. **Moreover, there is a class of aggressive and over-confident arbitrator in the construction industry, with a confirmed belief in the superiority of his own technical expertise** combined with inquisitorial activism (the latter unfortunately expressly encouraged by the "take the initiative" language of article 13 of the Scheme, no doubt borrowed from section 34(g) of the Arbitration Act), in contrast to hearing witnesses tested by cross-examination and analysis of contemporaneous documentation presented by the parties, for the satisfactory resolution of disputes.

As well as a concern regarding the ability of the aspiring adjudicators more generally, was a concern as to the appropriateness of having a complex construction industry disputes determined, albeit temporarily, within a 28 day timetable. If one looks at the list of contributors to Plea for Sanity, it is evident that much of the opposition and concern was held by legal practitioners and/or experienced arbitrators. A cynical view may be that the proposed reforms presented a threat to those who benefited from the then status quo of lengthy and expensive arbitration or litigation. A more benevolent view may be that those concerns were well founded – how could disputes regarding a final account, extension of time, loss and expense, allegations of professional negligence or alleged defects possibly be resolved in 28 days?

The evolution of adjudication - where are we now?

It is fair to say that today adjudication is very much an embedded part of the construction industry litigation landscape. It is also fair to say that at the outset in 1998 there was uncertainty as to the nature of adjudication and the form it would take. It is perhaps instructive that the adjudication provisions of the Scheme do not prescribe for any submissions to the adjudicator beyond the Referral of the dispute. Allied with the inquisitorial powers conferred upon the adjudicator (consistent with Section 34(g) of the Arbitration Act referred to by Duncan Wallace[6]) indicates that the original concept for adjudication was that the process would be more akin to expert determination, whereby an experienced and suitably trained industry professional would be presented with a 'dispute' consisting of the parties' previously canvassed and exchanged arguments, conduct an investigation and make a decision without the need for formal sequential submissions. Indeed the ICE Conditions of Contract at the time attempted to define the word 'dispute' by limiting it to matters which had already been referred to the Engineer for a decision and which had been subject to a notice of dissatisfaction. This concept was also referred to by one practitioner as the 'black bag' approach, whereby the parties would package up all their previously rehearsed arguments in a 'sack' and hand them over to the adjudicator for a decision.[7]

In contrast to the Scheme, the JCT Adjudication Rules did provide for a Response to be provided within 7 days service of the Referral. Perhaps as a result of familiarity with an

[6] ibid.

[7] Eg Dominic Helps, referring to the judgment in *Edmund Nuttall v RG Carter* [2002] EWHC 400 (TCC).

adversarial system, the 'norm' in adjudication is now for an exchange of sequential submissions, eg Referral, Response and Reply and more (eg Rejoinder, Surrejoinder, Rebutter, Surrebutter, First Final Submission, Second Final Submission etc etc.!). My view is that one of the reasons for this is that the adjudicators were initially drawn and/or trained by individuals from a pool of practitioners who had been trained in arbitration and were familiar with the adversarial common law system of resolving construction industry disputes. The TCC has also made it clear that parties are entitled to advance new arguments and evidence within an adjudication subject to the other party having a reasonable opportunity to present its case.[8] The adjudicator has also arguably been given a de-facto power to adopt an extended timetable in the event they consider that it would not be possible to conduct an adjudication in a procedurally fair manner as a result of its size and complexity.[9] Consequently it could be said that adjudication has become in reality a fast track system of arbitration.

Perhaps the turning point for adjudication was the first adjudication enforcement action by Dyson J (as he then was) in *Macob Civil Engineering Limited v Morrison Construction*[10]on 12th February 1999. The statistics of the number of adjudication appointments made by adjudicator nominating bodies ('ANBs') in the UK show that *Macob* triggered a marked increase in the numbers of adjudications which, apart from a drop in 2011 (and post the 2008 financial crisis and associated economic downturn), have continued at a sustained rate since that time.[11] Another contributory factor to the growth and continued use of adjudication may also be the historic drive towards more cost efficient litigation. At the outset we had the Woolf Reforms of 1996 and the Arbitration Act 1996, both of which were aimed at addressing concerns regarding the delays and costs associated with litigation and arbitration. Since then we have had the Jackson Cost Review of 2004 which had similar aims.

Another significant factor which in my view has contributed to the development of adjudication is the evolution of official referees to High Court Judges and the integration of the Technology and Construction Court ('TCC') as part of the Business and Property Courts of England and Wales with TCC Judges having the same status as Commercial Court Judges. In many ways I consider an analogy can be drawn between the role fulfilled by the official referee of the past and that of the present day adjudicator.

The official referee was created by Section 82 of the Judicature Act 1873. Its origin arose from the increased use of arbitration business in contrast to a jury trial or litigation for technical disputes. Although the official referee was abolished by Section 25 of the Courts Act 1971, 'official referees' business' continued. However, in some circles, the official referee was seen as inferior to High Court Judges. For example, Sir Antony Edwards-Stuart has referred to a perception of the official referees as the 'cadet branch' of the High Court.[12]

The change in status from 'cadet judges' to High Court Judges can perhaps best be seen in the appointment of Dyson J and subsequently Forbes J (who was the first Official Referee to become a High Court Judge). This was followed by the appointment of Jackson J (as he then

[8] Eg *Cantillon Limited v Urvasco Limited* [2008] EWHC 282 (TCC).
[9] Eg *CIB Properties Limited v Birse Construction* [2004] EWHC 2365 (TCC); *Dorchester Hotels Limited v Vivid Interiors* [2009] EWHC 70 (TCC).
[10] [1999] 2 WLUK 258.
[11] See eg Renato Nazzini and Aleksander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (*King's College London*, 3 November 2022) <10.18742/pub01-160> accessed 27 October 2023.
[12] See Antony Edwards-Stuart, 'The Jackson Reforms and Technology & Construction Court Litigation' in Julian Bailey (ed), *A Festschrift for Lord Justice Jackson* (Bloomsbury Publishing 2018).

was) and the 'Jackson 5' (Ramsey J, Akenhead J, Coulson J and Edwards-Stuart J) who have all played their role in elevating the status of the judges who dealt with construction industry disputes and also the TCC more generally. It can be seen from the caselaw and development of the jurisprudence concerning adjudication that a key part of the role of the TCC is to support and police adjudication and in particular the conduct of adjudicators and parties to adjudication. It can also be suggested that, as the status of the TCC has been raised and the pressure on the judicial budget has increased, adjudication has become the natural home for dealing with domestic commercial construction industry disputes. I would suggest that there is a correlation between the increased status of the TCC and that of the adjudicator. Three examples of this can be seen in the judgments of Coulson LJ in the Court of Appeal:

- *S&T (UK) Limited v Grove Developments Limited*: *[2018] EWHC 123 (TCC):-*

  > 70. (…) Mr Speaight properly conceded that, if the court had the power to do something, then so too did an adjudicator. **I agree: in any case where the parties have conferred upon an adjudicator the power to decide all disputes between them, the adjudicator has the same wide powers as the court.**[13]

- *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited and Cannon Corporate Limited v Primus Build Limited*:

  > 31. On analysis, **I can see no reason why, purely as a matter of jurisdiction (as opposed to utility), a reference to adjudication should be treated any differently to a reference to arbitration**…[14]

- *John Doyle Construction Limited (in Liquidation) v Erith Construction Limited*:

  > 29. (…) Although it has come at some cost to other court users in the TCC (because they can sometimes be bumped down the queue for interim appointments in order to prioritise adjudication enforcement hearings), it has generally been regarded as a great success. It is one of the reasons why, speaking personally, **I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'.** In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. **It is not an alternative to anything; for most construction disputes, it is the only game in town**.[15]

Lord Briggs' opinion in the UK Supreme Court in *Bresco* has added even greater weight to the increased status and importance of adjudication to the construction industry.

The TCC has also been seen to chastise parties for opting to litigate disputes in the TCC when adjudication may have been more appropriate:

> Finally, there is an adjudication scheme for claims in professional negligence, operated by the Professional Negligence Bar Association. …. It is a great pity that the parties did not adopt that method of resolving their dispute in this case. It would have been far quicker, and much more economical, than conducting a High Court trial ……. ….

[13] [2018] EWHC 123 (TCC) (emphasis added).
[14] [2019] EWCA Civ 27 (emphashs added).
[15] [2021] EWCA Civ 1452 (emphasis added).

> Using the scheme to which I have referred, to resolve a dispute such as this one, would have been a far better way for the parties to have proceeded.[16]

However, with increased status comes increased responsibility and scrutiny of the conduct of adjudicators and the parties to adjudication. For present purposes I have just looked at 2019 (but there are many more examples in different years), but some examples of the extent to which the conduct of adjudicators has been the subject an interrogation of the TCC are listed below: *J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd*,[17] *RGB P&C Ltd v Victory House General Partner Ltd*,[18] *Willow Corp SARL v MTD Contractors Ltd,*[19] *Corebuild Ltd v Cleaver & Anor.*[20] [2019] EWHC 2170 (TCC)

Another aspect of the increase in status of adjudication is the increase in complexity of the process. Allied with this is the effect it has on the cost of the process. As well as an increased need for accountability, comes an increased need for quality. Thankfully, there has been some progress in this regard, with the advent of low value dispute schemes, such as the CIC LVD Model Adjudication Procedure and the TeCSA LVD Scheme, and the increase in more extensive training and education of adjudicators by professional bodies than was available at the outset as well as the increased inclusion of adjudication modules by Universities as part of their post graduate LLM and MSc programmes.

The future – where are we going?

Oscar Wilde is attributed as saying that 'imitation is the sincerest form of flattery that mediocrity can pay to greatness'. With that quip in mind, there are signs that UK construction adjudication is likely to be the subject of increased use in the future or used as a model to be adopted elsewhere in other areas, industries or jurisdictions.

As things currently stand statutory adjudication in the UK is restricted to 'construction contracts' as defined by the Construction Act. Thus there are notable exclusions, such as construction contracts with residential owner occupiers or contracts which involve power generation. I predict that in the future there is likely to be a widening of the UK adjudication process by virtue of some erosion of the excluded operations currently caught by S.105 of the Construction Act.

I also predict that there may be a widening of the adjudication process to other industries. I have already alluded to voluntary adjudication schemes being adopted in other industries, e.g. the Professional Negligence Bar Association[21], and the Society of Computers and Law has also introduced an adjudication scheme for IT disputes. Although strictly a statutory "arbitration scheme", the creation of a Pubs Code Adjudicator (a product of the last UK coalition government) to address disputes between tied tenants and large pub-owning businesses/landlords bears similarities in the use of a statutory backed private dispute resolution regime as a means of dealing with disputes which would have otherwise occupied Court time and burdened the judicial budget.

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[16] *Beattie Passive Norse Limited (2) NPS Property Consultants Limited v NPS Property Consultants Limited* [2021] EWHC 1116 (TCC) [152] (Fraser J).
[17] [2019] EWHC 1152 (TCC).
[18] [2019] EWHC 1188 (TCC).
[19] [2019] EWHC 1591 (TCC).
[20] [2019] EWHC 2170 (TCC).
[21] ibid.

There has also been an increased uptake of adjudication internationally. Perhaps understandably, this has thus far been predominantly confined to common law and/or or commonwealth countries, but there are signs that this may not always be the case, eg a civil law jurisdiction such as Germany has been considering the process and Quebec has a pilot adjudication scheme. FIDIC has also recently instigated increased training and a new accreditation regime in order to cater for an anticipated increased demand for adjudicators on projects where its contracts are used as a result of a requirement of funders of international construction projects in developing countries (such as the World Bank) to adopt FIDIC contracts and a commitment to fund dispute adjudication/avoidance boards.

I also perceive an export or transfer of the skills acquired by construction industry adjudicators to other areas, such as dispute/conflict avoidance (or adjudication) boards or panels where board/panel members are able to use their experience to assist on live projects in order to prevent the escalation of disputes to a formal referral to adjudication or arbitration. Other areas where adjudicators are being used is where parties are seeking a more evaluative mediation process, eg the RICS evaluative mediation model where the evaluative mediator may be asked to provide an opinion or recommendation in the event a settlement is not achieved.

Although training and qualification of adjudicators has developed in line with the increase in complexity, one concern amongst those who have invested in the training is the difficulty of developing a practice as an adjudicator. The situation is arguably similar to mediation and arbitration. However, the difference is that, historically, newly trained or qualified arbitrators or mediators were able to act as pupils or observers in order to get hands on experience and receive guidance from experienced practitioners which they could then use in support of getting onto panels and getting their first appointment. My view is that there is a real need for adjudication to follow suit in this respect. This is something that I have pioneered over the recent years. My hope is that the ANBs/professional bodies now take the lead in the roll out and recognition of pupillage and mentoring schemes as in many ways they are the gatekeepers to the future of adjudication.

Conclusion and final thoughts

With the benefit of hindsight, the naysayers have been proved to be wrong. Adjudication in the UK has become an overwhelming success. It owes its success in many ways to the support it has received from the Courts and the evolution and increased status of the TCC. Adjudication is now a mature, complex and highly legal process. With this, comes expense and an increased need for quality and accountability. Recent moves to make adjudication more accessible to smaller and medium sized entities in order to resolve low value disputes are welcome. However, low value does not necessarily equate with simplicity or an absence of complexity. Thus the training requirements, case management and decision making skills are as much, if not more, demanding for these types of disputes as for high value, complex disputes with sophisticated and experienced representatives. This provides a challenge. It also provides an opportunity.