

"Adjudication" is used internationally by construction industry as an informal system of interim dispute resolution. Having been introduced in the UK by the Housing Grants, Construction and Regeneration Act 1996, adjudication has increasingly gained global currency and respect in the construction sector as an efficient measure for parties to adopt, in the search for effective solutions, when dealing with problems arising throughout the whole lifecycle of a project.

Adjudication: The New Arbitration in the Chinese Construction Industry?

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To what extent has the growth in adjudication spread to Mainland China? There is no doubt that there has been a growth in the popularity of ADR in Mainland China. The China International Economic and Trade Arbitration Commission ("CIETAC"), which employs its own Arbitration Rules to help resolve disputes, has seen an explosive increase in the number of new arbitration cases received. This has risen from 267 in 1992 to 1230 in 2008.

Nowadays, with the inevitable freeze on inter-bank lending and the financial sector's connection with the construction industry, many construction projects around the world have come under considerable financial strain. What impact will this have on ADR, and, more particularly, adjudication?

Clearly, many construction projects are currently failing because of the economic climate. One commentator has observed that: "The main reasons that projects fail in difficult economic times are due to poor cash flow filtering down to the contractor and professional team." One needs look no further than Macau and Dubai, by way of examples, demonstrating the impact that shortage of cash flow can have in terms of paralysing projects and ultimately leading to the failure of construction contracts completing.

The difficult economic situation suggests that the fast and cheap adjudication process is now, more than ever, an extremely useful way of resolving disputes. The aim of statutory adjudication in the UK was to enable a stronger cash flow situation at the lower end of the supply chain. In the UK, the construction industry has readily adopted adjudication because of its speed, confidentiality, simple procedure and improvement of cash flow. It is designed to produce a cash-flow remedy that can be used throughout the duration of the construction project. The intention is to avoid the previous practice of long-running arbitration or court litigation that deprived the claimant, usually the contractor, of money due while funding sizeable legal costs. Statutory adjudication schemes have also been introduced in other common law jurisdictions including New Zealand, Singapore and some Australian states.

What about countries that have yet to adopt any legislative control of adjudication? There is, of course, still the option of the parties voluntarily agreeing to adjudication in the construction contract. As of 2008, China announced that it intended to spend US\$570 billion on construction by 2010. It remains to be seen if adjudication will become more popular in large-scale Chinese construction contracts, but given its time and cost benefits, it is reasonable to suppose that this is a possibility.

How adjudication works

Typically, the construction contract allows for an adjudicator to be appointed as a means of dispute resolution. The adjudicator provides a decision on disputes as they arise during the course of a construction contract. The adjudicator will make a decision within a relatively strict timetable combined with a largely informal procedure. The decision will be

binding until it is subsequently reviewed by another tribunal - which could be an arbitrator or a court of law - or until the parties reach an agreement.

Similar to litigation, arbitration and expert determination, since adjudication is a binding process, it can lend itself to resolving disputes over multiple issues, which are common in large-scale construction contracts.

When drafting an adjudication clause, there are several factors to bear in mind. Generally, clauses should be kept brief and it is normal to stick to the wording of standard forms. However, if this is a multi-party project, a bespoke provision may be necessary. The types of "dispute" that will be sent to an adjudicator should be clearly defined and referred to in the clause. For reasons of certainty, the clause should state the procedural law and an appointing authority is usually provided for the adjudicator in circumstances where the parties are unable to agree on the suitability of candidates. Again for the sake of clarity, the language of the proceedings should be specified albeit in some cases, the proceedings may be conducted in 2 languages.

It is also important to note that adjudication is usually a part of a suite of multi-tiered resolution provisions commonly used in construction and energy contracts. Generally, the first step is one of non-binding no 3rd party intervention (negotiation) leading to, secondly, a form of non-binding 3rd party intervention (such as mediation), which in turn, will be followed by a binding form of 3rd party intervention which, though not common, can be adjudication. Litigation or arbitration is more commonly used. The use of adjudication in practice is examined in more detail below with the example of the construction of Hong Kong International Airport. As will be seen, there are advantages and disadvantages to this 3-tiered contractual approach.

On the one hand, the staggering of the overall process allows parties to seek to resolve disputes in a less adversarial setting and to preserve an ongoing commercial relationship with each other. Escalator clauses can also save significant amounts of time and money. The fear of having to resort to adjudication or court proceedings at the end of the process can serve as an incentive for parties to reach an amicable agreement at a much earlier stage.

However, a prolonged negotiation stage may simply serve to allow a recalcitrant party to continue to evade its obligations, leading to significant delay. Costs involved in the 2nd stage of the process may be viewed as wasted in the event that a mediation or dispute review board, for example, fails to live up to its objectives. Finally, if this clause is not properly drafted, the parties will encounter significant procedural difficulties as they move along the various stages of the dispute resolution path.

Practical examples of the use of adjudication in dispute resolution

The construction of Hong Kong International Airport was an enormous infrastructure project and illustrated the workings of 3 different forms of ADR in the context of the construction of the infrastructure, the underground line and the airport itself. Adjudication came to play a role in the first of these forms of ADR.

In the 8 infrastructure projects, the first layer of dispute resolution was referral to the engineer. If this failed, the next step was mediation and if, through that procedure, the parties failed to reach an agreement, the final stage was adjudication. The contracts for the infrastructure projects had "Special Rules for Mediation, Adjudication and Arbitration" and these were governed by the Hong Kong International Arbitration Centre.

How effective were the dispute resolution provisions during the project? The answer appears to be a resounding, "thumbs up" the opening of Hong Kong International Airport (a project referred to in its totality as the Airport Core Programme) being widely heralded

internationally as an example of how, where parties to a project collaborate in a spirit of partnership, projects even of the most complex nature, can nevertheless be a resounding success. A report from a Transparency International Mission concluded that it was staggering that a project costing the equivalent of US\$20.6 billion, which from inception to completion took over 15 years, ran as smoothly as it did. The Mission said that one of the key reasons for this success was the existence of clear rules for procurement of construction services, monitoring of contracts, enforcement of accountability of all parties and, vitally, dispute resolution.

It was felt that the existence of the 3rd stages of binding dispute resolution procedures (such as adjudication and arbitration) served to deter the referral of disputes and had also maybe encouraged the settlement of matters between the parties without the need for any 3rd party intervention. In total, of the roughly 125 cases that required dispute resolution, only 9 needed to be solved (and not always by adjudication) during the adjudication phase.

In Chinese projects, adjudication has not been widely used in construction contracts, though there is some evidence of its usage in some World Bank-funded projects. One Chinese example is from 2003, and it is regarding the use of voluntary adjudication in a contract for the mechanical and electrical installation of a port project in northern China.

The contractor was European and the employer was a large Chinese entity. Although the contract conditions were ad hoc, they were based on FIDIC provisions. According to the Chinese adjudicator, at this time, this was a fairly new process in Chinese construction projects, the common methods of resolving disputes in Mainland China being litigation, arbitration and conciliation/mediation. It was only on completion of the project that disputes were finally sent to adjudication. A referral to arbitration had proved fruitless and it was only through lobbying on the part of the World Bank that the employer finally agreed to take the matter to adjudication.

In the event, adjudication was seen as a successful alternative to arbitration and the contractors commented that adjudication seemed to be more time and cost effective. However, it should be noted, that the adjudicator had to conduct a mixed process of adjudication and mediation/conciliation to ultimately make his decision enforceable. The parties' gradual familiarization with the adjudication process enabled it to ultimately be a success. It is worth noting, however, that until now, the writers of this article are unaware of any adjudication decision coming to be scrutinised or there being any precedent case in China for an adjudication decision to be submitted to a court for enforcement.

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