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The Rise and Rise of Statutory Adjudication: Is the U.S. Ready?

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This article looks at the rise in the use of statutory adjudication in various jurisdictions in the context of complex construction disputes and asks if the United States is now ready to also embrace this ADR option. Statutory Adjudication has taken off in the United Kingdom, Ireland, Hong Kong, Singapore, New Zealand, Malaysia, and Australia. Most recently, the Federal Prompt Payment for Construction Work Act and the Canadian Construction Act (2018) have introduced adjudication in Ontario, Canada. While the United States gave the world the concept of dispute review boards (DRBs) (first used in 1975 with the second bore of the Eisenhower Tunnel at Loveland Pass, Colorado) it has not embraced statutory adjudication.

The authors consider that there are compelling reasons and inflammatory markers that indicate that the United States is now ready to embrace statutory adjudication in

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the context of construction contracts—but the United States needs to decide if statutory adjudication ought to apply to *all* disputes that arise in complex construction contracts (as in the United Kingdom) or be limited to solely payment disputes (as in Ireland); decide if statutory adjudication is limited to disputes that arise prior to practical or substantial completion; and codify how enforcement of adjudicators' decisions would work in practice.

Lord Briggs sitting in the United Kingdom Supreme Court in *Bresco*

Electrical Services Ltd v. Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25 handed down on June 17, 2020 at paragraph 10 gives a perfect definition of statutory adjudication:

Introduced as a statutory regime by the 1996 Act, adjudication of construction disputes has been a conspicuously successful addition to the range of dispute resolution mechanisms available for use in what used to be an over-adversarial, litigious environment. It builds upon a purely contractual structure for adjudication which was already by 1996

regarded by many in the industry as best practice.

Speaking generally, adjudication is one of a spectrum of dispute resolution mechanisms which range from party and party negotiation at one end, through mediation, early neutral evaluation (ENE) and arbitration to litigation at the other end, lying roughly between ENE and arbitration. ENE delivers a private non-binding opinion on the merits of the dispute from an independent, respected and often expert source.

Arbitration delivers a (usually) private determination from a similar source which is binding subject to very limited scope for appeal. Adjudication shares with ENE the independent, often expert, respected source together with the speed and economy of ENE, with a provisional element of binding decision, unless and until the matter in dispute is later resolved by arbitration, by litigation or by agreement.

Lord Briggs picks up the “independent, respected and often expert” characteristics of an adjudicator. In the context of disputes, adjudicators in practical terms have now replaced outright engineers and architects who were often found to be the professional contract administrator in the various standard form construction contracts.

In a similar way the AIA document issued by The American Institute of Architects has developed a system where an independent person does not replace the Architect but co-exists with the Architect. The AIA provision provides a ‘pay now argue later’ mechanism whereby the contractor can secure payment based upon its claim during the dispute.

The claim is issued to the initial decision maker (IDM). The IDM, under §15.2.1, then has 30 days to issue a decision on a claim. Pursuant to §15.1.4.2, the contract price and the time for completion shall be adjusted in accordance with the IDM’s decision.

This is similar to adjudication in the sense that the IDM’s Decision acts as an implied term adjusting the parties’ contract. Either party can challenge the IDM’s decision through the final dispute resolution process but the IDM’s decision will remain binding until a final award or judgment has been issued. The architect

There are **compelling reasons** that indicate the United States is **ready to embrace statutory adjudication** in the context of construction contracts.

is required to issue certificates for payment in accordance with the decision of the IDM is not allowed to open up, review or revise the IDM’s decision—this is inherent in §15.1.4.2:

The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker’s decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.

Payment Disputes Only?

Based on jurisprudence from other jurisdictions, whether statutory adjudication is limited to only disputes

about payment it still leaves scope for the parties to argue about the precise meaning of ‘payment.’ For example, a narrow reading is taken to mean that a dispute can only be referred to adjudication if it involves the assessment, certification or payment of sums that can be readily calculated from the cost model in the contract.

In contrast, the so-called ‘broad reading’ allows the contractor to bring into the notice of dispute claims for additional loss/expense, disputed variations, extensions of time and consequent prolongation. Patently, the latter is more complex and will require the adjudicator to evaluate facts, critical path activities, methods of delay analysis and possibly expert evidence.

Further, based on United Kingdom jurisprudence the ‘pay now argue later’ model created the so-called “smash and grab” problem—where a contractor is able to claim payment for the amount stated in an interim application (whether or not it represents the “true” valuation of the work) due to a procedural failure by the paying party to serve either a payment notice or a withholding notice/pay less notice.

The Court of Appeal in England and Wales in *S&T (UK) Limited v. Grove Developments Limited*, [2018] EWCA Civ 2448 clarified the issues: Employers, owners, payers faced with a smash & grab adjudication decision who commence a second adjudication (seeking a decision on the ‘true’ value of the amount due to the contractor) are allowed to adjudicate the same interim certificate on the “true” value of an amount due, but cannot start that second

adjudication until payment in full has been made on the first adjudication (which leaves open the insolvency risk).

Adjudicate at Any Time?

Another issue (and one related to the scope of disputes that can be referred) is whether the right to refer a dispute to statutory adjudication can be exercised at any point in the life of the construction dispute or whether it should be limited to the construction phase? This is a question for the relevant legislation. In the United Kingdom, under the *Housing Grants, Construction and Regeneration Act 1996* the courts have held that a notice of adjudication can be issued at any time (i.e. after practical completion and after the final account). Lord Briggs, in *Bresco Electrical Services Ltd v. Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, stated “Furthermore the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process. This is in part because Parliament chose to confer the right to adjudicate “at any time,” so that it can be and is used to resolve disputes, eg. about final accounts between the parties after practical completion, rather than merely at the interim stage: see *Connex South Eastern Ltd v. MJ Building Services Group plc* [2005] EWCA Civ 193; [2005] 1 WLR 3323, paras. 34-38 per Dyson LJ, who concluded that in section 108: “The phrase ‘at any time’ means exactly what it says.”

There are however, compelling reasons to limit adjudication to pre-practical completion. Should

the U.S. model want to limit, then the comments of Lord Ackner (made when the bill that led to the United Kingdom Statute passed through the upper chamber of the legislature) will be instructive (and allow the concepts of notices of dissatisfaction):

What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric, ‘pay now, argue later’ which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts.

Giving Effect To Adjudication Decisions

It is well understood that the adjudicator’s decision takes effect as an implied term of the contract. But what happens if a party refuses to give effect to the decision: is that a breach of contract that needs to go back to the adjudicator; or does it need to go to the final dispute resolution method arbitration or litigation; or is there a swift method of enforcement such that a court converts the decision into a court judgement.

All the foregoing are options for the potential U.S. legislation. In the United Kingdom there is a well-established summary judgment enforcement procedure. There is no reason to assume that the U.S. states cannot adopt similar procedures. There is some precedent (albeit in the context of DRBs): In *Massachusetts Highway Dept. v. Perini Corp.*, 13 Mass. L. Rep.

564 (Mass. Super. 2001); 2001 Mass. Super. Lexis 412 (Perini 1); *Massachusetts Highway Dept. v. Perini Corp.*, 14 Mass L. Rep. 452 (Mass. Super. 2002); 2002 Mass. Super. Lexis 110 (Perini 2); *Massachusetts Highway Dept. v. Perini Corp.*, 828 N.E. 2d 34 (Mass. 2005). The Massachusetts courts ruled that DRB decisions could be confirmed on an expedited basis with the court noting:

The court tends to agree with [Perini’s] observation that summary judgment motions are not really the correct vehicle [*sic*] for what is now before the Court. Rather, under both the Federal and Massachusetts Arbitration Acts, at this stage of a proceeding like that before the Second DRB, the court really must confirm the award, vacate it or send it back for further proceedings. Whatever the titles of the motions, it is the duty of this court to insure that any final judgment “shall grant the relief to which the party in whose favor it is rendered is entitled.”