



Forum

SPECIAL EDITION REPRINT

NOVEMBER 2007

The Use of “Adjudication DRBs” Where Parties Are Subject to Adjudication or Arbitration Processes

By Kurt Dettman and Christopher Miers

Introduction

Adjudication is a statutory process adopted in the United Kingdom by the Housing Grants Construction and Regeneration Act 1996 for obtaining a low cost, rapid decision in construction disputes. The use of adjudication has become well-established in the UK construction industry since the act was implemented in May 1998 and similar processes have now been introduced in other jurisdictions such as New Zealand and parts of Australia. In the UK it has had a profound effect in reducing the number of disputes that go to formal litigation or arbitration.

The adjudication process is available as an option for a party (usually the contractor) with a construction dispute to bring its claim to an “adjudicator” for a decision to be issued within 28 days after filing the claim. The parties are bound by that decision unless/until it is overturned by a later process of litigation or arbitration. In the vast majority of disputes, the parties accept the adjudicator’s decision and do not pursue a later court or arbitral appeal, so the adjudication process results in what is tantamount to a binding decision. Adjudicator’s decisions have also met with full support from the judi-

ary in enforcement actions, and as such parties have very little scope for non-payment of any award made by the adjudicator.

In the United States (US) domestic construction market the closest cognate to the UK’s adjudication process is arbitration. In many respects, the arbitration process is like the adjudication process. There are, however, some differences: arbitrations (especially in large, complex disputes) usually are more formal; arbitrations usually take much longer and are already be known about by both parties and therefore in the claim document there should be nothing new to take the defending party by surprise.

Once the defense is served the adjudicator may decide to call a meeting, visit the site, request additional information, documents or submissions, or take whatever other steps he/she considers are appropriate within the available timetable. The adjudicator may act inquisitorially, although in practice the adjudicator normally relies on the parties to submit the evidence on which they wish to rely. The adjudicator may also bring in an additional expert to advise him/her, provided that the parties

In the UK it (adjudication) has had a profound effect in reducing the number of disputes that go to formal litigation or arbitration.

expert's advice before the adjudicator comes to a decision. Once the adjudicator makes a decision, the parties are obliged to follow that decision, with very limited grounds for non-compliance.

The strength of the adjudication process is that it provides a rapid and cost effective mechanism for deciding a dispute, which can be undertaken during a project without major distraction from the overall project objectives. It provides a decision from an expert neutral third party on the disputed issue, which generally tends to end the matter. Its initial objective, which was to ensure that roughly the right amount of money was in the right hands as rapidly as reasonably possible, has been achieved and the process has transformed dispute resolution for the construction industry in the UK.

The downside of the adjudication process is that due to its speed it does not allow for a detailed analysis of issues. If therefore it is mis-used for a complex dispute the parties either need to agree a longer timetable for the adjudicator to give his/her decision, or to accept that the more expensive as they often replicate US litigation practices; arbitrations often are conducted after the project is over; and arbitration decisions are, in essence, final and binding when rendered because there is no realistic ability to appeal to court.

In this article, the authors discuss the concept of an "Adjudication DRB" as an alternative to the UK adjudication process and the US arbitration process. They propose that if the parties to a project are already subject to UK adjudication or US-style arbitration process, it may produce a better result if an "Adjudication DRB" is used in lieu of an adjudication/arbitration process.

The Adjudication Process

Within the UK adjudication process, the adjudicator can be a single person selected by agreement between the parties before

the start of the project, although more commonly he is selected after the dispute occurs by a "nominating body" which typically will be one of the main professional institutions. The typical adjudicator is either an experienced construction professional with some legal training or a lawyer with construction expertise.

The party initiating the adjudication must submit its claim document to the adjudicator within 7 days of electing to refer the dispute to adjudication, and the adjudicator must issue a decision within a further 28 days (unless a longer period is agreed). Most adjudications follow a standard procedure of requiring a defense submission seven days after receiving the claim. This very limited time available can place the defending party at a disadvantage, but it is premised on the assumption that the issues in dispute should adjudicator is not likely to have the time to delve into the complexities of the dispute and is likely to make his/her decision based on only the major parts of the argument.

Like all legal procedures, there are occasional adjudicator's decisions that appear to a party to be wrongly decided. In such cases the dissatisfied party can resort to litigation or arbitration (depending on the requirements of the contract) but normally must comply in the interim with the decision of the adjudicator.

The Arbitration Process

As most readers are aware, arbitration is a well-established dispute resolution mechanism in the construction industry. Since readers are likely to be familiar with the arbitration process the authors do not discuss here the details of the process.

There are certain features of arbitration, however, that sometimes may make it a less than ideal way to resolve construction disputes. Typically the arbitrator or

arbitration panel is selected well after a dispute has arisen or a formal claim has been made—indeed, the arbitration often occurs long after the project is over. Although construction arbitrators tend to be subject matter experts in construction issues and applicable legal principles, they are required by this late selection to learn about complex issues on disputes that often have been years in the making. Moreover, often these arbitration processes can involve cumbersome information exchanges, voluminous submissions, and lengthy hearings that sometimes stretch over years.

After the sometimes lengthy and expensive arbitration process, the arbitrator issues complex findings that represent the arbitrator’s best effort to understand, assimilate and reconcile conflicting positions on the facts, the costs, the delays, expert opinions, and legal liabilities. The process is therefore well suited to a very detailed analysis of issues where there is no urgency for resolution, but when compared to adjudication the arbitration process can appear slow and expensive.

The Adjudication DRB Concept

The “traditional” DRB process differs from the adjudication/arbitration process in the following respects:

- The DRB is in place for the duration of the project.
- The parties may bring their claims to the DRB in what is (at least in comparison to adjudication) a lengthier process.
- The DRB’s findings and recommendations are usually non-binding.

The DRB process offers several advantages as compared to the adjudication or arbitration process. One of the advantages

of a standing DRB is that it is thoroughly versed in the life cycle and history of the project. Through periodic site visits during the course of project the DRB becomes familiar with the nature of the project, important events and circumstances, the project participants, and the issues that may eventually become disputes or claims. When claims are presented to the DRB, it can use its historical knowledge of the project to better understand, discern and analyze the merits and amounts of such claims. In addition, the DRB should be able to reduce and/or shorten the process because the parties will not have to “educate” the DRB in the way a “cold” adjudicator/arbitrator needs to be educated. be perceived to be more efficient and impartial than that of single member, but at the same time is much more expensive. For smaller contracts economic factors may well prevail.

Another way in which a “standing” DRB can work better than a “one-off” adjudicator/arbitrator is that the DRB can be aware of and encourage the parties to resolve disputes before they become claims elevated to the DRB. Often, by raising issues and questions during its periodic site visits, and thus obliging the parties to focus on and discuss difficult issues before they escalate into disagreement, the DRB may be able to head off disputes. Thus, the DRB not only provides a dispute resolution mechanism, it can also provide a dispute avoidance mechanism. This additional ameliorative role of a DRB is not one that a traditional adjudicator/arbitrator can play when brought in after the claim has already matured.

As noted above, arbitrator decisions are very difficult to appeal. As the adage goes, “arbitrators’ decisions can be wrong on the facts, wrong on the law, but still not be overturned”. Assuming that this is the outcome that the parties selecting arbitration may receive, a knowledgeable, expert

DRB should be able to give a more satisfactory result. The DRB's knowledge of the project and the facts and circumstances underlying the claim should put it in a better position to give the parties a decision that is "right on the facts and right on the law."

The authors also propose that introducing the merits of the adjudication process into the traditional DRB process can give further advantages. The current FIDIC "Red Book" and "Yellow Book" international construction contracts have incorporated a form of combined DRB and Adjudication, through the use of a Dispute Adjudication Board (DAB) either appointed at the start of the project (Red Book) or after the dispute has arisen (Yellow Book). The FIDIC timetable is longer (84 days) for the making of a decision, and can make use of a three-person panel or a single person adjudicator. Both the ICC Dispute Board Rules and the UK Institute of Civil Engineers (ICE) Dispute Resolution Board Procedures similarly introduce dispute boards composed of one or three members, who issue a binding decision within 90 days or 84 respectively.

One concern that readers may have is the additional cost of supporting a standing DRB. The authors submit that the cost savings associated with a reduced and more efficient process implemented by a knowledgeable DRB will more than make up for the carrying costs of the DRB. Moreover, arguably the parties for their money are getting a better quality result on average because the DRB is applying its expertise combined with an in-depth knowledge of the project.

Conclusion

The adjudication and arbitration processes are well-established in the construction industry. These processes, however, have their limitations in terms of timeliness and cost—and ultimately the parties' satisfaction with and acceptance of the outcome.

The authors propose that for most projects on which the parties are already subject to a binding dispute resolution process, the preferred dispute resolution mechanism would be to combine the concept of a standing DRB with the concept of the UK adjudication/US arbitration processes. The use of "Adjudication DRBs" presents an opportunity to combine the best features of a DRB with the best features of the adjudication/arbitration processes. □

About the Authors:



Kurt L. Dettman is the principal of Constructive Dispute Resolutions, a consulting firm specializing in alternative dispute resolution in the construction industry. He can be reached at kdettman@c-adr.com and www.c-adr.com.



Christopher Miers is an adjudicator, mediator, chartered arbitrator, chartered architect and DRB member based in London, UK. He can be reached by email at cmiers@probyn-miers.com.



The **Dispute Resolution Board Foundation** is a not-for-profit, worldwide volunteer organization of construction industry professionals interested in promoting the avoidance and resolution of construction disputes through a Dispute Board process. For more information, visit www.drb.org.