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The Adaptability of Adjudication in the UAE from the Perspective of Islamic Shariaa and Civil law

التكييف القانوني ومدى توافق المحكم المستقل لفض المنازعات في

عقود التشييد والبناء في دولة الامارات العربية المتحدة

في ظل القانون المدني والشريعة الاسلامية

By

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Abstract

A number of jurisdictions have introduced a new mechanism to resolve construction disputes cheaply, expediently and efficiently. This new mechanism should consider the privity of construction contracts and without prejudice to the public policy. Adjudication fulfils all the criteria and was introduced because of the inefficiency of the traditional dispute resolution mechanisms and to secure cash flow in the construction industry. An adjudicator is a neutral third party who determines the dispute and has enough experience, impartiality and independence. The adjudicator is nominated by pre-agreement in the contract or by a nominating body.

Considering the success of adjudication in other jurisdictions it is thus desirable to introduce adjudication in the UAE. However, how this system conflicts with the fundamental principles of Sharia and civil law has to be examined.

Islamic Sharia law is considered as the main source of the law of UAE. It is important therefore to determine the potential legal obstacles that might be encountered by the introduction of adjudication in the UAE.

This study also investigates the prospects of introducing a construction court in Dubai that is compatible with Sharia law and civil law. Such a court would co-operate with the Bar association, Law Society and general authority of Islamic affairs and endowment for training and registering of adjudicators. With such a court it is likely that the acceptability of adjudicator's decision may also be achieved given the status of the court as an independent judiciary.

المخلص :

اتجهت معظم الدول والاقاليم الى استحداث اليات قانونية جديدة تتميز بالسرعة فى تسوية النزاعات . وخصوصا فى عقود التشييد والبناء , تراعى فيها احكام وضوابط العقد وخصوصيته . وعمومية الاطار القانوني الملزم فى الدولة .

لذا فأن التحكيم القانونى (المحكم المستقل) تعتبر الية تتميز بالسرعة والدقة قدر المستطاع وسهولة اللجوء اليها كملاد امن للردع والمطالبة و فض النزاعات فى هذا القطاع . فلم تعد الطرق المستخدمة حاليا كالجوء للمحاكم الوطنية والتحكيم ملاذا أمانا لضمان تدفق السيولة النقدية لشركات المقاولات وخصوصا مقاولى الباطن.

والتحكيم القانونى (adjudication) عبارة عن طرف ثالث مستقل له من الخبرة والكفاءة ومشهود له بالنزاهة والحيادية. يسمى و يناط اليه بالفصل فى النزاع القائم بين طرفى العقد اما باتفاق الاطراف عليه او بتسمية مؤسسيا او بقانون ملزم.

ولتطبيق هذه الفكرة وقياس مدى توافقها مع القانون المدني (الفرنسي) والشريعة الاسلامية¹ . كونهما المكون الرئيس للقانون المطبق فى دولة الامارات العربية المتحدة. فكان يتوجب اظهار التكيف القانوني لفكرة التحكيم القانوني وبيان المعوقات الادارية والقانونية الموجودة والمحملة لتطبيق الفكرة .

ان هذه الرسالة تتشرف بتقديم رؤيا جديدة لأنشاء محكمة تكنولوجية متوافقة مع الشريعة الاسلامية ومحاكاة للقانون الانجلوسكسونى (قانون السوابق القضائية) وغير متعارضة مع القانون المدني .

تتعاون المحكمة مع نقابة المحامين و جمعية المهندسين ووزارة الشؤون الاسلامية والاقواف فى تقديم الدورات وتسجيل المحكمين وبهدف استحداث نموذج عقدي جديد فى عقود الانشاءات . نمودجا بإجراءات عادلة مستنبطة من القانون الاصيل للدولة . وتؤسس المحكمة فروع متنقلة فى التحكيم القانوني فى قضايا الانشاءات. ولكونها محكمة فلا تطبق فيها مبدا السرية. فأحكامها علنية ومناحة لمبدأ السوابق القضائية.

مادة رقم 7 من الدستور الاماراتى تؤسس لكون الشريعة الاسلامية المصدر الاساس لاستنباط القوانين¹

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Table of Contents

ABSTRACT	2
: الملخص	3
ACKNOWLEDGEMENT	4
1 CHAPTER 1	7
1.1 INTRODUCTION	7
1.2 RESEARCH PROBLEM	8
1.3 RESEARCH QUESTIONS	8
1.4 RESEARCH METHODS	9
1.5 SIGNIFICANCE OF RESEARCH	9
1.6 ELEMENTS OF A DISPUTE	9
1.7 CONTRACT PRICE	10
1.8 ADJUDICATORS.....	10
1.9 CASH FLOW IN THE UNITED KINGDOM AND THE UNITED STATES	11
1.10 THE DOWNSIDE OF ADJUDICATION.....	12
1.11 CASH FLOW IN THE UNITED ARAB EMIRATES	12
CHAPTER 2	14
2.1 STATUTORY AND CONTRACTUAL ADJUDICATION:	14
2.2 CONSTRUCTING THE TEAM : ADJUDICATION TO BE THE NORMAL DISPUTE RESOLUTION MECHANISM :	14
2.3 THE NECESSITY OF ADJUDICATION AS A NORMAL DISPUTE RESOLUTION	15
1.12 FOR SUB-CONTRACTORS (SMALL ENTERPRISES):	15
2.4 STATUTORY ADJUDICATION IN UK:.....	16
2.4.1 <i>The statutory adjudication in UK designed to stand-alone. Its objective is to:</i>	17
2.5 ENFORCEMENT OF THE STATUTORY ADJUDICATION:	18
2.5.1 <i>Advantages of the UK statutory adjudication:</i>	19
2.5.2 <i>Disadvantages of the UK statutory adjudication :</i>	19
2.6 STATUTORY ADJUDICATION : NEUTRAL CERTIFICATION SCHEME:	20
2.6.1 <i>Adjudicator: scope of application , procedures and selection:</i>	21
2.6.2 <i>Timeframe and enforcement of the adjudication in NSW :</i>	22
2.6.3 <i>Advantages and disadvantages of the neutral certification adjudications :</i>	23
2.7 CONTRACTUAL ADJUDICATION:.....	23
2.7.1 <i>Decision of the DAB, time frame and Enforcement:</i>	25
2.7.2 <i>Pros and Cons of the DAB:</i>	26
3 CHAPTER 3:	28
3.1 ADMINISTRATIVE AND LEGAL OBSTACLES IN THE USE OF ADJUDICATION AS A FORM OF DISPUTE RESOLUTION IN CONSTRUCTION CONTRACT IN UAE.....	28
3.2 <i>Administration obstacles :</i>	28
3.3 <i>Legal obstacles:</i>	29
3.3.1 <i>Legal obstacles' encounters with the adjudicators to conduct the disputes</i>	31
3.3.2 <i>Bias:</i>	31
3.3.3 <i>The Current and Potential Legal Obstacles Resulting from The power of an Adjudicator to render a Summary Judgment :</i>	33

3.4	<i>Wrong summary decision granted from adjudicators</i>	34
3.4.1	<i>Interim measure and its legal obstacles</i>	34
3.4.2	<i>Non-compliance party with interim measures</i> :	35
3.4.3	<i>Adjudicators immunity in a wrong interim measures</i>	36
3.4.4	<i>Non-compliance of interim measures and termination of adjudication agreement</i> :	37
3.4.5	<i>Comparison between Adjudicator , Judge and Third party experts appointed by the parties</i> :	38
3.4.6	<i>Adjudicator</i> :.....	38
3.4.7	<i>Power of adjudicator to modify or amend the contracts and its provisions</i> :.....	39
4	CHAPTER 4	42
4.1.1	<i>Adjudication Under The Islamic Sharia Law</i>	42
4.1.2	<i>Neutral third party determination in the prospect of Islamic sharia law</i> :	42
4.1.3	<i>Models of Dispute Resolution in sharia</i> :.....	43
4.1.4	<i>The compatibility of adjudicator decision with the QIAS principals in Islamic shariaa</i> :	44
4.1.5	<i>Neutral third party determination in the prospect of Islamic shariaa law</i> :.....	45
4.2	<i>COMPARISON BETWEEN ADJUDICATION DECISION AND AMICABLE SETTLEMENT IN THE PROSPECT OF ISLAMIC SHARIAA LAW</i> :.....	46
4.3	<i>COMPARING JUDGE WITH THE ADJUDICATOR IN THE PROSPECTIVE OF ISLAMIC SHARIA</i> ,	47
4.3.1	<i>Legal obstacles of adjudication in prospect of shariaa law</i> :	48
5	CHAPTER 5	49
5.1	<i>CONCLUSION AND RECOMMENDATIONS</i>	49
5.1.1	<i>Jurisdiction, natural justice and premature dispute (dispute non-crystallization)</i>	49
5.1.2	<i>Right to refer dispute to adjudicators</i> :.....	50
5.1.3	<i>Restriction of lawyers</i>	50
5.1.4	<i>Statutory right of adjudication</i>	51
5.1.5	<i>Adjudication Hybrid scheme</i> :	52
5.1.6	<i>Administrative and legal obstacles encounter with adjudication to be implemented in UAE</i> :	52
5.1.7	<i>Necessary adoption of the adjudication to be suitable for the UAE system</i> :	53
5.1.8	<i>Necessary adoption for adjudication to be suitable with Islamic shariaa law</i> :	55
5.2	<i>ADJUDICATION IN UAE</i> :	56
5.2.1	<i>Statutory adjudication system</i> :	57
5.2.1.1	<i>Time frame for the certification system</i>	58
5.3	<i>Educate the Adjudicator and his power</i> :	60

1 Chapter 1

2.1 Introduction

For more than 20 years,² the construction industry has lived with the adjudication process as a form of alternative dispute resolution in construction contracts in England and Wales and in many other countries. This thesis will focus on the benefits and otherwise of applying the adjudication process to civil jurisdiction construction contract disputes within the United Arab Emirates.

Practice has shown that the drafting of good construction contract alone does not lead to avoidance of construction dispute. There is therefore the need to have in place an effective and efficient dispute resolution process in place in the construction industry in the event of a dispute arising.

Considering the nature of construction contracts where a project has to be completed within specified time and on budget in order to avoid overrun, the mechanism for resolving disputes that may arise has to be fast and efficient. This is necessary to avoid bad-faith delays, whilst at the same time respecting both parties' rights to a prejudice-free resolution of their dispute. In this regard the adjudication process in England and Wales has a time frame within which the adjudicator has to reach a decision. The whole idea is to ensure that the dispute is resolved quickly so that the parties can get on with the project. The adjudication process is seen as rough and ready justice but it has provision for further litigation or arbitration if any party does not accept the adjudicator's decision.

² Construction and regeneration act of UK 1996.

2.2 Research Problem

Statutory adjudication has been successful in many jurisdictions that have introduced it. All these countries, however, have a common law background. Other jurisdictions with civil law background for example, Germany and South Africa, have expressed their interest in adjudication but they have not formally introduced it. The United Arab Emirates is a civil law country which is heavily influenced by Islamic Sharia law. The UAE also has similar problems like the UK prior to the introduction of statutory adjudication, namely cash flow and the inefficiency of dispute resolution in the construction industry. The introduction of adjudication in the UAE, however, will give rise to a number of potential problems. There is concern as to which adjudication system should be adopted. Therefore this study attempts to identify which adjudication system is suitable for adoption. Further modifications have to be made to the adjudication system to suit the fundamental of principles of Islamic Sharia and civil law. These modifications will be identified in this study. The adoption of adjudication will also give rise to potential legal problems. This study thus seeks to identify these potential legal problems and identify solutions to them.

2.3 Research Questions

The following are the research questions that this study seeks to answer:

- a) What adjudication system is suitable to be adopted in the UAE?
- b) What modifications are needed make the system suit the fundamental legal principles of Islamic Sharia and civil law?
- c) What are the potential legal problems that might arise from the introduction of adjudication in the UAE?
- d) What are the solutions to the problems set out in **a-c** above.

2.4 Research Methods

This study adopts the traditional doctrinal legal research in the collection and examination of the data. Data were collected from various primary and secondary legal sources including the relevant Acts, case law, legal commentary, books and journals (trade and academic).

2.5 Significance of Research

This study is significant in a number of respects. First, it is the only study in the UAE that attempts to study the coalition of the principles of the common law adjudication with the fundamental legal principles of Sharia and civil law. Second, it is also unique in the treatment of this delicate area of law by identifying the system of adjudication that is suitable for adoption in the UAE and modifications that are needed to it. Third, the potential legal problems and solutions to these problems identified in this study will serve as pointers to the Government UAE should it wish to introduce adjudication in the future.

2.6 Elements of a dispute

Parties may only commence adjudication if there is an unresolved dispute. A dispute only crystallizes where a party has raised a claim and the other party rejects it and there is no attempt at a negotiated settlement or a negotiated settlement fails. For instance, when the alleged obligor receives a payment notice from a Claimant, and refuses to pay by the stipulated deadline, the Claimant must first seek amicable resolution of the dispute, because the alleged obligor may need some clarifications on the contract terms. Only when the parties cannot come to mutual agreement will the Claimant refer the dispute to adjudication.

Though UK law allows disputes to be referred to adjudication regardless of its value or complexity,³ some are of the view that it is inappropriate to use the adjudication process in this manner. Those who express this do not consider disputes of limited value or complexity as crystallizing and any referral to adjudication of such disputes is deemed to be a premature engagement of the adjudication process⁴.

There is merit in this argument in that the adjudication process should not be clogged with disputes of limited value and complexity. It should rather be reserved for disputes with high value and complexity which if not resolved timeously has the capability of impeding the delivery of the project on time and on budget. The parties should be encouraged to actively seek a mutual resolution of less value and less complex disputes.

2.7 Contract Price

Two most important elements in construction contract are the scope of work and contract price, and of the two, contract price is most important. Without a clearly-defined price, there is no contract. The typical methods of calculating contract price include percentage of completion, cost plus, unit price and ELS.

2.8 Adjudicators

In recent times majority of the adjudicators in UK are engineers and quantity surveyors who function as quasi judges and provide quick decisions which are binding but not final. Other adjudicators come from different professional backgrounds, such as law and architecture. The requirements for admission as an adjudicator include attendance at a one or two day course which is organized by ICE, CIARB, and others.

In UK construction contracts, only the job title or other designation of a desired type of adjudicator is stipulated rather than stipulating a specific individual. This is to avoid the problem of unavailability of the specified adjudicator. Alternatively, it may be decided to allow the nominated body in the contract to appoint an adjudicator.

³ Sec no 108 of the UK construction act 1996 .

⁴ *Specialist ceiling services northern ltd v ZVI construction UK LTD 2004TCC*

2.9 Cash Flow in the United Kingdom and the United States

It is generally understood that adjudication is an innovation devised to prevent bottlenecks or other obstructions of cash flow, which begins with lenders, and is passed through to the employers, the engineer, general contractors, and finally to subcontractors. Clearly, cash flow is smoothest when it is unidirectional. It is difficult to pour cash into the bottle whilst simultaneously trying to pour cash into the cups of the waiting contractors and subcontractors. However, when there is a dispute, cash flow bottleneck arises which makes cash flow temporarily bidirectional, that is to say, a positive and negative cash flow try to operate at the same time. Full court jurisdiction acts as a tugboat by slowly unplugging the bottleneck, but it is slow. Often, it is presumed that a full-jurisdiction court cannot resolve a dispute in less than six months.

Adjudication of disputes acts as a system of mini-dams which redirects the negative cash flow quickly to the Claimant, so that the claimant does not gain the right to stop his part in the scope of work, either due to unwillingness to continue or due to insolvency. In some systems, such as in the United Kingdom, the duration of adjudication is only twenty-eight days⁵; in others, such as those who use the expedited construction arbitration system designed by the International Institute for Conflict Prevention & Resolution, the maximum duration is six months.

For this reason, the use of adjudication in construction disputes for major projects has become de rigeur in many jurisdictions. All parties see the benefits of resolving disputes more quickly with adjudication than in full-jurisdiction court systems.

In addition to speed, the benefit of the UK's system of adjudication is that there is no limitation on size or complexity of the dispute, and any one may refer a dispute to adjudication at any time. However, it is argued that some legal advisers advise their clients (usually the employers) not to include adjudication provisions in their

⁵ Construction act of UK 1996

construction contract when procuring the project. The benefit of the CPR's expedited construction arbitration system is that the alleged obligor may respond to a claim with a counterclaim. This prevents a bad faith submission of a dispute to adjudication as a pre-emptive tactical manoeuvre to cause financial distress or insolvency for the alleged obligor.

In 'Constructing the Team' (Latham, 1994), one of the major problems identified in the implementation of construction projects is the lack of payment flowing down the supply chain. The money typically was held up by the lender-employer through the engineers, contractors, subcontractors and sub-subcontractors.

According to Latham, there is no expeditious and uncomplicated way of claiming the monies as a result it leads to reduced cash flow and consequently leading to insolvency and ultimate collapse of the economy.

2.10 The Downside of Adjudication

Adjudication seems a dreamland of opportunities for claims from contractors and construction attorneys. It can continue to protect cash flow for them, even after the project is completed. However, it often times results in legal complexity, because adjudicators often make mistakes on jurisdiction and procedure.

2.11 Cash Flow in the United Arab Emirates

Ever since the financial crisis of 2008, employers have become notorious for fraud and bad faith from the inception of a project. They hide their inability to pay and often disputes have to be resolved by compromising with a lump sum amount, which is usually less than the contract price.⁶ Such conduct cause a bottleneck in completion of

⁶ Judicial Authority of the Dubai International Financial Centre: Court of First Instance, 7/2013 CFI

the scope of work, or worse still, they lead to projects languishing from lack of completion.

This led to the Emirates grappling with a huge amount of partially-completed projects. As a result of this, the **FIDIC Red Book 1999** became increasingly popular in the Emirates as a standard form of construction contract. This is because its contracts prevent fraud and bad faith on the part of the employer by requiring the employer to prove its financial ability to pay the contract sum on time, and thereby not hinder cash flow.

Chapter 2

2.12 Statutory and contractual adjudication:

2.13 Constructing the team: Adjudication to be the normal dispute resolution mechanism:

The construction industry is reputed to be one of the main and largest economic sector in the United Kingdom. It includes trade, suppliers and manpower. It employs around 1.9m people in the UK and has a turnover of 65 billion pound a year.⁷

However, because of the nature of construction contracts, it is inevitable that disputes will arise during the implementation of a project. As a result of the inevitability of disputes it became necessary to find ways to swiftly resolve them so that project implementation does not suffer. The search for a swift means of resolving construction disputes was one of the reasons that led to the [Sir Michael Latham](#) report in 1994.

Prior to [sir Michael lather](#) report in 1994,⁸the construction industry in the UK was recipe for disaster with more than 35% of the suppliers and sub-contractors being bankrupt⁹. This led to over 500,000 employees losing their jobs.

[Sir Michael Latham](#) made thirty recommendations to improve the construction industry, one of which was to establish an effective and speedy mechanism of resolving disputes. The mechanism has to be inexpensive and easily accessible to all the parties.

⁷ Carlisle.J.Getting construction back on trace . www.mra.org.uk/bottom_line/chapter8.html

⁷ Michael Latheam, constructin the team : final report – joint review of procurement and contractual arrangements in the United Kingdom construction industry , HMSO , 1994.

⁹ Look international construction arbitration law page 105

Adjudication is the product of the recommendation on the need for a speedy and inexpensive method of resolving construction disputes. It is a speedy and inexpensive way of resolving construction disputes and reaching a binding decision until set aside at a subsequent arbitration or litigation.

Adjudication is the involvement of a neutral third party in the resolution of dispute. It is a speedy and effective way of resolving construction disputes to avoid a delay in the implementation of a construction project. It is described as a rough and ready justice. The decision is binding until set aside at a subsequent litigation or arbitration. Its purpose is to remove any legal or commercial obstacles that prevent those at the lower rung of the construction contract chain like the sub-contractor from pursuing any potential claim, because of the huge expense and time spent on dispute resolution routes like litigation and arbitration.

2.14 The necessity of adjudication as a normal dispute resolution

2.15 For sub-contractors (small enterprises):

The sub contractor sees adjudication as a way of equilibrium and balancing the legal and commercial powers in the construction industry. In other words, it limits the dominance of the employer and main contractor over construction contracts and its supply chain.

Statutory adjudication that has been in existence in the UK since 1996, gives the Sub-contractors a powerful protection because it enables him to refer disputes to adjudication at any time.¹⁰

Further, sub-contractors who refer a dispute to adjudication may obtain the relief he seeks with or without the co-operation of the main contractor unlike other forms of alternative dispute resolution ¹¹like mediation that requires the co-operation of the other party.

¹⁰ Sec 108 HGCR ACT 1996

¹¹ ADR alternative dispute resolution are the new mechanism of resolving dispute out of courts .

The focus of this chapter is on the necessity of adjudication as a normal dispute resolution method in construction disputes as recommended by Sir Michael Latham in his report in 1994¹². It will also look at whether adjudication has moved on to become a paper tiger and departed from its objective of protecting cash flow in the construction industry in order to prevent small companies going into insolvency. It would seem that as adjudication evolved complex legal argument have been developed which enables a party to either defeat the aim or minimize the benefits of the adjudicatory process.

The intention of adjudication is to protect cash flow. While Sir Michael Latham was looking into the problems in the construction industry between 1985 and 1994, Lord Wolfe was looking at the efficiency and effectiveness of the traditional methods of the dispute resolution (litigation and arbitration).

Lord Wolfe identified costs and time as the two main problems in traditional method of dispute resolution. He found that it takes months to resolve a dispute, from commencement to final resolution¹³

Another study by Cottam¹⁴ found that resolving dispute through arbitration would take a minimum of 12 months. Cottam saw this as a veritable instrument in the hands of an unscrupulous party. The length of time it takes to resolve dispute either through litigation or arbitration can cause a small sub-contractors to go into liquidation if he decides to resolve dispute through either of these methods.

Statutory Adjudication in UK:

Sir Michael Latham recommended for a quick and speedy way for a party in a construction dispute to refer it for resolution so that he can recover any money owed to him in order to avoid exposure to bankruptcy. This led to the development of statutory adjudication pursuant to the HOUSING GRANT, CONSTRUCTION AND

¹² Construction the team. HMSO. this was a report commissioned jointly by the gov and industry 1994

¹³ Page no 2 J.Redmond , adjudication in construction contract , Blackwell 2001

¹⁴ Cottam G 1997 adjudication chapter 7 in Campbell.P ed . construction dispute – avoidance and resolution whittles publishing . pp.115.AT pa. 115

REGENERATION ACT 1996 as amended. Section 108 of the Act provides for the referral of disputes at any time during or after the currency of the project .

Many countries around the world have adopted the UK adjudication model with varying degrees to suit their needs without losing sight of the adjudication objective. A good example of where UK adjudication has been adopted is new South Wales, Australia. While UK adjudication is a dispute resolution mechanism the one in new South Wales is a neutral certification scheme, which has to be determined within 14 days. It is only the Claimant that can refer disputes to the scheme unlike in the UK where either party can refer disputes to adjudication.

Ireland is another country that has adopted the UK adjudication system but theirs is a hybrid scheme. In this dissertation the aim is to examine how to adopt an adjudication process that is suitable and compatible with Islamic sharia law and civil law jurisdiction.

2.15.1 The statutory adjudication in UK designed to stand-alone. Its objective is to:

- I. Improve cash flow in the construction industry. It is to be independent of the payment scheme.
- II. Establishing an efficient and speedy process of dispute resolution.

The UK adjudication legal framework deliberately made statutory adjudication independent of the payment scheme and it provides for the referral of all types of disputes arising from the construction contract between the parties. It is not limited to only payment dispute. Section 108 (3) of the Housing and Regeneration Act 1996, provides for the referral of any disputes to adjudication at any time.

The UK adjudication is designed to cover a wide range of construction work. Sections 104 and 105 of the Housing and Regeneration Act 1996, covers all kinds of construction contracts that includes service suppliers, architect, engineering and labour supply, in respect of civil work and infrastructure.

The Act provides for the construction contract to be written,¹⁵ but this has been amended to cover oral contracts as well.

2.16 Enforcement of the statutory adjudication:

Section 108 (3) provides that an adjudicator's decision is binding until set aside by a subsequent litigation or arbitration,¹⁶. If there is a subsequent litigation or arbitration a party against whom an adjudication decision is made may still be required to comply with it as provided by Section 42 of the English Arbitration Act 1996. Section 42(1), provides " *unless otherwise agreed by parties that court may make an order requiring a party to comply with a peremptory order made by the tribunal*"¹⁷

The use of the phrase " *unless otherwise agreed by the parties* "in Section 42 (1), means that the parties are permitted to contract outside of the law.

A successful party in adjudication can apply to Court for the enforcement of the adjudicator's decision as a summary judgment. The court can also refuse enforcement by setting aside the adjudicator's decision as happened in the case of *Shaw v MFP Foundation & Piling Ltd*, where the contractor was successful in an adjudication claim for pending payment and when he sought enforcement of the decision the employer counterclaimed for uncompleted works and defects; the amount of which was approximately equal to the amount claimed by the contractor. The court found in favour of the employer and set aside the contractor's statutory demand resulting from the adjudicator's decision.¹⁸

This decision contrast with the decision in *Macob civil engineering v Morrison*,¹⁹ where the court held that an adjudicator's decision is enforceable irrespective of any error in the decision provided the adjudicator did not exceed his jurisdiction or failed to

¹⁵ Section 107 of the UK construction act 1996

¹⁶ Section 108(3) , UK construction act 1996

¹⁷ Section 42 OF the UK Arbitration act 1996

¹⁸ Ful judgment at : <http://www.bailii.org/ew/cases/EWHCCH/2010/9/HTML>

¹⁹ 1999 BLR 93.

apply the principles of natural justice. This established the pay now argue later principle of UK adjudication. This decision was informed by the need to protect cash flow.²⁰

2.16.1 Advantages of the UK statutory adjudication:

It is generally understood that adjudication is a dreamland for parties who wish to resolve their disputes expeditiously and inexpensively. Time and cost are enemies of litigants who seek to resolve their disputes through arbitration and court due to the lengthy process and high cost associated with litigation and arbitration. Adjudication cannot therefore compete with arbitration and litigation.

The speed and flexibility associated with adjudication statutory regime make adjudication serve a dual purpose of dispute resolution and dispute avoidance.

The usefulness of adjudication is further enhanced by the fact there is also court support for it by way of enforcement of adjudicatory decisions as summary judgments. All this has made adjudication the preferred destination for construction disputes rather than the traditional methods of dispute resolution – court and arbitration.

2.16.2 Disadvantages of the UK statutory adjudication:

Adjudication has evolved significantly from a mechanism for speedy, rough and ready regime of dispute resolution whose main objective is to protect cash flow so that small companies do not go into bankruptcy during the currency of a project,²¹ to a mechanism of dealing with complex disputes due to the statutory right of referring disputes to adjudication at any time.²² These complex disputes are not suitable for a fast track dispute resolution mechanism.²³

This evolution has led to the increasing involvement of attorneys and legal consultant, which has in turn led to increased cost and more time spent in resolving disputes. The

²⁰ DANCASTER, 2008

²¹ Sir/Micheal Latham report 1994

²² Section 108 3 construction act 1996 and its amendment 2009

²³ Wakefield,2011

twin qualities of adjudication, speed and costs efficiency are gradually being eroded because of adjudication venturing into the resolution of complex disputes. The strict case management in adjudication would deprive parties in a complex dispute the time to adequately prepare their case, thus making them and their assets to be at risk in the event of an unfavourable adjudicatory decision. This is because an adjudicatory decision is binding until set aside at a subsequent litigation or arbitration and can be summarily enforced by a court.

The lack of time to prepare a case in a complex dispute may defeat one of the requirements of adjudication, which is, that a party must be given the opportunity to put forward his case.

The gradual erosion of the two features of adjudication, speed and costs efficiency, is captured in the statement of Gudge .H.H.Toulmin, when he said :

*... A procedure which parliament introduced to provide a quick, easy and cheap provisional answer so that in particular, sub-contractors were not unjustly kept out of their money. It has developed into an elaborate and expensive procedure which is wholly confrontational.*²⁴

2.17 Statutory adjudication : Neutral certification scheme:

UK statutory adjudication scheme is a subject of interest in other jurisdictions. Practitioners in other jurisdictions have been researching the scheme to identify potential problems that may be encountered in construction contracts.

One of the problems identified is the relationship between a certifier and an employer, which is a potential conflict of interest in construction contract. This is because the certifier used to be an agent of the employer and was paid by him for his services²⁵.

²⁴ *AWG construction serviced Ltd v Rockingham Motor Speedway Ltd.*

²⁵ DAVENPORT, 2007

To avoid this potential conflict of interest it became necessary to develop a new approach to certification by evolving a system that would make the certifier impartial and independent so as to ensure the integrity of his decision.

As part of the new direction the adjudicator's jurisdiction is to be limited to resolving disputes relating to the determination of the value and measurement of progress payment²⁶. This led to the development of the neutral certification scheme.

It was introduced in New South Wales, (NSW) in Australia. It was the creation of the New South Wales Payment Act.²⁷ It is effectively the adjudicator enforcing what parties have agreed in the construction contract in relation to certification.

In both the UK and New South Wales adjudicatory process, it is only disputes that crystallize that can be referred to adjudication. The only difference is that in New South Wales it is only payment disputes that can be referred and it is only the contractor that can so refer unlike in the UK system where either party has a right to refer disputes to adjudication at any time.

The NSW system is geared towards expediting resolution of payment disputes in order to ensure cash flow in the construction industry.

2.17.1 Adjudicator: scope of application, procedures and selection:

The NSW system limits the jurisdiction of the adjudicator to the determination of progress payment value and to decide on rights and obligations

Section 4 of the NSW Payment Act gives jurisdiction over the construction contracts whether in writing, partly in writing and partly oral and oral contracts. . It covers contractors and others involved in the construction contract.

The Act provides for a two stage procedure:.

- I. A notice of adjudication to be issued

²⁶ Jones,2009.

²⁷ Building and construction industry security of payment act.

- II. Formal adjudication application served by the ANB²⁸ in accordance with Section 19 (1) of the Act.

A copy has to be served on the Respondent. However, Section 4 of the Act provides that it is the Claimant that has the right to initiate adjudication as he is the person who carried out the works either by supplying the goods or services. The Respondent will be the Defendant.

Selection of the adjudicator in NSW is not a difficult process. The Claimant is required to select an adjudicator from the ANB list of adjudicators. The ANB has rules that ensure the quality of the decisions of any adjudicator on their list. It also has mechanism for monitoring and revision of their adjudicator's decision. This is similar to the International Chamber of Commerce (ICC) quality control mechanism in respect of arbitration that they conduct.

The requirement to select an adjudicator from the ANB list is to ensure impartiality and avoid bias.

2.17.2 Timeframe and enforcement of the adjudication in NSW:

According to section no 21(1) of the NSW Payment Act, the Respondent has five working days to respond starting from the date the adjudication application is served on him through the ANB .

This strict time limit for the Respondent to respond to the application is considered as a weakness of the Act as it could be a source of an ambush. A Claimant acting in bad faith could lodge a voluminous claim document which the Respondent may not be able to respond to it within the strict time limit.

Unlike in the UK adjudication, NSW imposes some safeguards rules to avoid ambushing. In NSW a business day does not include holidays, industry shutdown , from Christmas until new year and no adjudication claim can be lodged on those days .

²⁸ Adjudication Nomination Body

On conclusion of the adjudication the successful party has to apply to the ANB where the adjudication was listed to obtain an “adjudication certificate” which stipulates the adjudication amount and thereafter submit the certificate to the court, who will enter a judgment in favour of the Claimant to be enforced against the Respondent

2.17.3 Advantages and disadvantages of the neutral certification adjudications:

The advantages of NSW system is that it gives little room for manoeuvre and ambushing to the unscrupulous party, thus reducing the chances of circumventing the rules.

It ensures that claims are determined in an expeditious and inexpensive manner.

The Act covers virtually all those involved in the construction industry.

The court support that it enjoys added to the fact that it is a mandatory statutory regime enhances the objectives of protecting cash flow and security of payment. This helps in preventing a fraudulent party from forcing out small companies out of business by stop payment to them. The strict time frame helps in this as well.

The extension of the scope of the Act to deal with damages claims is seen as a disadvantage as the Act was not designed for this type of dispute. Dispute of this nature involves elaborate investigation and collection of affidavit.

2.18 Contractual adjudication:

This is a pre agreed mechanism to resolve a dispute or at least prevent dispute from escalating. The new form of dispute resolution or de-escalation is the DAB.²⁹ It is considered in this dissertation because having considered the potential use of statutory adjudication in civil law jurisdiction it is important to also look at an alternative

²⁹ Dispute adjudication board, clause no 20. FIDIC red book,

adjudicatory process contained in the **FIDIC** form of contract, which is the most internationally used contract form .

The focus here is what led to the establishment of DAB, its benefits and how it is treated in civil law jurisdictions.

The DAB was introduced by the 1999 version of **FIDIC** construction contract suites. In the 1987 version the engineer had various roles rolled into one. He was a certifier, procurement officer, construction administration management, and dispute resolver. This multiplicity of roles gave rise to potential conflict of interest situations. There were instances where he had to resolve disputes arising from his own design.

To resolve this potential conflict of interest situation, **FIDIC** in 1999 made provisions for DAB to take over the dispute resolution role of the engineer.

The regular visits of the DAB to project sites to review the work achievement and defects were the main objective in the establishment of DAB. It is geared towards dispute prevention and escalation. It is effectively a dispute avoidance mechanism. It removes that barrier and sophisticated environment between parties by providing them a discussion forum.

Before a dispute can be referred to DAB, it must crystallize. A dispute crystallizes where the Claimant has raised it with the Respondent and it is rejected by the Respondent. Between the dispute crystallizing and its subsequent referral to DAB there are a number of intervening steps according to **FIDIC**.³⁰

The question that arises here is how are third neutral party's decisions treated.

³⁰ Sub-clause 20.1 of the **FIDIC** red book

2.18.1 Decision of the DAB, time frame and Enforcement:

Clause 3.5 of FIDIC form of contract 1999 provides that if a party is dissatisfied with the engineer's determination, he may serve a notice on the other party of his intention to refer the dispute to DAB in accordance with Clause 20.4 of FIDIC Redbook 1999.

The DAB is required to reach a decision within 84 days from the date of reference. On the enforcement of DAB decision there is no equivalent treaty on its enforcement as we have in arbitration; where we rely on the New York Convention.

The enforcement of a DAB decision is subject to the terms of reference of the Board and the contract conditions. However, the terms and conditions of the contract are still subject to laws of the particular jurisdiction a party seeks to enforce the DAB decision.

The losing party who is not satisfied with the decision may serve a notice of dissatisfaction on the winning party within 28 days from the date he becomes aware of the DAB decision³¹.

Where the losing party fails to serve a notice within 28 days of becoming aware of the decision, the decision will become final but not binding. Its enforcement may be a paper tiger because of lack of support by the courts and legislature in the jurisdictions it is sought to be enforced.

In relation to the terms and conditions of the contract, where a losing party fails to comply with DAB decision he may be in breach of contract which can lead to the winning party going to arbitration to claim for damages for breach of contract. This could be a dangerous path for the losing party because if the execution of the contract is in a civil law jurisdiction, he may not enjoy the limitation cap provided for in the contract, no matter the form of contract..

Back to SOP³², the winning party may not want to wait for the final determination if he proceeds to arbitration because such delay may expose him to insolvency, he could

³¹ Sub-clause 20.4 FIDIC RED BOOK 1999

³² Security of payment principals

at the first hearing of the arbitral tribunal apply for an interim securing injunction or a partial award to prevent the losing party from circumventing the DAB decision, so it was held in the case of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*.³³ This is a Singaporean case, the Court held that the losing party can apply for an interim securing injunction or a partial award to prevent the losing party from depriving him the fruit of his victory.

2.18.2 Pros and Cons of the DAB:

The fact that the members of the DAB are familiar with the contract and the project enhances the quality of their decision.

DAB is considered as an effective dispute resolution mechanism. It helps in dispute avoidance by filtering the disputes and categorising them into simple and complex disputes.

The combination of technical and legal knowledge by the DAB members is an advantage because they can give guidance and advice to the parties which helps them avoid breach of contract situations unlike in arbitration where the arbitrator is expected to remain neutral and impartial.

DAB is suitable for complex and huge project and not ideal for small projects because of the high fees payable to DAB members.

DAB is not directly linked to court unlike arbitration, therefore, no statutory back up in respect of the enforcement of the DAB decisions. Therefore, it is seen as a paper tiger of sort.

³³ Singapore , 2011 SGCA 33

The involvement of the legal experts especially attorneys in DABs increases the cost of that mechanism which can discourage parties from using it.³⁴

DAB decisions are a product of technical and legal knowledge. If the case goes to court or arbitration, they are treated as recommendations and the Court or arbitral tribunal may want further evidence of what informed the recommendations by the DAB.

Adjudication is divided into three categories and each category is suitable for a particular territory. In the UK it is a dispute resolution mechanism that allows parties to refer disputes whether simple or complex at anytime either during or after the currency of the contract.

The Courts unlike adjudication categorise cases on the basis of the nature of the dispute and the amount in dispute. For instance Dubai Amicable Dispute Resolution Centre review cases up to o 20000 AED and give the parties the opportunity to have a face to face discussion to resolve their dispute assisted by a mediator who also has a legal background.

The Amicable Centre gives a final and binding decision or alternatively refers the dispute to the relevant court.³⁵

The court also categorises disputes by the amount claimed. If the amount claimed is more than 100000 AED the appeal tribunal would review it and not the court of first instance.

In the UK, adjudication is not categorised, any dispute no matter the amount can be referred to adjudication at any time. However, parties can contract out of the law.

2.18.2.1 From the foregoing there are three forms of adjudication:

- I. Dispute resolution adjudication
- II. Certification adjudication
- III. Hybrid adjudication

³⁴ Daniel D McMILLAN & R.A.Rubin, Article published in the construction lawyer, volume 25. #2 2005.

³⁵ www.dc.gov.ae visited on 06/03/2015

3 Chapter 3:

3.1 Administrative and Legal obstacles in the use of adjudication as a form of dispute resolution in construction contract in UAE

One of the obstacles is the limitation of the power of the adjudicator to adopt, revise or modify the contract, in respect of both legal and financial positions of the contractual parties. Lord Justice Pearce stated that

*“ the actual financial result should not affect one’s view of the construction of the words , naturally one sympathises with the contractor in the circumstances, but one must assume that he chose to take the risk of greatly under pricing an item which might not arise ”*³⁶

There are number of “legal steps “ and procedures to be followed , when there is such unrealistically pricing (whether high or low) in a bill of quantities.

3.2 Administration obstacles :

The UAE or civil jurisdiction countries might have problems setting up adjudication bodies similar to the ones in the UK³⁷. There is a dearth of experts with similar level of experience as in the UK, in both technical and legal skills, to deal with adjudication.

A way of addressing this dearth of resource may be by merging the Engineering and Law Societies in the UAE. This would provide potential adjudicators in the UAE with substantial legal and technical training necessary for the work of an adjudicator.

³⁶ R.Knowles 200 Constactual Problems And Their Solutions , third edition , . John wiley & sons ltd 2012

³⁷ Construction & Technology court of UK

In adjudication parties have the right to refer disputes to adjudication at any time. This could be during or after the completion of the project³⁸. While the legal practitioners in UAE may understand the ground for referral of disputes during the project which ostensibly is to protect cash flow, they may not understand the basis for referral after completion of the project.

In UAE the idea of referral to adjudication may enjoy support during the currency of the project it may not be the same after the project has been completed.

Further, there may be need for a filtering process before any referral. Potential disputes can be categorized into simple dispute such as payment dispute and certification, and complex dispute as that between sub-contractors and sub-sub contractors and or professional negligence.

The complex dispute such as professional negligence should not be referred to adjudicator during or after the completion of the project, it should rather be referred to court only. This is because the latter is better equipped to resolve such disputes and they usually take a longer time to resolve compared to adjudication that is a rough and ready justice. The brevity between the commencement and conclusion of adjudication proceedings does not suite resolution of complex disputes.

Many practitioners in the UK have argued that adjudication is being moved a way from its core objective which is to protect cash flow and being used in the resolution of complex legal issues which have nothing to do with preserving cash flow.

3.3 Legal obstacles:

‘DENISE BOWES,³⁹ carried out a survey on the adoption of dispute board and dispute adjudicators. The target of the survey were lawyers, clients, consultant and contractors, practicing construction adjudication. The result showed a great approval

³⁸ Section 108 construction act of UK

³⁹ School of property, construction and planning university of central England in Birmingham, perry Barr, Birmingham. B422SU, UK.

of adjudication as a the preferred option for resolution of construction disputes. It is considered as being an easier, cheaper and effective method of dispute resolution.

However, those surveyed want adjudicators employed at the inception of the project so as to familiarise themselves with the nature of the project. The benefit of this is that they will be familiar with the dispute when it arises having been part of the project from inception. An adjudicator who is appointed when a dispute arises would have no knowledge of the project and dispute in which case he would spend more time familiarizing himself with the dispute.

The potential difficulty with appointing an adjudicator at the inception of the project is the likelihood that his independence may be compromised. If he is part of the project from inception there is the possibility that he may end up being closer to one of the parties, which would likely compromise his independence in the event of a dispute

The respondents in the survey expressed the view that the key objective of adjudication, which is speed, is being eroded as it now takes an adjudicator longer time in practice to resolve disputes. Many adjudicators now resolve disputes in more than the stipulated 28 days.⁴⁰

The reason for this is the fact that the adjudicator is saddled with resolving complex disputes like professional negligence rather dealing with certification and payment entitlement as is obtainable in AUSTRALIA .⁴¹

The benefits of adjudication include speed and the non-involvement of the lawyer and legal consultant. However, because adjudication is used to settle disputes either during the currency of a project or after completion, the speed with which disputes are resolved and the non- involvement of those who are legally trained may be a fertile ground for mistakes which could lead to a challenge of the decision and its non enforcement.⁴²

⁴⁰ Construction act 1996 of UK.

⁴¹ Victoria and NSW system.

⁴² Kenneth T.Salmon cases on the enforcing of construction adjudication awards .

The Claimant may employ “ambush” tactics in the referral process. The preparation and referral of the dispute which has to be answered by the Respondent in seven days⁴³ could lead to an abuse of the right of referral as the Claimant could make the referral at an inauspicious time to cause maximum discomfort to the Respondent.

On the other hand, the employer, who is the Respondent most of the time, can also abuse his own power by calling in the security bond prematurely. This can expose the Claimant to the risk of bankruptcy. The potential for mutual abuse of power by the parties creates a sophisticated environment between both parties.⁴⁴ It was the inherent danger in this type of situation that led the German legislature to prohibit the calling of bond prematurely as a revenge for the referrer's misuse of legal power.⁴⁵

3.3.1 Legal Obstacles Encountered in the Adjudication of Disputes:

There are a number of common grounds which could lead to the setting aside of an adjudicator's decision and refuse its enforcement. The grounds are mainly:

- I. Breach of natural justice
- II. And excess/lack of jurisdiction

The nature of adjudication requires the adjudicator to speed up and he might need all the powers to render an enforceable decision and interim measures .

3.3.2 Bias:

Adjudicators are required to reach a decision within 28 days and to give each party an opportunity to present its case and ensure that the principles of natural justice are engaged during the adjudication process. This is a huge task to achieve.

⁴³ Sec.108.3 construction act 1996.UK.

⁴⁴ Sec20.1 of German adjudication rules.

⁴⁵ Const L.J. 2010,26 (8) , 698.702 , Baker and Mckenzie , Frankfurt.

The adjudicator during the proceedings would have to hear evidence from the parties and relevant third parties. He can also cause an independent investigation to be carried out or rely on his own knowledge of the subject matter of the dispute. In all this he has to be fair and balanced in his conduct of the proceedings to avoid allegation of bias.

Bias can come in different forms, for instance, if the adjudicator meets one of the parties to gather information in the absence of the other party, it could lead to an allegation of bias. A losing party can challenge an adjudicator's decision on the ground of bias. The losing party can use the challenge to delay the enforcement thus putting the winning party under pressure.⁴⁶

Bias can take the form of the adjudicator having a direct or indirect financial interest in one of the parties⁴⁷.

Further, an adjudicator must give each party the opportunity to respond to the case put before him as failure to do this could lead to a void decision. The Court said this much in the case of *Balfour Beatty v London Borough of Lambeth*⁴⁸, where the judge commented as follows: “ *in my judgment (constructing or re-constructing) part’s case for it without confronting the other party with it is such a potentially serious breach of the requirement of either impartiality or fairness that the decision is invalid*”

One of the ways an adjudicator can avoid allegation of direct or indirect bias is to ask the parties before commencement of the adjudication to raise any objection they may have about him having conduct of the proceedings and if none is raised he can proceed with conduct of the proceedings⁴⁹

⁴⁶ AMEC PROJECTS LTD V WHITEFRIARS CITY ESTATES LTD 2004 EWHC 393 (TCC).
GLENCOT DEVELOPMENT & DESIGN LTD V BEN BARREH & SON (CONTRACTORS)
LTD

⁴⁷ G.necolas , Guided note , Adjudication society & CIArb.April 2013.

⁴⁸ Balfour Beatty construction Ltd v London Borough of Lambeth (2002) EWHC 597 (TCC).

⁴⁹

3.3.3 The Current and Potential Legal Obstacles Resulting from The power of an Adjudicator to render a Summary Judgment :

An adjudicator's decision is a form of summary judgment and its enforcement may face some difficulties in civil law countries like UAE and Germany because civil law countries are not familiar with summary judgment and its enforcement.⁵⁰ In order to allow for the enforcement of adjudicator's decision, the German legislature had to amend their laws to permit the enforcement conditional upon the appropriate security being posted.

In the UAE the enforcement could be done by the court appointing a guardian upon application by the party disputing the enforcement. The guardian will be an independent party or the court itself⁵¹

The enforcement of an adjudicator or a Dispute Advisory Board decision would entail a temporary preservation in the hands of the winning party the subject matter of the dispute. Considering that these decisions are not final, as they can be overturned in court, it could pose a problem of enforcement..

The German legal system has enacted new rules to deal with this, namely :

- I. Whether or not the construction contract provides a right to refer the case to state court or arbitration , the custodian guardian party in adjudication may apply for an enforcement claim for that particular binding decision ⁵²
- II. Accordingly, and as a next step the custodian guardian party at the adjudication would have the right to avoid the inflation cost of the arbitration; in case the losing party decides to take it further to arbitration. However , the successful party may be eligible to refer to court for a expedite court proceedings in this event.

⁵⁰ Construction law journal 2010, adjudication on rise in germany .

⁵¹ Article no 997-1010 , UAE civil transection code no 5/1985 .

⁵² Sec no 23.5 German Adjudication rule.

3.4 Wrong summary decision granted from adjudicators :

But the question here is what if the adjudicator omitted serious issues and granted an interim measures in error, which would potentially be set aside by the Court or at arbitration. It would seem unfair for the successful party to enjoy the benefits of the preserved material on the premise of an erroneous decision. This unfairness will become more pronounced if it takes a long time to resolve the dispute in court.

To address this problem the German Adjudication Rules⁵³ provide in such circumstances that the court should deal with the matter expeditiously and resolve it within a reasonable time. And if it is to be resolved by arbitration, the arbitration should not take more than 9 months.⁵⁴

3.4.1 Interim measure and its legal obstacles:

In order to effectively resolve disputes in any jurisdiction, the Court must have the power to preserve temporarily the subject matter of the dispute. In effect it must have the powers to impose interim measures during the pendency of a case to protect the subject matter from potential risk.⁵⁵ Arbitrators also have similar powers.

The adjudicator performs quasi judicial function; the question is whether he has similar powers as the Court or an arbitrator, this dissertation attempts to define the adjudicator position in civil jurisdictions, the exercise of his quasi judicial function and whether he has similar powers as the courts and arbitrators. In addition what are the legal obstacles that may impede his ability to grant interim measures?

Interim measures or temporary injunction is intended s to restrain and preserve a right potentially at risk.

⁵³ Article # 28 of the german adjudication rules

⁵⁴ DIS supplementary rules of adjudication of german .

⁵⁵ Article no 252 of civil procuders rules of UAE , NO 1/1992.

It is advisable for a party seeking interim measure to make the application at the first meeting with the adjudicator in the presence of the opposing party. Because If the measure is granted by the adjudicator in the absence of the opposing party, the adjudicator can be accused of bias and failure to give the opposing party an opportunity to put forward its case, which are grounds to set aside his decision.

However, from referral perspective, interim measures application should be made in such away as not to alert the Respondent so that he does not take steps to frustrate the application by seeking to make the subject matter out of reach of the preservative order. He could do this by filtering away or disposing of the asset.

In Germany, Dispute Adjudication Board can grant interim measures in related payment and acceleration of work dispute. If the employer is the opposing party in an interim measures application he is not allowed to call in the performance bond given by the contractor in revenge.⁵⁶

3.4.2 Non-compliance party with interim measures:

A party that fails to comply with an interim measure is in breach of contract. However, will the party be treated as being in breach of contract for non compliance with an interim measure that is subsequently set aside by the Court or arbitral tribunal?

It can be argued that an interim measure is subsisting until it is set aside by a court or an arbitral tribunal. In that case, while the interim measure is subsisting non compliance with it is a breach of contract. It may however, be argued that it may not be a breach contract if the granting of the measures was void abinitio (from the very beginning). In that case it means that the adjudicator who granted it had no jurisdiction at all to grant such measures. This is a topical issue in construction disputes.

⁵⁶ Clause no 20.1 German adjudication .

It is important to distinguish between a non-compliance with an adjudicator decision and a non-compliance with an interim order. A non-compliance with an interim measure may be treated as a breach of contract which would entitle the wronged party to sue for damages for more than the contract caps.

It is common to find in contracts that the damages recoverable in these circumstances are capped or alternatively liabilities are limited.⁵⁷ It is more of a paper tiger no matter the contract form used, whether **FIDIC** or any other form of contract.

Non-compliance with an interim measure order may be considered as a justification for terminating the whole contract. Ultimately, the other party could consider the action as a deliberately and intentional breach of the contract and claim damages accordingly.

Sub-Clause 17.6 of FIDIC contract form provides that the maximum compensation for damages shall not exceed the amount mentioned in the contract and its limitation is capped. This provision may not protect the non-compliant party in a civil law jurisdiction. Parties in civil law countries are usually advised against non-compliance with an interim measure.

3.4.3 Adjudicators immunity in a wrong interim measures :

The subsequent setting aside of an adjudicator's interim measure by a court or an arbitral tribunal will not deprive the adjudicator of the protection and immunity he enjoys, even if the interim measure caused considerable damage to the party against whom it was granted.⁵⁸ Adjudicators enjoy this protection in civil law jurisdiction. **Clause 13 of QATARI Adjudication Scheme provides that an adjudicator and the nominating body (QICDRC) are exempt from liability for any omission in the resolution of any dispute .**

⁵⁷ Most of the jurisdiction including UAE and Germany sect. 639 in the event of intentional breach not permissible.

⁵⁸ Clause no 13 of QATAR construction dispute resolution scheme consultation paper 1/2013.

3.4.4 Non-compliance of interim measures and termination of adjudication agreement:

In the event of a termination of contract as a result of non compliance with an adjudicator's decision, the question that arises is whether the wronged party can refer his claim for damages for breach of contract to the same adjudicator who granted the interim measure? In other words, is the adjudication agreement still valid? Section 108 (1) of the UK Construction Act provides that a party can refer a dispute to adjudication at any time. It seems that the wronged party can still refer the dispute to the same adjudicator as the Court held in the case of *A & D Maintenance and construction Ltd v Pagehurst Construction serviced Ltd (TCC)* .⁵⁹

The position seems to be the same in civil law countries because they treat arbitration agreement in the same way as it is treated in common law jurisdiction. They adopt the principle of **separability** of the arbitration agreement from the rest of the contract such that the arbitration agreement is not affected by whatever happens to the main contract.⁶⁰ The arbitration clause in a contract is independent and valid regardless of whether the main contract under considered is valid or void.⁶¹

⁵⁹ A & D Maintenance and construction Ltd v Pagehurst Construction serviced Ltd (TCC) 23rd june 1999.

⁶⁰ Separability principal.

⁶¹ F- jean . Comparative Law of International Arbitration

3.4.5 Comparison between Adjudicator, Judge and Third party experts appointed by the parties:

3.4.6 Adjudicator:

The adjudicator's power and duties are subject to the parties' agreement and the provisions of the Construction Act. The powers and duties may be increased and enlarged or reduced as the case may be. The adjudicator does not exercise unlimited powers as the parties agreement is also subject to the provisions of the Act.⁶² Some of the powers exercised by the adjudicator include power to grant interim measures and to obtain expert advice.⁶³

The powers exercised by the adjudicators in either statutory or contractual adjudication, are similar to that exercised by the Court. So the adjudicator is like a quasi judge performing quasi judicial function to grant interim measures, appoint experts or render a decision which is binding and make orders as to which of the parties should pay his fees.⁶⁴

The power of the adjudicator to make orders preserving evidence is similar to that exercised by a judge under procedural rules. The power of the judge to grant interim measures preserving evidence is subject to two conditions:

- I. that there is a potential hazard to the asset or right sought to be preserved
- II. And the likelihood of contamination of the asset or the right.

The applicant for interim measure is usually required to provide a guarantee that the right or asset sought to be preserved will be held in an escrow account pending the determination of the dispute. The sum of this is that in an application for interim measures, the judge effectively does a balancing act between the parties.

⁶² HGCARA 1996.

⁶³ The HGCARA 1996 didn't say opposite.

⁶⁴ The Scheme for Construction Contracts is silent on the parties' costs but provides that the Adjudicator is entitled to reasonable fees. The Scheme makes each party jointly and severally liable for the Adjudicator's fees and the wording used implies that payments may be made before determination of the issues.

3.4.7 Power of adjudicator to modify or amend the contracts and its provisions:

As stated above adjudication in the UK has recently become complicated because of the complex nature of some disputes referred to adjudication. One of the salient issues is the power of the adjudicator to amend or modify the provision of the contract on the grounds of unusual circumstances encountered by the parties during the currency of the project. An example of this could be where the construction contract provides for the fluctuation of the contract rate and prices due to market conditions.

In the event of a referral by one of the parties for amendment of the terms of the contract to deal with any unusual circumstances faced by the parties during the currency of the project, does the adjudicator have the jurisdiction to deal with such a referral?

The HGCR Act 1996 neither expressly confer or deny an adjudicator jurisdiction in such circumstances.⁶⁵ In the case of *Treasure & Son Ltd v Martin Dawes*,⁶⁶ it was held that the adjudicator may have jurisdiction over a dispute where it relates to the main contract and can define his jurisdiction accordingly.

Furthermore, Section 105 (2) of the HGCR act 1996 grants an adjudicator jurisdiction over disputes relating to the so called enabling and preparatory works. Disputes over enabling and preparatory works are a fertile ground for jurisdictional challenge. The parties usually challenge in court the jurisdiction of the adjudicator to entertain disputes relating to enabling and preparatory works.

The court takes a broad approach to jurisdictional challenges of this nature. This broad approach is espoused in the case of *Homer Burgess Ltd v Chirex (Annan)*⁶⁷. The decision in this case contrasts with that in *Cleveland Bridge UK Ltd v Whessoe Volker*

⁶⁵ Sec 107 HGCR 1996.

⁶⁶ *Treasure & son Ltd v Martin Dawes* 2007 EWHC 2410 TCC.

⁶⁷ 2000 BLR 124 & ABB power construction v Noorwest holst Engineering Ltd 2000 (77) TCR 831.

Stevin Joint Venture,⁶⁸ where the court refused the enforcement of an adjudicator's decision for lack of jurisdiction.

It would seem that the power of an adjudicator to review and amend the contractual provisions in order to rebalance the power between contractual parties owe its origin to an arbitral award issued by the French Court of Appeal on 13/01/1973.⁶⁹ The court gave support to the agreement between the parties where the circumstances so permits.

The International Chamber of Commerce in Paris, goes further than the court by giving the arbitral tribunal the power to modify the contract between the parties in order to rebalance the powers and duties if the circumstances so requires even in the absence of an express agreement by the parties.⁷⁰

The thinking behind this is that the real intentions of the parties is to balance legal and financial power between them and if in the event an unusual event occurs altering this balance of power in favour of one party, it is in line with the principle of fairness and natural justice for there to be an intervention to rebalance the contract.⁷¹

However, in the relationship between the main contractors and sub-contractors, where they encounter rebalancing problem, the sub-contractor would like an adjudicator to be granted the power to rebalance contracts in the event of the occurrence of an unusual event. However, the speedy nature of adjudication where a decision has to be rendered within 28 days will make giving an adjudicator such a power illogical. An arbitral tribunal takes a much longer time to render a decision.

The need to rebalance a contract may also arise between main contractors and his domestic sub-contractors in relation to valuation of the variation work where the contract omit to provide for a pre agreed mechanism to resolve a variation dispute. In practice if this arises it is supposed to be referred to court for resolution. But because of

⁶⁸ 2010 BLR 415

⁶⁹ REVUE D L'ARBITRAGE, P 68 OBS.FOUCHARD

Also Look At Bridin, Amiable Comotion Et Contrat, Rev.Arb 1984

⁷⁰ Clunet, 1980 P 96 case no 3267. Page no 277 arbitration, mentioned in proff / A.M.SADEQ, arbitration in global, arab countries and Egyptian. Published by, HOUSE OF LAW, 2012, EGYPT

⁷¹ Dr. A.A. MOHIE. Article published, AL-AHRAM Economic journal, Egypt,

the expense involved in going to Court and the main contractor's selfishness, the dispute is resolved acrimoniously by the main contractor.⁷²

The question that arises is whether an adjudicator who has been appointed in accordance with the contract between the parties has jurisdiction to rebalance contracts

⁷² Pre Harding, C 1991 , building without conflict ,November

4 Chapter 4

4.1.1 Adjudication Under The Islamic Sharia Law.

As stated above adjudication is a mechanism, whereby a neutral third party examines and resolves disputes between the parties outside of the court. The adjudicator has to be impartial, independent and respect the concept of rough and ready justice.

Most fundamentally, however, the adjudicator should act independently and in a quasi judicial manner. The adjudicator's function is similar to that of a judge or an arbitrator in that they examine and render decisions in disputes between the parties. Like judges and arbitrators they are subject to the applicable law and required to give reasons for their decisions and awards.⁷³

4.1.2 Neutral third party determination in the prospect of Islamic sharia law:

Third party determination and decision have been known in Islamic sharia since the beginning of time. In the time of Adam, the father of the world, he resolved a dispute between his sons, *QBEEL AND HABIL*. The decision he gave was binding on the parties. His son who was not happy with the decision committed a crime.

The story was that *QABEEL* had the intention to marry his own sister to be his wife but his father, Adam, was against it because according to God's rules of which they were subject to it is not permitted for a brother to marry his sister. Also Adam wanted his younger son, *Hbeel*, to take over from him, but his older son did not agree and was very angry. To resolve the dispute, Adam them to present a sacrifice or present to GOD and

⁷³ Matt molloy'S – WSP cel ltd v dalkia utilities services plc 2012 EWHC 2428 TCC COURT - UK

the one whose sacrifice is accepted by GOD will have the wife and superiority over the other and take over from him, Adam. The sign that the sacrifice or present has been accepted by GOD was a fire. God accepted HABIL present .but KABIL did not accept that decision and killed his own brother.⁷⁴

قال تعالى (وَاتْلُ عَلَيْهِمْ نَبَأَ ابْنَيْ آدَمَ بِالْحَقِّ إِذْ قَرَّبَا قُرْبَانًا فَتُقُبِّلَ مِنْ أَحَدِهِمَا وَلَمْ يُتَقَبَّلْ مِنَ الْآخَرِ قَالَ لَأَقْتُلَنَّكَ قَالَ إِنَّمَا يَتَقَبَّلُ اللَّهُ مِنَ الْمُتَّقِينَ (27) لئن بَسَطْتَ إِلَيَّ يَدَكَ لِتَقْتُلَنِي مَا أَنَا بِبَاسٍ بِإِيدَائِكَ لَأَقْتُلَنَّكَ إِنِّي أَخَافُ اللَّهَ رَبَّ الْعَالَمِينَ)

What we can deduce from the above is that a losing party does not easily accept his loss because every party to a dispute believes that he has a good case. Secondly that disputes are referred to a neutral third party and thirdly, the powers conferred on the neutral third party may be wide or limited.

4.1.3 Models of Dispute Resolution in sharia :

Islamic law (sharia) provides many types of models for dispute resolution. They include private settlement (ṣulḥ), settlement by appointing a judge قضاء (qaḍā) or independent *third party*

قال تعالى (وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا)⁷⁵

Arbitration (tahkīm).

The various Islamic dispute resolution models are similar to the modern version of dispute resolution. . The treatment of adjudication as a summary judgment is similar to the Islamic practice of appointing a single individual as a neutral third party to render a decision. Evidence of this is found where a dispute arose between the family leaders in QURAISH⁷⁶ at the final stage of constructing the QABBA.⁷⁷ Each family intended to

⁷⁴ Chapter 5 Sorat al Ma'ida ,verse, 27-31 ,Holly Quran

⁷⁵ Chapter 4 Sorat al Nisa , verse 35 , Holly Quran. If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.

⁷⁶ The incent people of Saudi Arabia .

⁷⁷ The house of god , located at Makkah , Saudi Arabia

apply for the holy black stone,⁷⁸ which everyone believes came from heaven. The family leaders appointed MR. Abo Omia Ebn El Mughira,⁷⁹ who determined the dispute. A further evidence of this was where the Arab society adjudicated that PROFIET MOHAMMED صلى الله عليه وسلم should put the black stone during re-erection of QAABA⁸⁰

The alternative dispute resolution or in other words the private justice model is really very efficient in the current climate because it has no statutory backing and is not a final binding decision, as a result it does not fully resolve disputes. However, it adopts the approaches of ADR in terms of fairness and rules of natural justice in dealing with the merits of the case. In applying real justice it is not inhibited by any procedural requirements which may be used by the unscrupulous party to circumvent the process.

4.1.4 The compatibility of adjudicator decision with the QIAS principals in Islamic shariaa :

Adjudication in the current form has to be adopted to be compatible with sharia law. As the later has the principles of QIAS⁸¹ قياس. However, the current adjudication model is not available as a case law precedent. It is only binding on the parties in the particular dispute and not opens to parties in other disputes to rely on. Further, the specialized and confidential nature of the merits of the adjudication dispute makes it unavailable as a precedent. Because of the restriction in the use of adjudication decision in sharia it does not affect the historical jurisdiction in modern model of adjudication.

Also adjudication in sharia law limited in space by the circumstances, location and religion, thus the concept of the current adjudication as a modern models without adoption, may not be suitable in Islamic law rather than the idea of an adjudicator as neutral third party. Because of this statutory adjudication is a difficult proposition in

⁷⁸ Astone came from the heaven to venerated the Kaaba

⁷⁹ One of Quraish leader. اميه ابن المغيرة.

⁸⁰ Mohammed sa lam zanati, arbitration in Arabs, article represented in the ARRICH arbitration conference page 13

⁸¹ مبدأ القياس في الشريعة الاسلامية حيث تقاس امور الخلف على افعال السلف the principal of QIAS in shariaa its analogy with the presidency in the English court, that litigant may rely on a similar circumstances of the merit to get the same judgment of their recent case.

Islamic civil law country compared to the non-Islamic civil law country. However, the German model may be an option but the jury is still out on that.

4.1.5 Neutral third party determination in the prospect of Islamic shariaa law :

Under the HGCR 1996 as amended parties can contract out of it but are required to comply with and its amendments. It allows the parties to adjudication to contract out of law but are required to accept the adjudicator's decision as final and binding.⁸²

“The parties may agree to accept the decision of the adjudicator as a finally determining the dispute “

This approach may be helpful in resolving disputes on a dispute by dispute basis as obtainable in the UK but this approach may face legal obstacles in civil law Islamic jurisdictions like the UAE. For instance in the UAE, the only person eligible to render a final decision in a dispute between two parties capable of enforcement is a registered judge not a neutral third party .

Further the losing party may rescind his decision and refuse to implement the decision in the case and there is no restrictions on him doing so in the constitutional law of UAE . .

However, it is possible in Islamic-sharia law to accept an adjudicator's decision as final and binding as happened in the case of Prophet *Yusuf v the wife of chief minister's Zulikha*, where the adjudicator gave a binding and final determination. When Zulikha tried to seduce Prophet Yusuf, she locked the door to have some privacy for her intention. When Prophet Yusuf refuse to indulge her, she was very angry and accused Prophet Yusuf of trying to seduce and rape her. Prophet Yusuf rejected her claim as

⁸² Sec 108(3) HGCR act 1996 ,

result of which a dispute crystallized.⁸³ He alleged that she tore his shirt when she tried to rape him .

An adjudicator was appointed by the Chief minister, the husband of Zulikha . The adjudicator in deciding the case stated that if Prophet Yesufu's *shirt was torn from the front Zulikha's allegation was true and if the Prophet's shirt was torn from the back, Zulikha's allegation was lie and the Prophet will be vindicated.*⁸⁴

قال تعالى (وَاسْتَبَقَا الْبَابَ وَقَدَّتْ قَمِيصَهُ مِنْ دُبُرٍ وَأَلْفَيَا سَيِّدَهَا لَدَى الْبَابِ قَالَتْ مَا جَزَاءُ مَنْ أَرَادَ بِأَهْلِكَ سُوءًا إِلَّا أَنْ يُسْجَنَ أَوْ عَذَابٌ أَلِيمٌ (٢٥) قَالَ هِيَ رَاوَدْتَنِي عَنْ نَفْسِي ۖ وَشَهِدَ شَاهِدٌ مِنْ أَهْلِهَا إِنْ كَانَ قَمِيصُهُ قُدَّ مِنْ قُبُلٍ فَصَدَقَتْ وَهُوَ مِنَ الْكَاذِبِينَ (٢٦)

The above is an obvious case of where an adjudicator's decision is final and binding.

It is important to distinguish between attempted adjudication system (described above which was practiced in Islamic history) and the modern day alternative dispute resolution. In adjudication parties appoint a neutral third party to determine the dispute between them and the adjudicator's decision is binding but not final. It can also be final and binding upon agreement of the parties.

4.2 Comparison between Adjudication decision and amicable settlement in the Perspective of Islamic shariaa law:

The private settlement (*sulh الصلح*) which is practiced in Islamic- civil jurisdictions has similar features as modern day alternative dispute resolution but differ in the following :

- I. In private settlement each party would amicably forgo a part of his right to reach a settlement. In addition, that part would be defined and even acknowledged before the settlement agreement.

⁸³ Crystallization of the dispute is the fundamental condition to refer the dispute to adjudicators according to section 107 of the HCGR 1996 act

⁸⁴ Chapter 12 Sorat YUSUF , verse 25 & 26 , Holly Quran.

- II. The outcome of the adjudication is considered as a decision even if it was a settlement reached by the parties during the currency of the dispute.
- III. In private settlement the settlement agreement is not enforceable on its own it has to be considered and attested to by the court. However, the adjudicator's decision is enforceable on its own without the need for an attestation.
- IV. Parties may object to the adjudication decision as its not final by referring the dispute to court or arbitration, but in a private settlement a party cannot object to the settlement.

Therefore, the correct definition of a private settlement agreement is that the parties agree to resolve their dispute without recourse to a neutral third party. This settlement agreement resolves the dispute. The source of this definition in Islamic sharia law is the HOLY QURAN

قال تعالى (وَإِنْ امْرَأَةٌ خَافَتْ مِنْ بَعْلِهَا نُشُوزًا أَوْ إِعْرَاضًا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يُصْلِحَا بَيْنَهُمَا صُلْحًا وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنْفُسُ الشُّحَّ وَإِنْ تُحْسِنُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا)⁸⁵

4.3 Comparing judge with the adjudicator in the Perspective of Islamic sharia,

The judge in sharia Islamic rule must meet a certain requirement to be appointed as a judge. He has to be basically a Muslim, free and not a slave, mature, not quick tempered, sane, and has faqh فقّه. In addition, to his fiqh فقّه, he must be able to determine and distinguish between the facts and merits of each case; and apply the relevant rule to the particular facts and merits of each case.

There is not much difference between a judge and an adjudicator in terms of their functions and obligations, as both render binding decisions,

⁸⁵ Chapter 4 Sorat Al Nisa , verse 128 , Holly Quran

The judge in Islamic sharia previously use to hear only religious cases on marriage, divorce and , inheritance . However, his jurisdiction has now extended to cover both civil and criminal matters. Originally, judges presided over disputes with no restrictions or even limitation, relying solely on their own discretion. He was not inhibited by any administrative rules. His objective was to achieve realistic justice in the light of what GOD stated in the Holy Quran as expressed in sharia the canon of islam⁸⁶

قال تعالى (وَأَنْ أَحْكُمْ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ وَاحْذَرْهُمْ أَنْ يَفْتِنُوكَ عَنْ بَعْضِ مَا أَنْزَلَ اللَّهُ إِلَيْكَ فَإِنْ تَوَلَّوْا فَاعْلَمُوا أَنَّمَا يُرِيدُ اللَّهُ أَنْ يُصِيبَهُمْ بِبَعْضِ ذُنُوبِهِمْ وَإِنَّ كَثِيرًا مِّنَ النَّاسِ لَفَاسِقُونَ)

In resolving dispute the judge apply the fundamental principles of natural justice, fairness to parties, jurisdictional rules and relevant law.

So the judge in sharia and an adjudicator apply similar principles. It follows therefore that the idea of an adjudicator will not be foreign in sharia.

4.3.1 Legal obstacles of adjudication in the perspective of shariaa law:

One of the differences between the modern adjudication system and sharia rule is in the area of preservation of the object of the dispute. While in modern adjudication a party who is the beneficiary of an interim application may have the object of the dispute in his possession, in sharia the object of the dispute will only be in the custody of one of the parties as a result of a final decision and not as a result of an interim decision. .

The judge in sharia unlike a modern day adjudicator is required to be faqih in his profession. This is not limited only to his profession but extends to having enough legal , professional and religious knowledge to make him eligible to determine the unusual circumstances that may arise in the case accrued.⁸⁷

قال تعالى (وَمَا أَرْسَلْنَا مِنْ قَبْلِكَ إِلَّا رِجَالًا نُوحِي إِلَيْهِمْ فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ (43) بِالْبَيِّنَاتِ وَالزُّبُرِ وَأَنْزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ وَلَعَلَّهُمْ يَتَفَكَّرُونَ)

⁸⁶ Chapter 5 Sorat al Maida'a , verse 49 , Holly Quran

⁸⁷ Chapter 16 Sorat al nahel , verse 43-44 , Holly Quran

5 Chapter 5

4.4 Conclusion And Recommendations.

An adjudicator has a dual role, in one respect he acts as a judge, reaching a decision on the dispute between the parties and in another respect, he gets the disputing parties to sit at the negotiating table to seek an amicable settlement of their dispute .

The adjudicator's decision is similar to the interim measure decision in court proceedings, both of which are binding but not final. Some of the common grounds for challenging an adjudicator's decision include:

5.1.1 Jurisdiction, natural justice and premature dispute (dispute non-crystallization)

Premature dispute came up in the case of Specialist Ceiling Services *Northern Ltd v ZVI Construction UK*,⁸⁸. It was held that one of the grounds to set aside an adjudicator's decision is where a dispute has been referred to adjudication prematurely. In this case the Claimant did not serve the settlement offer on the Respondent in the proper manner. The Respondent had indicated that it would have accepted the offer of settlement if it was served in the proper manner..

In cases of premature referral the adjudicator has the discretion to decide who pays the legal costs in the circumstances. This is different from the ordinary case where the loser pays the costs. The *tolent* clause amended by the construction act,⁸⁹ may not be applicable in this case.

⁸⁸ Cases on enforcement of construction adjudication page 131

⁸⁹ Amandmaent of the construction act October 1998

5.1.2 Right to refer dispute to adjudicators :

Disputes referred to adjudication are not limited to payment of contract sum or legal cost management but also cases relating to loss and expense, professional negligence and damages⁹⁰

Adjudication is like a bulwark protecting small companies from potential insolvency. However, the current dispute resolution regime in civil law jurisdictions like UAE, has its draw backs which includes the high costs and the length time spent in resolving simple disputes . In addition to this, is the complexity of court procedure

The courts provide high quality justice but at a price while alternative dispute resolution provide fine and applaud able justice

5.1.3 Restriction of lawyers

The gamesmanship and rhetoric lawyers engage in the court room contribute to the delay in the final determination of matters in court, which in turn lead to increased costs to the litigants⁹¹ and potential insolvency of the small litigant like the sub-contractors.

An alternative to court litigation, is alternative dispute resolution (ADR) mechanism, particularly adjudication, which is an alternative to court based litigation, thus avoiding the costs, time and stress associated with court based litigation.

The nature of court based litigation is such that the court and the lawyers are in control of the process. This was aptly captured by the Lord Chief Justice in 2008 in his speech titled “ Cost and Trauma”, referring to when court and lawyers are involved in the resolution , he said “ *they take charge of you willy-nilly , and you find that you have embarked on a course that has no turning back and the incident of which you cannot even understand* “

⁹⁰ THE GLASGOW CALEDONIAN UNIVERSITY REPORT.

⁹¹ Woolf interim reports

Alternative dispute resolution is considered the cheaper and easier method to resolve dispute. Adjudication in the UK, with the relevant statutory and judicial support it get is considered the most effective mechanism of resolving construction contract dispute. Lawyers and legal consultant outside of the UK encourage their clients not to include adjudication as the preferred dispute resolution mechanism in their contract.

5.1.4 Statutory right of adjudication

The statutory right of referring dispute to adjudication at any time⁹² is considered as key benefit of the adjudication system. However, legal practitioners frown at the use of adjudication to settle complex and technical legal dispute. They take view that complex and technical legal problem cannot be resolved in a speedy trial.

Other practitioners take the opposite view that disputes can be resolved by adjudication within 28 days plus 14 days (if an extension is granted) and so they consider it an appropriate mechanism for resolution of dispute.

It is important for the adjudicator to act impartially and fairly giving the parties equal opportunity to present their case and meet the case put forward by the opposing party. The principle of natural justice is very material in adjudication and the adjudicator must be seen to be faithful to this principle. However, it is important to clearly define what the principle of natural justice is to avoid an inhibition of the flexibility of the adjudicatory process.⁹³

The natural justice strand of the adjudicatory process also finds favour in the UK Human Rights Act 1998, where it is clearly enshrined in Article 6, the 'Right to fair trial.'⁹⁴

We are of the view that payment dispute should follow a different adjudicatory process rather than subjecting it to the same process used for resolving complex dispute. This is

⁹² Section 108(3) construction act of UK 1996

⁹³ B.Denise .school of property , construction and planning , university of central England Birmingham , Perry BARR, B422SU,UK

⁹⁴ Article no 6 of human right act 1998 of UK

informed by the need to remain faithful to the original objective of adjudication which is to ease cash flow. It venturing into the resolution of complex dispute is a departure from the original intention.

5.1.5 Adjudication Hybrid scheme:

The hybrid system of certification for payment dispute is in our view the most effective mechanism for resolving simple payment dispute.

Another option for adjudication to remain faithful to the original objective is the right of the parties to contract out which the parties are allowed to do under the UK Act if they so wish.

We also recommend that the adjudicator be given the power upon an application by the Claimant to amend, delete or rewrite the contract between the parties if he deems it necessary in order to rebalance the legal and financial powers between the parties. This, however, may be in breach of Clause no 70 of the Civil Procedures Law of the UAE 1985, which states that “ *No person may resile from what he has conclusively performed* ”⁹⁵

5.1.6 Administrative and legal obstacles encounter with adjudication to be implemented in UAE:

We looked at the types of adjudication and the potential administrative and legal obstacles that may be encountered by adjudication in a civil law jurisdiction.

We, however, recommended statutory adjudicatory regime for resolution of construction disputes in the UAE subject to necessary amendments to meet with the UAE requirements. However, there is an argument against adopting statutory adjudication in the UK because of the temporary binding nature of an adjudicator's decision.

⁹⁵ Article no 70 , CTC or UAE 5 /1985

It is argued that adjudication is not appropriate for the UAE, because the temporary binding nature of the decision can cause irreparable damage to the person against whom the decision is given even if the decision is subsequently overturned by the Court or at arbitration, because that party may not be in a position at that time to arrest the decline in his finances. As happened in the case of *Bouygues Uk Ltd V Dahl-Jensen Uk Ltd*,⁹⁶ where the adjudicator ordered the enforcement of the sum in contention which resulted in the Respondent going into liquidation. The decision was overturned subsequently but the harm had already been done.

Cash flow is the artery of the construction industry as Lord Denning stated in the case of Modern Engineering Bristol ltd v Gilbert – Ash Northern Ltd 1973, when he said that

“there must be cash flow within the building trade . It is the very life blood of the enterprise “

However, Sir Micheal Latham equally recognized the vitality of cash flow in the construction industry and saw adjudication as essential in ensuring the steady flow of cash in construction when he said in his report:

“Speed of adjudication would be an ideal means of maintaining the cash flow within the industry “⁹⁷

5.1.7 Necessary adoption of the adjudication to be suitable for the UAE system:

If the UAE is adopting adjudication it should critically look at the time frame for rendering decision. While speed is important sometime it may be an impossible task to render a decision within the time frame. ⁹⁸

⁹⁶ Bouygues Uk Ltd V Dahl-Jensen Uk Ltd,2000

⁹⁷ Sir Micheal Latham report 1994

⁹⁸ Streatfield-James (2003,p. 500) commented on the timeframe

In the light of the criticisms of arbitration, recommendations have been made on how to improve cashflow, some of these are set out in the draft Construction Contract bill put together by BERR⁹⁹. The key points in the draft bill are:

- I. More transparency in the exchange of information between parties to provide a better cash flow management.
- II. Adjudication is a better method of resolving dispute compared to traditional method and encourages the parties to follow adjudication
- III. Right of suspension for non payment.

The UK Adjudication law was amended in 2009¹⁰⁰. The amendment introduced some key changes namely :

- I. Not necessary for the construction contract to be in writing . Disputes arising from oral contract can be referred to adjudication .
- II. Introduction of the slip rule principles , the right of an adjudicator to correct any clerical mistake in his decision
- III. Prohibition of premature agreement by the parties as to who will pay cost of adjudication (the '*Tolent* Clause').

We recommend that holidays and charismas day should be excluded from the timeframe within which an adjudicator is to give a decision.¹⁰¹ This is to prevent ambushing by the Claimant party, who may want to take advantage of those days to refer a dispute to adjudication.

The ability of the adjudicator to familiarize himself with the facts of the dispute within the time frame is also matter of criticism.

⁹⁹ Business Enterprise & regulatory reform ,July 2008

¹⁰⁰ LDEDCA , 2009.

¹⁰¹ Redmond 2001.

While we agree that adjudication is an effective method of resolving payment disputes we have our reservation on its use to resolve complex disputes which would require considerable technical investigation

The adoption of UK adjudication may require some modifications in relation to time frame, collecting evidence, power of the adjudicator and limitation.

We have recommended a number of ways to overcome the administrative and legal obstacles in the adoption of adjudication in civil law jurisdiction. Also to free adjudication from lawyers and expert witness rhetoric and from ambushing tactics of parties.

5.1.8 Necessary adoption for adjudication to be suitable with Islamic shariaa law:

We looked at adjudication in relation to Islamic law. We examined the features of adjudication and the functions of the adjudicator. We expressed the view that sharia law will accommodate adjudication with or without relevant amendments.

Sharia does not object to the idea of appointing a neutral third party to determine the dispute on condition that the adjudicator must have the legal, technical and religious knowledge,¹⁰² which are necessary for him to determine the parties' rights and obligations.

Sharia law will also not object to the right of the parties to chose an adjudicator in a contract to determine a construction or civil action dispute. However, if there is any criminal element in the dispute that should be determined by a state court.

An adjudicator should enjoy similar powers as judges and adjudicator's decision should be registered in the justice ministry of the jurisdiction where it is rendered so that the ministry can review the decision before it is rendered..

¹⁰² Faqiha. فقيهه an expert of the religious issue , also he has the ability to render what so-called فتوى that is a new issue arise and he determine it.

4.5 Adjudication in UAE:

The government of Dubai, UAE, should establish a Technology and Construction Court which would act as an umbrella and nomination body for adjudicators. The Court will have a list of adjudicators and adjudicators would qualify to go on that list through an accreditation process which could involve passing some professional examinations. The Claimant or the parties to a dispute will select their adjudicators from the Court's list..

The Technology and Construction Court should have jurisdiction over all disputes arising from construction contract in the UAE. The word 'construction' should be defined to include not only real estate but also construction and technology.

The court should categorize claims according to their complexity and generally the claims should be placed in two categories :

- I. First category will be the simple payment claim, in which the court would have jurisdiction to resolve the same through the Payment Act. In dealing with claims in this category adjudicators should adopt rules similar to that of New South Wales on certification of entitlement claims .
- II. Second category will be the highly complex and technical claims that would require extensive investigations before the rights and obligations of the parties can be determined. This type of claims are better determined by the Technology and Construction Court through expedited trial which should take not more than 90 days to conclude.¹.

We recommend that the UAE adopts the hybrid adjudication system, which is a combination of statutory and contractual adjudication

5.1.9 Statutory adjudication system:

5.1.9.1 Certification system for payment dispute

That system would be similar to the certification system in New South Wales in Australia and the dispute has to be determined within 14 days, from the date the dispute referred to the Technology and Construction Court is served on the Respondent.

The Claimant only should have the right of referral in respect of disputes of up to 50,000 AED and if the amount is more than 50,000, either party should have the right to refer.

The restriction on referral is necessary because one of the objectives of the Technology and Construction Court should be to protect small companies from insolvency by enhancing cash flow in the industry.

The categorization will enable small companies take immediate steps to protect their cash flow. If there is no categorization all claims may be treated in the same way which could be a recipe for financial disaster for small companies.

Important note:

In construction disputes, the employer is usually the Defendant or Respondent and their claims arise mainly from construction defects and professional negligence, which are usually worth far more than the recommended threshold of 50,000 AED for simple payment claims. This is what informs our recommendation that in such claims that are worth more, both parties should have a right of referral.

- I. Notice of referral to adjudication should be served on the Respondent through the Technology and Construction Court. The notice should give the parties three days from the date of the Notice to try and reach an amicable settlement. If the

- dispute is not resolved during this period, it will then be referred to the adjudicator.
- II. If the dispute is resolved within the three day period, the Respondent should only pay 25% of the court fees but if it is not resolved within the three day period, the entire court fees and the adjudicator's fee should be added to the claim amount.
 - III. Ambushing and other bad faith tactics should not be permitted. The adjudicator should have the **sole discretion** to calculate business days for limitation purposes and timeframe.
 - IV. No objection of excess of jurisdictions would be entertained as the adjudicator just like an arbitrator should be able to determine his own jurisdiction. In other words he should benefit from the doctrine of competence-competence¹⁰³ in determining his jurisdiction if it is in issue
 - V. Adjudicators no matter the category of disputes they are dealing with should exercise similar powers, however, adjudicators dealing with simple payment claims should not have the power to grant interim measures or injunctions . simply because the duration of the case is only 14 days .

5.2.1.1 Time frame for the certification system

Simple payment claims should be determined within 14 days but the losing party should have a right of appeal to the Technology and Construction Court.

5.2.1.2 Limitation:

For claims up to 50000 (fifty thousand) AED, an adjudicator should have jurisdiction to review this case

¹⁰³ *competence-competence*" that is, the power of an arbitral tribunal to determine its own jurisdiction

5.2.1.3 **Decision:**

The adjudicator's decision in simple payment disputes should be binding but not final and the decision can be enforced with the support of the court and it should be enforceable within six days of it being rendered.

5.2.1.4 **Appointment of the adjudicators:**

Parties may agree on the adjudicator to be appointed but he has to be on the Technology and Construction Court list of adjudicators. Adjudicators on that list would have undergone some accreditation process

Where the parties do not agree on an adjudicator, the Claimant can on his own select an adjudicator from the list for claims up to 50000 AED. If the dispute is over 50000 AED, the Technology and Construction Court should have jurisdiction over it and be the adjudicator nominating body.

5.2.1.5 **Cost:**

Costs should follow the event so the losing party should pay the costs. In determining the costs payable, the adjudicators should take into account the conduct of the parties between the service of the referral notice and the adjudication hearing .

5.2.1.6 **Right of referring the dispute to the adjudicator:**

Claims up to 50000 only the Claimant is entitled to refer it to adjudication and if over 50,000AED, either party can refer.

The right of referral will be subject to the satisfaction of a payment notice. If the notified party fails to pay within three business days from the date of service of the notice, the adjudicator can proceed to hear the case .

5.2.1.7 The notice:

The notice has to be served through the Technology and Construction Court's Information Department and the notice can be served through the email address or fax number contained in the construction contract.

5.2.1.8 The right to render interim measures:

The adjudicator should not have the power to grant interim measures because the resolution of the dispute would be a speedy one, there has to be a three notice to the other side, adjudicator to reach a decision with 14 days and the decision to be enforced with six days. In all from commencement to conclusion will last 23 days.

5.3 Educate the Adjudicator and his power :

It is important for adjudicators to engage in continuous professional development in order to continue to hone their skills, knowledge and expertise. In addition adjudicators who are engineers should get some legal training as part of the continuous professional development. It is, however, important that every adjudicator selected has construction industry experience.

Adjudicators should have similar powers like judges including power to grant interim measures in dealing with claims before them.

5.4 Recommendation for Further research:

5.4.1 TCCD Hybrid Adjudication as a dispute resolution scheme for technical disputes

5.4.2 TCCD Expedition adjudication trial scheme for technical disputes

The above will assist in balancing the powers between the main employer, main contractors and supply chain.

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