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INFERIOR TRIBUNALS AND ENFORCING THEIR DECISIONS

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A: INTRODUCTION

In this paper inferior tribunal is used as a generic term for body, comprised of one or more persons, that is empowered to determine disputes between parties, generally a dispute concerning a contract between them, but whose determination is of temporary effect in that, if not accepted, the dispute considered by the tribunal can be re-heard in litigation or arbitration, the tribunal's decision being of, at most, evidential significance in those proceedings. For example, the United Kingdom legislation bringing into effect the right to statutory adjudication of disputes under most construction contracts provides that "the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration ... or by agreement".[1]

There has, over the last ten years or so, been a growing world wide interest in, and use of such tribunals for the determination of disputes concerning construction projects. It is not the purpose of this paper to consider the pressures that have lead to this development. Suffice to say that they include, on one hand, dissatisfaction with and loss of trust in the traditional role of those appointed to administer construction contracts, usually Architects or Engineers, in determining the parties' rights and entitlements and, on the other, concerns about the excessive cost and time involved in the taking of disputes to arbitration or litigation and the effect of such proceedings on business relationships.[2]

B: ADJUDICATION

This dissatisfaction manifested itself, in the United Kingdom, through the introduction during the late 1980s and early 1990s of provisions for adjudication of certain categories of disputes into United Kingdom building contracts and sub-contracts, in particular those that did not provide for a contract administrator, such as an Architect, to decide such disputes.[3]

These provisions were not widely used and their introduction into contacts providing for administration by Architects or Engineers was resisted by the professions. In the couple of cases were they were considered by the courts of England and Wales, the process was held not to be arbitration, since the contract provisions expressly provided for the adjudicator's decision to be binding pending arbitration, but an ephemeral and subordinate form of expert determination leading to a decision that gave rights in contract, but which could not be enforced summarily as an arbitral award.[4] The significance of the process being described as expert determination is that, in a number of decisions, the courts of England and Wales have concluded, on proceedings to enforce or challenge the decisions of experts, that their decisions can only be challenged on the grounds of actual or apparent bias, or because the person making that decision lacked jurisdiction because not empowered to do so under the relevant contractual procedures or because he made a

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[1] Part II of the Housing Grants, Construction and Regeneration Act 1996, s. 108(3).

[2] See, for example, the discussion of these pressures in N Bunni, *The FIDIC Forms of Contract* (Third Edition) Chapter 26; the Dispute Resolution Board Foundation, *DRBF Practices and Procedures Manual,* Section 1, *(www.drb.org)*; Sir Michael Latham, *Constructing the Team (the Latham Report)*, 1994, London HMSO.

[3] For example, by mid 1980s amendment to the Design and Build Standard Form Building Contract (WCD 81) published by the Joint Contracts Committee (JCT), and in the sub-contract suites for use with JCT Standards Form Main Contracts, published in the 1980s and early 1990s by the JCT and others.

[4] A Cameron Ltd v. John Mowlem & Co (1990) 53 BLR 24. But note, Cape Durasteel Limited v. Rosser & Russell (1995) 46 Con LR 75, in which a clause providing for adjudication was held to be an arbitration agreement. This case is distinguishable from Cameron v. Mowlem, in that the clause in question stipulated that the "adjudicator's" decision was final, and did not allow for it to be reconsidered in arbitration or litigation; thus the process could not be viewed, is in the case of statutory adjudication, as subordinate to arbitration. Consider also, Sutcliffe v Thackrah [1974] AC 727 (House of Lords), in particular Lord Morris, at 744; Arenson v. Arenson [1977] AC 405, in particular Lord Simon at 424 and Lord Wheatley, at 427.

decision that was not in respect of the dispute referred to him (answering the wrong question). The decision of an expert cannot be challenged on the grounds of error of law or of fact (answering the right question in the wrong way) and has to be honoured despite such errors. Neither, unless expressly provided for in the relevant contract, is the expert required to act judicially; that is complying with the dictates of procedural natural justice.[5] On the other hand, unlike in the case of an arbitrator, a claim may lie against the expert in negligence if, in reaching his decision, he does not exercise reasonable skill and care.[6]

It was against this background that Sir Michel Latham, who was commissioned by the United Kingdom Government to carry out a Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry recommended that all construction contacts should include provision for a speedy system of dispute resolution by an impartial adjudicator, referee or expert, with adjudication being the normal method of dispute resolution.[7] This recommendation was subsequently enacted, along with a few others made by Sir Michael Latham, principally concerning payment machinery to regulate rights of withholding and set off, in Part II of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). The provisions for adjudication, commonly referred to as statutory adjudication, are in s. 108 of that Act and in secondary legislation, the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme).[8]

Within a couple of years of the coming into force of this legislation, statutory adjudication became the principal method for resolving disputes, of what ever type, arising under construction contracts for projects constructed in the United Kingdom.[9] This includes disputes, whether of fact or law, on all types of engineering and building projects from minor works to infrastructure, ranging in value from a few hundred pounds to many tens of millions of pounds Stirling. It includes disputes about interim and final accounts, defects, delay and disruption, and about repudiation and frustration of contract. Most controversially, it includes disputes as to consultant's fees and professional negligence.[10]

The consequence has been a dramatic decline in the use of litigation and domestic arbitration to resolve such disputes,[11] albeit there is anecdotal evidence of a recent upturn

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[5] Re Dawdy (1885) 15 QBD 426 (Court of Appeal); Nikko Hotels v. MEPC [1991] 2 EGLR 103. The dictates of procedural natural justice, a common law concept, require each party to be treated fairly with a reasonable opportunity to present its case and to respond to the case it has to meet. The equivalent civilian concept is embodied in the principles of equality and confrontation.

[6] As, for example, in Campbell v Edwards [1976] 1 WLR 403 (Court of Appeal).

[7] Sir Michael Latham, *Constructing the Team (the Latham Report)*, 1994, London HMSO

[8] The HGCRA applies in England and Wales, Scotland and Northern Ireland, but the secondary legislation setting up the procedures to give effect to Part II of the Act differ in each jurisdiction. The differences are not particularly significant.

[9] The scope of the legislation is territorial, it apples to contracts for the carrying out of construction operations in England, Wales or Scotland (or Northern Ireland). The proper law of the contract is irrelevant; see s. 104(7).

[10] The author's experience, which is by no means unique, is instructive. He has adjudicated some 50 to 60 disputes ranging across the types described with values up to £8 million, about $15 million. Most have been determined within a month or so of appointment, the longest, including a two day meeting with the parties, and a 180 page decision, taking about two and a half months from appointment. He is not aware of any of his decision being disputed or the subject of subsequent arbitration or litigation.

[11] On some estimates there have been in excess of 20,000 adjudicated disputes in the United Kingdom, only a small minority of which are then subject to arbitration or litigation whether in respect of the merits or in enforcement proceedings. In short, in most cases, the parties live with the adjudicator's decision. See the yearly reports issued by the Caledonian University, Glasgow, Adjudication Reporting Centre (www.adjudication.gcal.ac.uk).

in both arbitration and adjudication due to dissatisfaction with the quality of many adjudicators.

C: STATUTORY ADJUDICATION IN THE UNITED KINGDOM – THE LEGISLATIVE AND CONTRACTUAL FRAMEWORK

The statutory right to adjudication is enshrined in s. 108 of the HGCRA. This provides that a party to a construction contact has the right (not an obligation) to refer a dispute (including any difference) arising under a construction contract governed by Part II of the HGCRA[12] for adjudication under a procedure that:

- 108(2)(a): enables a party to give notice at any time of its intention to refer a dispute to adjudication;

- 108(2)(b): provides a time table with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

- 108(2)(c): requires the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

- 108(2)(d): allows the adjudicator to extend the period of 28 days by up to 14 days with the consent of the referring party;

- 108(2)(e): imposes a duty on the adjudicator to act impartially;

- 108(2)(f): enables the adjudicator to take the initiative in ascertaining the facts and the law;

- 108(3): provides that the adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration (if applicable) or by agreement; and

- 108(4): provides that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and that any employee or agent of the adjudicator is similarly protected from liability.

The fiction of freedom of contract is preserved. It is only if the parties fail to agree adjudication rules in their contract that are compliant with these minimum requirements, that the default rules provided for in secondary legislation apply by way of implied term of their contract.[13] Most standard form building and engineering contracts and standard form professional services agreements published by United Kingdom drafting bodies include

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[12] Such contracts comprise, subject to limited exclusions, written agreements for the carrying out of construction operations, for arranging the carrying out of construction operations by others, whether by sub-contract or otherwise, for providing ones own labour, or the labour of others, for the carrying out of construction operations and to do architectural, design, or surveying work or to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape in relation to construction operations, s. 104 HGCRA. Construction operations are defined widely and include most building and engineering (including mechanical and electrical engineering, other than for certain types of process plant) including demolition and other enabling work, s. 105 HGCRA.

[13] Section 114(4) HGCR. The default rules, for England and Wales, are in Part I of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme").

adjudication rules satisfying these requirements.[14] Some, such as the contracts published by the Institute of Civil Engineers, have been amended recently to extend the scope of adjudication to disputes arising in connection with, as well as those arising under the contract, suggesting a growing confidence with the process.[15] Another variant, occasionally encountered, is that if the adjudicator's decision will be final if proceedings are not commenced in respect of the dispute he has determined within a stated period.

D: STATUTORY ADJUDICATION IN THE UNITED KINGDOM – ENFORCEMENT IN THE DOMESTIC COURTS

Section 8 of the HGCRA is silent on how an adjudicator's decision is enforced and the grounds, if any, on which enforcement can be resisted.[16] These questions have been worked out by the courts[17] in the years following the coming into force of the legislation. The current state of this judge made law is as follows.

- A claim to enforce an adjudicator's decision is a claim in contract based on the express, or, if Part I of the Scheme is being relied on, implied adjudication agreement in the parties' contract. What must be contended, in addition to that agreement is that a dispute arose between the parties encompassed by their adjudication agreement, that an adjudicator was appointed to determine that dispute and has made his decision on that dispute, but it has been honoured.[18] The merits of the dispute are not in issue, thus the court's judgment on such proceedings does not create an estoppel preventing the dispute determined by the adjudicator being litigated or arbitrated.[19]

- An adjudicator's a decision cannot be challenged on the grounds of error of law or fact (giving the wrong answer to the right question), and is enforceable despite such errors.[20] This reflects the view of adjudication as a form of contractually agreed expert determination. The contrary view that an adjudicator is exercising statutory powers and thus amenable to the public law principle that a person or

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[14] The statutory requirements do not touch on the question of party costs or adjudicator's fees. The Scheme and most contractually agreed rules provide that the adjudicator can allocate his fees between the parties, but that the parities bear their own costs.

[15] The law of England and Wales gives the former wording a wider meaning that the later so as, for instance, to encompass claims in misrepresentation and certain claims in tort.

[16] Part I of the Scheme includes, in paragraph 24, a provision, modelled on s. 42 of the English Arbitration Act 1996 by which, if an Adjudicator makes his decision by a peremptory order, a court can be asked to grant, in effect, a mandatory injunction requiring compliance with that order. Courts are reluctant to exercise this power in respect of orders for the payment of debts or damages, since one of the sanctions for non-compliance would be imprisonment, and imprisonment for non-payment of money judgments was abolished many years ago, Macob v. Morrison Construction [1999] BLR 93. Thus, this method of enforcement which is, in any case, only available if Part I of the Scheme is implied into the parties' contract, has fallen into disuse.

[17] Principally the Technology and Construction Court, a first instance court, occasionally, on appeal, by the Court of Appeal.

[18] The proceedings and what must be alleged and proved, are similar to the contractual "action on an arbitral award".

[19] Elanay Contracts v. The Vestry [2001] BLR 33. The adjudicator's decision does not create an estoppel either, because under the applicable rules it is, as required by s. 108(3), only binding, pending arbitration, litigation or party agreement.

[20] Bouygues v. Dahl-Jensen [2000] BLR 522 (Court of Appeal).

body exercising such powers may exceed its jurisdiction if it errs in law or fact has been rejected by the Court of Appeal.[21]

- An adjudicator's decision is null and void if he does not have jurisdiction to act as adjudicator (lacks substantive jurisdiction at the outset) or he makes a decision in excess of jurisdiction. Thus, if an adjudicator is appointed pursuant to the adjudication rules in Part I of the Scheme, but the court finds that those rules were not implied into the parties' contract because it was not a construction contract within the meaning of Part II of the HGCRA, his decision is a nullity.[22] If an adjudicator makes a decision on a matter that was not part of the dispute encompassed by the notice of intention to adjudicate, his decision on that matter will be a nullity but, if the bad can be severed, the rest of his decision can be enforced.[23]

- An adjudicator's jurisdiction springs from the parties' express or implied adjudication agreement conferring a right to refer disputes (which includes differences)[24] to adjudication, and the notice of intention to adjudicate, by which adjudication proceedings are commenced.[25] Thus, an adjudicator's decision will be unenforceable for want of jurisdiction if there was, in fact, no dispute between the parties at the time of the notice of intention to adjudicate. In considering this requirement, the courts have sought to resolve two competing tensions. On the one hand, the desire to prevent a party initiating adjudication ("the Referring Party") ambushing the other ("the Responding Party") with a complex and multi issue case prepared in great detail, possibly over many months, but to which the Responding Party has, at most, a week or two, to consider and respond.[26] On the other hand to avoid creating judge made law by which the parties must enter into a sustained period of discussion and negotiations before it can be said that a dispute has sufficiently crystallised to be capable of adjudication. These competing principles were recently considered by the Court of Appeal in AMEC Civil Engineering Ltd v The Secretary of State for Transport [2005] EWCA Civ 291.[27] The Court of Appeal concluded that, although the mere making of a claim did not amount to a dispute, a dispute would be held to exist once it could reasonably be inferred that a claim was not admitted. It not being the case that a dispute may not arise until negotiations or discussions have been concluded. It was also suggested that a difference might involve something less hard edged that a dispute.

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[21] C&B Scene Concept v. Isobars [2002] BLR 93 (Court of Appeal)

[22] See, for example, Northern Developments v. J&J Nichol [2000] BLR 158.

[23] See, for example, Ken Griffin v. Midas Homes (2002) 78 Con LR 152. The Referral cannot widen the scope of the dispute as characterised in the notice of intention to adjudicate: see, for example, KNS Industrial Services v. Sindall (2001) 74 Con LR 71.

[24] HGCRA, s. 108(1).

[25] All adjudication rules include these requirements, they being mandatory under HGCRA, ss. 108(1) and 108(2)(a).

[26] HGCRA, s. 108, does not identify periods for a response but, since there period from Referral to Decision is 28 days, and the adjudicator has no power to extend this period, most adduction rules or, if the rules are silent, adjudicators, will allow a period of seven or 14 days for a Response.

[27] Although this was an arbitration case, the Court of Appeal was concerned to achieve consistency on this point between arbitration and adjudication. See also Collins (Contractors) Ltd v. Baltic Quay Management (1994) Limited 2005] EWCA Civ 291,

The potential difficulties with this approach concerned Rix LJ[28] who, while recognising that, in many circumstances, it was useful to determine the existence of a dispute by reference to a claim which has not been admitted within a reasonable time to respond, considered that it was mistake to gloss the word "dispute" this way and was very cautious about accepting that either a "claim" or a "reasonable time to respond" was a condition precedent to the establishment of a dispute. He continued:

> "67. ... in the arbitration context it is possible and sensible to give to the word "dispute" a broad meaning in the sense that a dispute may readily be found or inferred in the absence of an acceptance of liability, a fortiori because the arbitration process itself is the best place to determine whether or not the claim is admitted or not.
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> 68. ... the problem over "dispute" has only really arisen in recent years in the context of adjudication for the purposes of Part II of the Housing Grants Construction and Regeneration Act 1996. ... In this new context, where adjudication is an additional provisional layer of dispute resolution, pending final litigation or arbitration, there is, as it seems to me, a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated. Unlike the arbitration context, adjudication is likely to occur at an early stage, when in any event there is no limitation problem, but there is the different concern that parties may be plunged into an expensive contest, the timing provisions of which are tightly drawn, before they, and particularly the respondent, are ready for it. In this context there has been an understandable concern that the respondent should have a reasonable time in which to respond to any claim."

- An adjudicator's decision will be unenforceable if there is a lack of impartiality by the adjudicator: This encompasses both actual and apparent bias. The test for apparent bias in English law is whether all the circumstances that have a bearing on the suggestion that the tribunal was biased (as found by the court) would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.[29]

- Somewhat controversially,[30] an adjudicator's decision may be unenforceable where he has committed a serious breach of procedural natural justice. The court sometimes takes the view that its authority should not be available to enforce a decision affected by such a breach. In other cases, the court subsumes such a challenge under the head of apparent bias.[31] The concern is only with serious failures to observe fundamental principles of fairness, causing injustice,[32] such as where an adjudicator takes into account in his decision material provided by one party, which is not seen by the other, or on which the other has had insufficient

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[28] AMEC Civil Engineering Ltd v The Secretary of State for Transport [2005] EWCA Civ 291 (Court of Appeal).

[29] Magill v. Porter [2001] UKHL 67 (House of Lords).

[30] Because adjudication was, initially, characterised as a species of expert determination, and, as explained above, there is no implied requirement for a person acting in the latter capacity to comply with procedural natural justice.

[31] Both possibilities are discussed in Discain v. Opecprime Developments No 1 [2000] BLR 402, and No 2 (2001) 80 Con LR 95.

[32] Carillion Construction Ltd v. Devonport Royal Dockyard [2005] EWCA Civ 1358 (Court of Appeal).

time to consider and respond to,[33] or where an adjudicator, himself, identifies a case or evidence on which he decide the dispute, but which the parties are not given the opportunity to address.[34] An adjudicator's decision cannot be challenged simply because the adjudicator does not observe the adversarial principle as it is understood by the English courts,[35] the adjudicator being expressly empowered to take the initiative in ascertaining the facts and the law.[36] Neither can it be challenged because the adjudicator imposes periods for the production of material that would be regarded as unreasonably, even impossibly short in court proceedings. The imposition of such periods is a necessary consequence, of his decision having to be reached within 28 days of the Referral.[37]

- If the adjudicator's decision concerns the payment of money due under the contract, enforcement of his decision cannot be resisted by set off or counterclaim.[38]

Once enforcement proceedings are commenced, they usually proceed by way of an application for summary judgment. The court generally decides the application on written evidence and oral submissions, often within a few weeks of proceedings being commenced, summary judgment being given if the judge is satisfied that the contentions of the party resisting enforcement have no real prospect of success.[39]

If judgment is given enforcing the decision, but the enforcing party is insolvent or has, since entering into the contract, become impecunious for reasons unconnected with the claim, it may be possible to obtain a stay of execution of the court's judgement, usually on condition that sums ordered to be paid by the adjudicator are paid into court, pending arbitration or litigation of the underling dispute.[40]

E: STATUTORY ADJUDICATION IN THE UNITED KINGDOM – PROCEDURE

Although the principal focus of this paper is on enforcement, the impact that the rapid time scales of statutory adjudication and the imposition by the courts of basic principles of procedural fairness on the process has had on the procedure for determining construction

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[33] Glencott Development v. Ben Barrett [2001] BLR 207; London and Amsterdam v. Waterman Partnership [2003] EWHC 3059.

[34] Balfour Beatty v. Lambeth BC [2002] EWHC 597.

[35] As discussed, for example, in Mustill and Boyd, Commercial Arbitration (2nd edition, 1989), p 288-289.

[36] All adjudication rules provide this power, it being a mandatory requirement of HGCRA, s. 108(2)(f).

[37] Austin Hall v. Buckland [2001] BLR 272, in which it was also said that adjudication was not subject to article 6 of the European Convention of Human Rights ("ECHR"), which concerns the right to a fair and public hearing, because the adjudicator was not a public body or making a final determination of rights. But, if this was wrong, and there was an incompatibility between HGCRA, s. 108 and article 6 ECHR, this was a matter for Parliament to resolve pursuant to s. 4 of the Human Rights Act 1998.

[38] This is a consequence of HGCRA, s. 111(1), which prevents the withholding of sums due and finally payable under a construction contract, on grounds that were not set out and quantified in a notice of withholding issued before the final date for payment of that sum; David McLean v Swansea Housing Association [2002] BLR 125; Bovis Lend Lease v. Triangle Developments [2003] BLR 31;

[39] Under CPR, Order 24; see Pegram Shopfitters v. Tally Wiejl (UK) Ltd [2003] EWCA Civ 1750(CA) (Court of Appeal).

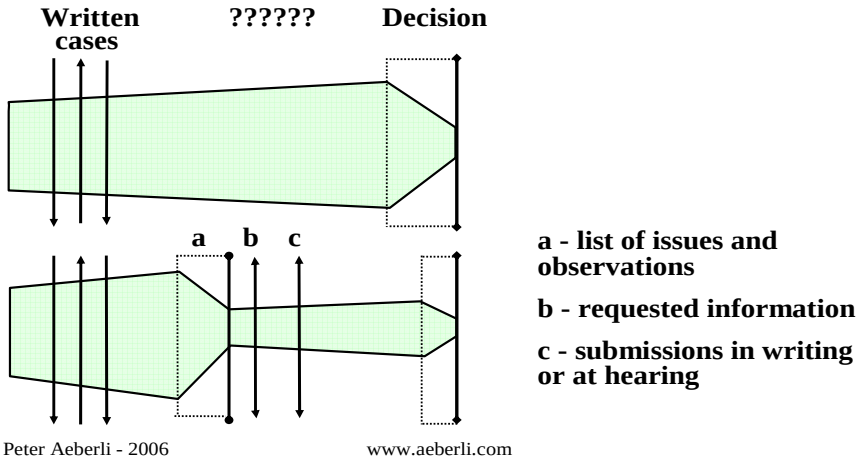
[40] Bouygues v. Dahl-Jensen [2000] BLR 522 (Court of Appeal); Wimbledon Construction Co v. Vago [2005] EWHC 1086

disputes, should not be ignored. An understanding these procedures may assist in persuading an enforcing court, other than at the place of adjudication, that the process is, indeed fair.

The rules under which adjudicators operate give little guidance as to how adjudications should be conducted. But it is generally accepted that common law court procedures which provide for the gradual revealing and development of the parties cases though a sequential exchange of pleadings, disclosure of documents, exchange of witness statements, exchange of expert reports and a hearing at which evidence is adduced orally in examination in chief and cross-examination and re-examination of witnesses, prior to final submissions orally and in writing, are unworkable.

Instead, a variety of different procedural approaches have developed and are taught to aspiring adjudicators. These gravitate either towards the view that an adjudicator should be passive or that he should be active. A visual comparison of these approaches is given in the figure below.

The passive and active tribunal in action



In both cases, the starting point is the material provided by the Referring Party in its notice of arbitration and, subject to being encompassed by the dispute identified in that notice, its Referral and by the Responding Party by its Response. Since, other than at the direction of the adjudicator, which might not be forthcoming, there is no provision in of the commonly encountered rules for a further exchange of material between the parties, the Referral and Response have to include in addition to a summery of the claims or defences advanced, all the material, whether narrative, legal submissions, documents, and statements from witnesses and experts, on which reliance is to be placed. All that must be properly cross-referenced to ensure that the adjudicator focuses on the points a party him to consider. If this is not done, there is a real risk that supporting material will be overlooked given the speed of the process or, if considered, the adjudicator will find it relevant in ways that neither party anticipated.

Those favouring the passive approach consider that all the parties' arguments relevant to the dispute should have been aired before the commencement of the adjudication and, metaphorically speaking, tied up in a black bag, which contains only the Referral and

Response, and such further exchanges between the parties as are allowed or tolerated by the adjudicator, and handed to the adjudicator who makes a decision on the basis of what he finds in that bag. The adjudicator will have little or no contact or dialogue with the parties and will, generally, give a decision that contains no, or only the most rudimentary reasons: A decision which, if they understand it at all, may leave the parties in doubt as to whether the adjudication has understood and addressed their contentions.

Those favouring the active approach[41] consider that an adjudicator should exercise his powers to conduct a focussed enquiry into the parties' cases as advanced in the Referral and Response. This can be done by the adjudicator identifying, subject to party input, the issues to be determined, further documents that the adjudicator wishes to see because necessary to determine those issues, and input from witness, experts, the parties and their representatives which will assist him in that task. The requested input can then be provided either in writing or at a meeting where the adjudicator questions those attending in conference; such meetings having more in common with a board room meeting than with a court room hearing. Exploration of the parties' cases in this way gives focus and direction to the later stages of the adjudication with less time and energy spent on the irrelevant or marginally relevant than is the case before a passive adjudicator, where uncertainty over what he considers important may cause every argument, however marginal, to be advanced and countered. Furthermore, having explored and focussed the parties' cases in this way, the adjudicator is better able to provide a reasoned decision that properly addresses the parties' contentions and claims.[42]

For this approach to work effectively, the adjudicator should, in order to avoid a plethora of exchanges with the parties each time he communicates a request, identify all these matters in a single document prepared and issued as soon as possible after the submission of the Referral, Response and, possibly, Reply. The adjudicator must also be sensitive to and focus on the key issues necessary to determine the parties' dispute, and aware of what can be realistically provided and addressed within the available time scales. If not, there is a risk that a party will have justified complaints that the dispute has broadened beyond what was encompassed by the notice of intention to adjudicate, thus the adjudicator has exceeded his jurisdiction, or that he has had insufficient time to consider material provided by the other party in response to the adjudicator's requests, thus the procedure is unfair.[43]

There has been much debate as to which approach is to be preferred. This debate is summarised in the table below.

PASSIVE	**ACTIVE**
Advantages	**Advantages**
• Little party input needed	• Merits investigated
• Do it yourself representation possible	• Issues identified and addressed
• Procedrually easy	• Less error prone on merits
• Relatively cheap (?)	• A "day in court"
	• Explicable determination of issues
	• A reasoned decision
Disadvantages	**Disadvantages**
• Error prone on merits	• Procedurally complex
• Limited understanding by adjudicator	• Greater party input

[41] The author favours this approach. The techniques he uses are discussed in his 2005 paper for the Society of Construction Law: *The Tribunal in the Driving Seat – Inquisitorial Procedures in Arbitration and Adjudication* (www.aeberli.com/papers).

[42] These procedures have a certain amount in common with court and arbitral procedure in civilian countries.

[43] As in McAlpine v. Transco Plc [2004] BLR 352 and London and Amsterdam v. Waterman Partnership [2003] EWHC 3059.

- Low adjudicator skills
- Unpredictable outcome
- Dispute may not be resolved
- Unreasoned or poorly reasoned decisions
- Will the decision stick

- Sophisticated representation desirable
- High adjudicator skills

It may be that there is no one right procedure. Rather it is a case of adapting a procedure or choosing an adjudicator that is appropriate for the nature, complexity and value of the dispute. There is, for example, little point in engaging high level representation at considerable expense, if the adjudicator is unable or unwilling to engage with those representatives in any meaningful way and will, in rendering decision, provide the parties with no indication of which of their various contention he had found convincing and which not. On the other hand, as in the case of many sub-contracts, the parties' dispute arises during the course of the works, has never been the subject of a consideration by outside professionals, such as a supervising Engineer or Architect, and is relatively straight forward and of small value, a decision, however, it is reached, may be all that is required for the parties to be able to move on.

It may, having regard to the following matters, be case of horses for courses.

- Complexity of dispute (single or multi issue/value)
- Nature of dispute (pure technical/technical-legal)
- Place of dispute in the parties' relationship
- Nature of parties and available resources (money/time)
- Level of representation (match with adjudicator)
- Implication of outcome to parties and others
- Is a reasoned decision needed
- Risk analysis (what are the range of acceptable outcomes; is arbitration/ litigation possible if decision is inexplicable).
- Can an adjudicator add value by identifying issues and highlighting likely outcomes if the dispute is litigated or arbitrated?
- Cheap and rough or fast track determination?

F: STATUTORY ADJUDICATION IN OTHER JURISDICTIONS – A DEVELOPING TREND[44]

The perceived success of statutory adjudication in the United Kingdom in improving cash flow in the construction industry and reducing party recourse to costly dispute resolution though the courts or by arbitration has lead to other common law jurisdictions enacting somewhat legislation. Although they do so with a narrower and more structured machinery for deciding what disputes can be referred to adjudication and when, and for the enforcement of the decisions of adjudicators appointed pursuant to that machinery in the local courts. The author is not aware of similar legislation being enacted in any civil law jurisdiction.

Such jurisdictions include:

- New South Wales, under the Building and Construction Industry Security of Payment Act 1999, as amended ("The NSW Act")

- Victoria, under the Building and Construction Industry Security of Payment Act 2002, ("the Victorian Act") which is currently under review.[45]

- Queensland, under the Building and Construction Industry Payments Act 2004 ("the Queensland Act").

- Western Australia, under the Construction Contracts Act 2004 ("the Western Act").

- Northern Territory of Australia, under the Construction Contracts (Security of Payments) Act 2004 ("the Northern Act").

- New Zealand, under the Construction Contracts Act 2002 ("the NZ Act"); and

- Singapore, under the Building and Construction Industry Security of Payment Act 2004 ("the Singapore Act**"**).

All of these Statutes have the following basic features in common:

- They apply to a defined class of contracts, designated "construction contracts".[46] In this, they follow a similar approach to the HGCRA.

- They create a statutory right to progress payments.[47] In some cases this is achieved, as in the HGCRA, by implying terms into the parties contract if it fails to meet the requirements imposed by the legislation.[48] In other cases, the right appears to be purely statutory.[49]

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[44] With thanks to Professor Doug Jones of Clayton Utz, Lawyers, No. 1 O'Connell Street, Sydney, Australia on whose paper, *Problem Solving: Rules Roles and Regulations*, given at the 9th Annual Conference (2006) of the Canadian College of Construction Lawyers, and with whose permission, much of the material in this section is based; any errors being mine.

[45] See the Building and Construction Industry Security of Payment (Amendment) Bill (2006).

[46] The Singapore Act also includes a concept of "supply contracts", which attract slightly different rules.

[47] Victorian Act, s. 9; Queensland Act, s. 12; Western Act, s. 15; NZ Act, s. 16; Singapore Act, s. 8.

[48] Western Act, s. 15, NZ Act, s. 15.

[49] NSW Act, s. 8.

- They entitle the contractor to serve a payment claim on the paying party and require the paying party to issue a response to such a claim.[50] This differs from the HGCRA approach, which stipulates what an adequate mechanism of payment is and implies conforming provisions from Part II of the Scheme[51] if the parties have not agreed conforming provisions in their contract. The required mechanism must provide an adequate mechanism for determining what payments become due under the contract and when, and provide for a final date for payment in relation to any sum which becomes due. It must also require that the paying party issue a notice of the amount of proposed payment not later than five days after the due date, and may include a facility for the paying party to issue a withholding notice a contractually agreed period, the default is 7 days, before the final date for payment; failure to issue such a withholding notice making such sums as are otherwise due and payable, payable without deduction.[52] These minimum requirements can, however, be satisfied in a number of different ways, not all of which involve the making of applications for payment by a contractor.

- They render "Pay when paid" provisions of no effect.[53] This is also the case under the HGCRA.[54]

- They create a right for the contractor to suspend work for non-payment of amounts due.[55] In some cases, this right can only be exercised where there is non-payment of an adjudicator's decision.[56] In other cases the right can also be exercised in other specified circumstances of non payment.[57] The equivalent right under the HGCRA is less structured, being available in all cases were, an effective notice of withholding not having been issued, payment a sum due and finally payable, is not paid.[58]

- They all give the right (not an obligation)[59] to a party to a construction contract to refer disputes to adjudication for a binding, but not final decision; but are, generally, more specific than the HGCRA about what can be referred and when. At one end stands the NSW Act and legislations modelled on it.[60] Under these Acts, a party is only entitled to commence statutory adjudication in relation to a payment claim made in the statutory form which is disputed or ignored.[61] The Western Act

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[50] Victorian Act, Sections 14-15; Queensland Act, ss 17-18; Western Act, ss 16-17; NZ Act, Sections 20-21; Singapore Act, clause 11.

[51] Part II of the Scheme for Construction Contracts (England and Wales) Regulations 1998. Different regulations apply in Scotland and Northern Ireland.

[52] HGCRA, ss. 110, 111, Part II of the Scheme, paragraph 10.

[53] Victorian Act, s. 13; Queensland Act, s. 16; Western Act, s. 9; NZ Act, s. 13; Singapore Act, clause 9. The definitions of what a Pay when Paid clause is, differ.

[54] HGCRA, s. 113.

[55] Victorian Act, s. 29; Queensland Act, s. 33; Western Act, s. 42(3); NZ Act, s. 72; Singapore Act, clause 26.

[56] Western Act, s. 42(3).

[57] Queensland Act, s. 33; NZ Act, s. 72, NSW Act, s. 27.

[58] HGCRA, s. 112,

[59] Adjudication cannot be compelled. If a party chooses not to adjudicate its claim but litigate or, if available, arbitrate it, there no basis n which those proceedings can be stayed or suspended pending adjudication. The position is the same as regards adjudication under the HGCRA.

[60] Such as the Queensland, Victorian and Singapore Acts.

[61] Queensland Act, s. 21; Victorian Act, s. 18; Singapore Act, clause 12, NSW Act, ss. 15 and 16.

takes a slightly broader approach by defining “payment dispute” more broadly, to include non-payment of a payment claim or non-return of retention moneys or security by the time they are due to be returned.[62] The approach of the NZ Act is closest to the HGCRA. The NZ Act provides that a party to a construction contract has the right to refer a “dispute" (which includes a disagreement) arising under that contract to adjudication, except where it is the subject of an international arbitration agreement.[63] But the NZ Act differs from the HGCRA in respect of how an adjudicator's determination enforced. An adjudicator’s determination on a matter of payment is enforceable and may be recovered as a debt due in any court.[64] An adjudicator’s determination about the "rights and obligations" of the parties is not enforceable as such.[65] Instead, if a party fails to comply with that determination, the other party may bring proceedings to enforce it, but the court need only have regard to, not be bound by, the adjudicator's determination.[66] It is unclear how this will work in practice.[67] Another characteristic that these Statutes have in common, but which differs from the HGCRA approach, is that the adjudication regimes they create are pure creatures of Statue, with stipulated mechanisms for the enforcement of and challenging adjudicator’s decisions in the local courts.[68]

G: STATUTORY ADJUDICATION – ENFORCEMENT IN AN INTERNATIONAL CONTEXT

Disputes may be determined by statutory adjudication between parties at least one of which is domiciled in a jurisdiction other than the country pursuant to whose legislation the adjudication takes place (“the home country”).[69] If so, enforcement of the adjudicator’s decision raises a number of difficulties that do not exist where both parties are domiciled in the home country.

Enforcement though the courts

Even in such a case, the first and most obvious place in which to commence enforcement will be in the courts of the home country. But, if the party against whom the proceedings are brought is domiciled in another jurisdiction, and cannot be served in the home country, this will depend on whether the courts of the home country are prepared to allow service on that party out of the jurisdiction.

In the case of proceedings to enforce the decision of a statutory adjudicator[70] concerning a project in England and Wales,[71] two situations must be considered.

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[62] Western Act, s. 6.

[63] NZ Act, ss. 5 and 25.

[64] NZ Act, ss. 58 and 59.

[65] NZ Act, s. 58(2).

[66] NZ Act, s. 61.

[67] The fist case under the NZ Act was George Developments Ltd v Canam Construction Ltd (New Zealand Court of Appeal, 12 April 2005), see Smellie R [2005] ICLR 523.

[68] See, for example, NSW, ss. 17, 24, 25, NZ Act, s. 25, 59.

[69] Ajudication legislation is generally territorial, and cannot be excluded by choice of law clauses. See, for example, HGCRA, ss 104(6)(b) and 104(7); NSW Act, s. 7 (other Australian Acts similar), the Singapore Act, s. 4; the New Zealand Act, s. 9.

[70] That is an adjudicator acting under Rules made pursuant to the HGCRA.

- The first is where the party against whom enforcement proceedings are brought is domiciled in a Convention or Regulation territory.[72] In such a case the *prima facie* rule is that a defendant must be sued in the courts of his place of domicile but, in matters relating to a contract, it may be sued in the courts for the place of performance of the obligation in question.[73] Given the territorial basis of the HGCRA, this will invariably mean in the courts of England and Wales[74] and, to that end, service oversees can be effected without the court's permission.[75]

- The second case is where the party against whom enforcement proceedings are brought is not domiciled in a Convention or Regulation territory or the claim is not subject to the Convention or Regulation.[76] In such a case, the courts of England and Wales will, subject to permission being obtained, exercise an exorbitant jurisdiction over that party and allow service on it out of the jurisdiction, *inter alia*, where the claim is in respect of a contract made within the jurisdiction, the contract is governed or the claim is in respect of a breach of contract committed within the jurisdtion.[77] One or more of these cases will apply to such enforcement proceedings.

In other jurisdictions where statutory adjudication has been adopted, it will be necessary to consider whether the home country courts can exercise an exorbitant jurisdiction over the defendant and in what circumstances. If there is no such jurisdiction, or it is not available in the circumstances, then enforcement proceedings will, ordinarily, have to be brought in the courts of the defendant's domicile. This raises a more fundamental difficulty than the obvious question of whether such proceedings are likely to be given a sympathetic hearing. As noted above, statutory adjudication and the rules for enforcement of decisions are, in most cases, just that, creatures of statute. Thus, it is not altogether clear that non-compliance with the decisions rendered through such a process would provide a basis of claim in other jurisdictions. Where, as in the case adjudication pursuant to the HGCRA, the adjudicator's jurisdiction is founded on the express or implied agreement of the parties and non-compliance with his decision a breach of contract, there may be less conceptual difficulty in seeking to enforce in the courts of other jurisdictions.

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[71] Similar principles apply in Scotland and Northern Ireland, since they are also subject to the Conventions and Regulation.

[72] A territory of a state that is a Contracting State to the Lugano or Brussels Convention or is subject to EU Council Regulation Nr 44/2001, the Judgment Regulation, Principally, EU and EFTA member states, and is subject to the Conventions or Regulation.

[73] Brussels and Lugano Conventions, Articles 2, 3 and 5; Judgments Regulation, Articles 2, 3 and 5. Given the pre-HGCRA case law, disused previously, that has held that adjudication, at any rate where the adjudicator's decision is only binding until such time as the dispute is determined by arbitration, litigation or agreement, is not arbitration, the court would not regard such enforcement proceedings as falling within the arbitration exception; Brussels and Lugano Conventions, Article 1(4); Judgments Regulation, Article 1.2(d).

[74] Or, of course, Scotland or Northern Ireland, as the case may be.

[75] CPR, Part 6.19.

[76] If adjudication was held to be a form of arbitration, the Conventions and Regulation would not apply, and the court's jurisdiction over the defendant, even if domiciled on a Convention or Regulation territory, would depend on the principles discussed here. This does, however, create something of a cleft stick. Since adjudicator's decisions are not final, they may not be enforceable under the New York Convention, even if the enforcing court concludes, which in many jurisdictions must be an open question, that it is a species of arbitration. Furthermore, in those cases where the procedure is founded on statue, not contract, it will not be possible to show an arbitration agreement as required by article IV of the New York Convention.

[77] See under CPR, Parts 6.21(5) and 6.21(6).

In enforcement proceedings are brought in the courts of the home state and judgement obtained, but the defendant does not have assets within the jurisdiction, it is necessary to consider whether the judgment of the enforcing court can be recognised and enforced where the defendant's assets are located.

Where the enforcing court is a court in England and Wales[78] the two cases, referred to above, must again be considered.

- The first is where the party against whom judgment has been given has assets in a Convention or Regulation territory.[79] In such a case, the judgment will be recognised and enforced unless, inter alia, it is contrary to public policy in the Member State in which enforcement is sought.[80] There are, however, difficulties that may be encountered. The first is that the enforcing court which, in reality, will usually be in a civil law jurisdiction, may regard adjudication as a species of arbitration, and thus, a judgment enforcing the adjudicator's decision as falling within the arbitration exception to the Conventions or Regulation;[81] declining recognition and enforcement on that ground. The second is that, particularly if the dispute decided by the adjudicator was complex and high value, the enforcing court may be persuaded that the adjudication process, with its tight timescales, is incompatible with its notions of procedural fairness and refuse recognition and enforcement on public policy grounds.[82]

- The second case is where the assets of the party against whom judgment has been given are not Convention or Regulation territory.[83] Here, the first question to consider is whether there is a treaty between the United Kingdom and the relevant state providing for the reciprocal recognition and enforcement of judgments. If so, how, having regard to the grounds on which recognition and enforcement can be refused, are those courts likely to view statutory adjudication.[84] If there is no such treaty, then the attitude of the courts of the enforcing court to judgments of the English courts will need to be investigated. The laws of some countries, such as England and Wales, are relatively supportive of foreign judgments, even in the absence of relevant treaty obligations, the laws of many other countries less so.

In other jurisdictions where statutory adjudication has been adopted, it will be necessary to consider whether the judgments of the courts in that jurisdiction are capable of recognition

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[78] Similar principles apply in Scotland and Northern Ireland, since they are also subject to the Conventions and Regulation.

[79] A territory of a state that is a Contracting State to the Lugano or Brussels Convention or is subject to EU Council Regulation Nr 44/2001, the Judgment Regulation, Principally, EU and EFTA member states, and is subject to the Conventions or Regulation.

[80] Brussels and Lugano Conventions, Title III, in particular Articles 26 and 27. Judgments Regulation, Chapter III, in particular Articles 33 and 34.

[81] Brussels and Lugano Conventions, Article 1(4); Judgments Regulation, Article 1.2(d). The English case law has been considered previously. The author is not aware of any case in which the status of the decision of a statutory adjudicator has been addressed by a civil law court.

[82] As noted previously, statutory adjudication has yet to be adopted in any civil law country. Thus, it is unclear what a civil law court would make of the process or whether arguments contending a lack of due process in adjudication would be regarded as matters of public policy.

[83] If adjudication was held to be a form of arbitration, the Conventions and Regulation would not apply, and the court's jurisdiction over the defendant, even if domiciled on a Convention or Regulation territory, would also depend on the principles discussed here.

[84] The issues are likely to be somewhat similar to those discussed in the context of recognition and enforcement under the Conventions or Regulation.

and enforcement in the courts of the country where the defendant has assets, either by treaty or because the courts where the defendant's assets are located are supportive of foreign judgments.

Enforcement by arbitration

Where, as is the case in statutory adjudication conduced under rules pursuant to the HGCR, the basis of the process is contractual and compliance with the adjudicator's decision a contractual obligation, enforcement through arbitration is a possibility. If an adjudicator's decision is not complied with, the resulting dispute are likely to be regarded as arising under or in connection with the contract in which the adjudication provision are contained or, to avoid any doubt about this,[85] such disputes can be expressly included within the scope of the arbitration clause. The advantage of doing so is that uncertainties, such as those discussed above, surrounding the enforcing of adjudicator's decisions though court action against a party domiciled other than at the place of adjudication, are avoided. Furthermore, any resulting arbitral award will be capable of (almost) world wide recognition and enforcement under the New York Convention.

This difficulty with this solution, where the basis of statutory adjudication is not contractual, and enforcement governed by statute, is that there may be public policy objections to bringing such matters within the scope of an arbitration clause, the effect of which would, *prima facie*, be to deprive either party of its statutory right of recourse to court enforcement.[86]

If enforcement by arbitration is adopted, the following matters should be considered in order to achieve a fast track system of enforcement.

- The arbitration clause should be widely drawn so that failure to honour a statutory adjudicator's decision is clearly within its scope.

- If in doubt law applicable to the adjudication procedure should be identified. This should ordinarily, be the law of the place of adjudication.

- A fast track procedure for the constitution of the tribunal and the rendering of its award should be considered.

- There should be a presumption in favour of a documents only procedure, possibly with oral submissions.

- Rights of set off or counterclaim to the monetary decisions of the adjudicator should be excluded.

- If the grounds on which enforcement of the decision can be resisted are to be stated, these might include want or excess of jurisdiction, want of impartiality and substantial breach of the principles of fairness applicable to the adjudication resulting in unfairness to either party.

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[85] In Macob v. Morrison Construction [1999] BLR 93 it was held that disputes about the enforcement of an adjudicator's decision did not come within the scope of the arbitration clause in the contract. No justification was given for this conclusion and it has been doubted subsequently. Since most arbitration clauses in United Kingdom construction contracts expressly exclude enforcement of adjudicator's decision from their scope, the point has not come before the court again.

[86] Deciding whether this is a real or merely a theoretical problem would involve an in-depth consideration of the relevant legislation and legal system; something that is beyond the scope of this paper.

H: DISPUTE BOARDS

A parallel and somewhat earlier response to concerns about the role of the supervising Architect or Engineer and the cost and delays of arbitration and litigation, to the development of adjudication, was the introduction, initially in the United States, of Dispute Boards as a method for preventing disagreements and disputes developing to the stage where litigation or arbitration was instigated. Thus, dispute review boards (DRBs) were introduced, generally as a term of the parties' contract, on an increasing number of major engineering and building projects in the United States from the mid 1970s onwards. They gained international recondition following their successful use on the El Cajon Hydro Project in Honduras in 1980 and, fostered from the mid 1990s by the World Bank, on many other major international projects since that time. The unique characteristic of the DRB is that it is constituted, unlike a statutory adjudicator, at the start of the project on which it was appointed and has a monitoring role in dispute avoidance thereafter. If disputes arise, the DRB is can only give recommendations. But the provisions governing the status of such recommendations often provide that, if not disputed by a party, by issue of a notice of proceedings, generally arbitration, within a stipulated period, they become final and binding.[87]

A somewhat later, but parallel development was the dispute adjudication board ("DAB"). The DAB like the DRB is usually constituted under provisions of the parties' contract at the start of a project and, like the DRB, has a role in dispute avoidance. The principal difference is that, if disputes arise, a DAB is empowered to render a decision that is immediately binding on the parties, but with a window of opportunity for each party to take the dispute to, usually, arbitration,[88] failing which the decision will be final as well as binding. The DAB is now favoured over the DRB by a number Multilateral Development Banks.[89]

Recently, the use of DRBs or DABs in fields other than construction has received some encouragement by the promulgation in 2004 of the ICC Dispute Board Rules. These Rules provide for three alternative types of Dispute Board. A DRB that renders recommendations which become binding if no party expresses dissatisfaction within the stated period; a DAB, that renders decisions that must be complied with immediately pending the outcome of arbitration, if initiated within the stated period but otherwise become final as well as binding; and a Combined Dispute Board ("CDB"), that normally renders recommendations but can in certain circumstances render decisions, the implications those recommendations and decisions being the same as under the DRB and DAB procedures.

I: DISPUTE BOARDS – THE CONTRACTUAL FRAMEWORK

Being solely a creature of contract, there are few principles that invariably apply to the constitution of a Dispute Board, other than the widely accepted division between DRBs and DABs and the generally held view that one of the major advantages of Dispute Boards, dispute avoidance, is lost if they are not a standing Board constituted at the start of the project, but are only appointed *ad hoc*, as and when a disputes arise.[90]

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[87] See, for example, the now superseded World Bank Standard Bidding Documents for the Procurement of Works (SBDW, First Edition), clause 67.

[88] The 1995 FIDIC Orange Book provided for a DAB rather than a DRB and, since 1999, all FIDIC contracts provide include provisions for a DAB.

[89] For example by use of the FIDIC MDB Harmonised Construction Contract, 2005 and 2006 editions**.**

[90] A good guide to the subject is the Dispute Resolution Board Foundation's, *DRBF Practices and Procedures Manual* (www.drb.org), but even this is not comprehensive since, being US based, it principally focuses on the DRB and has only recently has been revised to give some recognition to the growing importance of DABs.

In order to provide a context for the later discussion of the enforcement of inferior tribunal decisions, these notes focus on the machinery for Dispute Boards in the FIDC contracts and in the ICC Dispute Board Rules.

The FIDIC Dispute Adjudication Board

FIDIC provides, in its 1999 suite of contracts, the alternative of either a standing DAB or an *ad hoc* DAB. Machinery for the former is contained in the Red Book, machinery for the latter in the Silver and Orange Book;[91] FIDIC's view is that there is likely to be little need for a DAB monitoring role in the latter two contracts but, if required, the procedures in the Red book could be readily incorporated.[92]

The machinery for a standing DAB, provides for it to be constituted either as a single person or as a tribunal of three, with one nominated by each party, the third agreed, before the Contractor commences the Works. If the parties fail to agree or nominate, appointments are made by the contractually designated appointing official. Once constituted the standing DAB receives material from the parties concerning the progress of the Works and visits the site on a regular basis being available during those visits to assist in dispute avoidance. Thus the parties can, by agreement, jointly refer a matter to the DAB for its opinion.[93]

If a dispute, of any kind, arises between the Parties in connection with, or arising out of the Contract or the execution of the Works, it may be referred by either party in writing to the DAB for a decision, the DAB being deemed not to be acting as arbitrators. The DAB must give its decision on the dispute within 84 days after receiving the reference, or such other period as it proposes and is approved by the parties. Subject to this time constraint, the DAB has a wide discretion over the procedure to be followed in determining disputes provided it acts fairly and impartially and ensures that each party has a reasonable opportunity to present its case. These powers include, unless the parties agree otherwise in writing, power to adopt an inquisitorial procedure; although, somewhat surprisingly it must not express any opinions during any hearing concerning the merits of the parties' arguments.[94]

The DAB's decision is binding on the parties. They are required to give effect to it unless and until a party, having given a notice of dissatisfaction within 28 days of its receipt of the decision, that decision is revised by amicable settlement or an arbitral award in ICC arbitration and, unless the Contract has already been abandoned, repudiated or terminated, the Contractor must proceed with the Works meantime. If a notice of dissatisfaction is not given by either party within the stated period, the DAB's decision becomes final and binding on the parties.[95]

The principal difference between this standing DAB and the *ad hoc* alternative, is that the *ad hoc* DAB is appointed within 28 days of a party giving notice of its intention to refer a dispute to a DAB. Once the DAB is constituted, the manner for doing so being similar to

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[91] The Silver Book is for EPC/Turnkey Projects. The Orange Book is for Plant and Design-Build. The procedure is set out in clause 20 of the Conditions and the Annexed Procedural Rules. There are also General Conditions of Dispute Adjudication Agreement to be entered into between the contract parties and individual members of the DAB.

[92] FIDIC, *The FIDIC Contracts Guide* (2000), pages 203ff.

[93] FIDIC Red Book, clauses 20.2 and 20.3

[94] FIDIC Red Book, clause 20.4 and the Annexed Procedural Rules.

[95] FIDIC Red Book, clause 20.4. The procedures for amicable settlement and arbitration are in clauses 20.5 and 20.6.

that in the Red Book, the dispute is then referred to it. The procedures for this, the time scales that apply, the DAB's powers and the effect of its decision, are the same as in the case of a standing DAB.[96] It appears to be the intention, although this is not expressly stated in the contract, that the DAB's appointment expires once it has rendered a decision on the dispute it was appointed to decide.[97]

The ICC Dispute Board

The ICC publishes three model clauses by which parties agree to establish a one or three person DRB, DAB or CDB, all appointees having to be independent and impartial. Under the DRB clause, they agree that all disputes arising out of or in connection the contract which the clause concerns shall be submitted to the DRB for a recommendation. Under the DAB clause, they agree that all disputes arising out of or in connection the contract which the clause concerns shall be submitted to the DAB for decision (with the option of an ICC review of such decisions). In the CDB clause they agree that all disputes arising out of or in connection the contract which the cluse concerns shall be submitted to the DRB for a recommendation, unless the parties agree that it should render a decision or, on request of a party, it decides to do so.

These clauses also provide that if a party fails to comply with a recommendation or decision (referred to in the Rules as a determination), whichever is applicable, when required to do so pursuant to the Rules. A failure to do so may, itself, be referred to ICC arbitration. If a notice of dissatisfaction is given as provided for in the Rules, or the Board does not issue a recommendation or discretion, as the case may be, within the required time limits, or is disbanded pursuant to the Rules, the dispute shall be finally settled by ICC arbitration.

The Rules provide that, unless otherwise agreed, the Dispute Board will be established at the time of entering into the contract, the default being a three person board. If the parties fail to agree the necessary appointments, they are made by the ICC Dispute Board Centre.[98] The Dispute Board is then to receive regular information about the contract and its performance and hold regular meetings or site visits, as appropriate, with the parties.[99] It can also, on request or of its own initiative, and subject to obtain the agreement of all the parties, informally assist the parties in resolving disagreements.[100]

Disputes may be submitted to the Dispute Board for a determination by submitting a written statement of case to the Dispute Board, the responding party submitting response, generally within 30 days thereafter. The Dispute Board is required to issue its determination within 90 days of its receipt of the referring party's statement of case, unless the parties agree an extension. Subject to this time constraint, the Dispute Board has wide powers over the conduct of the proceedings although default timescales and procedures are included which will apply unless the Dispute Board decides otherwise. There is, as

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[96] FIDIC Orange and Silver Books, clauses 20.2, 20.3, 20.4 and the Annexed Procedural Rules. The procedures for amicable settlement and arbitration are in clauses 20.5 and 20.6.

[97] FIDIC, *The FIDIC Contracts Guide* (2000), page 203, under the commentary on clause 20.2. The English law doctrine that a tribunal is *functus officio* once it has rendered a decision on the dispute referred to it appears to be assumed.

[98] ICC Dispute Board Rules, principally Articles 1, 3 and 7.

[99] ICC Dispute Board Rules, Articles 11, 12 and 13.

[100] ICC Dispute Board Rules, Article 16.

under the FIDIC contracts, a mandatory requirement on the Dispute Board to act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.[101]

In the case of a recommendation, the Rules provide that this will only become binding and incontestable, in so far as such agreement can validly be made, if a party has not sent written notice of dissatisfaction to the other party and the Dispute Board within 30 days of receiving that recommendation; failure to comply with a binding recommendation being, itself, referrable to arbitration, if agreed, otherwise to any court of competent jurisdiction. If a notice of dissatisfaction is submitted by either party or the Dispute Board does not issue a recommendation within the required time limits or is disbanded under the Rules before it does so, the dispute is to be finally settled by arbitration, if agreed, otherwise by any court of competent jurisdiction.[102]

In the case of a decision, the Rules provide that this is binding on recept and shall be compiled with without delay, notwithstanding any expression of dissatisfaction. If no expression of dissatisfaction is given by a party to the other party and the Dispute Board within 30 days of receiving the decision, it remains binding on the parties and is incontestable, in so far as such agreement can validly be made. Any failure to comply with the decision is, itself, referrable to arbitration, if agreed, otherwise to any court of competent jurisdiction. If a notice of dissatisfaction is submitted by either party or the Dispute Board does not issue a decision within the required time limits or is disbanded under the Rules before it does so, the dispute is to be finally settled by arbitration, if agreed, otherwise by any court of competent jurisdiction. Until the dispute is finally settled by those proceedings the decision remains binding unless the tribunal in those proceedings (arbitrator or court) decides otherwise.[103]

J: DISPUTE BOARDS – ENFORCEMENT IN AN INTERNATIONAL CONTEXT

Many of the isseus considered above in relation to the enforcement of the decisions of statutory adjudicators, also apply to the enforcement of the determinations of a Dispute Board when binding and/or final under the applicable rules. Given the contractual basis of statutory adjudication under the HGCRA and absence of any statutory principals in the HGCRA concerning the enforcement of or challenges to the decisions of adjudicators, English case law concerned with such issues is likely to be particularly relevant when similar issues arise in the contends of enforcing the determination of Dispute Boards, since they are also a creature of contract.[104]

Although the option of litigation is available in the ICC Depute Board Rules, in most cases, for the reasons considered under Section G of this paper, enforcement though arbitration is likely to be preferable. An additional disincentive to the use of litigation to enforce the determinations of a Dispute Board is that, on an international project, litigation at the place of the project may be undesirable, for instance because the court system is poorly developed, the concept of Dispute Boards is not understood, or the judgments of those courts carry little or no weight in other jurisdictions, to say nothing about the complexities and uncertainties of litigating in a foreign jurisdiction. The most likely alternative,

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[101] ICC Dispute Board Rules, Articles 15, 17, 18, 19 and 20.

[102] ICC Dispute Board Rules, Articles 4 (DRB) and 6 (CDB).

[103] ICC Dispute Board Rules, Articles 5 (DAB) and 6 (CDB).

[104] Decisions on enforcement issues by courts in other jurisdictions that have adopted statutory adjudication are less likely to be of general relevance since, in many cases, they are concerned with statutory rights to enforce and challenge adjudicator's decisions.

commencing enforcement proceedings in the courts at the defendant's place of domicile, may be equally unattractive.[105]

The process of enforcement of Dispute Board determinations by arbitration could, however, be improved and streamlined by the incorporation of procedural rules along the lines suggested, in Section G of this paper, for the enforcement by arbitration of the decisions of statutory adjudicators.

K: CONCLUSIONS

There is a developing interest in and use of inferior tribunals to determine disputes on construction contracts, albeit on an interim basis, pending possible re-consideration in arbitration or litigation. Inevitably, this will, as was the case of the growth of arbitration over the past thirty years ago or so, lead to a developing body of law concerned with the nature of these tribunals and the status of their decisions. The purpose of this paper is to give an interim assessment of the current state of that development and review some of the problems that may emerge in the coming years in connection with enforcing, in an international context, the decisions of such tribunals.

Peter Aeberli

September 2006

[105] Even in the European Union and EFTA countries, despite the Brussels and Legano Conventions and Judgments Regulation providing a common system for allocating jurisdiction between courts and for the reciprocal recognition and enforcement of the court judgments, such factors may weigh in favour of arbitration as the vehicle for enforcing the decisions of inferior tribunals.