Dispute Resolution UK Style — Moving into the 21st Century

Tony ELVEN, United Kingdom

Key words:

ABSTRACT

During the twentieth century the United Kingdom construction industry developed a reputation for many facets of its performance. One area of considerable concern was the growth in the number of payment disputes leading the contracting parties into taking entrenched positions to the extent that in many cases they were unable to resolve the dispute themselves. Apart from the various serious adverse effects these disputes had to cash flow, further costs were incurred and substantial additional time was taken to resolve the matter by arbitration or litigation. This, in turn, could lead to the demise of a company that simply had insufficient resources to run with the fight. An alternative means of dispute resolution was desperately needed.

Sir Michael Latham was commissioned to carry out an investigation into the construction industry and his report entitled Constructing the Team was published in July 1994. In this report were a number of proposals for fairer contracts including the recommendation that the industry be encouraged to use certain standard contracts which were not subject to amendments. In this way the contracting parties knew at the outset what was expected of them during the performance of the contract. It was not sufficient for this to be undertaken at the good will of the parties but certain actions would be unfair or invalid as noted below:

1. Any attempt to amend or delete the sections relating to times and conditions of payment, including the right of interest on late payments;

2. To seek to deny or frustrate the right of immediate adjudication to any party of the contract or sub contract, where it has been requested by that party;

3. To refuse to implement the decision of the adjudicator;

4. To seek to exercise any right of set-off or contra charge without;

    a. Giving notice in advance
    b. Specifying the exact reason for deducting the set-off
    c. Being prepared to submit immediately to adjudication and accepting the result subject to 3 above.

5. to seek set-off in respect of any contract other than the one in progress.

In addition, it was also stated that any attempt by contractors to introduce 'pay when paid' conditions should be explicitly declared unfair and invalid.

Confidence in these recommendations was a necessity and therefore the central provisions of the report should be the subjects of legislation. Within two years of the publishing of the Latham Report the Conservative Government introduced The Housing Grants Construction and Regeneration Act 1996 which came into force on 1 May 1998. The Act provides the following:

a. Interim settlement of disputes by adjudication
b. Payment by installments for contracts lasting longer than 45 days
c. The ability to suspend performance if not paid within a specified period
d. The outlawing of 'pay when paid' clauses.

The most prominent of these provisions is the right to interim settlement of disputes by adjudication.

CONTACT

Tony Elven
Institution of Civil Engineering Surveyors
Dominion House
Sibson Road, Sale
Cheshire
M33 7PP
UNITED KINGDOM
Tel. + 44 161 972 3100
Fax + 44 161 972 3118
E-mail: Anthony@antongill.force9.co.uk
Web site: www.ices.org.uk

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1. INTRODUCTION

During the twentieth century the United Kingdom construction industry developed a reputation for many facets of its performance. One area of considerable concern was the growth in the number of payment disputes leading the contracting parties into taking entrenched positions to the extent that in many cases they were unable to resolve the dispute themselves. Apart from the various serious adverse effects these disputes had to cash flow, further costs were incurred and substantial additional time was taken to resolve the matter by arbitration or litigation. This, in turn, could lead to the demise of a company that simply had insufficient resources to run with the fight. An alternative means of dispute resolution was desperately needed.

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2. WHAT IS ADJUDICATION?

As with many issues today a prescribed cure to a problem introduces a term or phrase, which is unfamiliar to its reader. Was adjudication merely a new 'buzz' word for some kind of arbitration? What did it mean? How would it work?

In the construction industry the verb to adjudicate falls within its dictionary definition, i.e. to hear and give a decision on a disagreement between contracting parties. The matter for adjudication is resolved by an adjudicator who is specifically trained for the appointment. In addition the adjudicator must be sufficiently experienced and well versed on the law to apply current legislation and case law to the dispute in reaching his or her decision.

It may seem strange to note that the Act does not in fact define adjudication. However, it does set out the requirements for an adjudication clause within a construction contract.

Attempts have been made to 'hi-jack' these provisions by the authors of contracts to introduce contractual terms, which purport to comply with the requirements of the Act, but in reality are opposed to its meaning. In such cases the Act provides for the provisions contained within the Scheme for Construction Contracts. These have the effect of implied terms under the contract.

By the use of the Act the parties to construction contracts now enjoy legislative guidance and protection in the conduct and performance of the contract. However, any cynical reader knowing well the personal characteristics of some people involved in construction may well argue that these provisions are toothless and will not be used by the age-old protagonists of bleed thy neighbour, pay when dead or beggar my contract. We can now be held to account for our actions or inactions under a construction contract and the remedy may now be quick in coming.

The Act provides that a party to a construction contract has the right to refer to a dispute arising under the contract for adjudication under a procedure complying with section [of the Act] …at any time {S.108(i);(2)(a)}.

Having made the decision to refer a matter arising under the contract for adjudication how long will it take for a decision to be received from the adjudicator?

> S.108(2)(c) states that the contract shall require 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 or
>
> S.108(2)(d) allows the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred.
>
> Is it really so simple? - Probably not.

The decision to proceed with an adjudication may have been taken in temper or haste. Before such an action can be commenced the referring party must first consider the following:

a. Have I identified the matter I wish the adjudicator to decide?

b. On the basis of the legal requirement that he who alleges proves can I fully and properly substantiate my case? Do I have the correct records? Are they authenticated?

c. Am I asking the adjudicator to decide on a matter that 28 days or 42 days is a reasonable time period for a decision to be given?

d. When would a matter of principal be the correct question to ask the adjudicator to decide upon?

e. Have I the experience and expertise to prepare the referral document?

f. How much would it cost me to engage the services of an expert?

g. Is the expert proficient in matters of adjudication?

h. Will the costs of obtaining the required adjudication be cost effective? Do I need to reconsider my approach?

i. What time-scale have I allowed for the work to be undertaken?

j. Have I asked the adjudicator the right questions?

k. Many others !!!

The answer to the question raised earlier - is it really so simple? - Is therefore subject to many considerations. It is probably better to seek a decision on a matter that can be progressed with minimal time and cost, and for which a decision by the adjudicator can be given with minimal time and costs.

With such considerations being constantly raised is the Act considered a success and is the answer substantiated by the facts?

3. IS ADJUDICATION WORKING WITHIN THE UK?

The referring party within adjudication is usually die party who is not getting paid the sums perceived as being due. Who are these parties?

a. Frequently sub-contractors
b. Main contractors
c. Sometimes the Employer in cases of defending his position

As time has progressed since the Act came into force on 1 May 1998 more parties have tried to resolve their contractual disputes by means of adjudication. At a recent conference held in Wolverhampton it was reported that some 6000 disputes have been resolved by adjudication. The Act only came into force on 1 May 1998 and therefore by the end of November 2001 a maximum of 1300 days has been available to resolve these adjudications leading to an average of about 5 adjudications being decided upon each day.

The figures identified above represent an average since the Act came into force. In less than 4 years from the Act. becoming law more and more referrals are received. In 2001 the Institution of Civil Engineers reported an increase of some 40% in the number of its referrals. This did not include the number of adjudicators who were simply required for inclusion within contract documents for possible future adjudications.

Adjudication is now recognized to have the following advantages:

i. speed
ii. relatively inexpensive
iii. binding on the parties (albeit temporarily, that is until or unless the dispute is finally determined by legal processing or arbitration or agreement of the parties)
iv. generally easily and quickly enforceable by the courts.

Despite proving a popular and acceptable means of dispute resolution adjudication is recognised as having some disadvantages. These can be:

i. the speed required for an adjudicator to reach his decision can result in a bad or wrong decision which is nonetheless binding and enforceable.

ii. responding parties frequently complain of inadequate time in which to prepare their case

iii. parties own costs cannot generally be recovered.

On balance it is generally felt by most people throughout the construction industry that the Act is working with good effect and adjudication is a very useful basis for resolving payment disputes. It is understood that while the parties may not receive a perfect response to their referral the very fact of commencing an adjudication can be sufficient encouragement for the parties to try and resolve their dispute themselves. This is good sense and allows them to work together again in the future with perhaps a little more confidence than in the past.

4. HOW ARE WE MOVING INTO THE 21ST CENTURY

The Act has been the subject of certain criticism particularly the matter of an adjudicator's jurisdiction. An adjudicator cannot decide upon his own jurisdiction and therefore his jurisdiction is subject to attack frequently by responding parties. Within the UK such matters can be decided by application to the Technology and Construction Court with a decision given in a matter of days. Only very determined parties will pursue their challenge to this extent but even if they do, it should not, and need not in most cases, prevent the adjudication from proceeding.

Some fine-tuning of adjudication is generally perceived as being necessary and consulting documents have been sent to the various bodies within the industry for advice and comment. We understand that changes will be introduced through the amendment of the Scheme for Construction Contracts. This indicates a lack of complacency and the way forward is one of improvement to dispute resolution within the UK.