

PRACTITIONERS' PERCEPTION OF ADJUDICATION IN UK CONSTRUCTION

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The Construction Act of 1996 provided for adjudication to be available to the parties on the majority of construction contracts and it is now a well established construction dispute resolution process. Its perceived success is well documented. However, lately there have been criticisms targeting issues such as increased costs, ambush by the claiming party and unrealistic timescales. A questionnaire survey was conducted amongst Construction Professionals, Lawyers, Arbitrators/Adjudicators and Clients in order to establish the role of adjudication in the U.K. construction industry and to examine whether the above criticisms are widely held views. The results show that one of the advantages of the UK Adjudication system is that the parties have a right to seek adjudication "at any time" and respondents strongly disagreed that parties should be allowed to contract out. Data was inconclusive with regard to the criticisms that in practice the majority of adjudications exceed the 28 + 14 days timescale, or that Claimants frequently use "ambush" tactics when serving claim documents in order to disadvantage respondents. The implications of this are discussed.

Keywords: adjudication, ambush, dispute resolution, UK construction industry.

INTRODUCTION

The UK construction industry has traditionally incurred high levels of disputes which involve significant levels of money, time and resources in their resolution. Lord Denning (quoted in Hawker *et al.*, 1986), said "One of the greatest threats to cash flow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction context is often as bad or worse". Faulkner *et al.* (2002) agree, reporting that both routes are expensive, time consuming, overly formal and overly legal. This renders them inappropriate for a large percentage of construction disputes and has led to the fact that the resolution of construction claims and disputes in the UK construction industry has become the focus of concern for many.

Reports by Sir Michael Latham (1994) and Sir John Egan (1998) and the introduction of new legislation in the form of the Housing Grants, Construction and Regeneration Act 1996 have drawn attention to the issue of finding a satisfactory method of resolving contractual disputes, and provided for adjudication to be available to the parties on the majority of construction contracts. Adjudication is now a well established construction dispute resolution process (Bingham, 2002) and its perceived success is well documented. Lately, however, there have been criticisms. These criticisms target issues such as increased costs (Foster, 2002), ambush by the claiming party (Holder, 2000) and unrealistic timescales.

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Given this conflict in attitudes, this paper aims to investigate attitudes of construction industry practitioners towards adjudication with regard to its perceived advantages and to address the criticisms levied at it.

The paper is structured as follows: background, survey, results, discussion and conclusion.

BACKGROUND

It would be preferable for every dispute to be settled amicably and the majority of projects do not have disputes which are required to be resolved by any formal method. Judge John Newey QC (in Campbell 1997, p.xvi) stated that most disputes are settled by negotiation between the parties. However, given that construction is a multi-million pounds industry with projects ranging from very simple, low cost buildings to very complex developments costing millions of pounds, it is inevitable that there will be disputes which cannot be settled without recourse to more formal methods such as litigation, arbitration and adjudication.

Adjudication is not a new concept to construction. It has been available to parties since the early 1970's when it was first introduced into the JCT Standard Form of Contract with Contractor's Design (Redmond, 2001). However the provision was not often used and was never extended to other JCT contracts until after the introduction of the Housing, Grants, Construction and Regeneration Act (1996).

There is no precise definition of adjudication in the Act; however there are certain features which help to identify it. Streatfield-James (2003) recognizes the following:

- Any issue can be referred to adjudication
- An adjudicator's award takes immediate effect
- Arbitration or litigation can only be sought after practical completion of the works

Lord Ackner, quoted in Streatfield-James (2003, p.492) summed up the purpose of adjudication as "a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject-matter of arbitration or litigation".

The Act gives parties to the construction contracts which fall within it a right to refer a dispute or difference to adjudication at any time. In order to ensure that each party has this right, the Act requires that there are provisions for adjudication within all applicable contracts. If contracts do not contain these provisions then a mandatory scheme applies. It is not possible to contract out of adjudication (Anderson, 2000), the right is statutory and therefore exists whatever the wording of the contract (Redmond, 2001). It is the right which is statutory rather than adjudication itself (Riches and Lancaster, 1999). This means that one party cannot insist that an alternative means of dispute resolution should be the first line of resolving any disputes. Of course, as Turner and Turner (1999) comment, the fact that adjudication involves a consensual agreement to go to a third party to resolve a dispute does not mean that they have to. Consensual in this instance simply means that the parties can agree not to use it if they so wish. As Anderson (2000) points out, adjudication is an entitlement rather than a requirement, and that a party cannot be forced to go to adjudication, they simply cannot be denied the right. A recent study by Barrett *et al.* (2005) found that adjudication has not proved to be an ideal solution to the issue of

dispute resolution in the U.K., citing poor timescales, ambush and lack of clarity regarding enforcement of the adjudicator's decision.

Therefore it would seem appropriate to carry out a survey amongst those who are most directly affected by adjudication as to their views of its success or whether the criticisms are valid.

RESEARCH METHOD

A questionnaire survey was sent to practitioners within the industry including clients, consultants, contractors, lawyers, practicing adjudicators and academics. The study formed part of a larger survey into the adoption of Dispute Boards as a valid means of dispute resolution within the UK construction Industry. Respondents were asked to state their level of agreement with various statements. The statements were based on the findings of the literature review.

Statement no. 1 which stated “ADR is an easier and cheaper method of resolving construction disputes than adjudication, arbitration or litigation” intended to address the cost aspect of dispute resolution given the criticism that the three more formal routes were thought to be prohibitively expensive.

Statement no. 2 addressed the fact that adjudicators are not employed until after a dispute has arisen. Therefore the adjudicator has no knowledge of the project and will have to take time familiarizing themselves with it. The statement sought to establish whether this was thought of as a disadvantage

In adjudication the parties have a right to seek adjudication at any time, without having to wait until the end of the contract. Other methods of dispute resolution do not have this facility as a right. Therefore if respondents to Statement 3 “one of the advantages of the UK Adjudication system is that the parties have a right to seek adjudication “at any time” strongly agree with that concept, then this gives adjudication a huge advantage over other methods of dispute resolution.

Statements 4 and 5 seek to establish whether respondents agree that adjudication is no longer the quick and cheap process it was intended to be at its inception. A perceived advantage of adjudication is the short timescale in which an adjudicator is required to make a decision. In practice it is understood that many adjudications exceed this timescale. The purpose of Statement 4 was to establish whether it is the industry's experience that these timescales are, in fact, too short. A further perceived advantage is that adjudication was intended to be much cheaper than arbitration or litigation partly because of the shorter timescales and partly through the non-involvement of legal advisors. Statement 5 was seeking to establish whether adjudication is as cheap as it was intended to be and links back to statement 1.

An adjudicator's decision is binding on the parties until the completion of a contract, even if there has been an error in reaching that decision. The purpose of Statement 6 was to establish whether these are isolated events or occur frequently.

During the informal interviews conducted at the beginning of the research it was suggested that claimants use “ambush” tactics when serving claim documents giving respondents little time to reply even though the claim documents may have been many weeks or months in the drafting. Findings of the literature review concurred with this observation. Therefore Statement 7 was included in order to ascertain whether this view was one generally held in the industry.

Adjudication must adhere to the rules of natural justice. This means that there must be no perceived bias on the part of the adjudicator, he must give equal consideration to both parties and that both parties should be given equal opportunity to consider any information which comes to light, however late in the proceedings (Mills, 2005). The purpose of Statement 8 was to establish whether this requirement would inhibit the flexibility of the adjudication process.

Statement 9 could be seen as controversial. Currently, parties are not able to contract out of the Construction Act, thus enabling them to be able to seek adjudication at any time. Therefore it is impossible at this point for the parties to include within their contracts that any dispute will be referred to any method of alternative dispute resolution, in the first instance. In order to be able to do that they would need to be able to legally contract out of the Construction Act. Therefore the statement was included to see if there was a general feeling that this should be possible. A later question asks for respondents to give comments on their responses.

One of the original purposes of the Latham Report was to attempt to improve cash flow within the industry. This was intended to be achieved both through changes to contractual payment systems and by speeding up the resolution of those amounts which were in dispute. Adjudication led on from this, which is one reason for its short timescales. Statements 10 and 11 seek to establish whether there is general agreement with the notion that adjudication is good for disputes involving payment because that was one of the purposes of its introduction. However, for more complex technical disputes it has been argued that adjudication is less suitable, because of lack of background knowledge of the adjudicator and the short timescales within which they have to familiarize themselves with the project. Therefore the respondents were asked to state the extent to which they agreed that an adjudicator would be disadvantaged by lack of familiarity with the project.

A total of 60 responses were received of which 56 were used as some were largely incomplete.

RESULTS

ADR is an easier and cheaper method of resolving construction disputes than adjudication, arbitration or litigation

Over 50% of respondents either strongly agree (21%) or agree (43%) with the statement. With only 15% disagreeing to some extent it shows that most respondents would be in favour of ADR from a cost point of view.

Adjudication is not effective for complex, technical disputes

Although many respondents agreed with the statement (44%), the results were somewhat inconclusive and it may be, as several respondents state, that it depends on the dispute especially considering that all disputes are technical and most are complex. These respondents feel that it is those which involve many issues that may not be completed within the timescales and therefore may be unsuited to adjudication.

One of the advantages of the UK Adjudication system is that the parties have a right to seek adjudication “at any time”

As stated above, the Act gives parties to the construction contracts which fall within it a right to refer a dispute or difference to adjudication at any time. The respondents

were asked the extent to which they thought that this was an advantage. 78% of respondents agree with the above statement.

In practice the majority of adjudications exceed the 28 + 14 days timescale.

An unusually high number of respondents (32%) were neutral in response to this statement, although the majority (44%) agreed with it to some extent. Although the trend is towards agreement, the data is not conclusive. One Arbitrator stated “I’ve done about 45 and would say that 80% are finished within 42 days” and another stated that he had not been in one which lasted 42 days yet and that 28 days was the norm.

Adjudication is becoming as expensive as litigation and arbitration.

Although 44% of respondents disagreed with the statement the data was not conclusive. Comments made were in disagreement with the statement. One arbitrator commented that “you simply cannot rack up a similar amount of costs in such a short defined time period. Furthermore the parties don’t get their costs back so there is a genuine reluctance to throw money at adjudication”.

The temporarily binding nature of adjudication decisions can cause financial hardship to respondents

The responses were spread evenly between agree or strongly agree (43%) and disagree or strongly disagree (41%) meaning that the results were inconclusive.

Claimants frequently use “ambush” tactics when serving claim documents in order to disadvantage respondents.

The results indicate that most respondents (48%) agree or strongly agree with the statement. Significantly, more respondents strongly agree than strongly disagree.

The rules of natural justice inhibit the flexibility of the adjudication process.

Adjudicators must abide by the rules of natural justice, meaning that they have to be unbiased and act fairly towards both parties. Both parties must have the right to state their case and to answer the case against them. This may inhibit the process of adjudication in that adjudicators must consult equally with both parties and share all information which becomes available. The results show that there are an equal number of respondents who are neutral as there are those who agree or strongly agree – both with 27% of responses. However 44% of respondents disagree or strongly disagree.

The Construction Act should be amended to allow parties to contract out of adjudication.

The majority of respondents (69%) do not agree with this statement. One consultant noted that if the parties were allowed to contract out it would only help large companies, and one arbitrator stated that for all its faults the Act still benefits those who need it most.

The adjudicator is disadvantaged by lack of familiarity with the project

57% of respondents either disagree or strongly disagree with this statement.

Adjudication is only really effective on payment disputes.

48% of respondents disagreed to some extent with the statement. However, respondents were reasonably divided with a further 31% agreeing with it and the remainder neutral.

Should parties to a contract should be free to contract out of the Construction Act?

Finally, the respondents were asked to give a view as to whether parties to a contract should be free to contract out of the Construction Act requirement that enables them to seek adjudication at any time, allowing them the freedom to select another means of dispute resolution. 73% of respondents said that parties should not be free to contract out of the Construction Act.

Data was inconclusive with regard to the following criticisms:

- In practice the majority of adjudications exceed the 28 + 14 days timescale.
- Adjudication is not effective for complex, technical disputes
- Adjudication is becoming as expensive as litigation and arbitration
- The temporarily binding nature of adjudication decisions can cause financial hardship to respondents

The remaining statements elicited strong agreement or disagreement from the parties.

The following discussion section includes a comparison between the results of the survey with the findings of the literature review.

DISCUSSION

The aim of this study was to study the success of adjudication within the UK Construction Industry as perceived by those whom it most affects namely the professionals, contractors, lawyers and arbitrators, and clients. Respondents were asked the extent to which they agreed with eleven statements relating to adjudication.

Although adjudication has been in existence for many years, it was introduced into the mainstream of the UK Construction Industry by Housing, Grants, Construction and Regeneration Act 1995. The Act gives parties to the construction contracts which fall within it a right to refer a dispute or difference to adjudication at any time.

Respondents were asked the extent to which they agreed that this was an advantage and it is perhaps not surprising that 78% of respondents expressed agreement given that it was part of the whole premise of the Act. Latham believed that the speed of adjudication would be an ideal means of maintaining cash flow within the industry, because as Lord Denning noted in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) “There must be a cash flow in the building trade. It is the very life blood of the enterprise”. In *Bouygues U.K. Ltd. v Dahl-Jensen U. K. Ltd* (2000) the referring party was awarded a sum of money in adjudication from the defendants. After receipt of this money they went into liquidation. The decision was reversed by the courts but the defendants were not able to recover their losses. There have been suggestions that monies won in adjudication should be paid into a stakeholder account pending completion of the contract. However this would contravene the intention of the Act to maintain the cash flow of the industry. It is interesting to note that in response to the statement “The temporarily binding nature of adjudication decisions can cause financial hardship to respondents” the results indicate that the responses were spread evenly between agree or strongly agree (43%) and disagree or strongly disagree (41%) and were therefore inconclusive.

In addition to being the only means of formal dispute resolution available to the parties during the course of the contract, the timeframe within which adjudication must take place is also advantageous. The Act imposes a 28 day limit for the

adjudicator to make a decision, with a further 14 days being available if the parties so agree. It was suggested in the literature review that many adjudications exceed this timeframe. However the results proved largely inconclusive on this matter, despite 44% of respondents being in agreement.

Another stated advantage of adjudication is the fact that adjudication is inexpensive when compared to other methods (Turner and Turner, 1999). Again the results were somewhat inconclusive despite 44% of respondents being in disagreement. However, when asked whether methods of Alternative Dispute Resolution were an easier and cheaper method of resolving construction disputes than adjudication, arbitration or litigation, 64% of respondents agreed. This supports the assertion by Newman (1999) and Hibberd and Newman (1999) that ADR is a more efficient use of judicial resources.

Groton *et al.* (2001), in their paper comparing adjudication and Dispute Boards, made the point that an adjudicator will generally have no knowledge of the project until his appointment. Even after appointment, the timescales are such that the adjudicator has a very short time period in which to become familiar with the project. Streatfield-James (2003, p. 500) comments that “this can often be an impossible task”. Therefore respondents were asked whether the adjudicator is disadvantaged by lack of familiarity with the project. A total of 57% of respondents either disagree or strongly disagree with this statement. Linked to this is the consideration of the type of disputes to which adjudication is suited. If the adjudicator was to be disadvantaged by lack of familiarity of the project, does this mean that complex, technical disputes are not suitable for adjudication? The results were somewhat inconclusive in this regard, however 48% of respondents disagreed with the statement that adjudication is only really effective on payment disputes. This implies that fears expressed by commentators on this matter are not founded and that practitioners do not feel that there is any disadvantage through lack of familiarity whatever the type of dispute.

Other criticisms of adjudication include increased costs, ambush and the potential for escalating a dispute. Several commentators have expressed concern regarding the potential for ambush by the claimant (Streatfield-James (2003), Holtham *et al.* (1999)). This centres on the fact that the claimant can prepare its claim without a time limit, but there is a limited period in which to respond. Any extensions to this period have to be agreed between the parties and it may not be in the interests of the “ambushing” party to agree. Additionally, Streatfield-James has found that practices such as delivering claim documents on Christmas Eve, for example is not unknown. As Redmond (2001) points out, the Act allows for Christmas Day or any other Bank Holiday to be excluded, however many companies completely shut down over the Christmas and New Year period and this will not be accounted for within any timetable. Interestingly 48% of respondents agreed that claimants do frequently use “ambush” tactics when serving claim documents in order to disadvantage respondents.

No commentators have suggested that contracting out of the Act should be considered and when asked to comment on this many respondents observed that it would only help large companies. When asked to comment further many respondents cited the fact that contracting out would put contractors and, especially, subcontractors in a weakened position. For example, one consultant stated:

“No - they should not be allowed to contract out. In my experience contractors and large subcontractors are already amending contracts so as to restrict its subcontractors or sub-subcontractors ability to have a dispute

resolved. The reality seems to be that smaller subcontractors have little choice over the terms of a contract and if it wants to win work it has to contract on what might be regarded as 'unfair terms'."

Another consultant agrees, stating:

"No - I do not think parties should be able to contract out - contracting out at the top would cascade down the supply chain to the detriment of the smaller supplier / sub contractor, for whom adjudication was intended and for whom it works."

Of those citing other reasons not to opt out of the Construction Act most stated that adjudication is a perfectly good method of dispute resolution in terms of what it was intended to achieve. For example one consultant stated:

"Adjudication is a reasonably effective means of resolving disputes when the right adjudicator is appointed. ADR should rank alongside adjudication, not be an alternative."

However, another consultant stated:

"I consider that the Act gives the parties to the contract what it set out to do i.e. a relatively quick and cheap ADR procedure in Adjudication. The procedures fall down with the "ambush" leaving the respondent with a restricted response time. Also the inclusion of Solicitors time and Barristers opinions on points of law have made the "costs" out of proportion to the points of adjudication."

CONCLUSIONS

The findings of the questionnaire survey indicate that many of the criticisms within the literature review are unfounded. For example a majority of respondents disagreed that the adjudicator was disadvantaged by lack of familiarity with the project, whilst also disagreeing that adjudication is only effective for payment disputes. Although the results were somewhat inconclusive regarding the suitability of adjudication for complex, technical disputes the results of the previous two statements would suggest that it is suitable for these types of disputes. However the majority of respondents agreed with a major criticism, that ambush tactics are frequently employed to take advantage of the short timescales, leading to the 28 + 14 day timetable being exceeded.

Respondents were found to be in agreement with the stated advantages of adjudication regarding its cost effectiveness and the right of parties to refer disputes at any time. Respondents also largely agree that the rules of natural justice do not inhibit the flexibility of the proceedings. Given that an overwhelming majority of respondents felt that parties should not be able to contract out of the Construction Act and therefore remove their statutory right to adjudication it would seem that the process is very effective and viewed favourably by the industry.

The limitations of the study need to be recognized. Firstly, 56 questionnaires is a small sample and some categories of respondent had very few respondents. Secondly, given that data was inconclusive with regard to the timescale, the nature of the dispute and the costs, further research should be carried out in these areas

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