



DRBF Sydney Conference Session 6

Statutory Adjudication v DRBs

1. STATUTORY ADJUDICATION IN THE UK

Statutory adjudication has been in force in the UK since the relevant legislation ("the Act") came into force in 1998. Under the Act, "*a party to a construction contract has the right to refer a dispute for adjudication ... at any time...*", and the contract must provide (inter alia) for the adjudicator's decision to be given within 28 days from the date of referral. The parties may agree that the decision is both final and binding, but otherwise the decision is binding only until the dispute is finally decided by litigation or arbitration (or agreement). A statutory "Scheme" for adjudication applies if the contract does not itself include all of the requisite provisions.

The Act applies only to "construction contracts", which as defined include contracts for most types of building or engineering/infrastructure works within the UK except for the installation etc of power or process plant and machinery. However, certain exclusions apply: notably, the requirements of the legislation do not extend to the Project Agreement (head contract) for a PFI project.

2. COMPARISON WITH DISPUTE BOARDS

Function

The role of an adjudicator under the Act is, purely and simply, to decide the dispute that is referred by the contracting parties. It is no part of the adjudicator's role to seek to conciliate between the parties or to try to assist them to avoid future disputes.

The same is true of an ad-hoc DAB appointed under the (standard) terms of the FIDIC Silver and Yellow Books; and also true of a DAB appointed under other FIDIC conditions once a dispute has been referred to it, in relation to that dispute.

However, a DAB appointed under the (standard) terms of the FIDIC Red Book potentially has a wider role: the DAB is (should be) appointed at an early stage in the project, and makes periodic site visits so as to be acquainted with the progress of the works and of any actual or potential problems or claims; and the parties may jointly refer a matter to the DAB for a non-binding opinion. The MDB Harmonised edition of the Red Book goes further, as does the Gold Book, providing that the purpose of the DB's site visits includes "*as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes.*"



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It would not be inconsistent with the UK legislation, where it applies, for the parties to appoint an adjudicator with a similar ongoing involvement, including periodic site visits and even a proactive dispute avoidance role, so long as the contract otherwise contains all of the provisions that are required by the Act, and provided that the adjudicator does not engage in ex parte communications with one party which are not shared with the other party on matters relevant to a referred dispute (such communications could give rise to a successful challenge to the adjudicator's decision). However, I am not aware of any project in the UK where the opportunity to adopt such arrangements has been taken up.

Jurisdictional Pre-conditions

Where the Act does not apply, the contract may stipulate conditions that must be satisfied before a dispute can be referred to a DAB. For example, the NEC3 Option clause W1 (dispute resolution procedure drafted for use on UK projects that do not have to comply with the legislation) requires that disputes must be notified to the adjudicator within time limits set out in the contract; and, if a disputed matter is not referred within these time limits, then neither party may subsequently refer it to adjudication (or to the court or an arbitrator). Likewise, a contract may provide for escalation procedures to be undertaken between the parties before the dispute may be referred for independent resolution.

However, where the legislation does apply, any such jurisdictional pre-condition would fall foul of the requirement that a party must have the right to refer a dispute to adjudication at any time [*Midland Expressway Ltd v Carillion Construction Ltd (No. 2)* 106 Con. L. R. 154].

Occasionally, contracts that are subject to the Act will nevertheless provide for preliminary steps such as escalation procedures, but (if properly drafted) making it clear that the right to refer a dispute to adjudication at any time is not constrained by them. Such an approach is to be found in the Infrastructure Conditions of Contract (formerly ICE), which in clause 66(2) provides for a party to advise the other "*[as] soon as [it] becomes aware of any matter which if not resolved might become a dispute*", and requires the parties to meet no later than 7 days after such notification to try to resolve the matter. That could offend the Act, were it not that Clause 66B(1) goes on to provide that "*Notwithstanding Clauses 66 or 66A [each party] has the right to refer any matter in dispute ... to adjudication ... and ... may at any time give notice in writing ... of his intention to do so ...*"

Appointment of Tribunal

The appointment of a DAB is a well-known potential problem area under the FIDIC conditions, if the DAB has not already been constituted before a dispute arises. In those circumstances, there is considerable potential for the respondent to delay or frustrate the appointment of the DAB.



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The UK legislation for statutory adjudication is markedly better in that regard: if adequate provision for the appointment of an adjudicator is not in place, then the referring party may apply under the Scheme to any of the many Adjudicator Nominating Bodies for the appointment to be made.

Timescales

The timescales within which DABs and "statutory adjudicators" are respectively required to make their decisions represents the main difference between the two systems.

Conventionally, DABs are allowed periods of around 84 days within which to make their decisions. However, under the Act, an adjudicator must make his decision within 28 days (albeit that the period can be extended by 14 days with the consent of the referring party, or by a longer period if the parties so agree after the dispute has been referred).

Enforcement

The UK courts have taken a robust attitude to enforcement of the decisions of adjudicators appointed under contracts to which the Act applies. The appropriate procedural route for enforcement is by an application for summary judgement, and this is so even in cases where the contract provides for arbitration as the mechanism for final determination of disputes [*Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B.L.R. 93].

Giving judgement in the *Macob* case, Dyson J (as he then was) stated that:

"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ...Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved".

However, the prevailing view is that the right to enforcement derives not from the fact that such adjudication has a statutory basis, but from the implied (often express) contractual obligation of the parties to comply with an adjudicator's decision until the dispute is finally determined.

For that reason, it is to be expected that a UK court would adopt the same robust attitude to the enforcement of a DAB's decision. Indeed, precisely that attitude was displayed by the Technology and Construction Court in the enforcement of the decision of a contractual adjudicator appointed pursuant to a contract to which the UK legislation did not apply [*AMEC v Thames Water Utilities Ltd* [2010] EWHC 419]. The following comments of Coulson J in that case are particularly pertinent:



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"Whether that decision is issued pursuant to the 1996 Act, or by reference to a contractual adjudication mechanism, such a decision is temporarily binding. As a result, on an application to enforce, the court is not permitted to investigate whether the decision was right or wrong: indeed, such considerations are irrelevant. All that matters is whether the adjudicator had the jurisdiction to reach the decision that he did, and that he reached it by a fair process, making every allowance for the strict time constraints imposed in adjudication.

"There is therefore no difference in principle in the status of a decision provided by an adjudicator pursuant to the 1996 Act, and a decision provided pursuant to a contractual mechanism. Indeed, in the vast majority of cases even that is a distinction without a difference, because both types of decision are produced pursuant to a contractual mechanism. The former is the product of the implied terms referable to the 1996 Act (otherwise known as the Scheme for Construction Contracts, referred to below as "the Scheme"), whilst the latter is created by express terms. There is no difference in the status or enforceability of the resulting decision..."
[emphasis added]

The corollary to this, though, is that DAB decisions will be susceptible to challenge on the same bases as decisions of "statutory adjudicators" have successfully been challenged in the UK courts - for example, where there has been a breach of the principles of natural justice.

3. THE UK MARKET RESPONSE

The standard FIDIC provisions for dispute boards are not compatible with the UK system for statutory adjudication, in particular because of the extended timescales that they allow for the DAB's decisions. As a result, and coupled with the fanfare with which statutory adjudication was introduced, the nascent development of dispute boards in the UK market (as exemplified by the Channel Tunnel project) was largely killed off.

Some standard forms have been developed to provide for versions of dispute boards that comply with the statutory requirements:

- NEC3 Option clause W2 provides for the appointment of a single adjudicator which would normally take place at the outset of the project. The adjudicator's appointment continues throughout the project, but the adjudicator has no involvement with the project unless a party refers a dispute. A dispute must be referred to the adjudicator before any other proceedings can be started. If a dispute is referred, the timetable mirrors the statutory provisions.
- The Institution of Civil Engineers 'Dispute Resolution Board Procedure- Alternative Two' broadly contains the same DAB provisions as are contained within the FIDIC Red Book



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(including provisions for periodic site visits), with the major exception that the timetable for decisions is cut to 28 days (extendable) so as to comply the legislation.

The NEC3 Option clause W2 arrangement is regularly adopted, but many would not regard it as amounting to a dispute board in any meaningful sense. On the other hand, the 'Alternative Two' ICE procedure is faithful to the dispute board concept but, although published in 2005, has never yet in fact been adopted for a project in the UK so far as the ICE's own Dispute Resolution Services Section is aware.

In fact, the same applies to the Institution of Civil Engineers 'Dispute Resolution Board Procedure-Alternative One', which was drafted for use on projects to which the UK legislation does not apply, and which closely mirrors the DAB provisions of the FIDIC Red Book (including a decision period of 84 days). Curiously, though, that procedure has apparently been used on a project in Mozambique.

Experience of dispute boards on projects within the UK is thus extremely rare, and often contracting parties will settle for dispute escalation procedures coupled with one or other of the 'vanilla' Act-compliant adjudication procedures that are available from various publishers, even if their project is outside the scope of the legislation. Hence, for example, I am currently advising on a £1bn power project in the UK where the contract is based on modified FIDIC conditions, but with the DAB provisions simply replaced by standard adjudication provisions.

Nevertheless, it is interesting to note a recent (April 2012) initiative by the RICS, which has launched the RICS International Dispute Board Service, including training and accreditation for dispute board members and nomination services. Perhaps this will give renewed impetus to the adoption of dispute boards for UK projects.

Tensions between statutory adjudication and alternative dispute resolution provisions can and do arise under PFI projects in the UK. Whilst PFI Project Agreements are excluded from the legislation, statutory adjudication nevertheless applies to the first tier subcontract between the SPV and the EPC contractor as well as to sub-subcontracts. The potential for mismatch in the timetables for the resolution of disputes, as between the Project Agreement and contracts further down the chain, has been addressed in a number of ways by contract draftsmen:

- The procuring authority is often persuaded to agree that the equivalent of statutory adjudication shall apply to disputes under the Project Agreement. In such cases, the procuring authority may also agree to provisions for joinder of disputes between the SPV and the EPC contractor.
- "Equivalent Project Relief" provisions were devised to restrict an EPC contractor's substantive entitlement to what is recovered by the SPV from the procuring authority under



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the Project Agreement, so that (in theory at least) the relief that might be awarded by an adjudicator appointed under the EPC contract was restricted while the right to go to adjudication was not of itself restricted. However, such provisions were held to be invalid in the *Midland Expressway* case.

- A "Parallel Loan Agreement" may be entered into between the SPV and the parent company of the EPC contractor so that, if the EPC contractor becomes entitled to payment under an adjudicator's award before the SPV has recovered from the authority, then the parent company must make a loan to the SPV of an equivalent amount.

4. THE BEST OF BOTH WORLDS?

A highly innovative approach was adopted for contracts to deliver the venues and infrastructure for the London 2012 Olympic and Paralympic Games. The Olympic Delivery Authority saw that "*Positive and open relationships with our contractors are crucial to keeping the project on track...*" To that end, the ODA set up two panels:

- An Independent Dispute Avoidance Panel ("IDAP"), made up of eleven construction professionals who could be called in to help the ODA and its construction contractors to avoid any potential disputes that could impact on the delivery of the Olympic Park and the other London 2012 venues. The Panel's remit is to focus on finding pragmatic solutions to problems which might arise before they become disputes that would require lengthy resolution. Members of the panel were assigned to particular projects and make regular visits.
- Alongside the IDAP, the ODA set up a dedicated Adjudication Panel of twelve members, from which individuals could be appointed on an ad hoc basis to decide disputes which had not been avoided through the IDAP.

The ODA's Head of Legal reports that (as at mid April 2012) there have been only two referrals to the IDAP (the last of which was more than nine months' ago), and only three adjudications: a remarkable record having regard to the scale of the project.

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