
Part I

The United Kingdom

COPYRIGHTED MATERIAL
<http://www.pbookshop.com>

<http://www.pbookshop.com>

Chapter 1

Introduction

1.1 Overview

- [1.01] Construction adjudication can be defined as an interim dispute resolution procedure by which the parties submit their dispute to an independent third party for a decision.
- [1.02] In the UK, adjudication is available as a right for parties to a construction contract, following the enactment of the Housing Grants Construction and Regeneration Act 1996 (the **1996 Act**).¹ Unless the timetable has been extended, within a comparatively short period of time, parties will have a decision from an adjudicator, which save for in limited circumstances the courts will enforce. The mandatory and expedited nature of the process were the principal reasons why it was catapulted to the number-one method of dispute resolution in the construction industry no more than a year after the 1996 Act was passed and it is likely to retain its dominance for the foreseeable future, particularly as amendments made to the 1996 Act in 2011 widen the scope of its application.
- [1.03] The short timescale means that once an adjudication has commenced, there is very little time in which to learn or remind oneself about process and procedure. One needs to know quickly what to do, when to do it and, just as importantly, check that the other party and the adjudicator are following the right steps and, if not, what to do about it.
- [1.04] This part of the book aims to facilitate this, by providing a straightforward narrative of the process and procedure of adjudication. So far as it is possible to do, topics are presented in the order one would expect to encounter them. The procedure is interpreted and explained by reference to case law and enveloped with guidance on how to approach an issue, suggestions on what to do or not to do in certain situations, drafting tips and checklists at key points. In essence, this part of the book is a practical guide on construction adjudication in the United Kingdom.
- [1.05] There are three legal jurisdictions in the United Kingdom: England and Wales, Scotland and Northern Ireland. England and Wales is by far the largest economy of those jurisdictions and, no doubt at least partly for this reason, adjudication is more

¹<http://www.legislation.gov.uk/ukpga/1996/53/part/II>. Accessed 1 September 2015.

prevalent. Therefore, the majority of this part will explain the adjudication process by reference to the rules that apply in England and Wales. Although the primary legislation applies equally in each jurisdiction, secondary legislation does not enjoy the same uniformity. Furthermore, judicial precedent set in England and Wales, Northern Ireland and Scotland does not bind the courts in the other countries (although it is of persuasive influence). The result is a divergence of opinion on certain matters relating to adjudication. Accordingly, the key differences in legislation, procedure and judicial interpretation in Scotland and Northern Ireland are addressed separately in Chapters 19 and 20 respectively.

1.2 Background to statutory adjudication in the UK

- [1.06] In the 1970s and 1980s, payees² in the construction industry often struggled to ensure that they were remunerated in a timely fashion for the work they had done. The House of Lords decision of *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*³ in the early 1970s did not help. The decision effectively enabled payers to avoid paying payees merely by advancing a cross-claim. If the payee wished to contest the payer's position, the only way it could compel the payer to pay was either by a decision of the court or by an arbitral tribunal. Both litigation and arbitration would (and still do) take months at best, more likely years to reach a conclusion. Commercial intimidation was rife, with the result that thousands of firms were forced out of business. What the industry needed was a dedicated enforceable fast-track dispute process.⁴
- [1.07] Soon after the recession of the early 1990s, Sir Michael Latham was commissioned by the government and industry organisations to review procurement and contractual arrangements in the UK construction industry, with the aim of tackling payment and other issues. In 1994, he published a paper called *Constructing the Team*, which set out 30 recommendations for how to tackle the problems faced. Recommendation 25 was that Parliament should enact legislation to ensure that the payer paid the whole sum applied for unless it notified the payee of its contrary intention within a fixed period of time, specifying the reasons why. If there was no notification, the payee would be entitled to the amount applied for, regardless of any reason the payer had for not paying. The aim was to ensure that a payee received money to which it was entitled expeditiously without having to embark on lengthy and expensive litigation. Recommendation 26 was that where parties do fall into dispute, they have available to them a dispute resolution process that facilitates a quick and inexpensive platform for hearing the dispute, and that results in an impartial decision to which the parties must comply forthwith. To that end, adjudication should be the 'normal process of dispute resolution'.

²The payee is the party receiving money (typically the contractor or subcontractor). The payer is the party paying (typically the employer or contractor).

³[1974] A.C. 689.

⁴JCT DOM 1 had an adjudication procedure in it, but any decision of the adjudicator was capable of being stayed, pending arbitration proceedings.

Introduction

5

Those recommendations were, more or less, taken up by Parliament and drafted into the 1996 Act.

- [1.08] The 1996 Act is one of the most important pieces of legislation for the building and civil engineering industry in recent times. It has now served the construction industry for over 17 years. The huge reliance that is placed on adjudication, together with the court's robust attitude to the enforcement of adjudicators' decisions are evidence that many of Sir Michael Latham's recommendations have been implemented successfully (although critics will say that the tens of thousands of adjudications and the 600+ reported court decisions evidence the fact that the legislation has failed in one of its goals, which was to reduce conflict in the industry).
- [1.09] Perhaps the best statement which summarises the intent behind statutory adjudication can be found in a frequently cited extract of the decision of Mr Justice Dyson in *Macob Civil Engineering Ltd v Morrison Construction Ltd*.⁵

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... It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.

- [1.10] The implementation of a regime whereby disputing parties could have an interim binding decision on a disputed issue within a few weeks was, and still is, a revolution that has transformed the landscape of construction disputes.

1.3 Statutory adjudication regimes

- [1.11] In England and Wales, the 1996 Act came into operation on 1 May 1998.⁶ It applies automatically to all contracts within its scope on or after that date and cannot be contracted out of.
- [1.12] For a number of reasons, Parliament decided that certain changes should be made to the adjudication and payment provisions of the 1996 Act. After seven years and three public consultations, the 1996 Act was amended by Part 8 of the Local Democracy, Economic

⁵[1999] BLR 93, per Dyson J at [14].

⁶SI 1998 No. 650 (C.13). Housing Grants Construction and Regeneration Act 1996 (England and Wales) Commencement No. 4 Order 1998. <http://www.legislation.gov.uk/ukSI/1998/650/contents/made>. Accessed 1 September 2015.

Development and Construction Act 2009.⁷ This book refers to the amended 1996 Act as the **2009 Act**. In England and Wales, the 2009 Act came into force on 1 October 2011.⁸

- [1.13] Where there is a difference between a section in the 1996 Act and a section in the 2009 Act, they shall be distinguished and referred to accordingly. Where there is no difference, the reference shall be to the “**Act**”. At the time of writing, it is estimated that around 80% of all adjudications arise out of contracts to which the 2009 Act applies. This percentage will continue to increase, making the provisions of the 1996 Act less and less relevant.
- [1.14] In addition to primary legislation, each UK jurisdiction has enacted secondary legislation. Part 1 of this legislation is in essence a set of rules, which will either be chosen or imposed on the parties, by which parties and the adjudicator conduct the adjudication. In England and Wales, the legislation is called the Scheme for Construction Contracts (England and Wales) Regulations 1998⁹ (the **1998 Scheme**) and was brought into force on 1 May 1998, on the same day as the 1996 Act. In order to align this instrument with changes brought in by the 2009 Act, in England, the 1998 Scheme was amended by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011, which also came into operation on 1 October 2011.¹⁰ This book refers to the amended Scheme as the **2011 Scheme**. Where there is a difference between the paragraphs in the 1998 Scheme and the 2011 Scheme, they shall be distinguished and referred to accordingly. Where the paragraph is the same, the reference shall be to the **Scheme**.
- [1.15] Thus, there are in effect two regimes: the ‘old’ regime which was brought into force in May 1998 and the ‘new’ regime which was brought into force in October 2011. In the main, the differences between the old and new regimes, at least in relation to the scope of the Act and the adjudication provisions, are not particularly extensive. Where there are differences between the two regimes, they will be highlighted in the relevant sections of this book.

1.4 Use of case law in this part

- [1.16] The courts of England and Wales, Scotland and Northern Ireland have generated a significant body of case law arising out of the construction adjudication, in particular the interpretation of the statutory adjudication frameworks in those jurisdictions. England has generated by far the largest amount (around 85%), followed by Scotland, then

⁷<http://www.legislation.gov.uk/ukpga/2009/20/part/8>. Accessed 1 September 2015.

⁸SI 2011 No. 1597 (W. 185) (C.61). The Local Democracy, Economic Development and Construction Act 2009 (Commencement No. 2) (Wales) Order 2011. <http://www.legislation.gov.uk/wsi/2011/1597/contents/made>. Accessed 1 September 2015.

⁹SI 1998 No. 649. <http://www.legislation.gov.uk/uksi/1998/649/made>. Accessed 1 September 2015.

¹⁰SI 2011 No. 2333. <http://www.legislation.gov.uk/uksi/2011/2333/contents/made>. Accessed 1 September 2015. The amendments to the Scheme were enacted in Wales by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011 SI 2011 No. 1715 (W.194). <http://www.legislation.gov.uk/wsi/2011/1715/contents/made>. Accessed 1 September 2015.

Introduction

7

Northern Ireland. Although judicial precedent in each of these three jurisdictions does not bind the others, it is persuasive and is routinely referred to by counsel and judges.

- [1.17] Court judgments are a vital component of understanding the rules and procedures of adjudication. In addition to providing the parties to a particular dispute with a determination of their issues, judgments provide the public with a body of opinion on how the law is to be interpreted, given a particular set of facts. Unless overturned, the views expressed by the judges are binding both on the parties to the dispute and anyone thereafter. These binding opinions, layered on top of one another over time, have gradually closed down areas of ambiguity in the process and procedure or have defined issues that are not expressly dealt with by legislation.
- [1.18] In the usual way, this part of the book cites cases and extracts from court judgments in support of statements made. However, the presentation of those cases is perhaps different from many other books in three respects.
- [1.19] Invariably there are several cases, sometimes as many as 50, addressing the same topic. While some of those cases will espouse new points of principle, most will apply existing principles to the particular facts of the case. Rather than cite and summarise every single case or a topic in the body of this book, the number of cases cited is limited to a small selection that evidence a point of principle or exemplify a common factual scenario. However, there will be times when the reader needs to analyse every single decision on a topic. For that situation, Appendix 8 provides a case list of all reported court decisions that could be found since the 1996 Act was brought into force that address the subject of adjudication. The cases have been categorised into the topics they address. For ease of reference, those topics mirror exactly those addressed under each of the headings in Chapters 1–18 and appear in the same order. In theory at least, most if not all of the reported cases on any topic addressed in this book should be contained in the list.¹¹ Appendix 8 therefore represents the most comprehensive published list of cases available from one source, numbering around 560.¹² This number of cases, by comparison with other areas of law, is a phenomenal volume of case law, particularly given the comparatively short space of time in which it has been produced.¹³

¹¹In its 2013/2014 annual report, the TCC reported that there were 60 adjudication enforcement cases commenced in the TCC between October 2013 and 30 September 2014. See <https://www.judiciary.gov.uk/wp-content/uploads/2015/05/technology-construction-court-ar-2013-14.pdf>. Accessed 1 May 2015. Over the same period, the author was able to identify 31 reported cases. Whilst much of the difference is likely to be accounted for by discontinued cases or ex tempore judgments for example, there will be some instances where a written judgment has been handed down but not published.

¹²This excludes those cases relating to the payment provisions of Part II of the Act and Part 2 of the Scheme. Taking those into account, the total number of published cases rises to around 650.

¹³Coulson J, speaking extra-judicially, has commented that the popularity of adjudication was such that, in its first 10 years, it generated the equivalent of roughly 100 years of case law. It is notable, for example, that the arguments advanced to support or resist enforcement are very significantly more sophisticated now than they were in the early authorities.

- [1.20] All decisions arise out of a series of facts and circumstances, unique to that case. Where a party seeks to rely on the court's decision as support for the submissions in its case, it is important to ensure that the facts of the dispute in hand marry up sufficiently with the facts of the dispute in the court judgment. If they do not, a party may argue that the circumstances of a decided case are distinguishable from the present facts, such that the conclusions reached in the decided case do not apply. However, consistent with the purpose of this book, which is to act as a practical guide to adjudication and not as a case book, the facts and circumstances of cases cited in this part are invariably not set out, or if they are, they are set out succinctly. This has the happy benefit of allowing each topic to be dealt with in fewer words.
- [1.21] All the citations in the main body of the book, and in Appendix 8, refer not only to the name of the case and the neutral citation¹⁴ but also the paragraph number or numbers of the judgment relevant to the issue in hand. This should allow the reader to expedite the identification of the relevant part of the decision. This may only save a minute or two, but in the context of the compressed adjudication timetable, every minute counts. For reasons explained below, the paragraph numbering is taken from the judgments published by the British and Irish Legal Information Institute (**Bailii**)¹⁵ or where the case is not available on Bailii, at adjudication.co.uk.
- [1.22] What are the different ways one can access court judgments? The 'traditional' route is via one of a number of law reports. Judgments relating to construction adjudication are, for the most part, reported in at least one of the following: Adjudication Law Reports, the All England Law Reports, the Building Law Reports, the Construction Industry Law Letter, the Construction Law Journal or the Construction Law Reports. Many of these reports not only provide the text of the judgments, but also offer thoughtful and interesting commentary on the issues raised, written by highly regarded construction law practitioners. All of these reports are available in hard copy and online, but none of them are freely available. Furthermore each report is selective as to which judgments it chooses to report (generally those it considers are important or offer something 'new') and so one will not find a complete record of all adjudication cases from any of those sources.
- [1.23] Two of the most easily accessible, definitive, online and free sources of court judgments relating to adjudication are the websites Bailii.org and the adjudicator nominating body, adjudication.co.uk. Both websites are refreshingly free of bells and whistles. At the time of writing, all but a few of the judgments referred to in this book are contained on one of these two websites. Bailii is the more well-known and 'official' of the two sites, and judgments are typically posted on the site within a few days of being issued. However, it is generally easier to search for cases on adjudication.co.uk because it contains only cases that relate to the Act (whereas Bailii has a much wider remit) and it also contains the judgments of a number of unreported decisions not available on Bailii. Furthermore, although it already contained head notes for some judgments, in late 2014, head notes were added for many more judgments, courtesy of the law firm CMS Cameron McKenna LLP.

¹⁴Neutral citations were adopted as standard form in the High Court from early 2002. Before then, cases were cited by reference to one or more Law Reports. Citations in this book are made accordingly.

¹⁵www.bailii.org. Accessed on 1 September 2015.