

Adjudication in the Emirates

COLM O'SUILLEABHAIN - ASSOCIATE DIRECTOR, DRIVER TRETT ABU DHABI COMPLETED HIS LL.M IN CONSTRUCTION LAW AND ARBITRATION WITH A DISSERTATION ON THE APPLICABILITY AND SUITABILITY OF ADJUDICATION FOR USE IN THE UNITED ARAB EMIRATES (UAE).

Although the ultimate conclusion of the dissertation was that those interviewed believed that adjudication was not suitable for use in the UAE, a differing view is presented here to stimulate discussion and debate on the subject. This article will present a number of reasons why adjudication need not be dismissed as a potential method of resolving disputes and how, given the correct application, it can yield beneficial results in the UAE. We also look at the situations in which adjudication may be a feasible solution to the resolution of certain types of disputes in the UAE.

Adjudication will be very familiar to those involved in the United Kingdom (UK) construction industry. It came to the forefront as a dispute resolution method with the implementation of the Housing Grants, Construction and Regeneration Act (1996) (HGCRA). Although adjudication had existed prior to that, it was the implementation of this Act that provided the parties to a qualifying contract with the statutory right to submit a dispute to adjudication.

The HGCRA was not without its flaws, and despite a small number of high profile judicial rulings which threatened to derail its effectiveness, adjudication managed to establish itself as a quick and (relatively) simple method of resolving disputes which parties could undertake without incurring significant costs. The 1996 Act was amended in 2011 to close a number of the loopholes which had become evident through its use and were being exploited by unscrupulous parties. At this point, it is too early to judge whether or not these amendments have been successful.

The general consensus would appear to be that statutory adjudication in the UK has been a success, although it remains to be seen if this will still be considered to be the case following the 2011 amendments. Adjudication, like all other methods of dispute resolution, has its strengths and weaknesses. These are well known and extensively published; as such this article will not focus on the merits or demerits of adjudication as a dispute resolution

method, or seek to compare it to the other methods available.

It is generally accepted that the main factors which made adjudication so successful in the UK were its statutory nature, which was binding upon the parties until appealed to arbitration or the courts; the fact that it provided a fast-track method of resolving disputes; and the fact that it was a low cost option for the resolution of disputes, which provided a reasoned judgement.

Similarly, it is generally accepted that adjudication's main disadvantages were that it offered what was viewed by many as 'rough justice' and that, because of the compressed timeframes involved, the decisions reached were not always fully correct or extensively reasoned. Some users felt the fact that it was not finally binding on the parties, and could be appealed, was a disadvantage; while others felt that the statutory timeframes, which had to be adhered to, made its use as an 'ambush tactic' or 'fishing expedition' a common occurrence.

When considered in the UAE context there were a number of barriers identified to the use of adjudication. The main barrier being the lack of a statutory framework and recognised enforcement mechanism, comparable to the enforcement mechanisms currently in place for arbitration. Other barriers to acceptance of adjudication as a dispute resolution method in the UAE include:

- The lack of familiarity with adjudication as a dispute resolution method.
- The associated reluctance to use such an unfamiliar method.
- The fact that adjudication is not, in most cases, finally binding.

By the time a dispute has escalated to the stage where a formal dispute resolution mechanism is required, relations between the parties have frequently deteriorated. In such cases both parties have become so deeply entrenched in their positions that they are unwilling, and sometimes unable, to consider a resolution method they are unfamiliar with or one that is not finally binding. Parties can also be reluctant to

submit to a process which does not present both sides with adequate scope to present their respective cases and to issue whatever rebuttals they believe are necessary.

Based on these findings, it may seem like there is very little hope of adjudication being implemented or used successfully in the UAE. However, its low cost nature will no doubt be attractive to a sub-set of parties, particularly those who have been through arbitration or litigation previously. Such parties will have first-hand experience of the substantial costs and deterioration of working relationships, as well as the time commitment in relation to resources that can be an unwanted by-product of both processes. There will also be an as yet unquantified number of parties who, although in dispute with one another, have maintained reasonably good relations, or who at least have not become so entrenched in their positions that they will not consider all possible resolution options.

For parties who genuinely desire a determined judgment without the formalities or costs associated with arbitration or legal proceedings, and who may be prepared to compromise on the relative quality of the award, adjudication may offer an attractive and reasonably priced method of resolving their disputes quickly. These are the type of parties who, in a UAE context, would be best placed to consider adjudication as a resolution option. These parties would also have the greatest chance of obtaining an outcome of their dispute which, if not the desired outcome, is at least acceptable from a procedural and commercial point of view, or when considered holistically.

It is extremely unlikely that statutory adjudication will be introduced in the UAE in the foreseeable future. Therefore, parties to a construction contract looking to utilise adjudication as a dispute resolution method will have to rely on ad-hoc agreements, or the provisions already included with the conditions of contract being used. The FIDIC suite of contracts is the most widely used suite in the region

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and while the use of FIDIC '87 Red Book has been historically prevalent, based on anecdotal evidence, recent years have seen a marked increase in the use of other contracts from the FIDIC suite, most notably the FIDIC '99 Conditions of Contract.

FIDIC's most recent contracts contain provisions for the appointment of a dispute adjudication board (DAB). However, such provisions are frequently removed in the particular conditions and employers seem reluctant to implement or make use of them.

Although adjudication may not be considered particularly well suited to use in the region for a variety of reasons, there may still be situations where it is a viable option for the resolution of disputes. Employers, engineers, and contractors would be encouraged to retain the adjudication provisions (if already there) of the contract chosen, or to introduce them if not already included. The inclusion of such provisions will, at the very least, provide additional options to the parties when resolving disputes with very few

detrimental consequences in terms of time and cost. Should the parties be prepared to expand their views on adjudication, and at least experiment with its use, they may find the results surprisingly positive.

Suffice to say that the successful adjudication will be contingent on the approach of both parties to the process. No matter that the party responding to the adjudication may not be a willing participant; both parties to the dispute will need to approach the matter with a genuine desire to reach a resolution relatively quickly, with a view to continuing the working relationship. Without this approach, the benefits of electing to use adjudication will be negated and possibly lost altogether. In this respect the approach to adjudication is very similar to that adopted in mediation, wherein a mutually beneficial outcome is preferable to a determinative outcome achieved in an adversarial manner.

When considering the result of an adjudication both parties will also need to be aware of not only the potential time and cost issues, but also any likely deterioration in working relationships that can and

do arise from escalating a dispute; and whether or not the likely outcome justifies that course of action.

On the other hand, parties will also need to look at the scale and nature of the dispute and accept that there will, without question, be disputes which cannot be adequately dealt with by adjudication and will need to be referred to arbitration or litigation.

In conclusion, although it is very easy to look at the reasons why adjudication may not be applicable to, or suitable for, wide scale implementation and use in the UAE, there will undoubtedly be instances where it may be at least a viable option offering a reasonable chance of success. Driver would advise its clients not to discount any method of dispute resolution and to consider all options available when deciding on a suitable method. The parties must bear in mind not only the factors which make the use of adjudication less attractive, but also those which make adjudication particularly suited for the resolution of certain types of dispute given certain circumstances. ■

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