U.S. Project Disputes: Has the Time to Consider Adjudication Finally Arrived?

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Looking for more efficient dispute resolution procedures, the authors suggest adapting England's Adjudication scheme for U.S. use. They contend that, like dispute review boards, an adjudicator's decision would be enforceable by U.S. courts.

Contractors and lawyers in the United States have been at the vanguard of the alternative dispute resolution (ADR) movement. Their efforts have led to today's general acceptance of arbitration, mediation and creative med-arbitration arrangements to resolve the most complex and difficult project disputes. As these ADR processes become more sophisticated and costly, there is a growing recognition of the need for a simple and less costly ADR mechanism—one more in tune with the general project model that contemplates a prompt, cooperative and even-handed disposition of issues while the construction process is ongoing. The concept of "adjudication," a fast-track dispute resolution process introduced into the lexicon by the United Kingdom's Housing, Grants, Construction and Regeneration Act of 1996 (the HGCRA)[1], may be the nucleus for an approach that would find favor with the construction industry in the United States. However, adjudication as understood in the UK has not yet crossed the Atlantic. The closest thing to it is the dispute review board (DRB), which uses a panel approach instead of a single adjudicator. DRB decisions are usually non-binding and they are a creation of contract rather than legislation.

This paper considers whether a contractual form of adjudication might be workable within existing U.S. legal structure.

What is Adjudication?[2]

Adjudication was born out of the recognition that the UK construction industry needed a way to resolve disputes promptly and, where appropriate, allow money to flow from one party to another as quickly as possible. The HGCRA does not define the term "adjudication," but it is generally understood to be a process in which the parties agree that a third party will make a potentially binding decision on the issue of entitlement or liability. That sounds similar to arbitration.

Under the approach taken in the UK, the process is rooted in legislation. In short, while the parties can adapt it to their particular situation, an agreement to use the process is not needed in the UK. The HGCRA provides that all construction contracts entered into after May 1, 1998 must allow the parties to refer

any dispute under the contract to adjudication. The parties' contract can make certain specific provisions as to procedure; but if they do not, the HGCRA's adjudication scheme is read into the contract.[3]

The Statutory Adjudication Procedure

The HGCRA provides that the adjudication process begins with the referring party issuing an Adjudication Notice to the respondent. The Adjudication Notice identifies and defines the dispute. It is to set out:

- the nature and a brief description of the dispute and parties involved;
- the details of where and when the dispute arose;
- the nature of the redress sought; and
- the names and contact details of the parties.

In addition, if the parties have named an adjudicator in their contract, the party initiating the process will advise that person that his/her services will be required. If no one is specifically named or the named person is unavailable, the referring party submits the Adjudication Notice to a nominating body for the selection of an adjudicator.[4] The nominating body is to communicate the name of the selected adjudicator to the parties within five days of the request.

The referring party then submits a "Referral Notice" to the adjudicator setting out its full case, along with copies of all relevant documents. A copy of the Referral Notice is sent to the respondent within seven days of the publication of the Adjudication Notice to the adjudicator.

The HGCRA does not establish a date for the respondent to furnish a response to the Referral Notice. The generally used construction contract form in the UK provides seven days for a response,[5] but as a matter of practice, adjudicators frequently allow 14 days.

Adjudicators are required to decide cases within 28 days from receipt of the referring party's Referral Notice. However, the adjudicator can take up to 42 days if the referring party agrees, or more if the parties jointly agree. Otherwise, the 28 days is mandatory.[6]

In the absence of a detailed adjudication procedure agreed to by the parties, the adjudicator will set the procedure. Thus, the adjudicator may hold meetings, question the parties, visit the site, request further documents or information, appoint experts or legal advisors, or conduct a "mini-trial" at which witnesses provide evidence and are subject to cross-examination.

An adjudicator's award is binding on the parties unless and until overturned by litigation, arbitration or agreement. The prevailing party may demand prompt payment, and, if not received, can seek enforcement of the adjudicator's decision in court by an application for summary judgment followed by execution on that judgment. While there are grounds upon which a court may refuse to grant summary judgment on an adjudicator's decision, the grounds are narrowly cabined. A showing that the decision may ultimately be set aside as erroneous is not sufficient to preclude enforcement,[7] nor is it sufficient to show that immediate payment will cause financial hardship.[8]

If the contract contains an arbitration clause, enforcement of the adjudicator's award must be channeled through the arbitration process, as an arbitration clause mandates a stay of court proceedings.[9] The arbitrator is subject to the same restraints and has no greater powers than a court to act on an adjudicator's award.

Track Record of Adjudication in the UK

While there are undoubtedly some UK construction industry participants who take a dim view of adjudication, the consensus appears to be that it is a beneficial process. As the Chartered Institute's John Wright recently observed in *The Resolver*, a publication of the Chartered Institute of Arbitrators: "Adjudication has proved effectivein helping construction parties to resolve their disputes swiftly and cost-effectively, which has allowed projects to be completed without wasted cost and time in litigation."[10]

The Case for Adjudication in the U.S.

The UK adjudication process is not bogged down with delays that too often affect the ADR process in the United States. Because the UK process moves to a decision expeditiously, it provides a vehicle that prevents the sort of disruption of the revenue and cost streams that occur when the dispute process is slow, cumbersome, costly or indecisive.

Construction disputes in the United States often begin with a contractor raising an issue after it has commenced work, for example, a design issue that requires a design supplement or clarification and could well have a cost and/or time impact. The contractor brings the issue to the attention of the owner or designer (i.e., the architect or engineer), often by submitting a request for information (RFI). The owner/designer then provides direction to the contractor—a response to the RFI may take the form of an ASI (Architect's Supplemental Instruction), an OSI (Owner's Supplemental Instruction) or a "clarification"—as to how to resolve the issue.

Typically the contractor will respond in one of three ways:

- it will implement the direction, recognizing that it will not have a cost or time effect;
- it will require further information because the direction will not work with the building's current design, or
- it will advise the owner and/or the designer that the direction is a change in scope for which the contractor is entitled to additional compensation and/or an extension of the contract time

If, as often happens, the owner/designer denies the "change request," the owner will issue a unilateral directive to the contractor to proceed with the work, typically a no time or cost directive.[11] This leaves the parties to the disputes mechanism in the contract.

That process—which is often arbitration before a panel of three arbitrators—is, at its core, an adversarial process. When it occurs while the project work is on-going, it has the potential to become heated, making communication on the job site and collegial problem solving difficult. Most often, however, arbitration takes place after work on the project has ended, i.e., after substantial completion and punch list items have been addressed; final completion usually is withheld pending the outcome of the dispute. This means that for a year or more after the job, the parties' attention is diverted to arbitration.

Therefore, under the usual dispute resolution paradigm, the contractor and its subcontractors are forced to proceed with work for which they will not be paid at least until there is a decision in the arbitration, which may well take a year or more. The reason is that the owner and designer have decided that the work is not a change for which additional compensation is required. This situation imposes an enormous financial strain on the construction team. All too often, where substantial sums are at stake, the subcontractors cannot carry the financial load, which leads to mechanic lien filings, suits to enforce the liens and in some instances subcontractor bankruptcy and default. None of this is in the interest of having the members of the project team—owners. designers, contractors and subcontractors—working collegially to bring the project to a successful conclusion.

This scenario, which is all too common, is out of kilter with the business model associated with successful enterprises. Delayed resolution of business disputes is not a viable strategy for a business project. For an owner, delay retards the ability to operate, sell or rent a property, and it increases the burden of financing, even in a low interest-rate environment. For a contractor, delay is equally unpalatable. It generates extended general conditions costs, eats into already slim profit margins and disrupts workflows.

Resolving disputes long after they have arisen can have disastrous consequences for construction parties. The contractor and its subcontractors remain uncompensated, possibly for years after they performed the work; thus, they end up having to finance aspects of the project for a long period. Many contractors (especially subcontractors) cannot afford to do this. When the project is large and the number of issues substantial, being the contractor (or subcontractor) on a project can impose a crippling burden.

A possible solution to this situation is adjudication because it has the potential to make construction dispute resolution happen in a time frame that is less disruptive of project relations, the parties' business expectations and the project itself. Adjudication would also require less expenditure for counsel fees and other legal costs, would create a foundation for owner/contractor partnering and the preservation of their relationship, and sustain employee morale.[12]

The Big Dig and DRBs

Support for the use of adjudication in this country just requires a commitment to the process. An example of project participants committing to another form of early dispute resolution is the Big Dig in Boston.

This project involved connecting two interstate highways and Logan Airport with a series of tunnels and bridges while keeping traffic moving through the center of Boston. In part because of the size of the project, and to avoid the Massachusetts courts being swamped by lawsuits arising out of the project, the project documents called for DRBs to resolve "disputes" while the project is ongoing.[13] A "claim" became a "dispute" that could be submitted to a DRB when the contractor disagreed with a "final determination" by the owner's "Authorized Representative." After an issue was presented to the DRB, the contractor could anticipate an initial decision in roughly five months. While that initial decision was subject to a number of additional processes, it provided an early "reality" check. And, even if the process was pursued through the remaining steps, the DRB process allowed a decision to be made reasonably promptly after a contractor's filing.

The Big Dig illustrates that when the project participants are committed to resolving disputes promptly, they can make it happen.[14] There is no reason why U.S. construction participants cannot be equally committed to an adjudication process.

Enforceability of Adjudication Decisions

If adjudication is to work in the U.S., adjudication decisions must be enforceable in some way.[15] The DRB process on the Big Dig provided for "final findings" from the DRB to be approved or rejected in a decision by the Project Director. The process allowed for appeals to a Board of Contract Appeals or to a court within a 90-day time period. Beyond this period the decision became final and binding. In practice, the Project Director generally accepted the DRB's decision and the contractor accepted the Project Director's decision. In addition, the case law—albeit relatively limited—established that the DRB decisions would be enforceable in court. That precedent serves as a model for enforcement of adjudicator decisions.

Two cases involving the contractor Perini Corp. arose out of the Big Dig. In both cases, the courts ruled that DRB decisions could be confirmed on an expedited basis.[16] They did so by equating DRB decisions to arbitration awards.

In *Perini 1*, the court said, "The disputes resolution procedures, whether binding or not, are a form of contractually accepted arbitration and must be treated by the Court as such." In *Perini 2*, the court observed, "What is before the Court is an arbitration proceeding." In that case, the court granted summary judgment in favor of Perini on its motion to enforce and confirm a DRB award. The court noted in a footnote:

> The Court tends to agree with [Perini's] observation that summary judgment motions are not really the correct vehicle [sic] for what is now before the Court. Rather, under both the Federal and Massachusetts Arbitration Acts, at this stage of a proceeding like that before the Second DRB, the Court really must confirm the award, vacate it or send it back for further proceedings. Whatever the titles of the motions, it is the duty of this Court to insure that any final judgment "shall grant the relief to which the party in whose favor it is rendered is entitled."

The Massachusetts Supreme Court ultimately affirmed this decision and dismissal of the owner's complaints.[17]

The fact that DRBs do not have all of the procedural and due process trappings of arbitration is not likely to be an impediment to enforcement. The District of Columbia Court of Appeals, in *Washington Automotive v. 1828 L Street Associates,*[18] enforced a decision by a panel of appraisers establishing the value of a parcel of land for the purpose of fixing the ground rent under a long-term lease. The court adopted the view expressed by the United States Court of Appeals for the Second Circuit that any agreement in writing that "clearly manifests an intention of the parties to submit certain disputes to a specified third party for binding resolution" is to be enforced as an agreement to arbitrate.[19]

Conclusions

The lesson of *Perini 2* indicates that there is a legal framework in the United States for enforcing decisions made in a proceeding modeled on UK-style adjudication. We suspect that organizations such as the American Arbitration Association and JAMS, to mention only two well-known ADR providers, would be willing to take on the role played by Adjudicator Nominating Bodies[20] in the UK.

All that is missing is a commitment from project participants to adopt an adjudication process modeled on the UK process in their contract documents. Perhaps the place to press for this commitment is with the organizations that promulgate form construction documents, e.g., the American Institute of Architects or the Associated General Contractors. To be sure, it would well serve all project participants to have a dispute resolution framework that matches the project participants' aspiration for completion of the project without delays or unresolved disputes.

Endnotes

1 Though the Housing, Grants, Construction and Regeneration Act of 1996 (HGCRA) allows a party to initiate adjudication at any time, English courts have suggested that its use is more appropriate during the project, rather than after its completion. E.g., see *Balfour Beatty Construction Ltd. v. Lambeth LBC*, where Judge Lloyd Q.C., stated:

> This is yet another case in which adjudication has been launched after completion of the works and in which the dispute attracts a simple description but comprises a highly complex set of facts and issues relating to the performance of a contract carried out over many months. It may well be doubted whether adjudication was intended for such a situation.

2 This article is not intended to provide a detailed analysis or critique of the HGCRA or of English law relating to adjudication. For information on the law of adjudication in the UK see, e.g., www.pinsentmasons.com.

3 HGCRA § 108.

4 Several UK construction related institutions (Adjudicator Nominating Bodies) provide adjudicator nomination services. E.g., The Royal Institution of Chartered Surveyors; The Royal Institute of British Architects; Institution of Chartered Engineers and The Chartered Institute of Arbitrators.

5 The Joint Contracts Tribunal construction contract form.

6 See e.g., *Ritchie Bros. (PWC) Ltd. v. Daniel Philip (Commercials) Ltd.*, March 20, 2005, Scottish Court of Appeal.

7 See, *Herschel Engrg. Ltd. v. Breen Properties Ltd.*, July 28, 2000 TCC, London; Judge Humphrey Lloyd, Q.C.

8 See, *Total M&E Services Ltd. v. ABB Technologies Ltd.*, Feb. 26, 2002, Judge Wilcox Q.C.

9 UK Arbitration Act 1996, § 9.

10 S. Carey, "Adjudication is Working" (Masons December 2000).

11 E.g., American Institute of Architect Contract Form A.201-1997 Clause 4.3.3: "Pending final resolution of a claim, except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents." Subparagraph 9.7.1. deals with failure of payment by the owner entitling the contractor to stop work, and Article 14 concerns termination and suspension of the contract.

12 However, an important perceived defect of the UK adjudication process is that the speed of the process can create an "ambush" situation, that itself has an impact on the parties' relationship.

13 The first DRB in the U.S. was in 1975 for the second bore of the Eisenhower Tunnel Project in Colorado. See *Avoiding and Resolving Disputes During Construction, Technical Committee on Contracting Practices of the Underground Technology Research Council,* p. 16 (ASCE 1991). Indeed DRBs have been used on more than 100 U.S. projects valued at more than $6 billion. Over 70% of tunnel projects bid in the U.S. in 1990 had DRBs. On projects tracked by the American Society of Civil Engineers, 63 disputes were referred to DRBs and all were settled without litigation. DRBs have been used by the U.S. Army Corps. of Engineers and by more than 16 U.S. state or local government owners. DRBs have been used most frequently on tunnel, highway and bridge projects, but infrequently on projects such as high-rise buildings, industrial plants and commercial projects. *Id.*

14 DRBs are also gaining support internationally. In 2004, the International Chamber of Commerce promulgated Dispute Board Rules. Similarly, international contracting forms such as those of FIDIC now include DRB provisions.

15 In U.S. courts, summary judgment can be granted only where there are no issues of genuine material fact and the court finds that the moving party is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate that there is no triable issue of fact.

16 *Massachusetts Highway Dept. v. Perini Corp.,* 13 Mass. L. Rep. 564 (Mass. Super. 2001); 2001 Mass. Super. Lexis 412 (Perini 1); *Massachusetts Highway Dept. v. Perini Corp.,* 14 Mass L. Rep. 452 (Mass. Super. 2002); 2002 Mass. Super. Lexis 110 (Perini 2); *Massachusetts Highway Dept. v. Perini Corp.,* 828 N.E. 2d34 (Mass. 2005).

17 828 N.E. 2d 34 (Mass.2005).

18 906 A.2d 869 (DC 2006).

19 *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825 (2d Cir. 1988).

20 See n. 4 supra.

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