To Adjudicate or not to Adjudicate

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1. Introduction

The capacity of the arbitral process to resolve contractual difficulties in disputes involving technical issues appears unrivalled, provided the matter is handled with expedition and without too much formality, while preserving the rules of natural justice.

Excessive reliance on court procedures in arbitrations has, in many cases, caused undue delays in resolving disputed issues. Lawyers with unhappy clients who are faced with having to pay not only large sums of cash to the other party but paying the other party's costs as well, have searched for alternatives to arbitration or litigation. This has brought into existence a reasonably large array of alternatives, one of which will be examined in this presentation.

The Collins Concise English Dictionary (Australian Edition) defines "adjudication" as follows:

Adjudication: *to give a decision, especially a binding or formal one.*

Adjudication is clearly what a Judge or Arbitrator does in the normal course of events.

The word has a particular statutory meaning in the building industry in some States, related to the payment of subcontractors. This is not dealt with here.

Generally, in recent years adjudication has, in the area of the resolution of contractual disputes, evidently taken on a life of it's own and has come to have a variety of applications.

2. Contract Dispute No 1

In a recent dispute between a Contractor and a Subcontractor involving a substantial sum of money, the Dispute Resolution section of the contract included the following:

52.7 Powers of Adjudicator

The Adjudicator shall have the power :

(a) to open up, review and revise any direction of Contractor's Representative which has been referred to the Adjudicator as if no such direction had been given and substitute the exercise of the Adjudicator's discretion for that of Contractor's Representative;

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(b) to proceed to the resolution of the Dispute in such manner and subject to such rules as the adjudicator and the parties agree, or failing agreement, as the Adjudicator in the Adjudicator's absolute discretion determines is suitable for the nature of the Dispute and the Adjudicator shall not be bound by the rules of evidence;

(c) to engage and to consult with any advisors, legal or technical, as the Adjudicator may see fit; and

(d) to seek further information from either party.

52.9 Adjudicator to Act as Expert

In making the Adjudicator's decision, the Adjudicator shall act as an expert and not as an Arbitrator. The parties shall pay the Adjudicator's costs [including the costs of engaging any consulting advisors pursuant to Clause 52.7(c)] equally.

52.10 Litigation

Compliance with clauses 52.9 to 52.10 as appropriate shall be a binding preliminary to the commencement of litigation by Subcontractor or Contractor provided that nothing shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 47 or to seek urgent injunctive or declaratory relief in respect of any matter arising under the subcontract.(emphasis added)

3. Contract Dispute No 2

In a recent dispute between an Owner and a Contractor (in this case a Consulting Engineer) also related to a large sum of money, the Dispute Resolution section of the contract contained the following clauses:

25.7 Meeting with Adjudicator

The Adjudicator shall have the power:

(a) to proceed to the resolution of the Dispute in such manner and subject to such rules as the Adjudicator and the parties agree, or failing agreement, as the Adjudicator in the Adjudicator's absolute discretion determines is suitable for the nature of the Dispute. The Adjudicator shall not be bound by rules of evidence;

(b) to engage and consult with any advisers, legal or technical, as the Adjudicator may see fit; and

(c) to seek further information from either party.

25.9 Adjudicator to Act as Expert

(As 52.9)

25.10 Litigation

Compliance with Clauses 25.1 to 25.10 as appropriate ***shall not be a condition precedent*** *to the commencement of litigation by the Owner or the Contractor and nothing shall prejudice the right of a party to institute proceedings or to seek urgent injunctive or declaratory relief in respect of any matter arising under this agreement. (emphasis added)*

4. Evaluation of Clauses

4.1 It will be noted that in the second dispute, the equivalent of Clause 52.7(a) has been omitted (evidently because there is no certification process), which has the effect of widening the potential range of matters which may be dealt with by this approach. Clause 52.7(a) in the first dispute is a much better application of the method, since it seems that the process was developed initially as discussed in section 5.

4.2 Clauses 52.9 and 25.9 are identical in wording and tie the Adjudicator to the role of an Expert Determiner, without any attempt at defining what that term implies. A reference to the Institute's Rules for Expert Determination would assist here.

4.3 Clause 52.10, on the other hand, appears to place a barrier to litigation until the adjudication is finished, except in extraordinary circumstances (apparently resolved by a court), while Clause 25.10 means that a party in the dispute can halt the process at any time by application to the court, thus negating the reason for including the resolution process in the contract in the first place.

4.4 It will be realised that, as in mediation and expert determination, costs are shared.

5. Apparent Development of the Model

As far as I have been able to determine, the original prime intention of the adjudication process was to enable an independent and relatively low-cost review of the Superintendent's certificates. The procedure seems to have been:

- The dissatisfied party gives notice of the dispute to the Superintendent and the other party within a specified time of the dispute arising.

- The Adjudicator acts as an Expert, not as an Arbitrator and has the power to;
  -- open up and review or revise any direction of the Superintendent;
  -- proceed to resolution of the dispute in a manner to be agreed, without being bound by the rules of evidence and without legal representation; and
  -- engage and consult the persons that the Adjudicator thinks necessary.
  -- If either party is dissatisfied with the decision of the Adjudicator, then it must give notice of dissatisfaction to the other party within a specified period requiring the dispute to proceed to more formal dispute resolution in accordance with the contract.
  -- If no notice of dissatisfaction is given, then the decision of the Adjudicator is final and binding.

6. Comment

6.1 Adjudication has apparently extended well beyond it's original scope in it's application to the resolution of disputation. The looseness of Clause 25.7(a) means the technique could be applied literally to almost any dispute in that particular contract, when it is, on it's face, of limited application.

6.2 While expert determination could be considered "a clayton's arbitration", adjudication could be labelled "a clayton's expert determination". When extended beyond it's apparent origins as a device for handling certification disputes, it exhibits few qualities in favour of resolution apart from speed, and not always that.

6.3 In general disputation, it is a fairly rare bird where issues of fact do not have to be resolved, which requires the dispute resolver (whatever his/her title) to test areas of credibility as well as law. Considerations of estoppel alone require close examination of people's behaviour, which may be done only by a Judge in litigation or an Arbitrator empowered by the Commercial Arbitration Act. Expert determination, while enjoying reasonable success where almost all of the issues are technical in nature, also falls down in these circumstances. Unfortunately, adjudication comes to a sticky end much earlier in the cycle because of the limitations of what appears to be a current application of the technique.

It is a widely held view that an Adjudicator or Expert attempting to determine facts in a dispute is arbitrating, whatever the wording of any contract clause or subsequent agreement between the parties. The well-advised "loser" in such a process should have little trouble undermining the result.

6.4 The process is sometimes used as a precursor to either arbitration or litigation; in those circumstances the "winner" is unable to move to collect his "winnings" promptly. Some Solicitors have expressed the view that it may be an attempt to add another "layer" into dispute resolution to delay the process.

The one who is favoured by the Adjudicator's "decision" may have to wait to

recover costs as well, until after the arbitration or litigation is completed.

The Adjudicator's answer is inadmissible in court (and probably also in an arbitration) and the recovery of costs for the adjudication depends on the Judge or the Arbitrator coming to the same conclusion as the Adjudicator, which event may sometimes not occur because of the limitations on adjudication noted in 6.3.

6.5 A further limitation on adjudication occurs when it is used in a substantial matter where there is a large volume of documents requiring to be discovered. One of the parties may delay the process without fear of incurring the wrath of the Adjudicator, who is powerless to do anything about a party dragging the chain and is not able to do anything to apply a remedy subsequently by the allocation of costs.

6.6 A strong argument in favour of adjudication is where it is used as a "non-binding expert appraisal" to test the strength of the parties' positions and may lead to an early settlement. The procedure can be valuable in such circumstances. In addition, the apparent original model as noted in section 5 appears to be satisfactory. These are, in my view, correct uses of the process.

It appears that, since anyone drafting dispute resolution clauses in a contract is framing procedures without any idea of the nature of disputes which might arise, the use of techniques such as adjudication without qualification is fraught with difficulty. The process has its uses undoubtedly, but in my opinion not as a general method of resolving disputes.

7. Proposition

Practitioners, Contract Consultants and Solicitors drafting contract clauses, and seeking the greatest flexibility, may wish to consider the following suggestions;

- adjudication in the manner of section 5 for a quick resolution of certification issues. If unsuccessful, or other issues intrude, turning to;
- expert determination based on the NSW Public Works model, which uses this technique for substantial disputes. If the expert finds quantum exceeds $0.5m (or other agreed figure) proceeding to;
- arbitration, which has all of the required attributes to resolve the vast bulk of contractual disputes in a just and expeditious manner.❄