Building and Construction Industry Adjudication – The UK Experience

Robert Fenwick Elliott[1]

The Origins of Adjudication in the UK

In its modern form,[2] adjudication was developed in a limited contractual form in the UK and received attention from the courts from the 1980s – the standard forms of UK subcontracts[3] contained a paper-only system of resolving disputes about main contractor set-off against sub-contractor payments. The system was reasonably successful within its limited ambit notwithstanding a lack of support from the Court of Appeal.[4]

But the system was hugely extended following the Latham Reports[5] into the UK construction industry in 1993/4. The reports, which were commissioned as a joint exercise by industry and government, identified the central problems: contractors (and especially subcontractors) were facing significant delays in getting paid; there was too adversarial a climate and disputes were taking too long and costing too much to resolve. These problems were perceived as damaging for both the construction industry and its clients, and provision for adjudication was introduced by statute in 1996.

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1 Robert Fenwick Elliott is a Solicitor of the Supreme Court of England and Wales. Robert Fenwick Elliott (rjfe@feg.com.au) set up and for 21 years headed up Fenwick Elliott LLP, the biggest specialist firm of construction lawyers in the UK, where he acted for many disputants and as adjudicator in many construction disputes, including those where very substantial sums were in issue. He is a Vice-President of the Technology and Construction Solicitors Association in the UK (for which organisation he was the principal draftsman of the first set of statute-compliant adjudication rules in 1996, and for which he trained, accredited and appointed many adjudicators), founding chairman of the International Construction Law Alliance and a convenor of the Adjudication Forum of Australasia (www.bigbutton.com.au/~afa). He has written and lectured extensively in the UK, Australia, the USA and the Middle East on construction law topics, including not only the substantive law, but also the mediation, arbitration and litigation of construction disputes. He now lives in Adelaide, where he has recently helped set up Fenwick Elliott Grace (www.feg.com.au), a new construction law practice, and will mediate or adjudicate when not playing croquet.

2 The following footnote appears in *Building Contract Litigation: Practice and Precedents*, Fenwick Elliott, Sweet & Maxwell, London, loose leaf release 18 in the chapter on adjudication at paragraph 5-2:

> …the origins of the process are far from new: Dr Stephen Inwood has noted that Robert Hooke (1635-1703), who arguably contributed as much to English science as his rival Sir Isaac Newton and who in collaboration with Sir Christopher Wren did much work in the reconstruction of London after the Great Fire, "carried out occasional views on properties in the City, providing professional adjudications in disputes between property owners or builders, usually for a fee of 10s" (*The Man Who Knew Too Much*; Pan, 2002, page 386). The modest fee, and Hooke's many other commitments, suggests that the process cannot then typically have been a drawn out one.

3 The Green Form for nominated subcontracts and the Blue Form for domestic contracts.

4 See *A Cameron v Mowlem* (1990) 52 BLR 24.

5 Sir Michael Latham's initial report of December 1993 was called *Trust and Money* and the final report of July 1994 was called *Constructing the Team.*

At that time, the Court of Appeal had reined back in its earlier approach to summary judgment – hitherto the courts had been taking a robust approach to applications for summary judgment applications in the construction industry, and even if the contract contained an arbitration clause, would habitually give summary judgment (typically within about a month or so of the issue of proceedings) for what it could identify as due before referring the balance of the dispute off to arbitration.[6] The halting of that helpful approach[7] meant that, by the early 1990s contractors seeking payment had typically to wait for many months or even years before getting their judgment or arbitral award.

The solution to this problem offered by the Latham report was a right to adjudication of any dispute arising under a construction contract. Like the later Australian model, it was to be a cash flow mechanism; a party dissatisfied with an adverse adjudication decision had to write his cheque, but then had his rights to litigate or arbitrate in full later. Unlike the Australian model, it was the intention that adjudication "must become the key to settling disputes in the construction industry disputes"; the UK system was designed, not only for the small contractor seeking payment, but for all construction disputes. That intention has become fully realised.

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6 For the high water mark of that approach, see *Ellis v Wates* (1976) 2 BLR 57, per Lord Denning:

> The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, as the master did in this case, to the jurisdiction under Order 14…There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputedly due, then the court can give judgment for that sum and let the rest go to arbitration...

7 Which was effected by a number of cases starting with *Associated Bulk Carriers Ltd v Koch Shipping Inc* (1977) 7 BLR 28, and running through to *Hayter v Nelson* [1990] 2 Lloyd's Rep. 265 (which abolished the earlier distinction between a bona fide dispute and an attempt to dispute the indisputable for the purpose of stay of court proceedings for arbitration; from that case onwards, defendants could obtain for themselves the delays inherent in an arbitral system with no summary judgment mechanism merely by raising a finger and saying, "I dispute this") and *Crown House Engineering v Amec Projects Limited* (1990) 6 Const LJ No. 2 Page 141, in which Lord Bingham said:

> The high cost of litigation, and the premium on holding cash when interest rates are high, greatly increase the attractiveness to commercial plaintiffs of procedural shortcuts such as are provided by Ord 14 and Ord 29, r 12. A technical knock-out in the first round is much more advantageous than a win on points after 15. So plaintiffs are understandably tempted to seek summary judgment or interim payment in cases for which these procedures were never intended. This is a tendency which the courts have found it necessary to discourage: *Home and Overseas Insurance Company Limited v. Mentor Insurance Company (UK) Limited* [1989] 3 All ER 74; *British and Commonwealth Holdings plc v Quadrex Holdings Incorporated* [1989] 3 WLR 723.

The UK Legislation

There were a number of other underlying features of the UK legislation which distinguish it from the later legislation in Australia:

Firstly, it was treated as apolitical. As Sir Michael Latham himself recalled in 2004, in his review of the review of the reforms:

> *"(The Bill) was deliberately drafted to seek to hold a fair balance between the various conflicting views, and to reinforce fair contract conditions…At no stage was it seen in partisan terms…"*

In operation, the legislation has, in large measure, been welcomed both by main contractors and sub-contractors. This stands in contrast to the position that has sometimes obtained in Australia, where the Hansard record shows that adjudication legislation has been seen more often as an industrial relations matter, and in particular as a means of shifting the balance of power from the big business of contracting to small "subbies".[8]

Secondly, the legislation did not position itself as a process designed to circumvent the lawyers, and indeed in the consultation and debate stages was promoted vigorously by the specialist construction solicitors,[9] who saw the mechanism, not as a threat, but as providing an opportunity to provide a much faster and more cost effective means of providing dispute resolution to construction industry clients.

Thirdly, the inroads that the legislation made into the contractual process were comparatively modest. It set up a default payment mechanism for cases where the contract was silent about payment terms, and banned pay-when-paid clauses, but apart from that, made no significant inroads into the parties' freedom to make whatever contractual arrangements they want.

Fourthly, this relatively *laisser faire* approach was reflected in the detail of the adjudication provisions. These were certainly central to the scheme of the legislation, but parties were given the freedom to agree the precise form of the adjudication they wanted, and who they wanted as their adjudicator. No governmental adjudication registrars or other officials were provided for.

The Central Role of Adjudication in the UK

The revolutionary effect of the legislation did not lie in any novelty of adjudication as a mechanism, since it had already been around and in some limited use for a few years. Nor did it lie in its radical nature; rather adjudication sits somewhere around the middle of the field of available dispute resolution techniques. If these are placed in a grid showing increasing order of formality from top to bottom, and increasing degrees of finality from left to right, the resulting picture is broadly as follows:

8 See, by way of example the debates in the Victorian Legislative Assembly on 13th June 2006 and the Legislative Council on 18th July 2006.

9 Originally known as the Official Referees Solicitors Association, and later – following the change of name of the specialist court – as the Technology and Construction Solicitors Association.

					*More binding*
	Negotiation				
		Certification/ Engineer's Decision			
	Mediation				
	Hybrid form ADR				Expert Determination
			Adjudication		
Mini-trial					
	DRB				International Arbitration
				Domestic Arbitration	
More formal					Litigation

Rather, the profound change has lain in the very broad application of adjudication as an intermediate dispute resolution technique to virtually every type of dispute that arises in the construction industry, with no contracting out allowed. It sits adjacent to, but with some differences from, the various other techniques:

	Key points of similarity	*Key points of difference*
Certification	The process produces a prompt evaluation of payment and other contractual entitlements	Unlike many certifiers, the adjudicator is truly independent, and unlike all certifiers is not limited to considerations provided for in the contract[10]
ADR	Similar timeframe and cost; small adjudications are comparable to mediations and larger adjudications are more akin to mini-trial or hybrid processes[11]	Unlike mediation, mini-trial or hybrid processes, the adjudication always produces an enforceable result
Dispute Review Boards	Similar approach to scope and process; in many respects, DRBs are the US equivalent to adjudication	The popularity of DRBs in major projects in the USA has not spread much to the UK
Arbitration	Dispute resolution in the private sector before an agreed or appointed person	Adjudication is much quicker and cheaper than arbitration
Expert determination	Rapid and enforceable determination of issues	The decision of an adjudicator is not finally determinative of the parties' rights

10 It is sometimes mistakenly thought that all an adjudicator has to do is to implement the express payment mechanism in the contract. In fact, both in the UK and in Australia, the adjudicator is charged with deciding what is due, and that potentially entails the consideration of anything (provided for in the contract or not) that would provide a defence in law; see below.

11 See for example *Building Contract Litigation: Practice and Precedents* (supra) for an account of the use of these processes in construction disputes.

The Adjudication Mechanism

The legislation[12] was contained in section 108 *et seq*[13] of the *Housing Grants, Construction and Regeneration Act 1996*. The final Act is not well drafted;[14] the original Bill was even worse. The way the legislation works is as follows:

- parties to a construction contract are given a right to adjudication pursuant to a compliant procedure;
- the Act sets out eight features of a compliant adjudication scheme;
- if a construction contract does not contain a compliant procedure, then the terms of the statutory Scheme for Construction Contracts (a piece of subordinate legislation) cut in by way of statutory implication.

The eight compliance points are as follows:

1. The contract must enable a party to give notice at any time of his intention to refer a dispute to adjudication.
2. The contract must provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice.
3. The contract must require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.
4. The contract must allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred.
5. The contract must impose a duty on the adjudicator to act impartially.[15]
6. The contract must enable the adjudicator to take the initiative in ascertaining the facts and the law;
7. The contract shall provide that the decision of the adjudicator is binding until[16] the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
8. The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.[17]

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12 The legislation is very slightly different in Scotland and Northern Ireland from the legislation which extends to England and Wales.

13 It seems that the government department in question was allowed just one Bill that session, and so they lumped a collection of disparate measures into a single Bill.

14 By way of example, the enforcement mechanism in the Act provides that an adjudicator's decision be enforced as though it were a peremptory order made under section 42 of the *Arbitration Act 1996.* This statutory fiction has proved so obscure that no court has been able to implement it, and instead the courts have developed a settled route to enforcement as a matter of summary judgment.

15 This is an obscure requirement, because an adjudicator is under a duty to act impartially regardless of any express contractual provision to that effect. The safe course for draftsmen of adjudication provisions is to spell out the duty expressly, notwithstanding that it may be arguable that it is sufficient for the duty to be imposed as a matter of implication.

16 The word "until" does not preclude the court from finally determining the dispute before or at the same time as the adjudicator's decision can be enforced.

17 Prior to the Act, it was not normal for exemptions of this kind to extend to employees or agents. And so on this narrow ground, if no other, virtually none of the previous adjudication schemes satisfied the 1996 statutory requirements.

There are a number of features[18] of the UK system that are different from the Australian systems:

- There has been a proliferation of detailed adjudication rules, all incorporating the 8 essential elements, but differing in detailed procedures.[19] Only very rarely have there been attempts to introduce markedly loaded provisions.
- Claims can be brought by employers against contractors (and contractors against sub-contractors) as well as *vice versa*. Such claims include reverse ambushes, whereby employers who are impatient of contractors spending too long preparing claims can adjudicate on what, if anything, is due. But most claims have been for payment of sums due under the contract.[20]
- Adjudicable disputes include those under professional engagements, including architects' and engineers' appointments. But these are fairly rare.[21]
- The obligation on the adjudicator to use his initiative means that UK adjudicators in larger cases regularly[22] call meetings at which they ask questions of and listen to the parties. In valuation cases, these are in the nature of working meetings with the quantitiy surveyors. In other cases, there are mini-trial type hearings where the parties are represented by lawyers.
- The freedom from government regulation of appointments, and the involvement of lawyers from an early stage of the draft legislation, has led to many adjudicators, particularly in larger cases, being highly qualified lawyers or arbitrators. Adjudication appointments are regarded as rather more professionally prestigious than appears to be the case in Australia.[23]
- In large or complex cases, the timetable is sometimes extended out to several weeks by agreement.
- The loser must write his cheque, unless he can impugn the whole adjudication process;[24] there is no let-out if he commences litigation or arbitration, as under the original NSW and Victorian systems.
- It is rare for UK systems to allow disputed sums to go to a trustee-stakeholder account, and indeed the government's January 2006 analysis proposes an outright legislative ban of the practice.[25]

18 The UK experience has been fairly well researched, not least by the Adjudication Reporting Centre (ARC) of Glasgow Caledonian University. Their latest report, Number 7 of August 2005, is available on www.adjudication.gcal.ac.uk.

19 Eg the RIBA (architects) procedure, the ICE (engineers) procedure, the NEC (new engineers) procedure, TeCSA (specialist solicitors) procedure, etc.

20 About 60% are primarily concerned with payment issues, about 20% with delay, and 10% with other withholdings; see ARC Report #7, Table 9.

21 Only about 2.5% of adjudications are claims for professional fees, and just 0.2% are for professional negligence; see ARC Report # 7, Table 9.

22 See below.

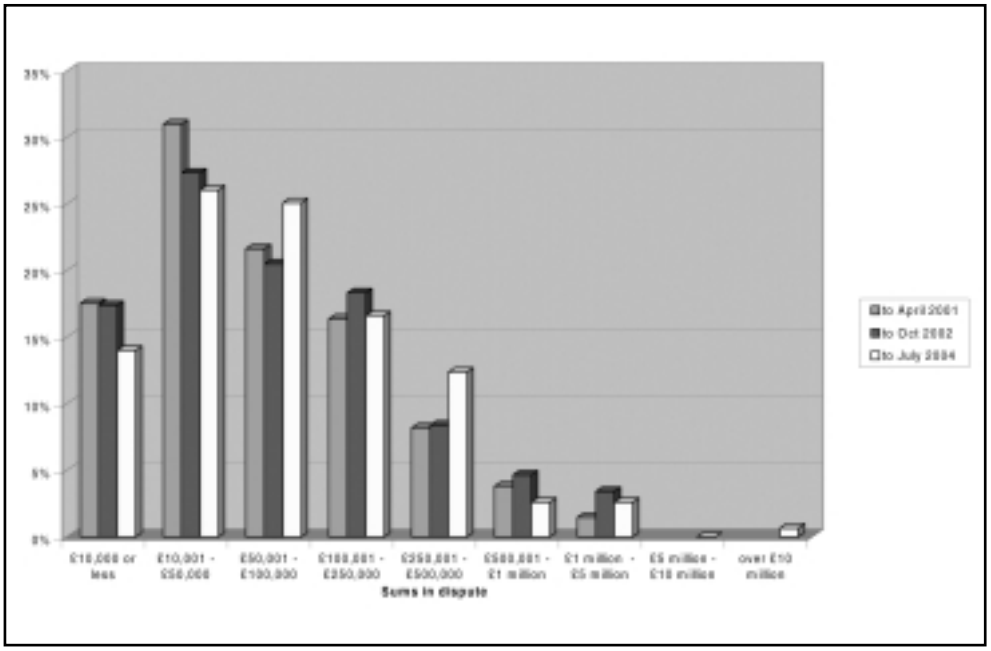
23 Such appointments are typically made by agreement, and not by nomination. Very senior solicitors and QCs tend to welcome such appointments. A few have abandoned their previous practices in order to undertake such work exclusively.

24 See below.

25 Improving Payment Practices in the Construction Industry, DTI, www.dti.gov.uk/construction/hgcra/consultanalysis.pdf.

- There is very little scope in the UK system for a contractor to obtain a "knock-out blow" based on his employer's failure to follow some prescribed paperwork procedure, such as the Australian payment schedule requirement. The employer loses his right to set-off if he fails to serve a set-off notice, but he still has the right to argue his valuation points in adjudication regardless of what notices or schedules he has served.

Most adjudications are of medium sized disputes: the trend is perhaps towards slightly bigger cases being taken to adjudication, as suggested by the following table:[26]



26 This table is taken from ARC Report #7, Figure 3, whose permission for reproduction is gratefully acknowledged.

Definition of Construction Contract, and Contracting In

The UK legislation excludes contracts with residential occupiers. At the time the legislation was being drafted, those responsible evidently felt that the task of picking their way through the minefield of consumer protection would be just too hard, particularly in light of the European legislation, which is capable of overriding UK legislation. There is thus no statutory right to adjudicate in residential construction contracts. But it is interesting to note that parties often now voluntarily include adjudication provisions in residential construction contracts, and some of the standard forms now so provide. There was one early case in which such an adjudication agreement was struck down under the consumer legislation,[27] but since then, there has been a string of cases[28] in which adjudication agreements in residential contracts have been upheld.

Indeed, whilst the UK legislation prohibits contracting out of adjudication, there have been many examples of parties contracting in.[29] This is in contrast to the position in Australia, in which the concept of contracting in remains novel (it appears to be only in South Australia that any moves are being made in this respect).[30]

There are probably two reasons why contracting into adjudication has to date proved more popular in the UK than in Australia:

- The way the UK legislation works is to require the parties to a construction contract to include an adjudication agreement in their construction contracts. There is precious little difference between a contractual adjudication agreement that the parties have included because they want to, and one that they have included because they have to, or indeed one that is there for both reasons.
- The underlying neutrality of the UK adjudication process referred to above means that both parties are likely to see it as a practical answer to the problem of excessive dispute resolution costs and time, and not as weapon for a contractor to wield against his employer.

The Appointment of Adjudicators

Unlike the NSW system, parties in the UK have complete freedom to choose their adjudicator or, if they prefer, their nominating body. In practice, it is rare for the parties to name their chosen adjudicator in their contract.[31] In many cases, the parties will agree on their adjudicator when a dispute

27 *Picardi v Cuniberti* [2002] EWHC 2923, applying the *Unfair Terms in Consumer Contracts Regulations 1999*.

28 Including *Allen Wilson v Buckingham* [2005] EWHC 1165, which reviewed some of them

29 Not only in the residential sector, but also the energy infrastructure sector, which is also largely excluded from the UK legislation.

30 At the time of writing, South Australia and Tasmania are the only States without a statutory adjudication scheme (it is currently under government consideration in SA). For a move towards a contractual scheme, see the work of the Contractual Adjudication Group at www.bigbutton.com.au/~afa.

31 There are probably two main reasons for this:

1. the parties cannot know in advance what sort of dispute will arise – it might be one calling for engineering, or valuation, or legal skills, and
2. there is too great a risk that any adjudicator worth his salt will be otherwise engaged at the moment his services are called on.

Thus adjudicators are named in the contract in less than 50% of cases.

arises on a "better the devil you know" principle. In large cases, they will often choose a construction specialist solicitor, but in smaller valuation cases, a quantity surveyor or other construction professional is much more usual.

There is no substantial evidence that any parties have been obtaining any advantage by applying any unfair pressure on the other concerning the identity of the adjudicator. The author's own experience in practice is that, in the rare cases where a party has thought that he might obtain an advantage by getting a "friendly" adjudicator appointed, such adjudicators have turned out to be independent-minded, and not necessarily friendly at all.

The freedom for the parties to agree on their adjudicator if they want to has not created any significant problems in practice, and has led to a couple of real advantages:

- adjudicators have been able to negotiate sensible and appropriate fee arrangements, unshackled by the commercial interest of any Adjudicator Nominating Body;
- the author's experience is that parties are more content to accept a decision from an adjudicator that they have both agreed on, as opposed to one from an adjudicator who has been imposed on them.[32]

Government Regulation of the Adjudicator Nominating Bodies

Unlike the position in Australia, there is no government regulation or licensing of Adjudicator Nominating Bodies in the UK; an ANB is any body that publicly holds itself out as such.[33] Neither is there any requirement for adjudicators to be trained, or to adhere to any programme of continuing professional development.

Perhaps surprisingly, the lack of government regulation has had no adverse impact:

- The great majority of appointments are made by professional body ANBs, and in particular the Royal Institution of Chartered Surveyors, the Royal Institute of British Architects, the Institution of Civil Engineers and the Technology and Construction Solicitors Association. Whilst there are a few "privateer" ANBs[34] in the UK, they have not had nearly as much impact as those in Australia.
- All the significant appointing bodies have training and qualification criteria, and, in various forms, CPD requirements.[35]

32 Discussions with other practitioners indicate that this perception is widely held.

33 Scheme for Construction Contracts, para 2(3). In the early drafts of the Bill, there was provision for some public control, but this provision was dropped for the practical reason that there was no departmental budget for it, and the government was anxious to get the legislation through. It was for much the same reason that the legislation appears in a compendium statute: the relevant department had several measures it wanted to get through, and an allocation of just one bill.

34 Ie commercial organisations who seek to make a profit from adjudication.

35 See ARC Report 7, Table 7.

Inquisitions and Hearings

The UK compliance point that the contract must enable the adjudicator to take the initiative in ascertaining the facts and the law is in stark contrast to eg section 22 of the NSW Act.[36] In practice, the author's experience is that it is somewhat rare for adjudicators to travel around like private detectives making enquiries, but in about 40% of all cases,[37] the adjudicator will initiate some form of interview or hearing process.[38]

These incursions by the adjudicators outside the mere content of the submissions are very often crucial. There is no doubt that many disputes involve conflicting versions of the facts, and a key part of the adjudicator's role is to determine which party's account of the facts is to be preferred. A few minutes or hours of questioning by or in front of the adjudicator[39] has often proved remarkably illuminating, and there is no doubt that it greatly increases the confidence felt by the parties in the effectiveness of the process.[40]

In those larger cases where there is a mini-trial style of hearing, the techniques of effective advocacy have proved much more akin to ADR processes than to full trial.[41] In the earlier development of the process, the English Bar proved to be rather slower than solicitors in adapting to the new climate,[42] but they will no doubt catch up.

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36 Whereby the adjudicator is limited to consideration of:
"(a) the provisions of this Act,
(b) the provisions of the construction contract from which the application arose,
(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."
But perhaps the practice in NSW will change somewhat in the direction of the UK practice as a result of the decision in *Pacific v Soliman* [2006] NSWSC 13, Brereton J.

37 And a much higher percentage in larger cases.

38 The ARC Report #7 presents the following finding of procedures adopted:

39 UK adjudicators do not allow cross-examination as such, but it is fairly common for them to allow exchanges to develop between the parties in which they will ask each other more or less rhetorical questions.

40 This point reflects not only the author's experience, but also that of other adjudicators and practitioners with experience of such processes, and is underlined by the steady proportion of cases in which such a process is employed.

41 In particular, "pleading points" and the like are usually ineffective in adjudications, and there is no scope at all for the sort of grinding cross-examination or review of written evidence that can occupy an arbitration for days or weeks on end. In adjudication, a focus on the central issue(s), often supported by just two or three examples, is typically far more effective.

42 Solicitors in the UK have been much more concerned than the bar in ADR type processes, and have thus had rather more experience of them. This is a point of difference from the Australian experience, where the bar appears to have embraced ADR rather more warmly. The author's impression is that things have, however, been changing in the UK, as the bar has been showing more interest in ADR.

Defences and the Scope of the Adjudicator's Jurisdiction

It was plainly envisaged by the draftsmen of the Australian security of payment legislation that adjudication would be essentially concerned with valuation issues, without much attention required of legal considerations. As the process has developed, however, it is clear that the Australian model is necessarily rather closer to the broad UK sweep that was envisaged:

- Many Australian construction contracts contain provisions for delay damages, ie sums in the nature of common law damages that are payable in the event of delay. Contrary to the expectation of some, it is now clear that claims to such delay damages are adjudicable.[43] In deciding if such delay damages are payable, an Australian adjudicator may inevitably have to determine what entitlement there is to extensions of time.
- The Australian legislation varies from State to State, but throughout, the adjudicator's function is to determine what is payable.[44] A sum is not payable if the other party has a defence to a claim for it. Such a defence might arise from a wide variety of legal principles. The contract might be void for mistake. The claiming party may have waived his rights, or become estopped from pursuing them. There may have been a compromise of them by way of accord and satisfaction. An Australian adjudicator will have to decide on any such matter that is raised, because he cannot otherwise determine if the amount claimed is payable.[45]

These two factors, taken together, mean that the potential[46] scope of the material to be decided by an adjudicator in Australia may, in some cases, be as extensive as in the UK.

Procedure Adopted	to October 2001	to October 2002	to July 2004
Employ a documents only procedure	56.0%	52.0%	56.9%
Employ an interview procedure with one party present	3.0%	0.3%	0.8%
Employe an interview procedure with both parties present	35.0%	21.0%	24.6%
Carry out a full hearing procedure	6.0%	6.0%	8.1%
Carry out a conference call			5.8%
Site visit		11.0%	1.9%
Legal debates			1.5%
Interview with contract administrator present			0.4%
Other		1.0%	

43 *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty. Ltd. & Ors* [2005] NSWCA 228

44 See for example the *Building and Construction Industry Security of Payment Act 1999* (NSW), section 22.

45 And also, it seems, some fundamental matters even if they are not raised; see *Pacific v Soliman* [2006] NSWSC 13, in which Brereton J said:

> …while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

46 The full extent of these considerations has yet to manifest itself. So far, there have been just a few dozen adjudication cases that have received any detailed attention from the Australian courts, compared to the hundreds of such in the UK; it is inevitable that a number of points will take rather longer to emerge and be developed.

Court Control – Natural Justice and Unnatural Justice

The UK courts' reaction to adjudication has been variable. Most judges, including those now sitting in the English Court of Appeal, have been supportive of the process and slow to allow challenges based on alleged breaches of natural justice or lack of jurisdiction. Others, including some judges of the Technology and Construction Court who have seen their caseload eroded by the new process, have gone to no pains to conceal their antipathy to the process, and have allowed enforcement challenges on the slenderest of grounds.[47]

Recent and appellate decisions have been similar in approach to *Brodyn v Davenport*,[48] ie

- Challenges are discouraged, on the basis that if losers do not like the result they are free to then litigate or arbitrate. In practice, it has been very rare indeed for an adjudication loser, having written his cheque, to avail himself of his right to a rerun; there has been just one case in which this consideration has been found to be factor to tighten the natural justice test.[49]
- Decisions will be enforced even if the adjudicator has made errors of law in reaching his decision.[50]
- The courts are slow to find breaches of natural justice.

Cost

There have been some very large cases adjudicated in the UK, and in some of these the cost of adjudication has been substantial, but still very much less (perhaps 10%) of the cost of litigating or arbitrating. In larger cases, most of the cost is spent with the legal team; in smaller cases, the parties may be unrepresented and there are just the adjudicator's fees to pay. Most adjudicators charge around £100 per hour (about $240); an experienced construction lawyer will charge much more.

There is not, in the UK, the same downward pressure on adjudicators' fees as there sometimes appears to be in Australia – the more prevalent industry reaction in the UK seems to be that adjudication is so much cheaper than litigation or arbitration that getting a reliable result is a much bigger priority than shaving a bit off the cost.

Summary

The UK experience has been one of success. The 1996 legislation applies to contracts entered into from 1998, and the take-up took another year or so to plateau; now there are many times more adjudications than cases taken to litigation:[51]

47 See eg the author's review of the caselaw at paragraph 5-7 of *Building Contract Disputes: Practice & Precedents* Sweet & Maxwell (London) Release 16.

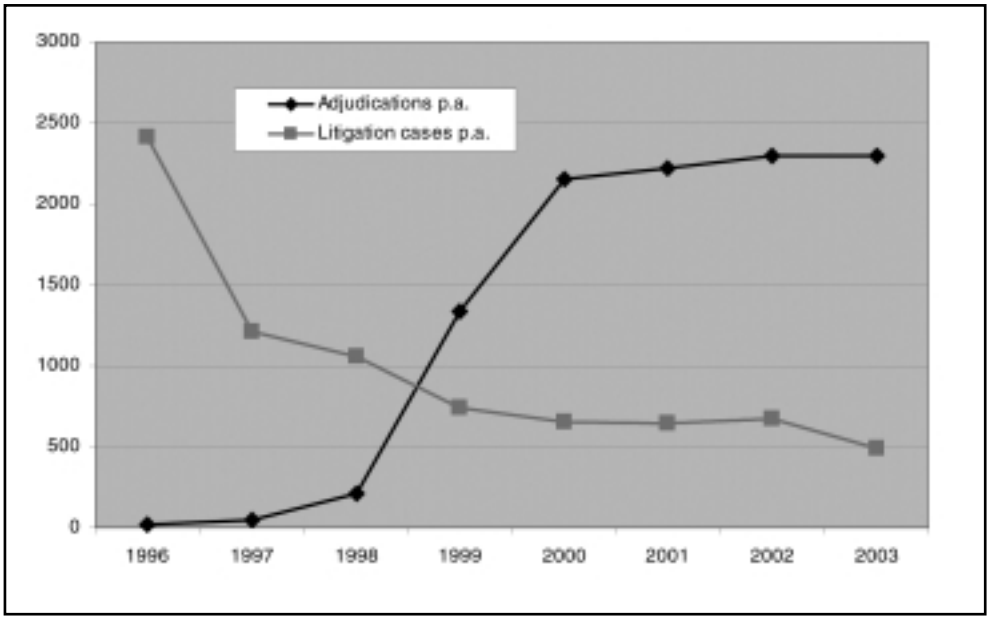
48 [2004] NSWCA 394, Hodgson JA, with Mason P and Giles J ageeing.

49 *Balfour Beatty v Lambeth* [2002] EWHC 597 (TCC). But a case on not dissimilar facts was determined the other way in the later Court of Appeal decision in *AMEC v Whitefriars* [2004] EWCA Civ 1418.

50 This has long been the approach of the court to the enforcement of expert determinations in the UK.

51 The adjudication figures for 1998 onwards are taken from ARC Report #7, which reports figures to March 2004, and adjusted slightly for non-reported adjudications. The litigation figures are taken from the UK government's Judicial Statistics, and adjusted for a number of factors, including TCC statistics as to the number of adjudication enforcements, which are not treated here as cases taken to litigation. The approximations made are those of the author.

Approximate numbers of UK adjudications/litigation cases in the first few years



Similarly, the growth of adjudication has been accompanied by a drop in construction arbitrations and mediations.[52]

These shifts have of course caused profound change, both in the industry, and in the practice of construction law. A more constructive and cooperative climate has materially displaced the old dispute-centered culture in which some cynical players would sacrifice their reputations and the success of their projects in order to hang onto the cash whilst a long and drawn-out dispute is litigated, and now that the industry has got a taste for much more affordable dispute resolution, the full cost of litigation or arbitration has become all the more unpalatable. There has been some change within construction law firms; they tend now to need more experienced lawyers and fewer assistants, and there has been a noticeable drop in the demand for the services of counsel.

The satisfaction level with adjudication in the UK seems to be very good:

- The author's experience in practice suggests that clients who experience the process find the results to be no more anomalous than arbitration awards, which are obtained at many times the cost and time.

52 See eg the fall in construction's percentage in the dispute sector breakdowns in CEDR's annual reports. Aggrieved parties are now often reluctant to mediate a dispute when, for about the same time and cost, they can get an enforceable result by adjudicating.

- Statistical evidence shows that complaints made against adjudicators run at a low level: only about 1% of appointments.[54]
- The system has proved popular, not only with subcontractors, but also main contractors and employers.[55]

This last point may be surprising, but an anecdote from the author's experience may go some of the way to explaining why this should be so. The author was acting for the UK government in relation to a dispute on the Millennium Dome, and thus alongside the construction manager. At the same time, the author's firm had also been acting for a subcontractor, and obtained a substantial adjudication decision against that same construction manager on another project. As the author was leaving a meeting, he was button-holed by a main board director of that construction manager: "Robert", he said, "Your people have been giving us a very hard time on … project". The author had just started to sidestep when the director went on: "Good thing too. I looked at the decision, and my people had obviously got it wrong. If it hadn't been for the adjudication, it would have gone to litigation which would have taken years, and I would have had to pay another million in legal costs as well as the claim. As it is, we've just negotiated another subcontract with your clients".

Morals for Australia

Are there any lessons that Australian States might learn form the UK experience? There are probably a number:

- The governmental controls on ANAs, and (in the eastern seaboard model, on party freedom to agree on their adjudicator) are unlikely to be having any beneficial effect. Adjudication would prosper more if parties were permitted to agree on the identity of their adjudicator.[56]
- Adjudication would be capable, without detriment, to cope with a rather wider ambit of case types than typically seen in Australia.
- There would probably be greater confidence in the process in Australia if adjudicators were allowed and encouraged to take a much more pro-active role in establishing which party is telling the truth and which is not where there are disputes of fact. That will probably entail some modest increase on the time available for enquiry and decision making.[57]

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53 In traditional litigation and arbitration, there has been a need in large cases for teams of assistants to deal with disclosure of documents and particularisation of pleading. In adjudication, these processes – which have often yielded little impact on the end result – have had virtually no place.

54 ARC Report #7, Table 6.

55 Particularly government employers, for whom traditional litigation or arbitration is unsatisfactory, because it takes too long, particularly for a government department that wants to close off its budgetary requirements promptly, and for whom ADR can sometimes lack the audit trial that they are looking for.

56 As would members of organisations such as IAMA, inasmuch as such members are likely to be the type of individuals that parties would choose. The losers from such a change would be the privateer adjudication organisations.

57 Sensible fine tuning of the legislation would arguably allow greater flexibility in the timescale, particularly in large or complex cases, easing of restriction on hearings and party representation at hearings, and some inquisitorial powers for adjudicators.

- As time goes by, adjudication respondents are more likely to raise defences that are not contemplated in the contract, but which nevertheless may defeat the payment claim.

Conversely, there are certainly some lessons that the UK could learn from the Australian experience, particularly in the area of enforcement and a much more straightforward jurisprudential basis for adjudication.[58]

What is remarkable, in both countries, is how well the process has weathered the different but undoubted shortcomings in the drafting of the legislation in both.

This paper was delivered at Drawing A Line In The Sand: New Approaches in ADR, the 2006 National Conference of the Institute of Arbitrators & Mediators Australia, Palm Cove, Queensland 28 May 2006.

58 In the UK, the statutory basis for enforcement being a dead letter (see above), there remains a fundamental uncertainty as to what cause of action is involved in an enforcement of adjudicator's decision. Competing theories – each of them readily arguable – are that:

1. the plaintiff is enforcing an express or implied contractual promise to comply with the adjudicator's decision;
2. the adjudicator's decision is enforceable *per se* as a matter of common law (this is the author's view);
3. the adjudicator's decision is merely binding evidence of the rights arising under the underlying contract.

For most practical purposes the issue is of academic interest only, but there are some potential ramifications, for example in terms of limitation periods. See the series of articles in *Construction Law Journal* at 19 Const LJ 144 and 193, 20 Const LJ 19 and 21 Const LJ 435.