"Everybody Has Won and All Must Have Prizes"[1]: How the Dispute Board Process Could Improve UK Adjudication[2]

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Adjudication has been hailed as a great success: it has certainly taken pressure off the courts and compared to litigation and arbitration it has provided, at least in theory, a quick and cheap way for the construction industry to have disputes resolved. But as adjudication has evolved it has attracted criticism for not being as quick and cheap as it was intended to be and for the problems that have sometimes occurred when the process has been used for large and complex disputes, or those not regarded as suitable for this method of dispute resolution. Although some of the changes which are due to be introduced in the Local Democracy, Economic Development and Construction Bill may help to address some of the criticisms, they are very likely to generate others. In this article, I will first take a step backwards and look at what Latham originally intended for adjudication, go on to discuss the adjudication process which is used on many international projects and then how this could be used to help the adjudication process in the United Kingdom evolve in a way that is perhaps closer to that originally envisaged by Sir Michael Latham.

Adjudication was conceived as a way of improving cash flow in the construction industry. Latham published his report in 1994[3] in which adjudication was put forward as an interim decision making process, to be carried out mostly during the duration of the project, not as a replacement for litigation or arbitration but as a precursor to it. The process provided for reference of a dispute to an adjudicator if agreement could not be reached on the value of a variation,[4] and it was recommended that the adjudicator was to be named in the contract.[5] In practice most adjudicators have been nominated by a nominating body which was named in the contract, but in the last few years there has been a significant move towards parties either naming the adjudicator in the contract, or agreeing the appointment of one when a dispute has arisen. The report also anticipated that on larger projects it might be necessary to name a number of suitably qualified adjudicators to cover different aspects of the project which might give rise to a dispute.[6] I am not aware of many projects

on which this has been the case, although a recent example is that of contracts for the 2012 Olympics projects.

Despite its apparent success, the number of adjudications has steadily declined since a peak in 2001–02.[7] At the same time there has been an increase in the number of high value adjudications in the £5–£10 million range and a decline of about 65 per cent in smaller claims of £10,000 or less. In 2001–02 only 33 per cent of adjudications were commenced before practical completion, which is perhaps not quite what Latham had in mind when he put forward adjudication as a process to be carried out while the project was on site. However, by 2007–08 it was reported that the number had fallen to 17 per cent. The evidence suggests that, contrary to Latham's aims, adjudication is increasingly being used after work on site has been completed and for larger final account disputes, rather than issues that have arisen during the course of the works.

In section 9.10 of the Latham Report it was anticipated that:
"If the proposed system of adjudication works properly, many current arbitrators[8] will be making decisions during the course of the project. There are provisions for speedy arbitration hearings during the course of the contract under rule 7 of the JCT Arbitration Rules 1988. But the experience of arbitrators themselves is that they are little used. Full arbitration after the completion of the contract will, hopefully, become much rarer."

This is also how the courts originally thought adjudication would be used, and H.H. Judge LLoyd QC summarised the position in *Herschel Engineering Ltd v Breen Property Ltd (No.2)*[9] in which he commented as follows:

"Parliament wanted adjudication to deal swiftly with problems as they arose during the course of the contract and which were not or could not be solved quickly by discussion … but could be resolved by the adjudicator so that the parties could get on with the contract."

Latham thought adjudication would be applied to individual problems encountered on site during the course of the project, some of which were likely to be quite small in value. However, the evidence suggests that in practice this is not how adjudication is used. H.H. Judge Toulmin CMG QC in *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd*[10] compared the original intent to that which adjudication had evolved to become:

"… a procedure which Parliament introduced to provide a quick, easy and cheap provisional answer so that, in particular, sub-contractors were not unjustly kept out of their money. It has developed into an elaborate and expensive procedure which is wholly confrontational …"

I think there are good reasons why adjudication has moved in this direction. Anecdotal evidence suggests that there are increasing concerns about the costs of adjudication and the increasing amount of time required as higher value and more complex cases are

referred. Some have suggested that adjudication has become more akin to arbitration, but without the advantages of[11] and of course without the benefit of a final and binding decision. Referring parties prefer to save up disputes until towards the end of the project and consolidate what might have been a number of individual disputes into one large referral.

A body of case law has been developed around cases that have found their way to the courts for final determination or enforcement, and therefore adjudication has become a more legalistic process than was anticipated when it was introduced. As a consequence, the parties now require legal knowledge, or, except for the smallest and most straightforward disputes, require a legal advisor. That has had the effect of increasing the costs, and hence the risk of losing has greater consequence. Even the winner is exposed to costs risk because party costs are not usually recoverable under most adjudication rules. It is therefore more cost effective to consolidate what might have been a number of smaller disputes into a larger claim, possibly at final account stage, for instance. Another reason for leaving dispute resolution to the end of the project is because it is a non-consensual and adversarial process. Although relationships may be strained during the course of the project, adjudication can really bring an end to any remaining good relations between parties.

At this stage it is worth reviewing what a successful dispute resolution process might ideally achieve. For both parties it might simply be about winning, but in most cases it is about finding the most appropriate settlement which allows both parties to move on. That settlement needs to reflect the respective strengths and weaknesses of each party's position. It should be arrived at with as little effort and management resources of the parties as possible, it should cause the minimum amount of disruption to the parties' business activities and ideally it ought to have a degree of predictability. In summary, the characteristics of a successful method of dispute resolution would be that it was fair, quick and cheap.

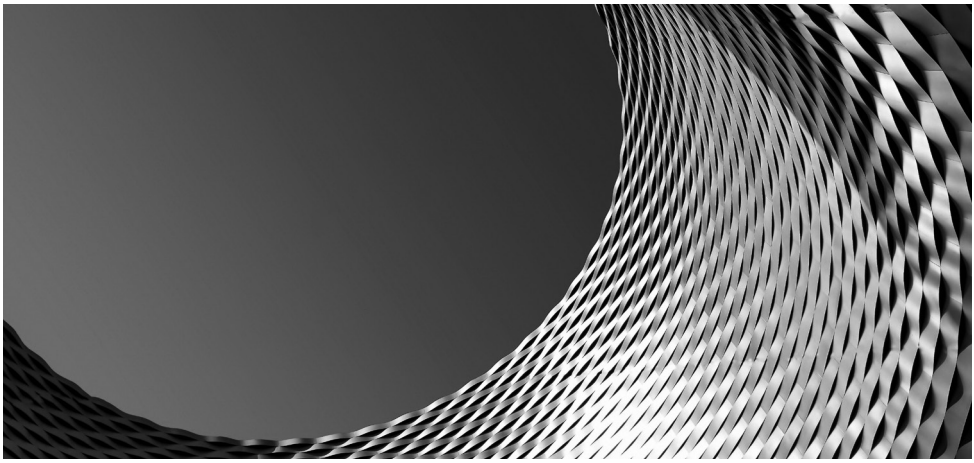
Despite increasing costs, adjudication is still very cost effective when compared with litigation and most forms of arbitration and in all but the largest and most complex cases it is still quick. Despite its perceived flaws very few adjudications proceed to final determination by litigation or arbitration. It could therefore be argued that parties are generally satisfied the most appropriate settlement has been reached. It is accepted that adjudication sometimes amounts to rough justice, but it appears nonetheless to be justice parties are prepared to accept despite its imperfections.[12] A decision in adjudication with which the parties are prepared to live is likely to be a decision that was not very far from what their expectations might have been if they had arrived at a similar result by negotiation, possibly with the involvement of a third party neutral to assist if required. In that case was it really necessary to use an adversarial procedure to resolve the dispute?

Let us take a look at what the alternatives might have been. There was of course direct negotiation. It is easy to suggest this course of action but much more difficult for parties

to get around a table and do this properly, if at all. In many cases a third party neutral is required to assist the process. The parties might decide to submit to an early neutral evaluation. Or the parties might decide to mediate. In both of these cases the independent third party will need to become familiar with the parties' issues and ideally with the background to the project,[13] although there is often little time for this. In both of these processes the parties retain a certain amount of control over the outcome. For instance, a party is not compelled to settle in mediation unless it has negotiated a settlement it is prepared to accept, and mediation, even if it does not result in a settlement, provides a good opportunity for the parties to explore the issues.

Another method of dispute resolution that could be employed is expert determination, but in my view this is no less adversarial than adjudication, and the parties have virtually no control over the outcome from which there is no appeal, meaning there is more at stake. Furthermore, the third party neutral will have had no previous experience of the project and there will therefore be a learning curve while the neutral is brought up to speed with the contract documentation and the issues in dispute. This lack of knowledge of the project can be avoided by appointing the neutral at the beginning of the contract. This principle underpins contracted (or project) mediation where the mediator is retained from the start and is available throughout the duration of the project. This technique was successfully implemented by Resolex on the Jersey Airport project.[14]

No matter whether you choose adjudication, mediation, early neutral evaluation or expert determination, they are all what I will term reactive methods of dispute resolution. They all take place after a dispute has crystallised, and the parties are inevitably entrenched in their positions and have probably already run up costs before the process formally starts. It has been claimed that contracted mediation provides the parties with a safety valve that allows



them to air issues before they escalate into conflict.[15] However, mediation is traditionally a method which is used after a dispute has arisen and despite the apparent advantages of contracted mediation it has not been widely used.

So, what are the characteristics of a proactive method of dispute resolution? In my view it is a process that allows a third party neutral to monitor the project, to be aware of the potential for disputes and heed the warning signs and to promote discussion of problems amongst the parties. It could be said that contracted mediation could provide all of these features, but it does not provide for a formal method of dispute resolution as set out by Parliament[16] in the event the discussions fail.[17] There is, however, a process that has all these features and which has been successfully used for years on numerous international projects: it is a process that begins with proactive dispute avoidance and if necessary can proceed to adjudication, and it is called a Dispute Board.

The main difference between a Dispute Board and adjudication as we currently know it in the United Kingdom is that the principle of dispute avoidance underpins the former. The Board (which can consist of one, three or more members) is appointed at the outset.

The Board is kept up to date with the progress of the project and holds regular meetings on site to monitor the project and to allow the parties to discuss any issues they may have. Disagreements are going to arise on even the best run projects, but it is not until a disagreement impacts on one of the parties' interests that it is likely to give rise to a dispute. The Board has the opportunity to discuss with the parties any issues they (or it) consider might give rise to disputes before they happen. The parties should have taken steps to ensure they have jointly appointed a well-respected board in which they can have confidence. If they have done so, the discussions are likely to be fruitful and many problems that arise on site can be dealt with before they become formal disputes.

Experience in international contracts suggests that for the most part using a Dispute Board really does help to avoid disputes, and if a dispute cannot be avoided it can be referred to a panel that is familiar with the project for a formal process of adjudication. In international contracts none of this is new, and it has been a feature of the FIDIC 1999 suite of contracts for some time. The process is regarded as being so advantageous that many of the international development banks now insist on the appointment of a Dispute Board because they consider the process can positively contribute to the success of the project and by doing so reduce their financial risks.

This process has many advantages and possesses many of the characteristics originally put forward by Latham. It is a process that takes place on site, during the course of the contract and certainly mostly before Practical Completion, by third party neutrals who are appointed at the commencement of the contract and who are therefore familiar with it. It is inherently non-legalistic, concentrating in the first instance on practical dispute avoidance and practical solutions to problems, which makes it less adversarial. It can be quick and therefore cheap. The parties have considerable control over the outcome,

in fact it is mainly in their hands, under the guidance of a Board which they respect and have confidence in. The mere presence of the Board[18] may encourage the parties to settle differences for themselves. The parties can ask the Board for an informal non-binding recommendation which may help them to settle the matter and in the event the dispute avoidance process fails the matter can be referred to formal adjudication for a binding decision.

Just as it is possible to have contracted or project mediation, it is possible to have contracted or project adjudication, where the adjudicator is appointed at the commencement of the contract, is available to help the parties avoid disputes, is available to provide non-binding recommendations and ultimately to adjudicate a dispute and give a decision if that is what is required. This can apply whether there is one adjudicator or several adjudicators.

Sceptics may say that the use of a Dispute Board is more expensive than adjudication as we know it today. The additional cost of having an adjudicator appointed at the outset and available to the parties for the duration of the contract should be considered against the costs involved in dealing with disputes by an entirely adversarial process. For smaller projects the Board is unlikely to consist of more than one member and for very small projects contracted adjudication may not be cost effective at all. However, in the case of larger projects evidence suggests the cost of the Board is modest[19] compared to the value of the contract, and in particular when compared to the costs of having disputes proceeding to litigation or arbitration. Anecdotal evidence suggests that Dispute Boards are very successful at avoiding disputes, with only a very few proceeding beyond the dispute adjudication stage.[20] The Dispute Resolution Board Foundation (DRBF) has collated a database[21] of projects which have used Dispute Boards. Many of these projects are based in the United States, where Dispute Boards have been used for a number of years, but the statistics speak for themselves. The DRBF is continuing to collate information about the use of Boards worldwide to verify anecdotal evidence of their success rates.

The use of Dispute Boards in the United States is different from that in most other parts of the world in that they are review boards giving non-binding advisory opinions (DRBs) rather than adjudication boards (DABs) which produce contractually binding decisions. There is no doubt the DRB has been successful in the United States, and some argue it is the better option for all disputes precisely because it is not a process of adjudication and it does not result in an interim binding decision.[22] However, in the United Kingdom we cannot ignore a party's right to adjudication, and the adoption of the DRB process is not going to change that. The DAB process is flexible enough to allow for all the informal dispute avoidance procedures of the DRB before one party refers the dispute formally for adjudication, which remains a statutory right.

In the United Kingdom there would be nothing to prevent a party referring a dispute straight to adjudication without the involvement of the Board in informal discussions; however, in the case of the 2012 Olympics, which has no contractual provisions or agreements which

prevent a party bypassing the dispute avoidance procedures, the lack of evidence of formal disputes means the process appears to be working. Hopefully the parties consider it is better to have the issues aired in front of a Board that is familiar with them, the project and the problems, and to first try to find a non-confrontational solution, and only if all else fails to have that dispute dealt with by the same Board in accordance with the national law.

The provisions for dispute resolution in international contracts such as the FIDIC suite are not compliant with statutory provisions in the United Kingdom without modification. This has been recognised in the ICE Dispute Resolution Board Procedure, Alternative 2,[23] which is based on the FIDIC procedures but suitably modified so as to be compliant with the Housing Grants, Construction and Regeneration Act 1996. These rules allow for the DRB to provide a non-binding recommendation or a contractually binding decision which is enforceable until superseded by agreement, arbitration or litigation. The contract will require some modification to incorporate provisions for a DAB and either the ICE Rules or whatever rules the party writing the contract wishes to incorporate.

Although Dispute Boards have not been commonly used in the United Kingdom, where they have been used they have been effective. Projects have included power plants, motorways and hospitals, the Docklands Light Railway, Eurotunnel and the High Speed Rail Link.[24] Most have reported that few disputes were referred to the Board, and in most cases no disputes were referred to litigation or arbitration, and as such they appear to be good examples of dispute avoidance in action. The best known current project using a type of Dispute Board is the 2012 Olympics projects, although here the functions of the independent dispute avoidance panel (IDAP) and that of the adjudication panel are separated, which means this is not a pure Dispute Board. The functions of dispute avoidance and dispute adjudication were separated because of concerns that adjudication decisions would not be enforced due to challenges on the grounds of a possible breach of natural justice. Such a breach could arise if the IDAP used mediation techniques to avoid disputes and then adjudicated the same dispute.[25] Mediation does not form part of the Dispute Board procedure, under which all negotiations take place with both parties present and at the same time, and therefore in my view these concerns were misplaced. Nonetheless, despite this variation on the traditional Dispute Board format, it seems to have been effective, because no disputes appear to have arisen out of the various projects; at least none that I am aware of yet.

Adjudication has justifiably been hailed as a success, but as it has evolved it has done so at the expense of many of its original aims, becoming more costly and time consuming and used less during the course of the contract. It is clearly not good for adjudication to be considered as just another form of arbitration, which some have advocated it is, even if adjudication is different. There is an opportunity to make adjudication more successful and to make it a less adversarial process through the inclusion of dispute avoidance procedures. Those procedures have been used internationally for years and for a small number of projects have been used successfully in the United Kingdom too. The process is fully compatible with UK legislation, and rules already exist that allow the provisions to be easily incorporated into contracts.

The title of this article is the quotation from “Alice in Wonderland” which Sir Michael Latham referred to in the Foreword to his report.[26] This was the starting point for adjudication in 1994, but the words are as true today as they were then. Although the means of delivering the results has evolved away from the initial principles envisaged by Latham and set out in his report, by using the contracted adjudication procedures adopted as part of international adjudication there is no reason why adjudication in the United Kingdom should not be brought closer to its original intentions so that everybody might win and all might have prizes, including the better image and better rewards for the construction industry considered possible by Latham.

1 *Taken from the Foreword to the Latham Report, Constructing The Team (HMSO, 1994), in which Sir Michael Latham quotes the words of the Dodo from Lewis Carroll’s Alice in Wonderland.*
2 *This article assumes that the reader has a basic knowledge of how a Dispute Board operates.*
3 *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry (July 1994).*
4 *See Section 5.18, paragraph 7.*
5 *See Section 9.4.*
6 *See fn.81.*
7 *Report No.10 (June 2010), Adjudication Reporting Centre, Glasgow Caledonian University.*
8 *The Latham Report anticipated that arbitrators would carry out adjudications.*
9 *Herschel Engineering Ltd v Breen Property Ltd [2000] B.L.R. 272 QBD (TCC).*
10 *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd [2004] EWHC 888 (TCC); [2004] T.C.L.R.*
11 *For instance, in most cases parties’ costs are not recoverable in adjudication, third parties cannot be joined in the proceedings and in general counterclaims cannot be dealt with in the same adjudication.*
12 *Alternatively, they may have been very unhappy with the adjudication decision but simply have no appetite to continue to litigation or arbitration (or perhaps no money), in which case it is questionable whether adjudication was the best process to use.*
13 *Some might argue this is not necessary in mediation; my own view is that for a successful outcome it is very useful for the mediator to have done so.*
14 *Stopping Disputes Before They Start”, Commercial Lawyer, February 2001.*
15 *E. Moore, Mediation In Business, IBA Business in Mediation, Global Round Up, April 2007.*
16 *I am of course referring to adjudication.*
17 *The parties could of course adjudicate afterwards, but this involves another neutral, and one which is not then familiar with the project and the issues.*
18 *Some have described this as being equivalent to the board “casting a long shadow”.*
19 *It is suggested it is between 0.1% to just over 1% of the contract value: G. Owen and B. Totterdill, Dispute Boards: Procedures and Practice (London: Thomas Telford, 2007).*
20 *Only about 2% of disputes have proceeded to arbitration.*
21 *Available on the DRBF website at http://www.drb.org/database_intro.htm [Accessed September 3, 2011].*
22 *D. Griffiths, Do Dispute Review Boards Trump Dispute Adjudication Boards in Creating More Successful Construction Projects? CIArb Arbitration, Vol.76, No.4, November 2010.*
23 *ICE Dispute Resolution Board Procedure, February 2005.*
24 *For more details on case studies see, for instance, Chern on Dispute Boards (Oxford: Wiley-Blackwell, 2008), Ch.4.*
25 *This problem arose in Glencot Development & Design Co Ltd v Ben Barratt & Son (Contractors) Ltd [2001]B.L.R. 207 QBD (TCC).*
26 *In which he said that better performance was required:*
“… but with fairness to all involved. Above all, it needs teamwork. Management jargon calls that ‘seeking win-win solutions’. I prefer the immortal words of the Dodo in Alice’s Adventures in Wonderland, ‘Everybody has won and all must have prizes’. The prize is enhanced performance in a healthier atmosphere. It will involve deeper satisfaction for clients. It will lead to a brighter image and better rewards for a great industry.”