"Dispute Review Boards" and "Adjudication": Two Cutting-Edge ADR Processes in International Construction[1]

by Harvey J. Kirsh[2]

"*You have a pretty good case, Mr. Pitkin. How much justice can you afford* ?"

(*Lawyer to his prospective client (caption to New Yorker magazine cartoon, J.B. Handelsman, (December 24, 1973)*)

DISPUTE REVIEW BOARDS: AN OVERVIEW

(i) Introduction

Most construction contracts contain mechanisms for the preliminary determination of disputes. For example, the 2007 revisions to the AIA (American Institute of Architects) series of contracts call for the appointment of an independent "**Initial Decision Maker**", who assumes the role, traditionally performed by the project architect/consultant, in rendering initial decisions for disagreements or disputes between the owner and the contractor[3]. Similarly, the most recent revisions to the Canadian standard form construction contracts (e.g., CCDC 2-2008, issued by the Canadian Construction

[1] This paper was delivered at the 2008 American Bar Association Annual Meeting program of the ABA Section of Dispute Resolution entitled "*The Emerging Global Order in International Construction 'Disputology': The Top 10 Cutting-Edge ADR Processes Employed in Construction World-Wide*" (August 9, 2008, New York)

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[3] This revision arose out of complaints by owners that they preferred to have the project architect advocate on their behalf in a dispute with the contractor, rather than serve as a neutral decision maker; and from skepticism by contractors as to whether project architects, who are paid by the owner, could serve impartially, particularly where the contractor's claims included allegations that the architect was negligent.

Documents Committee), although continuing the traditional role of the project consultant as the arbiter of first instance with respect to the interpretation, application, implementation, administration or enforcement of the contract, nevertheless call for the early appointment of a neutral, independent "**Project Mediator**" to supplement the dispute resolution function. A related process has been used on government projects in Hong Kong, in which a "**Dispute Resolution Advisor**" is jointly appointed by the government and the contractor to assist the parties, essentially though facilitated negotiation, in directly resolving disputes on the job[4].

However, large, complex construction and engineering projects are increasingly calling for the establishment of panels of "standing neutrals" to provide preliminary rulings upon disagreements and claims as they arise. Such panels are created either in the construction contract or at the outset of a project. Where the panel is mandated to provide a *non-binding opinion* on the merits of a dispute, it is generally referred to as a "**Dispute Review Board**" (or "**DRB**")[5].

According to The Dispute Resolution Board Foundation[6], which was established in 1996,

[4] See Luk & Wong, "Dispute Resolution Advisor as an ADR Method in Hong Kong Construction Disputes", AAA Handbook on Construction Arbitration and ADR, pp. 293-297 (2007), as referenced in See John W. Hinchey and Troy L. Harris, "International Construction Arbitration Handbook" (Thomson/West, 2008) (hereinafter called "Hinchey and Harris") , at *fn.* 7 of para. 1:10

[5] Unsuccessful attempts have been made to use "hybrid DRBs" to serve as arbitration panels issuing *final and binding decisions* as to disputes under a certain dollar amount, and issuing only *recommendations* as to disputes exceeding that dollar amount: see Robert A. Rubin, "*How NOT to Implement the DRB Process*", in Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 10, Issue 1 (February 2006), at page 13

[6] "The Dispute Review Board Foundation" changed its name to "The Dispute Resolution Board Foundation" in November of 2001, in order "*to conform with the dispute board trends on a global basis*", and particularly since DRBs are described in the DRBF bylaws as a "*means for prevention and **resolution***

a DRB consists of "*a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project*"[7]. Fairness, in terms of procedures and protocols, and the promotion and maintenance of good project relationships are cornerstone values of the DRB process[8].

Although the earliest reported use of a form of DRB (then called a "Joint Consulting Board") was on the Boundary Dam Hydroelectric Project in northeastern Washington in the 1960s[9], the genesis of the more common use of DRBs occurred in the mid-1970s on civil engineering works, particularly tunneling projects[10], such as the construction of the second bore of the Eisenhower Tunnel on I-70 in Colorado[11], and the Boston Central Artery Tunnel Project[12]. Other more recent tunneling projects employing the DRB process include the San Antonio River and San Pedro Creek Tunnels; the Bradley Lake Hydroelectric Power Tunnel; and Boston's Marine Industrial Park Tunnel[13].

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of construction disputes" (see "*Changing Our Name to Dispute Resolution Board Foundation*" in Forum (the newsletter of the DRBF, Vol. 6, Issue 1 (January 2002), at page 1

[7] See "*DRBF Practices and Procedures* Manual (January 2007)", Chapter 1, Section 1, page 1 (at http://www.drb.org/manual/1.1_final_12-06.pdf)

[8] See Jim Phillips, "*When is Fair Not Fair? Ethics in the DRB Process*", in Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 11, Issue 1 (February 2007), at page 1

[9] Richard A. Shadbolt, "*Resolution of Construction Disputes by Disputes Review Boards*" [1999] The International Construction Law Review 101 at 104

[10] See Hinchey and Harris, at para. 1:10. Also see Richard A. Shadbolt, "*Resolution of Construction Disputes by Disputes Review Boards*" [1999] The International Construction Law Review 101 at 103*ff*

[11] See "*DRBF Practices and Procedures* Manual (January 2007)", Chapter 1, Section 1, page 2 (at http://www.drb.org/manual/1.1_final_12-06.pdf)

[12] See Shipley, Expanding the DRB's Role – The Boston Central Artery Tunnel Project's Experience with Advisory Dispute Review Boards, as referenced in Hinchey and Harris, at *fn.* 2 of para. 1:10

[13] See "*DRBF Practices and Procedures* Manual (January 2007)", Chapter 1, Section 1, Appendix A (Case Studies), page 2 (at http://www.drb.org/manual/1A_Case_Studies.pdf)

Interestingly, a recent Google search of "*Dispute Review Boards*" generated almost 2.3 million hits (!!). Drilling down into this informal search has served to confirm that, aside from underground tunneling projects, the DRB process has also been used on a multitude of complex private and government construction projects throughout the world, including heavy civil engineering, industrial, institutional, and commercial projects.

Sample U.S. projects using DRBs include[14] Washington, D.C.'s Metropolitan Transit Authority; Phoenix's America West Arena (concert hall and Phoenix Suns' basketball arena); the Inter-Island Terminal of Hawaii's International Airport; Washington State's SR-90 Bellevue Transit Access project; and Colorado's Hanging Lake Viaduct[15]. Furthermore, domestic owner agencies that have used DRBs include State highway departments (e.g., The California Department of Transportation (Caltrans) and Florida Department of Transportation (FDOT), which use DRBs on almost all projects); public transit authorities; municipal public works projects (including bridge rehabilitation, building renovation, combined sewer overflow tunnels, convention centers, court houses, highways, libraries, parking structures, prisons, sewer pipelines and tunnels, sewerage treatment facilities, schools and water supply projects); universities (e.g., classroom and medical buildings, libraries, research facilities, and sports complexes); airport expansions; dams; hydroelectric projects; mines; manufacturing plants; office buildings; port facilities; private research laboratories; and public stadiums.

[14] See "*DRBF Practices and Procedures* Manual", Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)
[15] *supra, fn. 8*

Internationally[16], dispute boards have also been used in the Peoples' Republic of China (e.g., the US $3.4 billion Ertan Hydroelectric Project[17]); on Uganda's Owen Falls Extension Hydroelectric Project[18]; on the US $15 billion Folkestone (England) to Calais (France) Channel Tunnel; on the London Docklands Light Railway project; and on numerous projects in Australia, Bangladesh, Botswana, Canada, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, New Zealand, Pakistan, Poland, Romania, Sudan, Uganda, the U.K. and Vietnam.

Through the end of 2006, it is estimated that DRBs had been planned or used in over 2,000 global projects, having a combined construction value of over US $100 billion[19]. And throughout North America, the DRB process has been used in over 1,000 projects (averaging $42 million each), and 98.7% of those projects were completed without resorting to arbitration or litigation[20].

There was an early concern that the ready availability of a DRB would attract disputes, but "*in practice, just the opposite has occurred*"[21]:

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[16] See "*DRBF Practices and Procedures* Manual", Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

[17] For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 8, Issue 2 (May 2004), at page 1

[18] For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 8, Issue 1 (February 2004), at page 1

[19] See "*DRBF Practices and Procedures* Manual", Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

[20] See "*DRBF Practices and Procedures* Manual", Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

[21] Hinchey and Harris, at para. 1:10

> " . . . (T)*he existence of the DRB seems to have had a dampening effect on controversies by, in effect, giving the parties an incentive to resolve disputes among themselves, rather than suffer the inconvenience, disruption, and possible embarrassment of having to call in the DRB. According to virtually all surveys and commentary, party satisfaction with DRBs is high. Those who have used the process on one project tend to use it repeatedly. The high level of satisfaction is usually attributed to the 'real time' resolution of the dispute, while all involved parties are available and the job can continue to move forward*"[22].

Furthermore:

> " . . . *contractors are less likely to present exaggerated claims for the sake of increasing pressure on the owner/employer, and owners/employers are less likely to reject meritorious claims. Stated differently, both sides nave a vested interest in preserving their credibility, which may suffer if they misbehave while the 'teacher is in the room'*"[23].

(ii) DRB Case Study: The Toronto Sheppard Subway Twin Tunnels Project

The City of Toronto's Yonge Street subway line, the first of its kind in Canada, opened in 1954. And on January 1 of that year, the Toronto Transit Commission (the "TTC"), a

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[22] Hinchey and Harris, at para. 1:10. Also see D. D. McMillan and R. A. Rubin, "*Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements*", The Construction Lawyer (Spring, 2005) at *fn.* 9-10

[23] Hinchey and Harris, at para. 3:26

agency of the City of Toronto, became the sole provider of public transportation services in the city. Over the years[24], new subway extensions, branches and lines extended the reach of the city to the growing suburban populations.

The Sheppard Subway line, which took 8 years to build, and which cost almost $1 billion, opened on November 22, 2002. It was the first subway line in Canada whose two separate subway tunnels (the "Twin Tunnels") were built entirely by two tunnel boring machines ("TBMs"). The TBMs (nicknamed "Rock" and "Roll") not only dug through the earth, but also installed reinforced concrete liner rings as they passed. The Twin Tunnels were approximately 2.7 miles in total length, were to run side by side, approximately 40 feet apart, and were generally located from approximately 15 to 85 feet below the surface of Sheppard Avenue East.

TTC had entered into a CDN $93 million tunneling contract with MPF, a joint venture consisting McNally International Inc., PCL Constructors Eastern Inc., and The Foundation Company Inc. (subsequently known as Aecon Construction Group Inc.). The Twin Tunnels contract established, and set out the procedure, function and key features of, a Dispute Review Board. The DRB's stated purpose was to assist in the resolution of claims and other disputes arising out of the performance of the work on the Twin Tunnels project, in an independent, fair and impartial manner, in order to avoid construction delay and litigation. The mandate of the DRB included the provision of written

[24] 1963, 1966, 1968, 1973, 1974, 1978, 1980, 1996 and 2002

recommendations to the parties in order to assist in the resolution of such disputes. However, although not binding on either party, "*the recommendations of the Disputes Review Board should carry great weight for both the Commission* [TTC] *and the Contractor* [MPF]".

According to the Twin Tunnels contract, the DRB was to consist of one member selected by TTC and approved by MPF, a second member selected by MPF and approved by TTC, and a third member selected by the first two members and approved by both TTC and MPF. The third member was to act as Chair for all DRB activities. The contract also provided that "(i)*t is desirable that all Disputes Review Board members be experienced with the type of construction involved in this Twin Tunnels Project, and interpretation of contract documents. The goal in selecting the third member is to complement the construction experience of the first two and to provide leadership for the Board's activities*".

The DRB member selected by TTC and approved by MPF was a well-respected engineer who was President of a consulting company, and who had substantial underground and mass transit project experience and expertise.

The DRB member selected by MPF and approved by TTC was a registered civil, geotechnical and safety engineer, and a Professor of Civil Engineering at Stanford University, who had experience as an expert witness in cases involving geotechnical,

contractual or construction practice issues, and who had served both as Chair and as a member of numerous other dispute review boards.

The DRB member selected by the two appointed members of the DRB as Chair of the DRB, and approved by both TTC and MPF, was an engineering consultant with substantial experience managing large tunnelling and other underground construction contracts, who had considerable experience chairing numerous other dispute review boards relating to tunnelling, subway and other construction and infrastructure projects.

Within a short time after commencing its tunneling work, MPF gave notice to TTC that it was incurring additional cost as a result of muck disposal problems due to high foam usage. MPF alleged that the actual quantity of foam that it was required to use in order to successfully excavate the tunnels far exceeded both what it expected to use and what it could have reasonably been expected to use. MPF contended that, as a result of the high foam usage, its tunnel spoil was reduced to such a high-slump condition that its disposal costs were significantly increased. MPF alleged that both it and its trucking subcontractor were forced to haul the excavated and conditioned tunnel muck to inconvenient and expensive disposal sites, all at costs far beyond what MPF had included in its bid.

Subsequently, MPF submitted its 369-page claim for CDN $4.4 million in additional costs associated with tunnel spoil disposal. TTC quickly responded that there was no

valid basis for the claim, and, after preliminary settlement discussions, the parties agreed to bring the matter before the DRB for a formal hearing.

Both TTC and MPF were given the opportunity to make written pre-hearing submissions, to present both factual and expert evidence, to make further submissions at the 2-day hearing, and to make written post-hearing submissions.

Shortly thereafter, the DRB released its detailed and comprehensive 41-page written "Recommendation". The three members of the panel, in unanimously rejecting MPF's claim, stated that "*MPF has not made a reasonable case for extra compensation based upon arguments that lay within the four corners of the contract.*"

Presumably of the view that success lay just outside "*the four corners of the contract*", MPF provided written notification to TTC of its rejection of the DRB's Recommendation (in accordance with the contract), and commenced litigation proceedings.

The facts, issues, pleadings, and submissions in the ensuing litigation were virtually identical to those which were put before the DRB. However, in its Statement of Claim, MPF made no reference whatsoever to the hearing before, or to the Recommendation of, the DRB. So TTC, in its Statement of Defence, pleaded that "(t)*he claim being asserted by MPF against TTC in this litigation is precisely the same claim that was submitted by MPF and TTC to the DRB for hearing more than 2 ½ years ago*". MPF might have, but neglected to, put forward a reply to the effect that the entire DRB process was non-

binding and akin to mediation, and was therefore privileged as being in the nature of settlement communications.

TTC also pleaded that the commencement of this litigation gave rise to the risk of the court making a decision that would be inconsistent with the decision made 2 ½ years earlier by the panel of three eminently qualified and experienced experts comprising the DRB; and that inconsistent decisions would bring the alternative dispute resolution and DRB processes into disrepute.

Furthermore, TTC pleaded that, as a matter of public policy, the commencement of litigation, after the same claim was unanimously and unequivocally rejected previously by a DRB, created a precedent that only served to discredit the benefits of the partnering, dispute resolution and DRB concepts and processes, and to discourage other parties on other projects from attempting to resolve their disputes using those concepts and processes instead of litigation.

The litigation settled before trial. "*You have a pretty good case, Mr. Pitkin. How much justice can you afford* ?"

DISPUTE BOARDS AND THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce ("ICC"), based in Paris, employs three types of dispute resolution procedures for large construction and engineering projects[25]:

1. **Dispute Review Boards** ("**DRB**"s) issue *non-binding recommendations* for disputes which arise during the course of a project[26]. The parties may accept or reject the recommendation. If none of the parties objects within a specified time frame, then the recommendation of the DRB would become contractually binding. On the other hand, if one of the parties should object, then the recommendation would not be binding, in which case the dispute may then be referred to arbitration (if the parties should agree), or litigated. Pending an ultimate decision of the arbitration panel or the court, the parties may voluntarily comply with the recommendation, but are not bound to do so. The ICC promotes the overall DRB approach as a device to avoid one party "winning" and the other party "losing".

2. **Dispute Adjudication Boards** ("**DAB**"s) issue *provisionally binding decisions*[27]. Decisions are enforceable without delay as a term of the contract, unless or until one of the parties should later succeed in convincing an arbitration panel or a court to reverse or

[25] See ICC "Dispute Boards": http://www.iccwbo.org/court/dispute_boards/id4528/index.html

[26] The standard ICC Dispute Board clauses for DRBs provide that all disputes arising out of or in connection with the contract *shall* be submitted, *in the first instance*, to the DRB, in accordance with the ICC's Dispute Board Rules

[27] The standard ICC Dispute Board clauses for DABs provide that all disputes arising out of or in connection with the contract *shall* be submitted, *in the first instance*, to the DAB, in accordance with the ICC's Dispute Board Rules

modify the DAB's decision. Pending a decision of an arbitration panel or a court reversing or modifying the decision, the parties are required to comply with it.

3. **Combined Dispute Boards** ("**CDB**"s)[28] typically issue *non-binding recommendations*, but, at the request of one or both of the parties, has the flexibility to issue *provisionally binding decisions*. This is considered to be a hybrid or intermediate procedure.

Other international arbitral bodies -- such as the Oslo Chamber of Commerce, the International Center for Dispute Resolution, and the Cairo Regional Center for International Commercial Arbitration -- have similar procedures.

DISPUTE ADJUDICATION BOARDS AND FIDIC

FIDIC (International Federation of Consulting Engineers / Fédération Internationale des Ingénieurs-Conseils) is an international organization, based in Geneva, whose "rainbow" suite of standard forms of contracts for engineering construction are widely used throughout the world.

[28] This third dispute resolution procedure was added by the ICC Dispute Board Rules, which came into force on September 1, 2004. As one commentator wrote: "*As its name suggests, this creature is a kind of hybrid which, depending upon the circumstances, can issue either a Decision or a Recommendation. Some guidance is given in art. 6 of the Rules as to the circumstances in which one or* [the] *other route may be taken but it is easy to see difficulties in this novel and uncertain arrangement*": see Christopher Dering, "*Engineer or Dispute Adjudication Board: How to Choose*", at http://www1.fidic.org/resources/contracts/ibc_oct05/dering_different_ibc_oct05.asp, at page 2

The current versions of FIDIC's contract forms all provide that disputes are to be resolved by a Disputes Adjudication Board ("**DAB**"), which issues a "decision". Under the evolving FIDIC arrangements, the DAB process has replaced the dispute-resolving role of the engineer as the arbiter of first instance[29]. On this point, one commentator wrote:

> "*FIDIC's* [then] *proposed alternative of having disputes settled by the Board procedure instead of the Engineer is a welcome development. The availability of this alternative will help redress the imbalance in favour of the Employer that has long existed in Clause 67 of the Red Book. The Board can provide a neutral and objective, even if rough and ready, prediction of* [what] *an arbitral tribunal will decide, at modest cost and within a short time frame compared to international arbitration. This should enable more disputes to be finally settled without arbitration than was true when disputes were referred to the Engineer*"[30].

In the FIDIC "**Red Book**" (Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer), the DAB is to be appointed at the outset of the contract, usually within 28 days. Typically three persons, having a blend of technical, legal, contractual, and procedural skills, are appointed to the panel, and their decision-making mandate is determined by the Procedural Rules annexed to the contract.

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[29] In some cases, the engineer may be appointed as the DAB, and would perform the Board's function

[30] Christopher Seppälä, "*The New FIDIC Provision for a Dispute Adjudication Board*", [1997] The International Construction Law Review (Volume 14, Part 4), also at: http://www1.fidic.org/resources/contracts/seppala_dab_1997.asp, at page 11

The Procedural Rules require the DAB to visit the project site at intervals of not more than 140 days, including times of critical construction events, at the request of either the owner or the contractor.

By way of contrast to the Red Book procedure, appointment of a DAB, under the **Yellow** (Conditions of Contract for Plant and Design-Build) and **Silver Books** (Conditions of Contract for EPC and Turnkey), takes place only after a dispute has arisen (i.e., within 28 days of the reference of a dispute[31]). And, unlike the Red Book process (where the DAB remains in place through the life of the project), under the Yellow and Silver Book procedures the appointment of each DAB (there can be more than one) expires after it has completed its mandate dealing with the original dispute which was referred to it.

Procedural Rule 7 gives the DAB wide discretion and powers with respect to, among other things, its own jurisdiction; the scope of any dispute which may be referred to it; the procedure to be applied in deciding a dispute; and the conduct of any hearing. Its decision, which must be made within 12 weeks of the reference of the dispute, is *provisionally binding*, and the parties are required to comply with it pending a subsequent reversal or modification of it by agreement between the parties or by an arbitral award. If neither party gives "*notice of dissatisfaction*" within 28 days of receiving the decision, it becomes *final and binding*. On the other hand, should a notice of dissatisfaction be served, then, in accordance with Sub-Clause 20.6 of the contract, the dispute shall be

[31] Appointment could take 28 days plus the time required to nominate and secure the agreement of the third DAB panel member if the parties are unable to agree

resolved by final and binding arbitration, by a panel of three arbitrators[32]. Interestingly enough, that sub-clause also provides that any decision of the DAB shall be admissible in evidence in the arbitration hearing, which raises legal, evidentiary, and strategy issues.

This year, 2008, FIDIC is planning to publish a new **Design-Build-Operate form of contract**, which will supplement its other existing contract forms for major works. The new form will be suitable for projects combining design, construction and long-term operation and maintenance of a facility, which are awarded to a single contractor entity. It is anticipated that the contract will call for the appointment of an "Employer's Representative" to be appointed prior to the signing of the contract. That person would have authority to make decisions on behalf of the owner (e.g., granting extensions of time). The decisions of the Employer's Representative would be binding on the parties, unless and until reversed by the DAB. If either party chooses to contest the DAB's decision (and assuming that there is no amicable settlement), the dispute may then be referred to arbitration under the ICC Rules.

[32] The contract calls for ICC-administered international arbitration under the ICC Rules

ADJUDICATION

(i) The Latham Report Of 1994

In 1993, Sir Michael Anthony Latham, a retired British Conservative Member of Parliament, was commissioned to lead an investigation into concerns expressed in the United Kingdom's construction industry about the significant expenses and unreasonable delays required to resolve construction claims, and about the shortcomings of the existing dispute resolution methods. Latham's inquiry ultimately lead to the publication, in July of 1994, of his joint government and industry report, "*Constructing the Team*" (which came to be known as the "**Latham Report**").

The Latham Report's identification and critical evaluation of the inefficiencies in the processes and procedures in the construction industry set the agenda for reform. One of the major recommendations of the Report was that "adjudication" should be the standard form of dispute resolution. This became the driving force for legislative reform which followed.

(ii) United Kingdom's Housing Grants, Construction And Regeneration Act 1996

The *Housing Grants, Construction and Regeneration Act 1996*[33] (known as the "***Act***" or "***The Construction Act***"), which received Royal Assent on July 24, 1996, was responsible for introducing a new form of "**adjudication**" for construction disputes.

[33] Acts of the UK Parliament , 1996, Chapter 53

As Sir Michael Latham wrote:

> "*The coming into force of the Construction Act on May 1, 1998, nearly two years after in received Royal Assent, was a seminal event for the construction process throughout Britain. One of the most significant parts of the Act was the statutory right of adjudication, intended to provide speedy and relatively inexpensive settlements of construction disputes throughout an industry which had been plagued by them.*"[34]

A set of imposing regulations followed in 1998, entitled "*Scheme for Construction Contracts (England and Wales) Regulations 1998*". Those regulations are included by default in construction contracts to which the *Construction Act* applies, if the contract does not meet the minimum procedural requirements for compliance with the *Act*.

Section 108 of the *Act* provides that:

(a) A party to a written[35] construction contract[36] has the right to give notice at any time of his intention to refer a "dispute" to adjudication[37]. "Dispute" is defined to include "any difference"[38];

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[34] Sir Michael Latham, in his Foreword to Richard Anderson's "A Practical Guide to Adjudication in Construction Matters" (W. Green / Sweet & Maxwell, 2000)

[35] Section 107(1) of the Act provides that "*The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing*". However, there is speculation that anticipated amendments to the *Act*, which will form part of the Government's legislative program for 2008-2009, will provide that

(b) An impartial[39] adjudicator is to be appointed, and the dispute is to be referred to him/her within 7 days of such notice[40];

(c) The adjudicator is required to reach a decision within 28 days of the referral (subject to a specified 14-day time extension, with the agreement of the referring party[41], or to a further time extension by agreement of both parties[42]);

(d) The construction contract is to provide that the decision of the adjudicator is binding until 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[43]; and

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construction contracts will no longer have to be in writing for the right to adjudicate to apply (see Alexandra Price, "*Government Plans Changes to the Housing Grants, Construction and Regeneration Act*" (June 19, 2008) at:
http://www.lexology.com/library/detail.aspx?g=9673a16d-56a8-4075=b72e-49b1f036f005

[36] "Construction contract" is broadly defined in section 104 of *The Construction Act*. Such definition applies only to construction contracts which relate to the carrying out of "construction operations" (as defined in section 105 of the *Act*) in England, Wales or Scotland, regardless of whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract (section 108(7) of the *Act*)

[37] Subsections 108(1) and (2)(a), *The Construction Act*

[38] *ibid*

[39] Section 108(2)(e), *The Construction Act*. Also see *Balfour Beatty Construction Limited v. The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597

[40] Section 108(2)(b), *The Construction Act*

[41] Section 108(2)(d), *The Construction Act*

[42] Section 108(2)(c), *The Construction Act*

[43] Section 108(3), *The Construction Act*

(e) The construction contract is also to provide that the adjudicator is immune from liability (presumably under the doctrine of "arbitral immunity"[44]), provided that he/she has acted in good faith[45].

(iii) Adjudication – A General Overview

As can be seen, "adjudication", which applies to "construction contracts" (as defined in the *Construction Act*[46]), is a statutory procedure by which a party to a construction contract has the right to have a dispute decided, in a speedy and cost-effective manner, by a neutral adjudicator.

PROCESS. Once the adjudicator receives the referral notice, he/she will set the procedure for the adjudication; will take the initiative in reviewing the facts and the applicable law; may seek advice from others, with the consent of the parties; and will render a decision (with reasons, if requested) within the four corners of the referral notice, and within the allotted time (28 days, 42 days, or longer, depending upon the agreement of the parties). Once the decision has been rendered, the parties must comply with it (until it is finally resolved by arbitration, litigation or agreement).

In his speech to the House of Lords, Lord Ackner stated:

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[44] For a general discussion of "arbitral immunity", see Harvey J. Kirsh, "*Arbitral Immunity of Design Consultants*", Pipeline Magazine (published by Mechanical Contractors Association of Toronto, 2001), Vol. 3, No. 3, Summer 2001; and Bristow, D. I. and Parke, J., "*The Gathering Storm of Arbitrators' and Mediators' Liability*" (2001), 7 C.L.R. (3d) 238

[45] Section 108(4), *The Construction Act*

[46] *supra, fn* 36

> "*What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. This was a highly satisfactory process. It came under the rubric, 'pay now, argue later' which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts*."[47]

ENFORCEABILITY. As indicated above, the adjudicator's decision is provisionally binding on the parties, unless and until it is challenged and finally resolved by arbitration, litigation or agreement. Until that time, and subject to a possible defence by the unsuccessful party that the adjudicator exceeded his/her jurisdiction[48], the adjudicator's decision may be enforced by the court.

The issue of enforceability of the adjudicator's decision was confirmed, shortly after the promulgation of the *Construction Act*, in *Macob Civil Engineering Ltd. v. Morrison Construction Ltd*.[49], a 1999 decision of the Technology and Construction Court (High Court of Justice, Queen's Bench Division). In that case, Hon. Mr. Justice Dyson held

[47] Speech of Lord Ackner, reported in Hansard, House of Lords Volume 571, Columns 989-990, as referenced in Hinchey and Harris, at *fn* 12 of para. 1:17
[48] See *Carillion Construction Limited v. Devonport Royal Dockyard* [2005] EWHC 778
[49] [1999] B.L.R. 93

that "(c)*rucially,* [Parliament] *has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved*."[50]

COSTS. Although construction contracts usually provide that both parties are jointly and severally liable for payment of the adjudicator's fees, the adjudicator is often given the authority and discretion to apportion them between the parties. Typically, they are to be paid by the unsuccessful party. As for the parties' own costs (e.g., for lawyers, experts, etc.), they are usually not recoverable from the opposing party, although the adjudicator may be given the authority and discretion to award or apportion them as well.

(iv) Selected Challenges And Critiques

- The word "dispute", although broadly defined in section 108(1) of the *Construction Act* to include "any difference", is not otherwise precisely defined; and obviously the implementation of the legislation requires a clear understanding as to what a dispute is, and when a dispute arises. As M. Green wrote:

> "*It is possible to challenge the jurisdiction of an adjudicator on the basis that a dispute has not yet come into existence. It is crucial therefore to discern whether or not a claim falls within the accepted parameters of what constitutes a dispute.*"[51]

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[50] *ibid*, at 98

[51] M. Green, "*Construction Adjudication and the Definition of Disputes: An Analysis of Recent Case Law*" (October, 2006, see: http://www.rics.org/Newsroom/Researchandreports/Researcharchive/COBRA+2006+paper+by+Green.htm

- In the absence of any directions from the adjudicator as to the time for implementation of the decision, the parties are required to comply with it immediately. However:

> "(M)*ost participants and commentators on Statutory Adjudication have observed that, because of the short time frames and truncated procedures, justice will be meted out as with a machete, rather than a scalpel*."[52]

- In an extended lament about the unacceptable delays and high expense inherent in construction arbitrations in the United States, senior construction lawyer and ADR neutral, Barry Grove, after reviewing some of the processes being used by the American Arbitration Association (e.g., Fast Track Rules) and the International Chamber of Commerce, concluded that "(a)*rbitration avoidance is the panacea. This is done through better, fairer contracts and schemes like partnering, alliancing, dispute review boards and mediation*"[53]. Then, turning his critical sights on "adjudication", he continued:

> "*The response in England is draconian. Most construction disputes that arise from projects within the geographical reach of Parliament must now, by statute, be heard and resolved within 28-42 days by an 'adjudicator' who will be appointed if the parties cannot select one by agreement. The adjudicator's*

[52] Hinchey and Harris, para. 1:17, at page 57. Also see Derek Simmonds, "Statutory Adjudication: A Practical Guide" (Wiley-Blackwell, 2003), at page 59

[53] Jesse B. Grove III, "*New Rules for Expedited Construction Arbitration in the United States*", [2007] The International Construction Law Review 136, at 137

> *decision is immediately binding but not final since the dispute is subject to de novo rehearing in subsequent arbitration or litigation.* ***It is doubtful that this process can do justice to a significant or complex dispute***[54]***. And anyway it is open to either party to go on with an unacceptably long and expensive arbitration or litigation. What adjudication has really achieved is rough justice on an interim basis***."[55] [emphasis added]

(v) Epilogue On Adjudication

In his 2005 paper, "*The Adjudication Option: Time for Uniform Security of Payment Legislation in Canada*", senior construction lawyer and ADR neutral, Duncan Glaholt, advocated a plan for the adoption of the adjudication model for use in Canadian construction contracts. In his paper, he observed that versions of the U.K. scheme had already been promulgated in other Commonwealth countries such as Singapore, New Zealand and Australia.

Similarly, John Hinchey and Troy Harris, in their recently published text "International

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[54] But see Hinchey and Harris, para. 1:17, at page 58, where the authors contend that, despite the suggestion that the truncated process is not suitable for complex construction cases, " *the Act has been increasingly used for more complex cases being referred to adjudication*". In support, the authors cite *CIB Properties v. Birse Construction* ([2005 B.L.R. 173, [2004] EWHC 2365, [2005] 1 W.L.R. 2252 (U.K. QBD (TCC) 2004), stating that England's Technology and Construction Court did not conclude that adjudication was an inadequate process for resolving even complex construction disputes. What mattered was that the adjudicator reached a fair decision within the applicable time limits, not so much that he/she reached the "right" result. Also see *Macob Civil Engineering Ltd. v. Morrison Construction Ltd. supra, fn.* 48; *Northern Developments (Cumbria) Ltd. v. J. & J. Nichol* [2002] B.L.R. 158 at 162

[55] *ibid*

Construction Arbitration Handbook"[56], concluded that:

> " . . . *the English experiences with Adjudication, both good and bad, will undoubtedly be drawn upon by other countries, particularly the United States, in deciding whether or what aspects of Statutory Adjudication can or could be transplanted, either into domestic contracts or legislation*."[57]

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[56] Thomson / West (2008)
[57] Hinchey and Harris, para. 1:17, at page 53