

## DE-ESCALATING CONSTRUCTION DISPUTES IN MAJOR INFRASTRUCTURE DELIVERY: LESSONS FROM THE UNITED KINGDOM AS CANADA MOVES TO STATUTORY DISPUTE ADJUDICATION

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### Introduction

In the delivery of infrastructure projects, construction disputes give rise to delays and potential cost overruns. This is especially the case in major projects in the energy and natural resources sector, which ranks among the most dispute intensive industries in the global economy<sup>1</sup>.

Construction disputes form part of a series of dispute risks that are a persistent reality in the delivery of strategic infrastructure projects in the energy and natural resources sector. Construction projects are traditionally "bedeviled"<sup>2</sup> by disputes. The number of parties, international components, challenging locations and the scale of the operations are all contributing factors to a fertile disputes environment. As a result, construction disputes necessitate a specialist dispute resolution mechanism that facilitates the expedited resolution of disputes both in time and in parallel to the continuation of the construction works. The key is to ensure the prompt delivery of the project works without delay<sup>3</sup> and to avoid a further escalation of the construction dispute.

Dispute adjudication provides parties with a fast, project-accompanying alternative dispute resolution mechanism that produces an interim binding decision. Where the parties are unable to reach amicable settlement on the adjudicator's decision during a mandatory negotiation period, the decision may be escalated along a dispute escalation chain to either litigation or international commercial arbitration for final resolution.

Following the introduction of dispute adjudication in the United Kingdom in the *Housing Grants, Construction and Regeneration Act 1996* (the "1996 Construction Act"), a number of common law jurisdictions introduced statutory dispute adjudication for the construction industry. Canada is one of the last jurisdictions to adopt statutory dispute adjudication in construction contracting<sup>4</sup>. In light of this development, this paper undertakes to provide an exposition of the key points and issues on dispute adjudication, based on the lengthy experience with statutory dispute adjudication in the United Kingdom.

Firstly, in Ontario, the comprehensive report presented in April 2016 by Reynolds and Vogel on the status of the construction industry entitled "Striking the Balance:

Expert Review of Ontario's Construction Lien Act"<sup>5</sup> made 101 recommendations for improvements in the construction industry, including recommendations to introduce a formal statutory dispute adjudication mechanism as well as a prompt payment regime. In response to the report, the Attorney General of Ontario introduced Bill 142, *An Act to Amend the Construction Lien Act* on May 31<sup>st</sup>, 2017<sup>6</sup>. On December 5, 2017, Bill 142 was passed unanimously by the Ontario legislature. Section 1 of Bill 142 renames the former *Construction Lien Act* as the *Construction Act*. The *Construction Act* received Royal Assent on December 12, 2017.

Secondly, Federal Bill S-224, *Canada Prompt Payment Act: respecting payments made under construction contracts*<sup>7</sup>, passed third reading in the Senate on May 4<sup>th</sup>, 2017 and will introduce statutory dispute adjudication at federal level.

### The origins of statutory dispute adjudication and construction disputes

Dispute adjudication is rooted in the concept of alternative dispute resolution. Adjudication allows the parties to resolve disputes according to a mutually agreed dispute resolution mechanism that does not, without an escalation of the dispute, resort to resolution by litigation or arbitration.

### Common dispute issues in major infrastructure construction projects

Contractual parties to major infrastructure construction projects, including energy infrastructure projects, depend on an independent, impartial, expedited and flexible dispute resolution mechanism that does not cause the project works to be delayed or that results in an escalation of project costs. Dispute adjudication operates as a project accompanying mechanism, which manages and resolves project disputes in time. At the core of dispute adjudication are four interconnected considerations. Dispute adjudication avoids an escalation of the dispute, maintains the commercial relations between the parties, balances the commercial interests of the parties and reduces insolvency risk by unlocking payment and cash flow issues. Only when the initial dispute neutralising process of adjudication fails does the mechanism





operate as an expedited dispute resolution mechanism, by way of an escalation of the dispute for final resolution by either litigation or arbitration.

### General observations on dispute adjudication

Dispute adjudication operates so that only the most serious and complex of disputes are escalated to litigation or arbitration. This process of sub-dividing the escalation of construction disputes has been “particularly popular”<sup>8</sup> for infrastructure projects and operates to filter disputes. Dispute adjudication maintains the commercial relationship between the parties by containing the risk of project disputes.

Dispute adjudication is located within the cluster of established alternative dispute resolution proceedings, effectively between mediation and arbitration<sup>9</sup>. Parties voluntarily submit to a process that encourages cooperation and de-legitimizes confrontational behaviour<sup>10</sup>.

### The objective of dispute adjudication

Dispute adjudication achieves its objective of dispute avoidance and dispute de-escalation in two ways. Firstly, dispute adjudication front-loads the avoidance and potential resolution of the parties’ dispute. By including provisions on mandatory discussions and amicable settlement between the parties, a potential dispute may be negotiated off the agenda, before it develops into a protracted dispute between the parties. This is the dispute avoidance strategy of dispute adjudication. Secondly, dispute adjudication seeks to resolve a dispute in time to the ongoing project completion. The dispute resolution mechanism and the completion of the construction works therefore operate in parallel and the mechanism exerts pressure on the parties to resolve their dispute with a collaborative focus on the overall construction project.

### De-escalation by virtue of an interim binding decision

Parties to construction projects require a dispute mechanism that resolves disputes by virtue of issuing binding decisions on an interim basis<sup>11</sup>. A decision of an adjudicator has interim binding effect, which is an essential aspect of the dispute adjudication mechanism.

This facilitates discussion between the parties, in order to prevent an existing dispute from escalating to either litigation or international commercial arbitration.

Dispute adjudication differs from litigation or international commercial arbitration, which is a finite form of dispute resolution. Dispute adjudication is dependent on a strict contractual dispute escalation process, set out in a multi-tiered dispute resolution clause. Dispute escalation ensures that only the most serious and protracted disputes are finally resolved with the aid of the coercive powers<sup>12</sup> of litigation or arbitration.

### Advantages and disadvantages of dispute adjudication

An in time dispute resolution mechanism is essential to the operation of the construction industry. This is especially relevant to large-scale and long-term construction contracts that may involve a large number of parties. The complexities of the project works, the scale of investment and the duration of long-term projects underline the importance of an effective dispute management process that allows projects to continue in parallel to the expedited resolution of disputes. The collaborative nature of the construction industry, especially on large-scale projects, is it that it is simply not within any of the project parties’ interest to interrupt the project works in order to resolve disputes off-site by either time-consuming litigation or arbitration.

Herein lies the key advantage of dispute adjudication. Disputes are managed and disposed of in real time, so that “critical project relationships can be maintained, schedules met and costs kept in check as the disputes play out”<sup>13</sup>. Dispute adjudication is therefore driven by a desire to provide the contractual parties with a quick and practical resolution of their dispute. By issuing an interim decision, the adjudication process allows subsequent management decisions to be taken with the benefit of an adjudicator’s decision<sup>14</sup>.

As a consequence of the expedited resolution of disputes by way of adjudication, there is a risk that adjudication may result in allegations of rough justice. As the English courts have consistently held, the adjudication system can only properly function in practice when some of the inherent breaches of the rules of natural justice “are disregarded”<sup>15</sup> and the expediency of the adjudication mechanism is kept in mind by the parties.

### The statutory adjudication regime in the United Kingdom

The United Kingdom courts, in particularly the dedicated Technology and Construction Court bench of the High Court of England and Wales, have developed a deep jurisprudence on the complexities of statutory adjudication pursuant to the 1996 Construction Act regime. An analysis of this jurisprudence is critical and will provide guidance on how the statutory dispute adjudication regimes in Canada may be framed and interpreted.

### An expedited mechanism to reach the adjudicator’s decision

Pursuant to the statutory regime of the *1996 Construction Act*, the adjudicator is to reach its decision within a 28-day period<sup>16</sup>. A longer period can be agreed upon between the parties. The *1996 Construction Act* prescribes that a construction contract must include mandatory provisions so that a decision of the adjudicator shall be binding “until the dispute is finally determined”<sup>17</sup> by either legal proceedings, arbitration or settlement between the parties. To facilitate amicable settlement between the parties, they can accept the decision of the adjudicator as the final determination of their dispute.

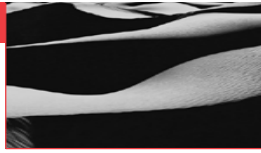
### Establishing a construction dispute

For the purposes of the *1996 Construction Act*, “dispute” includes “any difference” arising under a construction contract<sup>18</sup> as related to a construction operation, including questions on termination of such a contract. A dispute may be referred to adjudication “at any time”<sup>19</sup>. The concept of dispute or difference should be given an “inclusive interpretation”<sup>20</sup> and a refusal of a claim for payment will typically give rise to a dispute pursuant to the English statutory regime.

### The jurisdiction of an adjudicator

The decision of the House of Lords in *Fiona Trust & Holding Corp v Privalov* challenged the established principle that an arbitrator could not also exercise jurisdiction over issues arising outside of the contract. On this basis, an arbitration clause, as a distinct agreement, would not be invalidated by a rescission of the main contract<sup>21</sup>. Commentators have suggested that such an approach “may well be adopted” by courts when determining whether or not to enforce an adjudicator’s decision<sup>22</sup>.

The English law is not, however, entirely clear on this important point. The default position is that an adjudicator, absent any agreement by the parties to the contrary; does not



enjoy an automatic right to determine his or her own jurisdiction<sup>23</sup>. In *Ecovision Systems Ltd v Vinci Construction UK Ltd*<sup>24</sup>, the Technology and Construction Court, although strictly *obiter*, confirmed that an adjudicator does not have power to determine his or her jurisdiction and that a court could interfere with such a conclusion, typically at enforcement stage<sup>25</sup>.

### Evidence in support of a dispute

In *Bovis Lend Lease Ltd v The Trustees of the London Clinic*, one of the issues before the court related to the evidence that must be submitted to support a construction dispute. The court concluded that an adjudication clause is not limited strictly to claims established under the construction contract<sup>26</sup>. Where it was clear that a construction dispute had crystallised, it was not necessary for all of the evidence to have been formally or informally submitted prior to the adjudication.

In *Jacques (t/a C&E Jacques Partnership) v Ensign Contractors Ltd.*, the court emphasised the distinctive aspects of adjudication, namely that the right answer is subordinate to the expediency with which an answer must be obtained<sup>27</sup>. This is a deeply enshrined position in the law of adjudication. As such, an adjudicator enjoys a wide discretion on the admissibility of evidence and only the most exceptional circumstances will amount to a breach of natural justice<sup>28</sup>.

### The adjudicator's decision

The statutory regime of the *1996 Construction Act* prescribes that the adjudicator shall decide the matters in dispute and may take into account any matter which the parties agree should be within the scope of the adjudication. The adjudicator may also take into account matters under the contract which the adjudicator considers to be "necessarily connected with the dispute"<sup>29</sup>.

The parties are required to comply with the adjudicator's decision "immediately on delivery of the decision"<sup>30</sup>. In reaching the decision, the adjudicator may take into account any matter that the parties agree should be included within the scope of their adjudication.

The statute also provides that it is mandatory for the parties to comply with the decision of the adjudicator<sup>31</sup> until the dispute is finally determined by either litigation, arbitration or by agreement between the parties. To foster agreement between the parties, they may accept the adjudicator's decision as finally determining their dispute<sup>32</sup>.

### Enforcing the adjudicator's decision

An enforceable decision of an adjudicator is "only binding until the dispute is finally determined by litigation, arbitration or agreement"<sup>33</sup>. In *Bouygues UK Ltd v Dahl-Jensen UK Ltd.*, the court set out the steps for enforcing an adjudicator's decision. The first step is to determine the dispute or disputes that were referred to the adjudicator. The second step is to see whether the adjudicator made a mistake and how that mistake should be characterised. In the context of a mistake, courts should keep in mind that the expedited nature of the adjudication process means that "mistakes will inevitably occur"<sup>34</sup>.

When considering the enforceability of an adjudicator's decision, it is important to recall that by introducing the mechanism in the *1996 Construction Act*, the United Kingdom Parliament has not abolished arbitration and litigation of construction disputes, "but it has made it clear that decisions of adjudicators are binding"<sup>35</sup> and are to be complied with until the dispute is finally resolved.

### Challenging the adjudicator's decision

A challenge to the decision of an adjudicator is difficult to reconcile with the expedited and summary nature of adjudication<sup>36</sup>. In light of this, it is important to recall that adjudication is an "intervening provisional stage"<sup>37</sup> of dispute escalation.

The most important factor for a court to consider in a challenge is whether the adjudicator had the ability to determine the adjudication with fairness<sup>38</sup>. The leading English authority on this point is *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*<sup>39</sup> where the Court of Appeal confirmed that an adjudicator is bound to adhere to the stringent principles of natural justice. Natural justice, as per *Carillion Construction Ltd.*, requires the avoidance of bias and the granting to each party of a fair hearing<sup>40</sup>.

Challenges on grounds of alleged breaches of natural justice should be limited to the most serious of cases only<sup>41</sup>, as the adjudication process cannot accommodate an excessive concern for "procedural niceties"<sup>42</sup>. The correct procedure is to challenge the decision at the enforcement stage by way of litigation or arbitration, as adjudication is not the final determination of the parties' dispute<sup>43</sup>.

Increasingly, parties are seeking to challenge an adjudicator's decision at the late stage of enforcement, particularly on grounds that the adjudicator has made an error in reaching its decision. This issue arose in the recent decision of *Hutton Construction Limited v Wilson Properties (London) Limited*<sup>44</sup>, where the court reiterated that the objective of dispute adjudication is to ensure that there is an enforcement hearing of an adjudicator's decision within an expedited period of time. The courts simply lack the resources to allow a defendant to "re-run"<sup>45</sup> a substantive part of the adjudication at the late stage of enforcement. This is the correct position, given the very limited time available at the enforcement proceedings and it is correct that a defendant should not be permitted to "shoehorn into the time available at the enforcement hearing"<sup>46</sup> the entirety of the dispute giving rise to the adjudication.


### Problem areas in the law of dispute adjudication

The statutory dispute adjudication process pursuant to the *1996 Construction Act* is by no means a perfect one. A number of attributes of the streamlined adjudication mechanism, such as the expediency of the process, have been exploited by parties who have attempted to move dispute adjudication closer to the procedurally intensive process of litigation or commercial arbitration. This has resulted in a number of problem areas.

### Adjudication by ambush

One of the issues that has troubled the English courts is in the context of commencing an adjudication pursuant to the *1996 Construction Act*. The mechanism provides the parties with relative flexibility in issuing a notice of adjudication. This has given rise to the concept of "adjudication by ambush", which was raised as a defence before Akenhead J in *Bovis Lend Lease Ltd v The Trustees of the London Clinic*<sup>47</sup>. On the facts, the Clinic attempted to argue that Bovis had over 16 months to prepare its case for adjudication, whereas it was given an initial two weeks only to respond to new claims and evidence.

Akenhead J agreed with Bovis in rebutting this argument, concluding that the *1996 Construction Act* enables parties to refer any aspect of a dispute to adjudication at any time and that the only threshold requirement is that a dispute must have crystallised.



Adjudication by ambush does not, therefore, give rise to an automatic allegation of procedural unfairness. The question for the adjudicator to decide is if, based on the evidence submitted, he or she is able to deliver a decision within the prescribed statutory timeframe<sup>48</sup>.

In *Dorchester Hotel Ltd v Vivid Interiors Ltd*, a similar restrictive interpretation was taken. In that decision, the court rejected Dorchester's argument that it had suffered unfairness and a breach of natural justice because of the limited time available over the Christmas holiday period to consider a large volume of evidence that was included with the referral to adjudication<sup>49</sup>.

### **Smash and grab adjudications**

So-called "smash and grab" adjudications were heavily criticised in the recent decision of *Hutton Construction Limited v Wilson Properties (London) Limited*<sup>50</sup> of the Technology and Construction Court. Typically brought by contractors, smash and grab adjudications are adjudication claims based on the argument that the other party has failed to serve proper or timely applications for payment or pay less notices, "thereby automatically entitling the claiming party to the sums claimed"<sup>51</sup>.

### **Serial adjudications**

Serial adjudications involve an adjudication which may already have been dealt with by previous adjudicators who had been tasked to determine the same or a substantially identical dispute. Policy grounds strongly dictate against serial adjudications. For example, in *Carillion Construction Limited v Stephen Andrew Smith*<sup>52</sup>, it was held that a party to a construction contract has no right to expect that an essentially identical dispute may be referred to adjudication more than once. The *Carillion* decision remains the leading authority in English law on how to determine if the same or substantially the same dispute has previously been referred to or resolved in an earlier adjudication<sup>53</sup>.

### **A late adjudicator's decision**

The issue of a late adjudicator's decision is problematic as it is contrary to the expediency of adjudication. A late decision upsets the natural flow of the dispute adjudication procedure. Despite this, the English common law is not clear on the consequences of a late decision by an adjudicator, with two conflicting decisions handed down by the Technology and Construction Court.

In *Simons Construction Ltd v Aardvark Developments Ltd*, the adjudicator had issued a draft decision to the parties, before delivering a final decision outside the prescribed statutory time limit. There was no change in substance between the decisions. The court concluded that a final decision rendered late by the adjudicator may be valid, provided that the parties consented to the delay and the late decision of the adjudicator did not terminate the adjudication agreement on grounds of delay<sup>54</sup>.

In the subsequent decision of *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd*<sup>55</sup>, a contrary conclusion was reached. The decision emphasised that the statutory time period was strict and focused its attention on the conduct of the parties in their interactions with the adjudicator. According to the court, there was a clear obligation on the parties to respond "plainly and promptly"<sup>56</sup> to any request of the adjudicator.

### **Failure to make payment pursuant to an adjudicator's decision**

When dispute adjudication was introduced in the *1996 Construction Act*, the English courts were divided on whether a failure to make

proper payment pursuant to an adjudicator's decision could give rise to a separate cause of action.

Subsequent jurisprudence of the English courts has clarified this important practical point. In *Jim Ennis Construction Limited v Premier Asphalt Limited*, the Technology and Construction Court concluded that a new cause of action did arise, in order to compel the losing party to comply with a payment obligation<sup>57</sup>. This view was also endorsed in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*<sup>58</sup>. The prevailing position does appear to favour the view that the decision of an adjudicator gives rise to a fresh cause of action, similar to an action in debt<sup>59</sup>.

### **Recovery of payment obligations pursuant to an adjudicator's decision**

The statutory scheme under the *1996 Construction Act* is also silent on the recovery of money paid by a party pursuant to the decision of an adjudicator. In an important decision in 2015, the Supreme Court of the United Kingdom clarified the status of such payments in *Aspects Contracts (Asbestos) Ltd v Higgins Construction Plc*<sup>60</sup>. The court concluded that it was an artificial construction to treat a claim to recover sums paid based on an alleged breach of contract<sup>61</sup>. The court held that a necessary consequence of the statutory adjudication regime is that it implies into the parties' contractual relationship a directly enforceable right to recover an overpayment made by a party pursuant to a decision of the adjudicator<sup>62</sup>.

### **A strict interpretation of dispute adjudication as part of dispute escalation**

It is important to recall that as attempts are made to move dispute adjudication closer to the established areas of litigation or arbitration for dispute resolution, the underlying "rough and ready" focus of dispute adjudication is lost. Dispute adjudication depends on the expedited resolution of a dispute within a short period of time by an adjudicator who is tasked to reach an interim-binding decision quickly and without the luxuries of "procedural niceties". Two key arguments therefore support the conclusion that a mandatory dispute adjudication mechanism should be interpreted strictly.

### **The prompt payment argument**

Dispute adjudication is intrinsically linked to the "prompt payment" obligations as set out in the statutory regimes on construction contracting. The payment obligations form part of what is called a "security of payment mechanism" which facilitates the timely payment for construction works and which is designed to support construction contractors and sub-contractors, who are typically the financially weaker party. The mechanism isolates the risk of an insolvent party to the construction contract from accumulating additional debts, delaying payment and thereby 'infecting' the contractual payment chain. Commercial risks are passed onto the stronger contractual party<sup>63</sup>, typically the employer. Any disputed payment obligation is determined by way of dispute adjudication, resulting in the payment obligation being formalised in an interim binding adjudication decision.

This security of payment process operates as follows: Pay now, argue later. The contractor will be in possession of the payment until the point in time when the other party (usually the employer) has successfully challenged the adjudicator's decision on the "prompt payment" obligation by way of an escalation of the dispute to litigation or arbitration. This ensures that the contractor maintains cash-flow and is able to complete the construction works.

### **The dispute escalation argument**

The provisions on dispute adjudication in construction contracts are usually encased within a multi-tiered dispute escalation clause. Essentially, a dispute is pushed along the escalation scale and typically, complex long-term construction contracts provide for a two or three-stage multi-tier dispute escalation clause. It is usual practice to start the sliding scale with negotiations, followed by adjudication or mediation and finally litigation or arbitration<sup>64</sup> as the terminal dispute layer of "last-resort"<sup>65</sup>.



A key issue with dispute escalation clauses lies in the enforceability of the escalation steps<sup>66</sup>. A strict interpretation, which the author supports, mandates that the parties must be held to adhere to the provisions of their previously agreed bargain and that an active dispute resolution method, for example adjudication, has the power to bind a higher dispute method. An escalated arbitral tribunal would therefore be forced to stay the resolution of the dispute until such time as the adjudication step has been completed<sup>67</sup>. For example, in the non-construction law context, in *International Research Corporation v Lufthansa Systems Asia Pacific*, the Court of Appeal of Singapore held that where parties have contracted for a specific dispute resolution procedure as a condition precedent to litigation or arbitration, that procedure must be fulfilled<sup>68</sup>. A similar position was taken in the decision of *Peterborough City Council v Enterprise Managed Services Ltd*<sup>69</sup>, where the English High Court confirmed that the parties could not leapfrog the dispute adjudication procedure to undertake direct recourse to litigation of the dispute. The emphasis on escalation and the mandatory provision on amicable settlement by the court confirmed that the adjudication process is, first and foremost, designed to de-escalate disputes between the parties.

The decision in *Peterborough* is an important reminder that adjudication serves the primary purpose of dispute avoidance. The parties are locked in dialogue and negotiation throughout the process. Two processes are operating simultaneously. Firstly, an active dialogue between the parties is facilitated. Secondly, a time-limited challenge period to the decision of the adjudicator ensures that the parties do not endlessly negotiate, thus ensuring procedural efficiency. Upon completion of the adjudication step, the dispute is escalated to the next dispute layer.

In order to bypass any dispute escalation process, an outright procedural impossibility would have to exist. An example of this arose in the decision of *Al-Waddan Hotel Limited v Man Enterprise SAL*<sup>70</sup>, where the court resorted to considerations of party refusal and hindrance in order to justify the conclusion that direct recourse to arbitration should be permitted as an exception<sup>71</sup>.

If the parties were permitted to avoid the mandatory escalation provisions, the integrity of the entire dispute escalation process would break down<sup>72</sup>. As the Australian decision of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* correctly held, the rigorous enforcement of an escalation clause is required to safeguard the parties' participation in a process 'from which cooperation and consent may come'<sup>73</sup>. It is therefore correct to conclude that the enforcement of a dispute escalation clause should be interpreted strictly.

### The introduction of statutory dispute adjudication in Canada

In Canada, two significant developments on dispute adjudication are currently ongoing. Firstly, Bill 142 was passed unanimously by the Ontario legislature on December 5, 2017. The new *Construction Act* received Royal Assent on December 12, 2017. Thus, Ontario has formally introduced a statutory dispute adjudication mechanism as well as a prompt payment regime. Secondly, Bill S-224, the *Canada Prompt Payment Act*, which is making its way through the legislative process, will introduce statutory dispute adjudication and prompt payment obligations at federal level. These developments will formalise dispute adjudication within the dispute resolution landscape in Canada.

### Ontario Bill 142, An Act to Amend the Construction Lien Act

The "Striking the Balance: Expert Review of Ontario's Construction Lien Act" report was commissioned by the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure and prepared by construction law experts Bruce Reynold and Sharon Vogel. The report was delivered in April 2016. Based on its recommendations, Bill 142 proposed amendments to the province's *Construction Lien Act*, which is now renamed the *Construction Act* following Royal Assent.

The *Construction Act* is as a direct result of the Ontario Report. For example, the report discussed dispute adjudication at great length in Chapter 9. The report endorsed dispute adjudication as a mechanism for dispute resolution in construction contracting and concluded as follows: "We recommend that adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts"<sup>74</sup>, in both the private and public sectors in Ontario. This is also reflected in the *Construction Act*.

The central issue of dispute adjudication, namely, the enforceability of an adjudicator's decision, is addressed in the Ontario Report. The report endorsed the interim binding effect of an adjudicator's decision, until final determination of the dispute by either litigation or arbitration or when the dispute is settled between the parties<sup>75</sup>. The report further recommended that an adjudication decision be enforced, if necessary, by way of application to the Superior Court of Justice "in a manner similar to that employed in respect of the awards in domestic arbitrations"<sup>76</sup>. These recommendations are reflected in Part II.1 of the *Construction Act*, specifically in section 13.20.

The Ontario Report also discussed the concept of "security of payment" in Chapter 8. As discussed further below, this mechanism is also known as "prompt payment" and has been popular in comparative jurisdictions. Part I.1 of the *Construction Act* sets out the provisions on prompt payment.

The objective is to facilitate cash-flow among the contractual parties to a construction contract. The regime effectively creates an unlocking of potential payment delays and resultant disputes. The Ontario Report recommended that an implied statutory prompt payment regime be implemented and that the trigger point for prompt payment should be the delivery of a proper invoice with a 28-day payment period between owner and general contractor (extended by a further 7 days as between a general contractor and subcontractor)<sup>77</sup>.

### Federal Bill S-224, Canada Prompt Payment Act

Federal Bill S-224, *Canada Prompt Payment Act: respecting payments made under construction contracts*<sup>78</sup>, passed third reading in the Senate on May 4<sup>th</sup>, 2017. As the bill was initiated in the Senate, it is now before the House of Commons for its first reading<sup>79</sup>. The proposed legislation relates to construction contracts between a "government institution" and a "contractor/subcontractor" only<sup>80</sup>. This encompasses both a department or ministry of state of the Government of Canada and any parent Crown corporation or wholly owned subsidiary of a Crown corporation.

Bill S-224 has two critical objectives, namely to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors. The scope of the *Prompt Payment Act* relates to contracts for construction works, including design services. Employment contracts to carry out construction works as an employee as well as certain prescribed classes (to be determined in future regulations) are excluded from the scope<sup>81</sup>. In light of this, the regulations accompanying the future act will be critical.



The proposed federal legislation will provide for a right of the payee to suspend performance of the construction works<sup>82</sup> where a payer<sup>83</sup> fails to make payment in accordance with the decision of an adjudicator within seven days after the decision is rendered. A contractor or subcontractor may terminate the construction contract for non-payment of amounts due to the payee as determined by the decision of an adjudicator, as per section 19 of Bill S-224. Moreover, a payee may terminate the construction contract if the payer does not make payment within 14 days after receipt of a written notice to the payer giving notice of the payee's intention to terminate.

At the core of these two central provisions is section 20 of the bill, which sets out the dispute adjudication mechanism. A single adjudicator determines the dispute upon written submissions and the adjudicator must render its decision within 28 days from the date of appointment. The decision is binding but not final on the parties, until the decision is "finally determined by legal proceedings, arbitration or agreement of the parties"<sup>84</sup>.

### Recommendations and conclusions

The adoption of statutory dispute adjudication in Canada benefits from a comprehensive body of judicial evaluations and commentary arising from the United Kingdom.

As this paper has argued, dispute adjudication plays, and will continue to play, an increasingly important role in the de-escalation and avoidance of disputes in the construction industry, especially in the timely delivery of major infrastructure projects in the dispute-intensive energy and natural resources sector. Although the origins of statutory dispute adjudication are rooted in the resolution of "any dispute" within the wider construction industry, the key advantage of dispute adjudication for the energy and natural resources sector is that adjudication facilitates the resolution of disputes in parallel to ongoing construction works. On this basis, the following principles and recommendations endorse dispute adjudication as a suitable dispute resolution mechanism for disputes arising from the construction of major infrastructure projects:

1. The number of parties, international components and challenging geographical locations of typical energy and natural resources infrastructure projects require an expedited, flexible and party-driven dispute resolution mechanism.
2. The dispute resolution mechanism must be in time and on site in order to focus the parties' attention on the overall goal of delivering the project in time and at cost.
3. Dispute adjudication should be included within an escalation mechanism that may entail mediation, litigation or arbitration. This provides the parties with the requisite assurances that adjudication is a not a weak form of alternative dispute resolution, thereby reducing the temptation to bypass the adjudication process and to escalate the dispute directly to litigation or international commercial arbitration.
4. As the case law examined in this paper confirms, a strict enforcement of the mandatory pre-arbitration dispute adjudication provisions ensures that the parties take the mechanism seriously and adhere to their contractual bargain. Negotiation and settlement pursuant to a decision of an adjudicator is an important step in dispute adjudication, from which resolution of the dispute by way of cooperation may arise.

As Canada develops its dispute adjudication framework, important lessons from the United Kingdom regime include the fact that "procedural niceties" cannot be accommodated in an expedited adjudication mechanism. As argued in this paper, it is important that only the basic procedural safeguards of natural justice operate in dispute adjudication.

The problem areas in the United Kingdom statutory dispute adjudication regime as examined in this paper confirm that dispute adjudication is not a perfect process. Once one acknowledges the "rough and ready" nature of dispute adjudication, however, the temptation to introduce procedural luxuries common to other forms of dispute resolution will fall away.

In the United Kingdom, there are clear signs that the courts are being increasingly vocal about a re-statement of the objectives of dispute adjudication. For example, the March 2017 decision of *Hutton Construction Ltd*<sup>85</sup> may be indicative of what is to come. In rejecting a challenge to the enforceability of the adjudicator's decision, Coulson J reminded the parties that had he allowed the defendant a re-run of the adjudication at the enforcement stage, this would have taken away the status of adjudication as the *de facto* dispute resolution mechanism in the construction industry.

As statutory dispute adjudication gains momentum in Canada, the important aspect of expediency should not be forgotten. With this in mind, and with the benefit of a comprehensive body of jurisprudence on the United Kingdom adjudication mechanism, the prospect of successfully establishing dispute adjudication in Canada looks likely.

At the moment Ontario leads the way. This is a welcome development for the resolution of construction disputes in the delivery of major infrastructure projects, especially for the energy and natural resources sector.

### Biography of Professor Rudiger Tscherning

Rudiger Tscherning is an Assistant Professor of Law and joined the Faculty of Law at the University of Calgary in July 2016. He is a Ph.D. candidate at the Institute for Comparative Law, Conflict of Laws and International Business Law at the University of Heidelberg, where his doctoral research examines dispute resolution mechanisms in international energy infrastructure projects. He holds an LL.M. in Energy and Climate Change Law and Policy from the University of Dundee, Scotland (2011) and an LL.M. in International Commercial Law from the University of Nottingham, England (2003). He also holds an LL.B. from Trinity College Dublin, Ireland (2002).



<sup>1</sup> DR Haigh, "Unique Procedural Issues Found in International Oil & Gas Disputes", Paper delivered at the ICC/AIPN Dispute Resolution in the International Oil & Gas Business Conference, Paris, 29-30 October 2007 [unpublished].

<sup>2</sup> D Jones, "Dispute Boards: Preventing and Resolving Disputes", (Paper delivered at the Society of Construction Law Malaysia Construction Law International Conference 2014, Kuala Lumpur, 18-20 September 2014) [unpublished].

<sup>3</sup> J Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) Ch 1 at 1.

<sup>4</sup> *Housing Grants, Construction and Regeneration Act 1996* (UK), [http://www.legislation.gov.uk/ukpga/1996/53/pdfs/ukpga\\_19960053\\_en.pdf](http://www.legislation.gov.uk/ukpga/1996/53/pdfs/ukpga_19960053_en.pdf). Other common law statutes include: The Australian *Building and Construction Industry Security of Payment Act 1999* (Cth); New Zealand *Construction Contracts Act 2002* (New Zealand), and the Irish *Construction Contracts Act 2013* (Ireland). The legislative texts are available at: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/](http://www.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/), <http://www.legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html>, and <http://www.irishstatutebook.ie/pdf/2013/en.act.2013.0034.pdf>.

<sup>5</sup> B Reynolds and S Vogel, "Striking the Balance: Expert Review of Ontario's Construction Lien Act", Report prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, 30 April 2016, [Ontario Report], available at: [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla\\_report/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/).

<sup>6</sup> Bill 142, *An Act to amend the Construction Lien Act*, 2nd Sess, 41st Leg, Ontario, 2017, available at: [http://www.ontla.on.ca/bills/bills-files/41\\_Parliament/Session2/b142\\_e.pdf](http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b142_e.pdf).

<sup>7</sup> Bill S-224, *Canada Prompt Payment Act: An Act respecting payments made under construction contracts*, 1st Sess, 42nd Leg, 2017, available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8917303>.

<sup>8</sup> A Connerty, "The Role of ADR in International Disputes" (2006) 12:1 *Arb Intl* 47 at 52.

<sup>9</sup> G Born, ed, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2014) at 281.

<sup>10</sup> C Bühring-Uhle, *Arbitration and Mediation in International Business*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006) at 203.

<sup>11</sup> J Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) Ch 1 at 56.

<sup>12</sup> J Uff, *Construction Law*, 9th ed (London, UK: Thomson Sweet & Maxwell, 2005) at 30.

<sup>13</sup> K Dettman and D Ross, 'The Use of DRBs in the Energy Industry', Dispute Resolution Board Foundation Forum, 14(2) May 2010, 6 at p. 8.

<sup>14</sup> EW Chan, CKL Chan & MJ Hills, "Construction Industry Adjudication: A Comparative Study of International Practice" (2005) 22 *J Intl Arb* 363 at 364. See also ME Morris, "Adjudication as Operated on the Construction of the Dartford River Crossing (the Queen Elizabeth II Bridge)" (1994) 60 *Arbitration* 13.

<sup>15</sup> *Balfour Beatty Construction Limited v Lambeth London Borough Council* [2002] BLR 288; see further the discussion of authorities at J Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) Ch 5, n 3.

<sup>16</sup> *Supra* note 4 at s 108(2)(a)-(c).

<sup>17</sup> *Supra* note 4 at s 108(3).

<sup>18</sup> *Supra* note 4 at s 108(1).

<sup>19</sup> J Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) Ch 3 at 51.

<sup>20</sup> *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC).

<sup>21</sup> *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

<sup>22</sup> N Gould, CI Arb and Adjudication Society, *Guidance Note: Jurisdiction of the UK Construction Adjudicator*, December 2012 at 15, available at: <http://www.adjudication.org>.

<sup>23</sup> *Ibid* at 24.

<sup>24</sup> *Ecovision Systems Limited v Vinci Construction UK Limited* [2015] EWHC 587 (TCC).

<sup>25</sup> *Ibid* at para 71.

<sup>26</sup> *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC).

<sup>27</sup> *Jacques (t/a C&E Jacques Partnership) v Ensign Contractors Ltd* [2009] EWHC 3383 (TCC) at para 21.

<sup>28</sup> *Ibid* at para 26.

<sup>29</sup> *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 649/1998.

<sup>30</sup> *Ibid*, Section 20: Adjudicator's decision.

<sup>31</sup> *Ibid*, Section 23(2): Effect of the decision.

<sup>32</sup> *Supra* note 4 at s 108(3).

<sup>33</sup> *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000] BLR 49 (TCC) at para 23.

<sup>34</sup> *Ibid* at para 36.

<sup>35</sup> *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739 (TCC) at para 14.

<sup>36</sup> *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] WL 634882 at para 20.

<sup>37</sup> *Supra* note 35.

<sup>38</sup> *Dorchester Hotel Ltd v Vivid Interiors Ltd* [2009] WL 634882 at para 26.

<sup>39</sup> *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWHC (Civ) 1358.

<sup>40</sup> N Gould, CI Arb and Adjudication Society, *Guidance Note: Natural Justice*, April 2013, available at: <http://www.adjudication.org>.

<sup>41</sup> *Canitlon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC). At para 57, Akenhead J sets out the five-point test as follows: it must be established that the adjudicator failed to apply the rules of natural justice; the breach of the rules must be more than peripheral and must be material breaches; a breach is material where, for example, a failure to provide the parties an opportunity to comment upon a decisive point or issue is established; and whether the issue is decisive or peripheral or irrelevant is a question of degree and must be assessed by a judge. It is only when an adjudicator deviates extensively from the norms of natural justice, for example by determining the adjudication on facts or legal issues not argued by the parties, that a breach will successfully be established.

<sup>42</sup> *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth* [2002] BLR 288, para 56.

<sup>43</sup> *Carillion Construction Ltd* [2005] EWCA Civ 1358 at para 85-87. The passage at para 86 is central to the Court of Appeal's position, pointing out that the purpose of construction adjudication is not to reach a proper legal decision but to reach an interim solution which ensures swift payment of a contractor or sub-contractor. The court stated as follows: "The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions".

<sup>44</sup> *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 5617 (TCC) at para 3.

<sup>45</sup> *Ibid* at para 21.

<sup>46</sup> *Ibid* at para 37.

<sup>47</sup> *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC).

<sup>48</sup> *Ibid* at para 51.

<sup>49</sup> The referral was submitted one day ahead of the Christmas break and consisted of 92 pages including four heads of complex claims and was accompanied by 37 lever arch files. The adjudicator had accepted the appointment on condition that the parties would disregard the Christmas period for the purpose of the 28 days and that an extended period of 42 days would be adequate.

<sup>50</sup> *Supra* note 44.

<sup>51</sup> *Supra* note 44 at para 6.

<sup>52</sup> *Carillion Construction Limited v Stephen Andrew Smith* [2011] EWHC 2910 (TCC) at para 55.

<sup>53</sup> *Ibid* at para 56: Different evidence or arguments raised, as well as a different quantum claimed, will not, of itself, be indicative that a different dispute has arisen. Where essentially the same cause of action is relied upon, this is a strong indication that the disputes are similar.

<sup>54</sup> *Simons Construction Ltd v Aardvark Developments Ltd* [2003] WL 22358283 (TCC) at para 29.

<sup>55</sup> *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd* [2007] WL 2187002 (TCC) at para 6.



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<sup>56</sup> *Ibid* at para 15.

<sup>57</sup> *Jim Ennis Construction Limited v Premier Asphalt Limited* [2009] EWHC 1906 (TCC) at para 16.

<sup>58</sup> *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWHC 1322 (TCC) at para 32.

<sup>59</sup> A Tweedale, "Construction Act review: causes of action - recovering monies paid under an adjudicator's decision" (2014) 30:8 Construction LJ 390 at 394.

<sup>60</sup> *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38.

<sup>61</sup> *Ibid* at para 19.

<sup>62</sup> *Ibid* at para 23.

<sup>63</sup> C Seppälä, "An Engineer's/Dispute Adjudication Board's Decision Is Enforceable by An Arbitral Award", White and Case Client Update, December 2009 at 8.

<sup>64</sup> See further, TA Martin, "Dispute Resolution in the international energy sector: an overview", (2011) 4:4 Journal of World Energy Law and Business 332 at 336-339 for a comprehensive overview of alternative dispute resolution mechanisms.

<sup>65</sup> C Chatterjee, "Settlement of Disputes Procedures and Arbitration under FIDIC" (2000) 17:3 J Intl Arb 103 at 105.

<sup>66</sup> D Kayali, "Enforceability of Multi-Tiered Dispute Resolution

Clauses" (2010) 27:6 J Int Arb (2010) 551 at 560.

<sup>67</sup> *Ibid* at 561.

<sup>68</sup> *International Research Corporation v Lufthansa Systems Asia Pacific* [2013] SGCA 55 [62].

<sup>69</sup> *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC).

<sup>70</sup> *Al-Waddan Hotel Limited v Man Enterprise SAL* [2014] EWHC 4796 (TCC).

<sup>71</sup> *Ibid* at para. 57.

<sup>72</sup> R Choat, "No dispute: arguments under dispute resolution and dispute escalation provisions", (2009) 4:4 Construction Law International 7.

<sup>73</sup> *Hooper Baillie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>74</sup> Ontario Report, *Supra* note 5, Chapter 9, part 4: Analysis and Recommendations, Recommendation 57.

<sup>75</sup> *Supra* note 4, Chapter 9, part 5.5: How are Adjudicated Decisions Enforced, Recommendation 76.

<sup>76</sup> *Supra* note 5, Chapter 9, part 5.5: How are Adjudicated Decisions Enforced, Recommendation 77.

<sup>77</sup> *Supra* note 5, Chapter 8, part 4.4, Recommendation 50.

<sup>78</sup> *Supra* note 7.

<sup>79</sup> For a status update on Bill S-224 see <https://openparliament.ca/bills/42-1/S-224/>.

<sup>80</sup> *Supra* note 7, s 4(1).

<sup>81</sup> *Supra* note 7, s 5.

<sup>82</sup> *Supra* note 7, s 17.

<sup>83</sup> *Supra* note 7. Section 3 defines 'payer' to mean a government institution or any contractor or subcontractor required to make payment under a construction contract.

<sup>84</sup> *Supra* note 7, s 20(9).

<sup>85</sup> *Supra* note 50.



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