

# Construction Disputes in Major Infrastructure Deliveries: Lessons from the United Kingdom for the Introduction of Statutory Dispute Adjudication in Canada

R U D I G E R T S C H E R N I N G \*

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## ABSTRACT

In the delivery of infrastructure projects, construction disputes give rise to delays and cost overruns. These disputes require a specialised dispute resolution mechanism, which facilitates the expedited resolution of disputes ‘in time’. Dispute adjudication provides parties with a fast, project-accompanying mechanism that produces an interim binding adjudicator’s decision. Where the parties are unable to reach an amicable settlement, the dispute may be escalated up to litigation or commercial arbitration for final resolution, as part of a multi-tiered dispute resolution clause. Two current developments in Canada are placing dispute adjudication in focus. In Ontario, after a comprehensive review of the construction industry in 2016,<sup>1</sup> the introduction of dispute adjudication was recommended.<sup>2</sup> In response to the report, the Attorney General of Ontario introduced *Bill 142, An Act to Amend the*

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<sup>1</sup> Ontario, Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure, *Striking the Balance: Expert Review of Ontario’s Construction Lien Act*, by Bruce Reynolds & Sharon Vogel (Ottawa: Ministry of the Attorney General, 2016), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla\\_report/](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cla_report/)> [*Ontario Report*].

<sup>2</sup> *Ibid*; see also Recommendations 57, 76 and 77 reflecting this.

*Construction Lien Act*, on May 31st, 2017.<sup>3</sup> On December 5, 2017, Bill 142 was carried on division by the Ontario legislature.<sup>4</sup> Section 1 of Bill 142 renames the former *Construction Lien Act* to the ‘Construction Act’ and this *Construction Act* received Royal Assent on December 12, 2017.<sup>5</sup> Similar legislation is currently before the Legislative Assembly in Manitoba.<sup>6</sup> At the Federal level, the Government of Canada has just published a commissioned report entitled “Building a Federal Framework for Prompt Payment and Adjudication”<sup>7</sup>, which recommends that dispute adjudication should be adopted as a “targeted dispute resolution mechanism”<sup>8</sup> for federal construction projects. In addition, Bill S-224, of May 2017, similarly places the concept of dispute adjudication at the forefront of alternative dispute resolution for federal construction projects in Canada.<sup>9</sup>

The objective of this paper is to provide guidance on dispute adjudication in Canada, by examining a number of critical aspects of the established United Kingdom regime by way of comparison. The paper identifies key ‘lessons learned’, including the fact that ‘procedural niceties’ cannot be accommodated in an expedited dispute resolution mechanism that relies heavily on a ‘rough and ready’ resolution of construction disputes. The paper also highlights a number of ‘problem areas’ in the United Kingdom regime but predicts that dispute adjudication will play an increasingly important role in the de-escalation and avoidance of construction disputes in the energy industries of Canada. With the benefit of a detailed comparative body of jurisprudence, the prospect of successfully establishing dispute adjudication mechanisms in

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<sup>3</sup> 2nd Sess, 41st Leg, Ontario, 2017, online:

<ontla.on.ca/bills/billsfiles/41\_Parliament/Session2/b142\_e.pdf>.

<sup>4</sup> Legislative Assembly of Ontario, Bill 142, *An Act to amend the Construction Lien Act*, 2nd Sess, 41st Leg, Ontario, 2017, Status, online: <ola.org/en/legislative-business/bills/parliament-41/session-2/bill-142/status>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Legislative Assembly of Manitoba, Bill 218, *The Prompt Payments in the Construction Industry Act*, 3rd Sess, 41st Leg, Manitoba, 2018, Status: online: <web2.gov.mb.ca/bills/41-3/b218e.php> [Bill 218].

<sup>7</sup> Singleton Urquhart Reynolds Vogel LLP, Building a Federal Framework for Prompt Payment and Adjudication (Ottawa, Government of Canada, Public Services and Procurement Canada, 2018), online: <tps-gc-pwgs-c.gc.ca/biens-property/divul-gation-disclosure/psdic-ppci/rapsd-ppes-eng.html>.

<sup>8</sup> *Ibid* at ch X.

<sup>9</sup> Bill S-224, *Canada Prompt Payment Act: An Act respecting payments made under construction contracts*, 1st Sess, 42nd Leg, 2017, online:

<parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8917303> [Bill S-224].

Canada looks likely. This would be a welcome development for the resolution of construction disputes concerning the delivery of major energy infrastructure.

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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 for major projects within the energy and natural resources sectors, which rank among the most dispute-intensive of all industries in the global economy.<sup>10</sup>

Construction disputes form part of a series of dispute risks that are a persistent reality in the delivery of strategic infrastructure projects. Construction projects are traditionally ‘bedeviled’<sup>11</sup> by disputes. The number of parties, international components, challenging locations, and the scale of operations are all contributing factors to an environment fertile for disputes. As a result, construction disputes necessitate a specialised dispute resolution mechanism that facilitates the expedited resolution of disputes ‘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>12</sup> and to avoid the further escalation of a given 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 an 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.

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<sup>10</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>11</sup> D Jones, “Dispute Boards: Preventing and Resolving Disputes” (Paper delivered to the Society of Construction Law, Malaysia; International Conference 2014, Kuala Lumpur, 18–20 September 2014) [unpublished].

<sup>12</sup> Jane Jenkins, *International Construction Arbitration Law*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2013) ch 1 at 1.

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.<sup>13</sup> Canada is one of the last jurisdictions to adopt statutory dispute adjudication in construction contracting. In light of this development, this paper undertakes to provide an exposition of the key points and issues of 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>14</sup> made 101 recommendations for improvements in the construction industry, including recommendation to introduce a formal statutory dispute adjudication mechanism as well as a prompt payment regime.<sup>15</sup> In response to the report, the Attorney General of Ontario introduced Bill 142, *An Act to Amend the Construction Lien Act* on May 31st, 2017.<sup>16</sup> On December 5, 2017, Bill 142 was carried on division by the Ontario legislature.<sup>17</sup> 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.<sup>18</sup> Similar legislation is currently before the Legislative Assembly in Manitoba.<sup>19</sup> At the Federal level, the Government of Canada has just published a commissioned report entitled “Building a Federal Framework for Prompt Payment and Adjudication”<sup>20</sup>, which recommends that dispute adjudication should be adopted as a “targeted dispute resolution mechanism”<sup>21</sup> for federal

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<sup>13</sup> *Housing Grants, Construction and Regeneration Act 1996* (UK), online:

<[legislation.gov.uk/ukpga/1996/53/pdfs/ukpga\\_19960053\\_en.pdf](http://legislation.gov.uk/ukpga/1996/53/pdfs/ukpga_19960053_en.pdf)> [1996 Construction Act]. 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). These legislative texts can be found online: <[austlii.edu.au/au/legis/nsw/consol\\_act/bacisopa1999606/](http://austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606/)>; <[legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html](http://legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html)>; <[irishstatutebook.ie/pdf/2013/en.act.2013.0034.pdf](http://irishstatutebook.ie/pdf/2013/en.act.2013.0034.pdf)>.

<sup>14</sup> Ontario Report, *supra* note 1.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Supra* note 3.

<sup>17</sup> *Supra* note 4.

<sup>18</sup> *Ibid.*

<sup>19</sup> Bill 218, *supra* note 6.

<sup>20</sup> Singleton Urquhart Reynolds Vogel LLP, *supra* note 7.

<sup>21</sup> *Ibid* at ch X.

construction projects. In addition, Federal Bill S-224, *Canada Prompt Payment Act: respecting payments made under construction contracts*,<sup>22</sup> passed third reading in the Senate on May 4th, 2017 and will introduce statutory dispute adjudication at the federal level.

This paper examines the concept of dispute adjudication as a comparative analysis of the United Kingdom's statutory adjudication mechanism pursuant to the *1996 Construction Act*. The UK legislative regime contains the first codification of a dispute adjudication mechanism for the construction industry which has been replicated, in various forms, in a number of common law jurisdictions. The objective of this paper is to provide an interpretative guide to dispute adjudication by examining a number of critical aspects of the dispute adjudication regime in the United Kingdom. Drawing on this analysis, the paper identifies key 'lessons learned' from the UK experience and highlights a number of 'problem areas' in how the statutory provisions on dispute adjudication have been interpreted. The paper provides guidance on how these problems can be avoided in Canada (and in other interested jurisdictions). It also provides guidance on how statutory dispute adjudication can be established as an attractive dispute resolution mechanism within the landscape of alternative dispute resolution in Canada, particularly in the context of construction disputes in the delivery of major infrastructure projects.

This paper is structured as follows. In Part I, the general concept of dispute adjudication is discussed, including construction disputes in major infrastructure projects. Part II examines the statutory adjudication regime in the United Kingdom, followed by a detailed discussion of problem areas and 'lessons learned' from the UK regime in Part III. Part IV of the paper provides an overview of current developments in Canadian construction law with the introduction of statutory dispute adjudication in Canada, both at the federal and provincial level in Ontario. The paper concludes in Part V with a number of recommendations that are designed to facilitate the expedited introduction of dispute adjudication for the resolution of construction disputes in major infrastructure projects in Canada.

## I. THE ORIGINS OF STATUTORY DISPUTE ADJUDICATION AND CONSTRUCTION DISPUTES

Dispute adjudication is rooted in the concept of alternative dispute resolution, driven by an underlying policy to allow the parties to resolve disputes according to a mutually agreed dispute resolution mechanism that

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<sup>22</sup> *Supra* note 9.

does not, without an escalation of the dispute, resort to resolution by litigation or arbitration.

The House of Lords' leading decision in the *Channel Tunnel* case<sup>23</sup> paved the way for commercial parties to contractually agree on a pre-arbitral dispute resolution mechanism in the United Kingdom. The decision, as encapsulated by Lord Mustill's classic statement on alternative dispute resolution in the English common law, concluded that "having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go."<sup>24</sup> The decision firmly endorsed pre-arbitral dispute resolution mechanisms in the English common law and prepared the way for the subsequent introduction of statutory dispute adjudication in domestic construction contracts by way of Part II of the *1996 Construction Act*.<sup>25</sup>

The origins of statutory dispute adjudication in the United Kingdom are rooted in the economic downturn of the 1980s and early 1990s and its effect on the domestic construction industry. The government in power at the time, together with the construction industry, undertook a comprehensive review of the industry and tasked Sir Michael Latham to commission a report on the status of the industry entitled "Constructing the Team". The 1994 report is generally referred to as "The Latham Report" and it concluded that the most effective form of construction contracting is one that includes a duty for all parties to conduct their contractual duties fairly and with mutual cooperation.<sup>26</sup>

To avoid and resolve construction disputes, the *Latham Report* recommended that a pre-determined impartial adjudicator/referee/expert mechanism would best serve the interests of all involved parties.<sup>27</sup> Latham criticised the 'adversarial attitudes' of court-based litigation in the United Kingdom at the time and noted that the dispute practice in the United States of America had taken a number of positive steps to reduce this, including the introduction of alternative dispute resolution mechanisms.<sup>28</sup> On this basis, the *Latham Report* endorsed a multi-tiered dispute resolution mechanism for

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<sup>23</sup> *Channel Tunnel Group Limited v Balfour Beatty Construction Limited et al*, [1993] 2 WLR 262 [*Channel Tunnel*].

<sup>24</sup> *Ibid* at 276–277.

<sup>25</sup> *1996 Construction Act*, *supra* note 13; see also K Salmon, "The enforcement of adjudicators' awards under the Housing Grants Construction and Regeneration Act 1996: Part 31" (2009) 75:2 *Arbitration* 271.

<sup>26</sup> Sir Michael Latham, "Constructing the Team", *The Latham Report*, (United Kingdom: Her Majesty's Stationary Office, 1994), s 5.18.

<sup>27</sup> *Ibid*, s 8.7.

<sup>28</sup> *Ibid*, s 9.2.

specialist construction industry disputes, which formalised dispute adjudication in the United Kingdom construction law. Latham concluded that arbitration, as the dispute resolution mechanism of last resort, should be restricted to resolving disputes after practical completion of the project works only.<sup>29</sup> This recommendation ultimately established dispute adjudication as a project-accompanying dispute resolution mechanism, with interim binding effect, until the dispute was resolved with finality by either litigation or commercial arbitration.

#### A. 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.

## II. 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 subdividing the escalation of construction disputes has been “particularly popular”<sup>30</sup> for infrastructure projects and operates to ‘filter’ disputes. Dispute adjudication therefore maintains the commercial relationship between the parties by containing the risk of project disputes.

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<sup>29</sup> *Ibid*, s 9.10.

<sup>30</sup> Anthony Connerty, “The Role of ADR in the Resolution of International Disputes” (1996) 12:1 *Arb Intl* 47 at 52.

Dispute adjudication is located within the cluster of established alternative dispute resolution proceedings, effectively between mediation and arbitration.<sup>31</sup> Parties voluntarily submit to a process that encourages cooperation, de-legitimises confrontational behaviour, and sets out a precise dispute avoidance programme.<sup>32</sup> In the context of dispute escalation, dispute adjudication can be considered a mandatory pre-escalation process.

#### A. THE OBJECTIVE OF DISPUTE ADJUDICATION

Dispute Adjudication achieves its objective of dispute avoidance and dispute de-escalation in two ways. First, dispute adjudication ‘front loads’ the avoidance and potential resolution of the parties’ dispute. By including provisions on mandatory discussions between the parties, a potential dispute may be negotiated off the agenda between the parties, before it develops into a protracted dispute between the parties. This is the dispute avoidance strategy of dispute adjudication, which forms part of the concept of dispute escalation. The English High Court, in the decision of *Peterborough City Council v Enterprise Managed Services Ltd* (examined in further detail below),<sup>33</sup> confirmed that parties must be held to their contractually agreed dispute escalation procedure. The Supreme Court of Switzerland also confirmed, in 2014,<sup>34</sup> the importance of dispute avoidance as part 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 coexist and operate in parallel. This in-time mechanism exerts pressure on the parties to resolve their dispute “there and then,” and underlines the overall collaborative focus of the construction project. This aspect focuses the parties’ attention on the overall completion of the project works.

Negotiation forms an important part of the adjudication process, typically involving an initial negotiation between senior management representatives of the parties, who may be open to broader commercial motivations.<sup>35</sup> When an adjudicator’s decision has been made, the parties typically comply with their contractual obligation to negotiate amicably for the prescribed period of time.

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<sup>31</sup> Gary Born, ed, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2014) at 281.

<sup>32</sup> Christian Bühring-Uhle, *Arbitration and Mediation in International Business*, 2nd ed (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006) at 202.

<sup>33</sup> [2014] EWHC 3193 (TCC).

<sup>34</sup> Case 4A\_124/2014, 4 July 2014, (Supreme Court, Switzerland) [Switzerland].

<sup>35</sup> Jenkins, *supra* note 12 at 52–53.

It is only then that the parties may escalate their dispute to the next layer of dispute resolution along the escalation chain, usually by either litigation or commercial arbitration.

### 1. *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 of an interim basis.<sup>36</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 to prevent an existing dispute from ‘escalating’ to either litigation or international commercial arbitration.

Dispute adjudication differs to litigation or international commercial arbitration, the latter being finite or terminal forms of dispute resolution. Dispute adjudication is dependent on a strict contractual dispute escalation process. Dispute escalation facilitates the resolution of a dispute in parallel to the completion of the project works and only the most serious and protracted disputes are finally resolved with the aid of the coercive powers of litigation or arbitration.<sup>37</sup> Adjudication proceedings “prevent disputes in the first place and if this is not successful... assist and facilitate the parties in the equitable resolution of disputes.”<sup>38</sup> Dispute adjudication is therefore proactive,<sup>39</sup> fusing dispute avoidance with dispute resolution. Adjudication reverses the “backward-oriented dispute settlement to [a] future-oriented avoidances of disputes.”<sup>40</sup>

## B. 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

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<sup>36</sup> *Ibid* at 56.

<sup>37</sup> John Uff, *Construction Law*, 9th ed (London, UK: Thomson Sweet & Maxwell, 2005) at 30.

<sup>38</sup> G Golvan, “Practical Issues in the Establishment and Operation of a Dispute Resolution Board: Some Reflections on the Operation of Sydney’s Desalination Plant Project Dispute Resolution Board” (2009) 132 *Australian Construction Law Newsletter* 30, as quoted in Jones, *supra* note 11 at 18–20.

<sup>39</sup> Jones, *supra* note 11 at 18–20.

<sup>40</sup> Klaus Peter Berger, “Integration of Mediation Elements into Arbitration” (2003) 19:3 *Arb Intl* 387 at 396.

management process that allows projects to continue in parallel to the expedited resolution of disputes between the parties. The collaborative nature of the construction industry, especially on large-scale projects, is that it is simply not within any of the project parties' interest to interrupt the project works to resolve disputes off-site by either time-consuming litigation or arbitration.

Herein lies the key advantage of dispute adjudication. Disputes are disposed of in real time, as they occur, and parties are able to continue completion of the works. Dispute adjudication manages disputes as they arise, so that "critical project relationships can be maintained, schedules met and costs kept in check as the disputes play out."<sup>41</sup> Dispute adjudication is therefore driven by a desire to provide the contractual parties with a quick and practical resolution of their dispute, at all times maintaining the overall objective of preventing the project works to become delayed or worse, from stopping completely. By issuing an interim decision, the adjudication process allows subsequent management decisions to be taken in light of any decisions issued by the adjudicator.<sup>42</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 discussed in detail below, the English courts have held that the adjudication system can only properly function in practice when some of the inherent breaches of the rules of natural justice "are disregarded"<sup>43</sup> and the expediency of the adjudication mechanism is kept in mind by the parties.

### III. THE STATUTORY ADJUDICATION REGIME IN THE UNITED KINGDOM

This section examines the statutory dispute adjudication mechanism pursuant to the UK regime of the 1996 *Construction Act*. It will examine the six key areas of dispute adjudication, including the establishment of a construction 'dispute', the jurisdiction of the adjudicator, the issue of evidence, and the enforceability of an adjudicator's decision. This section will also undertake a discussion of key problem areas in the law of dispute adjudication, as distilled

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<sup>41</sup> Kurt Dettman & Duncan Ross, "The Use of DRBs in the Energy Industry", *Dispute Resolution Board Foundation Forum* (May 2010), 14:2, 6 at 8.

<sup>42</sup> Edwin HW Chan, Charles KL Chan & Martyn J Hills, "Construction Industry Adjudication: A Comparative Study of International Practice" (2005) 22 *J Intl Arb* 363 at 364. See also Michael E Morris, "Adjudication as Operated on the Construction of the Dartford River Crossing (the Queen Elizabeth II Bridge)" (1994) 60 *Arbitration* 13.

<sup>43</sup> *Balfour Beatty Construction Limited v Lambeth London Borough Council*, [2002] BLR 288; for further discussion of authorities, see Jenkins, *supra* note 12 at ch 5, n 3.

from an analysis of the guiding judicial decisions from the United Kingdom on dispute adjudication.

The United Kingdom courts, 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, both at the federal and provincial level, should be framed and interpreted.

Following the introduction of dispute adjudication and a security of payment mechanism in Part II of the *1996 Construction Act*, a number of common law jurisdictions followed suit. Canada is one of the last jurisdictions to adopt statutory dispute adjudication in construction contracting.<sup>44</sup> The statutory regimes are not identical, but they do share a commonality in terms of providing for an interim binding and expedited dispute escalation mechanism. In addition, following a decade long consultation, the Hong Kong 2002 Construction Industry Review Committee Report recommended the introduction of dispute adjudication as part of security of payment legislation in Hong Kong, following a legislative consultation period in 2015.<sup>45</sup> The legislation is anticipated to enter into force in 2017.

#### A. AN EXPEDITED MECHANISM TO REACH THE ADJUDICATOR'S DECISION

Pursuant to the statutory regime of the *1996 Construction Act*, the adjudicator is to reach a decision within a 28-day period (unless the parties agree upon a longer time period).<sup>46</sup> 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>47</sup> by

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<sup>44</sup> *Supra* note 13. Other common law statutes include: The Australian Building and Construction Industry Security of Payment Act 1999 (Cth), the New Zealand *Construction Contracts Act 2002*, and the Irish *Construction Contracts Act 2013*. The legislative texts are available online: <austlii.edu.au/au/legis/nsw/consol\_act/bacisopa1999606/>; <legislation.govt.nz/act/public/2002/0046/latest/DLM163059.html>; <irishstatutebook.ie/pdf/2013/en.act.2013.0034.pdf>.

<sup>45</sup> “Report on Public Consultation on Proposed Security of Payment Legislation for the Construction Industry”, Development Bureau of Hong Kong, April 2016. The report supports the introduction of security of payment legislation for Hong Kong’s construction industry, online: <devb.gov.hk/filemanager/en/content\_880/SOPL\_consultation\_report.pdf>.

<sup>46</sup> *Supra* note 13, s 108(2)(c).

<sup>47</sup> *Ibid*, s 108(3).

either legal proceedings, arbitration or by agreement between the parties. To facilitate amicable settlement between the parties, they can accept the decision of the adjudicator as the final determination of the dispute.

## B. ESTABLISHING A CONSTRUCTION DISPUTE

The statutory regime applies to any contract related to building works in England, Wales or Scotland or to a contract subject to the laws of those jurisdictions.<sup>48</sup> For the purposes of the 1996 Construction Act, the term “dispute” includes “any difference” arising under a construction contract,<sup>49</sup> as related to a construction operation, including questions of termination of such a contract. A dispute may be referred to adjudication “at any time.”<sup>50</sup>

In *Bovis Lend Lease Ltd v The Trustees of the London Clinic*,<sup>51</sup> Akenhead J discussed in detail what constitutes a “dispute” for the purposes of the 1996 Construction Act and when such a dispute crystallises. The court revisited the earlier decision of *Amec Civil Engineering Ltd v The Secretary of State for Transport*,<sup>52</sup> where Jackson J had derived seven propositions on the issue.<sup>53</sup> Adding to this jurisprudence, the court in *Bovis* concluded that the concept of dispute or difference should be given an “inclusive interpretation” and refusal of a claim for payment will typically give rise to a dispute pursuant to the English statutory regime.<sup>54</sup>

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<sup>48</sup> *Ibid*, s 104(6).

<sup>49</sup> *Ibid*, s 108(1).

<sup>50</sup> Jenkins, *supra* note 12 at 52.

<sup>51</sup> [2009] EWHC 64 (TCC) [*Bovis*].

<sup>52</sup> [2004] EWHC 2339 (TCC).

<sup>53</sup> *Ibid* at para 68, where Jackson J sets out the understanding of a ‘dispute’ as follows: the definition should be given its normal meaning; the mere fact that a claimant notifies to a respondent of a claim does not automatically and immediately give rise to a dispute; a dispute does not arise unless and until it emerges that the claim is not admitted; the circumstances in which it emerges that a claim is not admitted may be varied; the period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure; where a claimant imposes a deadline upon the respondent for responding to the claim, that deadline does not have automatic effect and the time for responding must be reasonable; if the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

<sup>54</sup> *Supra* note 51 at para 41.

### C. 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>55</sup> Commentators have suggested that such an approach “may well be adopted” by courts when determining whether to enforce an adjudicator’s decision.<sup>56</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>57</sup>

In *Ecovision Systems Ltd v Vinci Construction UK Ltd*,<sup>58</sup> the English High Court was faced with a particularly difficult factual situation of a challenge to an adjudicator’s jurisdiction. On the facts, it was not clear on which rules the adjudicator had based his jurisdiction to determine the adjudication. Although strictly provided by way of *obiter dictum*, the judgment makes a number of helpful observations on the question of adjudicator’s power to determine jurisdiction and confirmed that an adjudicator does not have such jurisdiction, even on a temporary basis. A court could interfere with an adjudicator’s conclusion as to his or her jurisdiction, typically at enforcement stage by way of summary judgment.<sup>59</sup>

The principle that a party seeking to challenge the jurisdiction of an adjudicator must ‘object early and object repeatedly’ has long been recognised in the law of adjudication. In *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*,<sup>60</sup> the Technology and Construction Court reiterated this position. When a party to an adjudication objects early and reserves its position of objecting to the adjudicator’s jurisdiction, that party may participate in the adjudication without prejudice and may raise the issue of the adjudicator’s lack of jurisdiction in subsequent enforcement proceedings.<sup>61</sup> A failure to do so

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<sup>55</sup> *Fiona Trust & Holding Corp v Privalov*, [2007] UKHL 40.

<sup>56</sup> Nicholas Gould et al, Chartered Institute of Arbitrators and Adjudication Society, *Guidance Note: Jurisdiction of the UK Construction Adjudicator* (December 2012) at 15, online: <[adjudication.org/sites/default/files/Guidance\\_Note\\_\\_\\_Jurisdiction\\_of\\_the\\_Adjudicator\\_2.pdf](http://adjudication.org/sites/default/files/Guidance_Note___Jurisdiction_of_the_Adjudicator_2.pdf)>.

<sup>57</sup> *Ibid* at 24.

<sup>58</sup> [2015] EWHC 587 (TCC).

<sup>59</sup> *Ibid* at para 71.

<sup>60</sup> [2016] EWHC 2915 (TCC).

<sup>61</sup> *Ibid* at para 10.

means that the party cannot avoid the effect of the adjudicator's decision on jurisdictional grounds and the party is taken to have consented to the adjudicator's jurisdiction.<sup>62</sup>

#### D. EVIDENCE IN SUPPORT OF A DISPUTE

In *Bovis*, one of the issues before the court related to the evidence that must be submitted to support a construction dispute, pursuant to the 1996 *Construction Act* adjudication mechanism. The notice to adjudicate had not contained a report as a supporting document upon which Bovis as claimant sought to rely. Akenhead J interpreted the adjudication clause in a 'purposive' and 'commercial' manner and concluded that an adjudication clause is not limited strictly to claims established under the construction contract.<sup>63</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. This requirement was in no way determinative of the scope of the referred dispute.<sup>64</sup>

In *Jacques (t/a C&E Jacques Partnership) v Ensign Contractors Ltd*,<sup>65</sup> Akenhead J had to consider alleged breaches of natural justice arising from a failure to consider a number of defences raised during the adjudication. The court followed the "reasonably robust"<sup>66</sup> position taken on prior judicial challenges to adjudicators' decisions, which emphasises the distinctive aspects of adjudication. In adjudication, the 'right' answer is subordinate to the expediency with which an answer must be obtained.<sup>67</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>68</sup>

#### E. 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.

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Bovis*, *supra* note 51 at para 64.

<sup>64</sup> *Ibid* at para 47.

<sup>65</sup> [2009] EWHC 3383 (TCC).

<sup>66</sup> *Ibid* at para 21.

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

<sup>68</sup> *Ibid* at para 26.

The adjudicator may also take into account matters under the contract which the adjudicator considers to be “necessarily connected with the dispute”.<sup>69</sup>

The parties are required to comply with the adjudicator’s decision “immediately on delivery of the decision.”<sup>70</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 the decision of the adjudicator is binding until the dispute is finally determined by either litigation, arbitration or by agreement between the parties. Alternatively, the parties may accept the decision as finally determining the dispute.<sup>71</sup> It is mandatory for the parties to comply with the decision of the adjudicator until the dispute is finally determined.<sup>72</sup>

#### F. 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>73</sup> In *Bouygues UK Ltd v DahlJensen 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 (the issue of correcting a mistake in an adjudicator’s decision is examined in more detail below). 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>74</sup> This should guard against characterising a mistaken answer to that of an excessive exercise of the adjudicator’s jurisdiction.

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 and are to be complied with until the dispute is finally

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<sup>69</sup> *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 649/1998 [Scheme for Construction].

<sup>70</sup> *Ibid.*

<sup>71</sup> *1996 Construction Act*, *supra* note 13, s 108(3).

<sup>72</sup> *Scheme for Construction*, *supra* note 69, s 23.

<sup>73</sup> *Bouygues UK Ltd v DahlJensen UK Ltd*, [2000] BLR 49 (TCC) at para 23.

<sup>74</sup> *Ibid* at para 36.

resolved.”<sup>75</sup> On this basis, the usual remedy for failure to pay in accordance with an adjudicator’s decision “will be to issue proceedings claiming the sum due, followed by an application for summary judgment.”<sup>76</sup>

### G. 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>77</sup> In light of this, it is important to recall that adjudication is an “intervening provisional stage”<sup>78</sup> of dispute escalation. On this basis, judicial intervention is restricted to the most serious of breaches of natural justice only.

The most important factor for a court to consider in a challenge of an adjudicator’s decision is whether the adjudicator had the ability to determine the adjudication with fairness.<sup>79</sup> The leading English authority on this point is *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*,<sup>80</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>81</sup>

Challenges on grounds of alleged breaches of natural justice should be limited to the most serious of cases only,<sup>82</sup> as the adjudication process cannot accommodate an excessive concern for “procedural niceties”.<sup>83</sup> The correct

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<sup>75</sup> *Macob Civil Engineering Ltd v Morrison Construction Ltd*, [1999] CLC 739 (TCC) at para 14 [Macob].

<sup>76</sup> *Ibid* at para 37.

<sup>77</sup> *Dorchester Hotel Ltd v Vivid Interiors Ltd*, [2009] WL 634882 at para 20 [Dorchester].

<sup>78</sup> *Macob*, *supra* note 75 at para 14.

<sup>79</sup> *Dorchester*, *supra* note 77 at para 26.

<sup>80</sup> [2005] EWHC (Civ) 1358 [Carillion].

<sup>81</sup> Nicholas Gould et al, Chartered Institute of Arbitrators and Adjudication Society, *Guidance Note: Natural Justice*, April 2013, online: <[adjudication.org/sites/default/files/4163-1049-6768%20v%205.%20Natural%20Justice%20Guidance%20Note%20\(1\).pdf](http://adjudication.org/sites/default/files/4163-1049-6768%20v%205.%20Natural%20Justice%20Guidance%20Note%20(1).pdf)>.

<sup>82</sup> *Cantillon Ltd v Urvasco Ltd*, [2008] EWHC 282 (TCC), at para 57 (where 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 issues 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>83</sup> *Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth*, [2002] BLR 288 at para 56.

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>84</sup>

One ground for successfully challenging of an adjudicator's decision is where the adjudicator "carries forward an apparent pre-determination".<sup>85</sup> In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*, the adjudicator had been re-appointed to determine a dispute between the parties.<sup>86</sup> Whitefriars alleged that there was a real risk of bias based on the fact that the adjudicator may have followed his previous conclusions, which had been based on an unfair decision.<sup>87</sup> The court held that a re-appointment will not amount to an automatic pre-determination that the decision of the adjudicator will be biased.<sup>88</sup>

Increasingly, parties are seeking to challenge the enforcement of an adjudicator's decision on grounds that the adjudicator has made an error in reaching its decision. In *Hutton Construction Limited v Wilson Properties (London) Limited*, the court dealt with the "increasingly common"<sup>89</sup> and troubling issue of challenging an adjudicator's decision at the late stage of enforcement. It is, however, an established principle in dispute adjudication that an adjudicator's decision will be enforced provided that the adjudicator has broadly acted in accordance with the rules of natural justice.<sup>90</sup> Where an admitted error has occurred, an exception may apply. In *Hutton Construction*, the court discussed when such a challenge may proceed, including where the adjudicator's construction of a contract clause is beyond any rational justification, the adjudicator's calculation of the relevant time period is obviously wrong, or the adjudicator's categorisation of a payment notice was not capable of being described as such.<sup>91</sup>

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<sup>84</sup> See *Carillion*, *supra* note 80 at paras 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 to provide definitive answers to complex questions".

<sup>85</sup> See especially *Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail*, [2011] EWCA Civ 1617 at paras 45–50.

<sup>86</sup> [2004] EWHC 393 (TCC).

<sup>87</sup> *Ibid* at para 117.

<sup>88</sup> *Ibid* at para 118.

<sup>89</sup> [2017] EWHC 5617 (TCC) at para 2 [*Hutton Construction*].

<sup>90</sup> *Ibid* at para 3.

<sup>91</sup> *Ibid* at para 18.

The decision reiterates that the objective of the adjudication process 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>92</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 stage and the fact that this could also amount to a potential abuse of process. A party must therefore challenge the adjudicator's decision by way of a separate claim "at the outset"<sup>93</sup> and a defendant should not be permitted to "shoehorn into the time available at the enforcement hearing the entirety"<sup>94</sup> of the dispute giving rise to the adjudication. If the courts permitted such a course of action, adjudication would no longer be the "de facto dispute resolution regime in the construction industry."<sup>95</sup> As a consequence, adjudication would be relegated to the first part of a two-part dispute resolution process, with "everything coming back to the court for review prior to enforcement."<sup>96</sup> Such an approach would undermine the expediency of dispute adjudication and work against the dispute avoidance emphasis of dispute adjudication.

#### IV. 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. Several 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, which this section examines.

##### A. ADJUDICATION BY AMBUSH

One of the first issues that has troubled the English courts is in the context of commencing an adjudication pursuant to the 1996 *Construction Act*. The timing of the mechanism provides the parties with relative flexibility in issuing a notice of adjudication. This has given rise to the concept of 'adjudication by

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<sup>92</sup> *Ibid* at para 21.

<sup>93</sup> UK, Civil Procedure Rules of England and Wales (CPR) - Part 8: Alternative Procedure for Claims, online: <[justice.gov.uk/courts/procedure-rules/civil/rules/part08](http://justice.gov.uk/courts/procedure-rules/civil/rules/part08)>.

<sup>94</sup> *Hutton Construction*, *supra* note 89 at 630.

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid* [emphasis added].

ambush’, which was raised as a defence before Akenhead J in *Bovis Lend Lease Ltd v The Trustees of the London Clinic*.<sup>97</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’ (see Part II above) and that the only threshold requirement is that a dispute must have ‘crystallised’ (see further Part II above). 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>98</sup>

In *Dorchester Hotel Ltd v Vivid Interiors Ltd*,<sup>99</sup> 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>100</sup>

## B. “SMASH AND GRAB” ADJUDICATION

So-called “smash and grab” adjudications were heavily criticised in the recent decision of *Hutton Construction* of the Technology and Construction Court.<sup>101</sup> 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>102</sup>

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<sup>97</sup> *Supra* note 51.

<sup>98</sup> *Ibid* at para 51.

<sup>99</sup> See *supra* note 77.

<sup>100</sup> *Ibid* at paras 23–35; 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>101</sup> *Supra* note 89.

<sup>102</sup> *Ibid* at para 6.

### C. SERIAL ADJUDICATIONS

The Technology and Construction Court reaffirmed its earlier conclusions on serial adjudications in the recent decision of *Universal Piling & Construction Ltd v VG Clements Ltd*.<sup>103</sup> 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*,<sup>104</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>105</sup>

### D. A LATE ADJUDICATOR'S DECISION

The issue of a 'late' adjudicator's decision is problematic as it is contrary to the underlying objective of adjudication, that of expediency. 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 passed 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 time period of the statutory adjudication regime. There was no change in substance between the draft and the final decision. The court concluded that a final decision rendered late by the adjudicator may be valid, provided that the jurisdiction to produce the decision was not undermined by the adjudicator's failure to produce the decision in time.<sup>106</sup> In this case, although section 108 of the 1996 Construction Act prescribed a 28-day period, the court found that there was no set point by which the adjudication was to be completed, provided that the parties consented to the delay and the late

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<sup>103</sup> [2016] EWHC 3321 (TCC).

<sup>104</sup> [2011] EWHC 2910 (TCC) at para 55.

<sup>105</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>106</sup> [2003] WL 22358283 (TCC) at para 26.

decision of the adjudicator did not terminate the adjudication agreement on grounds of delay.<sup>107</sup> On this reasoning, the adjudicator's decision was binding.

In the later decision of *AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd*,<sup>108</sup> a contrary conclusion was reached by the court. 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 adjudication, a factor that the court may take into consideration. On the facts, Speedwell had provided information late to the adjudicator and had failed to respond to the adjudicator's request for extra time. According to the court, there was a clear obligation on the parties to respond 'plainly and promptly' to any request of the adjudicator in its efforts to determine the dispute.<sup>109</sup>

#### E. CORRECTING A MISTAKE IN AN ADJUDICATOR'S DECISION

The English courts have consistently resisted challenges to an adjudicator's decision on the ground that there is a lack of jurisdiction arising from an error of law. This has resulted in a practical anomaly, whereby the correction by an adjudicator of a simple clerical mistake, for example an omission in his or her decision, was previously not possible.

In *Bloor Construction (UK) Limited v Bowmer & Kirkland (London) Limited*,<sup>110</sup> the court took issue with this anomaly and extended the 'slip rule', which had been available in the English common law since 1985 to correct arbitral awards, to decisions of adjudicators. The rule must be exercised without causing prejudice to the other party and within a reasonable timeframe.<sup>111</sup> The concept of reasonable time was not defined, but would take into consideration the fact that an adjudicator has 28-days to make a decision pursuant to the statutory regime.

The decision in *O'Donnell Developments Ltd v Build Ability Ltd* clarified that the English courts must act cautiously in holding that an erroneous application of the slip rule would amount to an excess of the adjudicator's jurisdiction.<sup>112</sup> The court in that case was influenced by the conclusion in *Bouygues* which cautioned that the speedy nature of adjudication in the English regime meant that mistakes inherently arise.<sup>113</sup> Since 2011, the rule to correct 'slips' in an

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<sup>107</sup> *Ibid* at para 29.

<sup>108</sup> [2007] WL 2187002 (TCC) at para 6.

<sup>109</sup> *Ibid* at para 15.

<sup>110</sup> [2000] BLR 314 (TCC).

<sup>111</sup> *Ibid*.

<sup>112</sup> [2009] WL 5641175 (TCC) at para 38.

<sup>113</sup> *Bouygues UK Ltd v DahlJensen UK Ltd*, [2000] BLR 49 (TCC) at para 36.

adjudicator's decision has been included in the 1996 *Construction Act*,<sup>114</sup> which provides that the rule must be included in any construction contract governed by the statutory regime. The correction of a clerical mistake by an adjudicator is a frequent ground upon which to challenge a decision and accordingly, an adjudicator should proceed with caution when applying the slip rule.

#### F. 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.

Initially, as in *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*,<sup>115</sup> an adjudicator's decision was held to constitute an expression of liability and quantum on the original dispute giving rise to the adjudication.<sup>116</sup> The original cause of action therefore survived the adjudicator's decision and was not superseded by it or merged with any subsequent decision.<sup>117</sup>

Unfortunately, the jurisprudence of the English courts is not decisive on 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>118</sup> This view was also endorsed in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*.<sup>119</sup> The prevailing position, however, favours the view that the decision of an adjudicator does give rise to a fresh cause of action, similar to an action in debt.<sup>120</sup>

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<sup>114</sup> Section 108(3A) was included in the 1996 *Construction Act*, *supra* note 13, following the substantial amendments to the construction adjudication regime of October 2011, pursuant to the provisions of the *Local Democracy, Economic Development and Construction Act 2009* (UK).

<sup>115</sup> [2001] BLR 207.

<sup>116</sup> *Ibid* at para 33.

<sup>117</sup> *Bovis*, *supra* note 51 at para 34.

<sup>118</sup> [2009] EWHC 1906 (TCC) at para 16.

<sup>119</sup> [2013] EWHC 1322 (TCC) at para 32.

<sup>120</sup> Andrew Tweeddale, "Construction Act review: causes of action – recovering monies paid under an adjudicator's decision" (2014) 30:8 *Construction LJ* 390 at 394.

### G. RECOVERY OF PAYMENT OBLIGATIONS PURSUANT TO AN ADJUDICATOR'S DECISION

The statutory scheme under the 1996 *Construction Act* is silent on the recovery of money paid by a party pursuant to the decision of an adjudicator.<sup>121</sup> Recovery of payments made is of critical relevance, for example in the context of the statute of limitation. The Supreme Court of the United Kingdom clarified the status of payments and implied terms in *Aspects Contracts (Asbestos) Ltd v Higgins Construction Plc*.<sup>122</sup> The court concluded that for adjudications pursuant to the 1996 *Construction Act*, it was an 'artificial' construction to treat a claim to recover sums paid based on an alleged breach of contract. 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.

It was also held possible to recover the overpayment by virtue of an independent restitutionary obligation on the grounds that an adjudicator's decision "ceases, retrospectively, to bind",<sup>123</sup> a claim which may be relevant where issues of statutory limitation may arise.

### H. PAYMENT OF THE ADJUDICATOR'S FEES AND COSTS

The 1996 *Construction Act* provides that an adjudicator is entitled to payment of reasonable fees and expenses, as reasonably incurred.<sup>124</sup> Where the parties have not included provisions on payment and costs of the adjudicator, the position is unclear when an adjudicator's decision is unenforceable due to a defect in the adjudication.<sup>125</sup> One view is that the English courts have suggested that an adjudicator should not be entitled to payment for a defective decision when the decision lacks subsequent binding effect.<sup>126</sup>

This restrictive interpretation assumes that an implied warranty of enforceability is in operation. One could argue, however, that it is not necessarily correct that an unenforceable decision is automatically worthless to

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<sup>121</sup> *Ibid.*

<sup>122</sup> [2015] UKSC 38 at para 19.

<sup>123</sup> *Ibid* at para 24.

<sup>124</sup> *Scheme for Construction, supra* note 69 at s 25.

<sup>125</sup> See further: Patrick Taylor, "Adjudicators' fees where the decision is unenforceable" (2013) 79:1 *Arbitration* 105; Cliff Wakefield, "Are the users of adjudication getting a raw deal" (2011) 27:2 *Construction LJ* 103.

<sup>126</sup> *Dr Peter Rankilor & Perco Engineering Services Ltd v M Igor Ltd* (27 January 2006) EWHC (TCC) [unreported], cited in Crispin Winsor, "Adjudicators' entitlement to their fees" (2012) 28:5 *Const LJ* 369, n 10.

the parties,<sup>127</sup> especially when one considers that dispute adjudication forms part of the overall dispute avoidance objective of dispute escalation. This is because the underlying objective of dispute adjudication is to facilitate the parties in their settlement of a dispute. A defective decision may still be a good starting position for the parties' negotiation.

The English Court of Appeal examined this question in *Systech International Ltd v PC Harrington Contractors Ltd*.<sup>128</sup> The court rejected a process-focused approach and confirmed a strict test of contractual bargain, which focuses on the 'end-result' only. The standard applied is whether the adjudicator performed the contractual function to produce an enforceable decision as the parties had bargained for in their contract. If not, there is no entitlement to payment.<sup>129</sup> In contrast, in the High Court, Akenhead J had rejected this narrow line of argument on the grounds that there was no 'total failure', that the consideration for performance is not 'whole or indivisible' and that there was at a minimum partial performance by the adjudicator.<sup>130</sup>

Following the Court of Appeal decision in *PC Harrington Contractors Ltd*, there is a risk that adjudicators may undertake 'defensive adjudication' by spending additional time and costs to give each party an opportunity for comment.<sup>131</sup> It may therefore be advisable for adjudicators to include an express clause in their appointment terms which provides for their payment even where the decision is deemed unenforceable.

## V. A STRICT INTERPRETATION OF DISPUTE ADJUDICATION AS PART OF DISPUTE ESCALATION

As the section above on key problem areas in the United Kingdom regime has illustrated, it is important to recall that a number of procedural issues in the law of statutory adjudication have arisen as a direct result of attempts by creative lawyers to move dispute adjudication closer to the established areas of litigation or arbitration for dispute resolution. But with such efforts, the underlying 'rough and ready' focus of dispute adjudication is lost. As this section will argue, dispute adjudication depends on the expedited resolution of a dispute within a short period of time by an adjudicator who is tasked to reach

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<sup>127</sup> *Ibid* at 372.

<sup>128</sup> [2012] EWCA Civ 1371.

<sup>129</sup> *Ibid* at para 32.

<sup>130</sup> *Systech International Ltd v PC Harrington Contractors Ltd*, [2011] EWHC 2722 (TCC) at para 45.

<sup>131</sup> Patrick Taylor, "Adjudicators' fees where the decision is unenforceable" (2013) 79:1 Arbitration 105.

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 and that the process should not be influenced by procedural aspects of the more established forms of dispute resolution such as litigation or commercial arbitration.

As examined above, the United Kingdom courts have consistently set out to balance basic procedural safeguards on grounds of natural justice with the ‘rough and ready’ nature of adjudication. This is because dispute adjudication supports a ‘prompt payment’ mechanism in construction contracting and forms part of a wider dispute escalation process in construction dispute resolution.

#### A. 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. The contractors 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>132</sup> typically the employer. A contractor, who is depending on the successful completion of the project for its cash-flow and profit, is therefore “shielded” from the risk of assuming the role of debtor to an insolvent employer.

The United Kingdom scheme sets out mandatory provisions on timing for payment and for payments by way of instalments, staged payments or periodic payments.<sup>133</sup> Any disputed payment obligation, however, 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

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<sup>132</sup> C Seppälä, “An Engineer’s/Dispute Adjudication Board’s Decision Is Enforceable by An Arbitral Award” (December 2009), White and Case Client Update, at 8.

<sup>133</sup> *Scheme for Construction*, *supra* note 69 at Part II, s 1.

escalation of the dispute to litigation or arbitration. This ensures that the contractor maintains cash-flow and is able to complete the construction works.

## B. 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 complex long-term construction contracts typically provide for either a two or three-stage dispute escalation process. It is usual practice to start the sliding scale with negotiations, followed by adjudication or mediation, and finally litigation or arbitration,<sup>134</sup> as the terminal dispute layer of “last-resort.”<sup>135</sup> For example, dispute adjudication as part of a multi-tiered dispute resolution clause has been included in the construction contracts for a number of high profile mega-infrastructure projects such as the Boston Central Artery/Tunnel project,<sup>136</sup> the Channel Tunnel project,<sup>137</sup> and the Sydney Desalination Plant project.<sup>138</sup>

One of the distinguishing features of construction dispute escalation is that at all times, the process depends on the parties’ cooperation. This, in turn, focuses the parties on avoiding further confrontation<sup>139</sup> – or a hardening of their positions.

A key issue with dispute escalation clauses lies in the “enforceability of the negotiation or mediation steps”.<sup>140</sup> One line of argument places the emphasis on the voluntary and consensual nature of parties’ participation in the dispute resolution mechanisms. This leads to the conclusion that the

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<sup>134</sup> Jenkins, *supra* note 12 at 336–339 for a comprehensive overview of alternative dispute resolution mechanisms.

<sup>135</sup> Charles Chatterjee, “Settlement of Disputes Procedures and Arbitration under FIDIC” (2000) 17:3 J Intl Arb 103 at 105.

<sup>136</sup> Connerty, *supra* note 30 at 52.

<sup>137</sup> See *Channel Tunnel*, *supra* note 23, for further details (where a two-tier dispute resolution clause provided that disputes between the parties shall ‘in the first place’ be referred in writing to a panel of three persons acting as independent experts but not as arbitrators. The *Channel Tunnel* clause contained specific wording to ensure that despite a dispute (and its attempt to resolve it) construction of the works would continue. The wording also included clear provisions on the consequences of failing to give effect to a decision of the dispute panel, namely a contractual breach on which a party could sue.

<sup>138</sup> Jones, *supra* note 11.

<sup>139</sup> K P Berger, “Law and Practice of Escalation Clauses” (2006) 22:1 Arb Intl 1 at 2 [Berger, “Law”].

<sup>140</sup> Didem Kayali, “Enforceability of Multi-Tiered Dispute Resolution Clauses” (2010) 27:6 J Int Arb (2010) 551 at 560.

dispute resolution procedures of the escalation clause “are not enforceable under judicial supervision”.<sup>141</sup>

A strict interpretation, however, mandates that the parties must be held to adhere to the provisions of their previously agreed bargain, a position which the author supports. This interpretation has the effect 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>142</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>143</sup> A similar position was taken in the decision of *Peterborough City Council v Enterprise Managed Services Ltd*, where the English High Court confirmed that the parties could not “opt out of the adjudication process”<sup>144</sup> and ‘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 therefore an important reminder that adjudication serves the primary purpose of dispute avoidance. The parties are “locked” in dialogue and negotiation throughout the process. That is, 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 up” 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>145</sup> where the parties were unable to proceed with an escalation of the dispute to the next dispute layer of arbitration, due to the fact that the adjudication had not taken place (the

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<sup>141</sup> *Ibid* at 561.

<sup>142</sup> *Ibid*.

<sup>143</sup> [2013] SGCA 55 [62].

<sup>144</sup> *Peterborough*, *supra* note 33 at para 35.

<sup>145</sup> [2014] EWHC 4796 (TCC).

contractual appointment of the adjudicator had expired and the adjudicator had refused to complete the adjudication). 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>146</sup>

The strict position on enforcing a dispute escalation clause is arguably correct. The tiered escalation of a dispute creates a strong incentive for the parties to "re-evaluate not only the associated legal and factual issues, but also, thereby, the chance of reaching amicable agreement".<sup>147</sup> Dispute adjudication, as part of this dispute escalation mechanism, is a process designed for compromise.<sup>148</sup> This satisfies the dispute avoidance aspect of adjudication. Only very limited grounds, which are strictly enforced, should permit the parties to leapfrog a dispute layer such as adjudication. These grounds could be based on outright violations of good faith,<sup>149</sup> or, as in *AlWaddan Hotel Limited*, arise from obstructive conduct.

If the parties were permitted to avoid the mandatory escalation provisions, the integrity of the entire dispute escalation process would break down, as any subsequent escalated decision may be prevented from becoming final and binding.<sup>150</sup> It is important to recall that dispute escalation is a process designed for securing the amicable settlement of a dispute between the parties. 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 co-operation and consent might come."<sup>151</sup> It is therefore correct to conclude that the enforcement of a dispute escalation clause, of which dispute adjudication forms part, should be interpreted strictly.

## VI. THE INTRODUCTION OF STATUTORY DISPUTE ADJUDICATION IN CANADA

In Canada, two significant developments on dispute adjudication are currently ongoing. Bill 142 was passed unanimously by the Ontario legislature on December 5, 2017.<sup>152</sup> The new *Construction Act* received Royal Assent on

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<sup>146</sup> *Ibid* at para 57.

<sup>147</sup> Berger, "Law", *supra* note 137 at 16-17.

<sup>148</sup> Kayali, *supra* note 140 at 561.

<sup>149</sup> Switzerland, *supra* note 34 at para 3.4.4.

<sup>150</sup> Rupert Choat, "No dispute' arguments under dispute resolution and dispute escalation provisions", (2009) 4:4 *Construction L International* 7.

<sup>151</sup> (1992) 28 NSWLR 194 at 206 [*Hooper*].

<sup>152</sup> *Supra* note 4.

December 12, 2017. Thus, Ontario has formally introduced a statutory dispute adjudication mechanism as well as a prompt payment regime. Secondly, Bill S-224, *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.

#### A. 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 Reynolds 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 a direct result of the *Ontario Report*. For example, the report had discussed dispute adjudication at great length in Chapter 9. The report endorsed dispute adjudication as a mechanism for dispute resolution in construction contracting and had 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>153</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>154</sup> The report further recommended that an adjudication decision be enforced, if so 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>155</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,

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<sup>153</sup> *Ontario Report*, *supra* note 1, c 9, s 4. See Recommendation 57.

<sup>154</sup> *Ibid* at ch 9, s 5.5. See Recommendation 76.

<sup>155</sup> *Ibid* at ch 9, s 5.5. See Recommendation 77.

section 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>156</sup>

## B. FEDERAL BILL S-224, CANADA PROMPT PAYMENT ACT

Federal Bill S-224, *Canada Prompt Payment Act: respecting payments made under construction contracts*, passed third reading in the Senate on May 4th, 2017.<sup>157</sup> As the bill was initiated in the Senate, it is now before the House of Commons for its first reading.<sup>158</sup> The proposed legislation relates to construction contracts between a “government institution” and a “contractor/subcontractor” only.<sup>159</sup> This encompasses either 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 Bill S-224 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>160</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 where a payer fails to make payment in accordance with the decision of an adjudicator within seven days after the decision is rendered.<sup>161</sup> 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

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<sup>156</sup> *Ibid* at ch 8, s 4.4, rec 50.

<sup>157</sup> Bill S-224, *supra* note 9.

<sup>158</sup> For a status update on Bill S-224, see online: <[openparliament.ca/bills/42-1/S-224/](http://openparliament.ca/bills/42-1/S-224/)>.

<sup>159</sup> Bill S-224, *supra* note 9, s 4(1).

<sup>160</sup> *Ibid*, s 5.

<sup>161</sup> *Ibid*, s 3 (which defines “payer” to mean a government institution or any contractor or subcontractor required to make payment under a construction contract); *ibid*, s 17.

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>162</sup>

## VII. RECOMMENDATIONS AND CONCLUSION

The adoption of statutory dispute adjudication in Canada benefits from a comprehensive body of judicial evaluations and commentary arising from the United Kingdom regime pursuant to the *1996 Construction Act*.

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 by the common law courts of the mandatory 'pre-arbitration' dispute adjudication provisions ensures that the parties take the mechanism seriously and adhere to their contractual

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<sup>162</sup> *Ibid*, s 20(9).

bargain. Although very limited exceptions exist, these are strictly enforced and reserved for outright procedural impossibility. At all times, the common law courts have endorsed the view that negotiation and settlement pursuant to a decision of an adjudicator is an important step in the dispute adjudication mechanism, from which resolution of the dispute “by way of cooperation” may arise.<sup>163</sup>

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. It has been said that the majority of so-called ‘problems’ in the adjudication mechanism are caused by ingenious legal arguments introduced by lawyers to move the dispute adjudication process closer to litigation or commercial arbitration. 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. The objective of dispute adjudication is to provide the parties with an interim binding decision by a qualified adjudicator, all in a time-critical period.

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* 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 regime”<sup>164</sup> 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.

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<sup>163</sup> Hooper, *supra* note 151.

<sup>164</sup> *Hutton Construction*, *supra* note 89 at para 37.