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# A D J U D I C A T I O N
in the
# CONSTRUCTION INDUSTRY IN THE UK
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# A ROLE MODEL FOR MALAYSIA ?

***by***

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1 On the l May 1998 an Act of Parliament came into force in England, Wales and Scotland. It was extended to Northern Ireland on 1 June 1999. It is known as "The Construction Act"'; its proper name is the Housing Grants Construction & Regeneration Act 1996. But do not now expect it to apply to housing only; it applies to nearly all commercial construction operations. I will give you precise scope later.

2 It may sound far too sensational to say this, but I believe the "Construction Act" is the most important piece of legislation in the construction industry ever. I will go further, it's impact and benefits are so enormous and successful that I can see every justification for its introduction in all branches of commerce not just construction. And may I go even further, let me commend this Act to Malaysia.

3 Let me tell you about the Act. It has two main themes:
(1) A brand new dispute management process called 'Adjudication'.
(2) New Payment rules.

## BACKGROUND

4 The United Kingdom has conducted occasional reviews of the construction procurement process and contractual arrangements. They go back to 1932, then 1964, then 1972, then 1994. The theme has always been how to provide better value for the customer. Recommendations have frequently been past by but not always. The 1994 report, called "Constructing the Team" by Sir Michael Latham, carried a key recommendation which was the basis of the "Construction Act", It was that we had to seek a more efficient way to deal

with ordinary building disputes. The reason is that differences of opinion are inevitable on a fast moving construction project and if not "nipped in the bud" they tend to destroy teamwork by allowing disputes to deteriorate into conflict.

At the same time we lawyers were also searching for methods of improving dispute management methods. Litigation was expensive and slow. Arbitration had become "Litigation in the private sector", Mediation was not attracting much use. Of Litigation it was said by our most senior civil Judge, Lord Woolf (June 1995) "Access to Justice".

"Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.

And on 24 January 1995 the Lord Chief Justice and the Vice-Chancellor issued a Practice Direction ([1995] 1 WLR 262) setting out new requirements in the preparation and control of cases. In announcing it the Lord Chief Justice said:

"The aim is to try and change the whole culture, the ethos, applying in the field if civil litigation. We have over the years been too ready to allow those who are litigating to dictate the pace at which cases proceed."

Meanwhile the Arbitrators were working on a new Act of Parliament. On 31 January 1997 came into force in England, Wales and Northern Ireland "The Arbitration Act 1996". It is a masterpiece. It frees up Arbitrators to drive the process forward and be effective and economical. But implementation of the Litigation reforms via new Arbitration and via New Litigation (from 26 April 1999) were painfully too late for industry and in particular the Construction Industry. So it sought via Parliament a discreet new system of its own. It is called Adjudication. And I admit to three things; first, I did not think it would get through Parliament, 2nd I did not think industry would truly want it, and 3rd I thought the lawyers would be against it. I was totally wrong. The Act came, the industry has embraced it, is using it, likes it, and the lawyers . . . . yes, the lawyers, have completely welcomed it. In short this is a dramatic success.

5 **HOW DOES ADJUDICATION OPERATE?**

(1) It applies to disputes arising under a construction contract for construction operations.

(2) It is only mandatory if one party to the contract triggers adjudication. Parties can go straight to Litigation/ Arbitration/ Mediation if they wish.

(3) The Adjudicator is (usually) appointed by an independent body.

(4) Appointments are made within hours.

(5) The appointed Adjudicator then has 28 days to deal with the dispute referred. (The parties and Adjudicator can extend time).

(6) The decision is an announcement as to the *rights* of the parties under the contract, i.e. Judicial. (this is not a "commercial decision").

(7) While the decision deals with facts/evidence + law the procedure is entirely different to Arbitration or Litigation. It is more INVESTIGATIVE than ADVERSARIAL. Having said that the Adjudicator can adopt whatever procedure is most expedient and economic and fair.

(8) The Adjudicator's decisions are final and binding, but only until finally decided in Litigation or Arbitration.

(9) The Courts will enforce the Adjudicator's decision irrespective of errors of fact or law. If the Adjudicator has jurisdiction to deal with a dispute then his decision binds until litigated or arbitrated.

(10) The Litigation or Arbitration is not an appeal. It is conducted as though the Adjudication was never carried out.

6 **HOW DOES THE PROCESS BECOME PART OF THE CONTRACT?**

(1) The legislation requires each contract to contain Adjudication but if the contract fails to so provide then a default mechanism is implied into the contract. It is called "The Scheme".

(2) A copy of the Act and "The Scheme" is enclosed.

Let us take a look at these provisions in detail. (This lecture will now take you through key parts of "The Construction Act" and "The Scheme")

7 **EXPERIENCE**

The provisions applied to contracts which arose after 1 May 1998, so things were slow in 1998. But, in 1999 the pace quickened. By now we have has more than 1000 Adjudications. Of these I know of 26 which have been scrutinised by the courts when a party refused to obey the decision. The courts have followed the spirit and intention of Parliament by enforcing decisions on the simple notion that if the Adjudicator has jurisdiction then his decision binds.

8 **LAWYERS**

Many have been shocked by the idea that the whole investigation takes no more than 28 days! The secret is to abandon the procedural time tables familiar to the grinding detail of Litigation. Secondly the secret is to bring "bite-size" disputes to the Adjudicator. Thirdly, the Adjudicator is frequently a lawyer or if a technical person, then that person will seek legal advice. But the main attraction is that all Adjudicators have been trained in the process and examined and interviewed. Moreover they are bound to continue training. Most of all it has been drummed into technical Adjudicators that they must

make decisions about the rights and duties of the parties under the contract according to law. They cannot decide according to their sympathies or decide "commercially". Lawyers are therefore encouraged because we have not had arbitrary decisions. The Adjudicator is behaving like a referee in a football game or umpire in a cricket match. Only the rules of the particular game applied.

But there is more. Lawyers actually want an efficient method of managing disputes. The reason is to coax clients to keep coming back with repeat business. This 28 day process is actually efficient and there is many a lawyer ideally placed to assimilate quickly large amounts of information about a building dispute, then analyse and present the problem in clear terms to the Adjudicator. In truth the construction lawyer is needed all the more for this high speed process. He is a good communicator and he is able to easily deal with modest size disputes within days of being instructed. And there is more, Those disputes which were or are uneconomical to fight in Litigation (costs being disproportionate to sums in dispute), now have a proper Judicial forum.

9 **THE PAYMENT PROVISION**

This is the Second Part of the Construction Act and is in some ways *more* important than Adjudication. Here are the features:

(1) The Contract will contain "Adequate machinery" for dealing with interim payments. There *will* be interim payments.

(2) Pay when paid is banned.

(3) There is a right to postpone work if not paid on time.

(4) The payer must tell the payee:
  (i) What is to be paid in his forthcoming payment; and
  (ii) How calculated; and
  (iii) Issue a "Green Notice" giving this advance information.

(5) If the payer believes he has a right to withhold money from sums otherwise due:
  (i) The payer must issue an "Amber Notice" advising:
    (a) amount withheld;
    (b) reasons;
    (c) how calculated; and
  (ii) Issue the notice before the cheque is due.

(6) If no correct "Amber Notice" is issued then the right to withhold is lost.

(7) If money is not paid when it ought to be paid then the payee may:
  (1) Issue a "Red Notice"; and
  (2) Wait 7 days and pull off site.

10 **TYPES OF DISPUTE COMING TO ADJUDICATION**:

(1) Failure to pay on time;
(2) Failure to give Amber/ Green/ Red Notices;
(3) Value of Variations;
(4) Value of Loss and Expense;
(5) Period of Extensions of Time;
(6) Whether a person has repudiated the contract;
(7) Whether the work is correct quality;
(8) Interpretation of contract;
(9) Scope of Contract;
and
many more.

11 **THE AUSTRALIAN MODEL**

On 26 March 2000, New South Wales brought into force their version of the Construction Act. It is called:

It is not the same as the UK model. I will discuss its features at the conference.

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