

# APPLICATION OF NEW CONCEPTS TO CONSTRUCTION CONTRACTS DISPUTE RESOLUTION AND MANAGEMENT – ADJUDICATION

## 1.0 INTRODUCTION

1.1 **Adjudication** in general and broad nomenclature is the settlement of disputes in a judicial manner by a third-party neutral who issues a decision which could be binding or non-binding. Therefore, it includes all the third-party facilitated mechanisms ranging from mediation to litigation.

1.2 However, **Adjudication** in a narrow sense is the mechanism for settlement of a dispute by an expert third-person neutral, during the pendency of a construction contract, who issues provisionally binding decision that could only be reversed by an arbitral or litigation proceedings, after the practical completion of the project. The reason behind this concept is the need to curtail the disruptive tendency of disputes to mar project cost and timelines that easily translates to insolvencies and bankruptcies. Thus, a quicker and cheaper means of resolving disputes as against the default options of arbitration (where provided) and litigation found expression in adjudication.

## 2.0 The Law Governing Adjudication

2.1 The law governing Adjudication is either **Contractual** or **Statutory**. Adjudication is an interim means of settling disputes in an on-going construction project with binding provisional outcomes, for immediate implementation, subject to ultimate resolution by arbitration or litigation. Adjudication is fast gaining acceptance in the industry as a dispute resolution mechanism of choice owing to its being speedy, relatively inexpensive, providing cash flow relief and bindingness.

2.2 Most adjudication regimes available today are contractual and found expression in both bespoke contracts and Standard Forms of Contract in use today. Adjudication clauses are found in the following standard forms:

(a) Federation Internationale des Ingenieurs Conseils (FIDIC), Conditions of Contract for Construction – Clause 21 deals essentially with **Disputes and Arbitration**

**Clause 21.1** provides for a scheme of Adjudication under Disputes Adjudication/Avoidance Board (DAAB) which stipulated inter alia as follows:

Disputes shall be decided by a DAAB in accordance with Sub Clause 21.4 [Obtaining DAAB' Decision]. The Parties shall jointly appoint the member(s) of DAAB within the time stated in the Contract Data (if not stated, 28 days) after the Contractor receives the Letter of Acceptance.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the sole member) or three suitably qualified members (the 'members'). If the number is not stated, and the Parties do not agree otherwise, **the DAAB shall comprise three members.**

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB

The DAAB is to comprise three members, each Party shall select one member for the agreement of the other party. The parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB is shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of the remuneration.

If at any time the parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DAAB (including the appointment of each member) shall expire either:

(a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [Discharge]; or

(b) 28 days after the DAAB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [Obtaining DAAB's Decision] before such discharge has become effective,

whichever is later.

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DAAB (including the appointment of each member) shall expire 28 days after:

- (i) the DAAB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [Obtaining DAAB's Decision]) within 224 days after the date of termination; or
- (ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination whichever is earlier.

**Clause 21.2** – provides for failure to appoint DAAB member (s).

**Clause 21.3** – provides for Avoidance of Disputes.

**Clause 21.4** – provides for obtaining of DAAB's Decision.

**Clause 21.5** – provides for attempt at amicable settlement where a Notice of Dissatisfaction (NOD) has been given under Clause, prior to the eventual initiation of international Arbitration, if the dispute remains unsettled. (21.6)

It should be stated that a DAAB consists of either one or three adjudicators as shall be agreed by the parties. The decision of the adjudicator(s), after 28 days without a Notice of Dissatisfaction, becomes binding and final.

2.2 (b) Attached to the DAAB provisions are **General Conditions of Dispute Avoidance/Adjudication Agreement** (Appendix) comprising the following Clauses:

1. Definitions
2. General provisions
3. Warranties
4. Independence and Impartiality
5. General obligations of DAAB member
6. General obligations of the Parties
7. Confidentiality
8. The Parties undertaking and Indemnity
9. Fees and Expenses
10. Resignation and Termination

## 11. Challenge

12. Disputes under the DAAB Agreement arising however shall be settled by arbitration under the Rules of Arbitration of the International Chambers of Commerce, 2017 by one arbitrator appointed in accordance with these Rules of Arbitration.

2.2 (c) DAAB Procedural Rules are also attached as (Annex) and contain the following Rules:

Rule 1 – Objectives

Rule 2 – Avoidance of Disputes

Rules 3 – Meetings and Site visits

Rule 4 – Communications and Documentations

Rule 5 – Power of DAAB

Rule 6 – Disputes

Rule 7 – Hearings

Rule 8 – The DAAB's Decision

Rule 9 – In the event of the Termination of DAAB Agreement

Rule 10 - Objection Procedure

Rule 11 – Challenge Procedure

## 2.3 JOINT CONTRACTS TRIBUNAL (JCT) FORM

Section 9.2 of The JCT 2009/11 provides for Adjudication as follows:

“If a dispute or difference arises under the contract which either party wishes to refer to adjudication, the Scheme shall apply subject to the following:

1. For the purposes of the Scheme, the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contracts Particulars;

2. Where the dispute or difference is or includes a dispute or difference relating to clause 3.18.4 and as to whether an instruction issued there under is reasonable in all circumstances:

(i) The Adjudicator to decide such a dispute or difference (shall where practicable) be an individual with the appropriate expertise and experience in the specialist area or discipline relevant to the instruction or issue in dispute.

(ii) If the Adjudicator does not have the appropriate expertise and experience, the Adjudicator shall appoint an independent expert with such expertise and experience to advise and report in writing on whether or not the instruction under clause 3.18.4 is reasonable in all the circumstances.

It is pertinent to mention that adjudication proceedings under the Scheme as countenanced in the adjudication provisions of the Scheme for Construction Contracts (HGCRA 1996) is a precursor to Arbitration or legal proceedings. Arbitration or legal proceedings are **not** an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by the Adjudicator.

## **2.4 NEW ENGINEERING CONTRACT (NEC) 4**

2.4.1 Adjudication provisions under The New Engineering Contract 4 are organized under CORE CLAUSES with **Option W1** (used when adjudication is the method of dispute resolution and the United Kingdom Housing Grants, Construction and Regeneration Act 1996 does not apply), and **Option W2** (used when adjudication is the method of dispute resolution and the United Kingdom Housing Grants, Construction and Regeneration Act 1996 applies).

2.4.2 Option W1 provides as follows:

### **Resolving Disputes W1**

W1.1 (1) A dispute arising under or in connection with the contract is referred to the Senior Representatives in accordance with Dispute Reference Table. If the dispute is not resolved by the Senior Representatives, it is referred to and decided by the Adjudicator. A party may replace a Senior Representative after notifying the other Party of the name of the replacement.

(2) The Party referring a dispute notifies the Senior Representatives, the other party and the Project Manager of the nature of dispute it wishes to resolve. Each Party submits to the other their statement of case within one week of the notification. Each statement of case is limited to no more than ten sides of A4 paper together with supporting evidence, unless otherwise agreed by the Parties.

(3) The Senior Representatives attend as many meetings and use any procedure they consider necessary to try to resolve the dispute over a period of no more than three weeks. At the end of this period the Senior Representatives produce a list of issues agreed and issues not agreed. The Project Manager and The Contractor put into effect the issues agreed.

(4) No evidence of the statement of case or discussions is disclosed, used or referred to in any subsequent proceedings before the Adjudicator or the tribunal.

DISPUTE DIFFERNECE TABLE		
DISPUTE ABOUT	WHICH PARTY MAY REFER IT TO THE SENIOR REPRESENTATIVE	WHEN MAY IT BE REFERRED TO THE SENIOR REPRESENTATIVE
An action or inaction of the Project Manager or the Supervisor	Either Party	Not more than four weeks after the Party becomes aware of the action or inaction.
A program, compensation event or quotation for a compensation event which is treated as having been accepted	The Client	Not more than four weeks after it was treated as accepted
An assessment of Defined Cost which is treated as correct	Either Party	Not more than four weeks after it was treated as correct
Any other matter	Either Party	When the dispute arises

### **The Adjudicator W1.2**

(1) The parties appoint the Adjudicator under the NEC Dispute Resolution Service Contract current at the starting date.

(2) The Adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.

(3) If the Adjudicator is not identified in the Contract Data or if the Adjudicator resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the Adjudicator nominating body to choose one. The

Adjudicator nominating body chooses an adjudicator within seven days of the request. The chosen adjudicator becomes the Adjudicator.

(4) A replacement Adjudicator has the power to decide a dispute referred to a predecessor but not decided at the time when the predecessor resigned or became unable to act. The Adjudicator deals with an undecided dispute as if it had been referred on the date of appointment as replacement Adjudicator.

(5) The Adjudicator and the Adjudicator's employees and agents are not liable to the Parties for any action or failure to take action in an adjudication unless the action or failure to take action was in bad faith.

### **Notice of Adjudication W1.3**

(1) A Party disputing any issue not agreed by the Senior Representative issues a notice of adjudication to the other Party and the Project Manager within two weeks of the production of the list of agreed and not agreed issues, or when it should have been produced. The dispute is referred to the Adjudicator within one week of the notice of adjudication.

(2) The times for notifying and referring a dispute may be extended by the Project Manager if the Contractor and the Project Manager agree to the extension before the notice or referral is due. The Project Manager informs the Contractor of the extension that has been agreed. If a disputed matter is not notified and referred within the times set out in the contract, neither Party may subsequently refer it to the Adjudicator or the tribunal.

(3) The Party referring the dispute to the Adjudicator includes with its referral information to be considered by the Adjudicator. Any more information from a Party to be considered by the Adjudicator is provided within four weeks of the referral. This period may be extended if the Adjudicator and the Parties agree.

(4) If a matter disputed by the Contractor under or in connection with a subcontract is also a matter disputed under or in connection with the contract and if the subcontract allows, the Contractor may refer the subcontract dispute to the Adjudicator at the same time as the main contract referral. The Adjudicator then decides the disputes together and references to the Parties for the purposes of the dispute are interpreted as including the Subcontractor.

(5) The Adjudicator may

- Review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a matter which has been treated as accepted or correct

- Take the initiative in ascertaining the facts and the law related to the dispute
  - Instruct a Party to provide further information related to the dispute which is stated time and
  - Instruct a Party to take any other action which is considered necessary for the Adjudicator to reach a decision and to do so within a stated time.
- (6) A communication between a Party and the Adjudicator is communicated to the other Party at the same time.
- (7) If the Adjudicator's decision includes assessment of additional cost or delay caused to the Contractor, the assessment is made in the same way as a compensation event is assessed.
- (8) The Adjudicator decides the dispute and informs the Parties and the Project Manager of the decision and reasons within four weeks of the end of the period for receiving information. This four-week period may be extended if the Parties agree.
- (9) Unless and until the Adjudicator has informed the Parties of the decision, the Parties, The Project Manager and the Supervisor proceed as if the matter disputed was not disputed.
- (10) The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by the contract that it is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal. A Party does not refer a dispute to the Adjudicator that it is the same or substantially the same as one that has already been referred to the Adjudicator.
- (11) The Adjudicator may, within two weeks of giving the decision to the Parties, correct any clerical mistake or ambiguity.

#### **The Tribunal W1.4**

- (1) A Party does not refer any dispute under or in connection with the contract to the tribunal unless it has first been referred to the Adjudicator in accordance with the contract.
- (2) If, after being informed of the Adjudicator's decision, a Party is dissatisfied, that Party may notify the other Party of the matter which is disputed and state that it intends to refer



the matter to the tribunal. The dispute is not referred to the tribunal unless this notification is given within four weeks of being informed of the Adjudicator's decision.

(3) If the Adjudicator does not inform the Parties of the decision within the time provided by the contract, a Party may notify the other Party that it intends to refer the dispute to the tribunal. A Party does not refer a dispute to the tribunal unless this information is given within four weeks of the date by which the Adjudicator should have informed the Parties of the decision.

(4) The tribunal settles the dispute referred to it. The tribunal has the powers to reconsider any decision of the Adjudicator and review and revise any action or inaction of the Project Manager or the Supervisor related to the dispute. A party is not limited in the tribunal proceedings to the information, evidence or arguments put to the Adjudicator.

(5) If the tribunal is arbitration, the arbitration procedure, the place where the arbitration is to be held and the method of choosing the arbitrator are those stated in the Contract Data.

(6) A party does not call the Adjudicator as a witness in tribunal proceedings.

## **2.5 GOVERNMENT CONTRACT WORKS (GC/WORKS/1) 1998**

GC/works/1 1998 is the standard form used for Central Government Contracts in the United Kingdom and have found cognate application in some other jurisdictions within the Commonwealth. Clause 59 provides for adjudication as follows:

(1) The Employer or the Contractor may at any time notify the other of intention to refer a dispute, difference or question arising under, out of, or relating to, the Contract to Adjudication. Within 7 Days of such notice, the dispute may by further notice be referred to the adjudicator specified in the Abstract of Particulars.

(2) The notice of referral shall set out the principal facts and arguments relating to the dispute. Copies of all relevant documents in the possession of the party giving the notice of referral shall be enclosed with the notice. A copy of the notice and enclosures shall at the same time be sent by the party giving the notice to the PM, the QS and the other party.

(3) (a) If the person named as the adjudicator in the Abstract of Particulars is unable to act, or ceases to be independent of the Employer, the Contractor, the PM and the QS, he shall be substituted as provided in the Abstract of Particulars.

(b) It shall be a condition precedent to the appointment of an adjudicator that he shall notify both parties that he will comply with this condition and its time limits.

(c) The Adjudicator, unless already appointed, shall be approved within 7 Days of the giving of notice of intention to refer a dispute to adjudication under paragraph (1). The Employer and the Contractor shall jointly proceed to use all reasonable endeavors to complete the appointment of the adjudicator and named substitute adjudicator. If either or both such joint appointments have not been completed within 28 days of the acceptance of the tender, either the Employer or the Contractor alone may proceed to complete such appointments. If it becomes necessary to substitute as adjudicator a person **not** named as adjudicator, either the Employer or Contractor alone may proceed to make such appointment. For all such appointments, the form of adjudicator's appointment prescribed by the Contract shall be used, so far as is reasonably practicable. A copy of each such appointment shall be supplied to each party. No such appointment shall be amended or replaced without the consent of both parties.

(4) The PM, the QS and the other party may submit representations to the adjudicator not later than 7 Days from the receipt of the notice of referral.

(5) The adjudicator shall notify his decision to the PM, the QS, the Employer and the Contractor not earlier than 10 days and not later than 28 days from the receipt of the notice of referral, or such longer period as is agreed by the Employer and the Contractor after the dispute has been referred. The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred. The adjudicator's decision shall state how the cost of the adjudicator's fee or salary (including overhead) shall be apportioned between the parties, and whether one party is to bear the whole or part of the reasonable legal and other costs and expenses of the other, relating to the adjudication.

(6) The adjudicator may take the initiative in ascertaining the facts and the law, and the Employer and the Contractor shall enable him to do so. In coming to a decision, the adjudicator shall have regard to how far the parties have complied with any procedures in the Contract relevant to the matter in dispute and to what extent each of them has acted promptly, reasonably and in good faith. The adjudicator shall act independently and impartially, as an expert adjudicator and not as an arbitrator. The adjudicator shall have all the powers to assess and award damages and legal and other costs and expenses; and, in addition to, notwithstanding the terms of condition 47 (Finance Charges), to award interest. In particular, without limitation, the adjudicator may award simple or compound interest from such dates, at such rates and with such rates as he considers meet the justice of the case-

(a) On the whole or part of any amount awarded by him, in respect of any period up to the date of the award.

- (b) On the whole or part of any amount claimed in the adjudication proceedings but paid before the award was made, in respect of any period up to the date of payment;

and may award such interest from the date of the award (or any later date) until payment, on the outstanding amount of any award (including any award of interest and any award of damages and legal and other costs and expenses).

(7) Subject to the proviso to Condition 60(1) (Arbitration and choice of law), the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration, or the parties otherwise agree to arbitration), or by agreement: and the parties do not agree to accept the decision of the adjudicator as finally determining the disputes.

(8) In addition to his other powers, the adjudicator shall have power to vary or overrule any decision previously made under the Contract by the Employer, the PM or the QS, other than decisions in respect of the following matters –

- (a) Decisions by or on behalf of the Employer under Condition 26 (site attendance);
- (b) Decisions by or on behalf of the Employer under Condition 27 (passes) (if applicable);
- (c) Provided that the circumstances mentioned in Condition 56 (a)(1) or (b) (Determination by Employer) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice under Condition 56(1)(a), or to give notice of determination under Condition 56(1);
- (d) Decisions or deemed decisions of the Employer to determine the Contract under Condition 56(8) (Determination by Employer);
- (e) Provided that the circumstances mentioned in Condition 58
- (f) A (1) (Determination following suspension of Works) have arisen, and have not been waived by the Employer, decisions of the employer to give notice of determination under Condition 58(A); and
- (g) Decisions of the Employer under Condition 61 (Assignment).

In relation to decisions in respect of those matters, the Contractor's only remedy against Employer shall be financial compensation.

(9) Notwithstanding Condition 60 (Arbitration and Choice of Law), the Employer and the Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgement and enforcement in respect of all such decisions.

(10) If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision. Such requests may only be made within 14 days of the decision being notified to the requesting party.

(11) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator, unless the act or omission is in bad faith. Any employee or agent of the adjudicator is similarly protected from liability.

## **2.6 GENERAL CONDITIONS OF CONTRACT (GCC) MAY 2011 EDITION (Issued by the Bureau for Public Procurement)**

Settlement of Disputes under the GCC is a three-tier scheme organized as follows:

Clause 82.1 – Amicable Settlement

Clauses 82.2 – **Adjudicator**

Clause 82.4 – Arbitration

Clause 82.2 (1) states: The Adjudicator named in the SCC is jointly appointed by the Employer and the Contractor. If Employer and the contractor do not agree on the appointment of the Adjudicator, the Employer will request the Appointing Authority designated in the SCC to appoint the Adjudicator within 14 days of receipt of such request.

(b) Should the Adjudicator resign or die, or should the Employer and the Contractor agree that the Adjudicator is not functioning in accordance with the provisions of the Contract, a new Adjudicator shall be jointly appointed by the Employer and the Contractor, within 30 days, the Adjudicator shall be designated by the Appointing Authority designated in the SCC at the request of either party, within 14 days of receipt.

Clause 82.3 provides for the procedures of disputes:

(a) If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

(b) The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

(c) The Adjudicator shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. The Contractor shall make all payments (fees and reimbursable expenses) to the Adjudicator, and the Employer shall reimburse half of these payments through the regular progress payments. Either party may refer a decision of the Adjudicator to Arbitration in accordance with GCC Sub-Clause 82.4 within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision shall be final and binding.

2.7 Some of the Contractual adjudication provisions have cognate rules for administering adjudication but parties are at liberty to choose what rules they intend to apply. Party autonomy is fundamental to contractual adjudication and is a core driver of the entire process.

The institute of Construction Industry Arbitrators has produced **Dispute Board Rules 2023** which is applicable to any adjudication where the institute is the appointing authority and other adjudication proceedings where parties choose ICIARB rules as applicable.

The rules are organized under 23 Articles as follows:

Article 1 – Definitions

Article 2 – Agreement to submit to the rules

Article 3 – Appointment of the Adjudicator

Article 4 – Conflict of Interest

Article 5 – Adjudication Agreement

Article 6 – Cooperation of the Parties

Article 7 – Meetings and Site Visits

Article 8 – Written communications and Time limits

Article 9 – Beginning and End of the Adjudication Activities

Article 10 – Powers of the Adjudicators

Article 11 – Payment of the Adjudicators

Article 12 – Procedure before the Adjudicators

Article 13 – Formal Referral of Disputes for a Decision; Statement of Case

Article 14 – Response and Additional Documentation

Article 15 – Organization and Conduct of Hearings

Article 16 – Decision of the Adjudicators

Article 17 – Contents of a Decision

Article 18 – Making of the Decision

Article 19 – Correction and Interpretation of Decisions

Article 20 – Admissibility of Decisions in Subsequent Proceedings

Article 21 – Administrative Expenses

Article 22 – General Rules

Article 23 – Application of the Rules

### **3.0 STATUTORY ADJUDICATION**

3.1 Construction Industry is a key player in every economy, its aggregate product constitutes the basis of all other economic activities necessary for economic growth and wellbeing. Therefore, inefficiency therein creates inter-sectional linkages that impact negatively on economic development. This reduction and containment of disputes is germane to efficiency and effectiveness of the sector. Particularly relevant is payment disputes and means of efficient resolution thereof. Arbitration (if provided for) and litigation were the core methods of addressing such disputes and these over time, have proved to be very adversarial, costly and time wasting.

3.2 Latham Report of 1994, in an attempt to remedy these deficiencies, recommended a statutory provision for interim payments to both Contractors and subcontractors and adjudication as a less cumbersome and interim mechanism for resolving disputes with a

binding outcome, pending final resolution (if need be) by arbitration or litigation. In accepting these recommendations, the UK parliament enacted the Housing Grant Construction and Regeneration Act 1996 (HGCRA). This landmark legislation provides as follows:

Section 108 – Right to refer disputes to adjudication

(1) A party to a construction contract has a right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose, disputes include any difference.

(2) The contract shall (include provision in writing so as to)

(a) Enable a party to give notice at any time of his intention to refer a dispute to adjudication.

(b) Provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice.

(c) Require the adjudicator to reach a decision within 28 days of referral or such longer periods as is agreed by the parties after the dispute has been referred.

(d) Allow the adjudicator to extend the period of 28 days up to 14 days with the consent of the party by whom the dispute was referred.

(e) Impose the duty on the adjudicator to act impartially; and

(f) Enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide (in writing) that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for the arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute

(3a) The contract shall include provision in writing, permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.

(4) The contract shall also provide (in writing) that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of its function as

adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the scheme for construction contracts apply.

(6) For England and Wales, the scheme may apply the provision of the Arbitration Act 1996 with such adaptations and modifications as appeared to the minister making the scheme to be appropriate.

For Scotland, the scheme may include provision conferring powers on court in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

3.3 The success of the UK experiments encourages the statutory adoption of adjudication in other jurisdictions example by

1. New South Wales – Security of Payments (SOP) Act 1999
2. New Zealand – Construction Contract Act (CCA) 2002
3. Singapore – Security of Payments (SOP) Act 2004
4. Malaysia – Construction Industry Payment and Adjudication ACT (CIPAA) 2012
5. Hongkong – Pending the enactment of the Security of Payment Legislation (SOPL), Hongkong's Special Administrative Region Development Bureau (SAR) released a technical circular in October 2021 setting out the implementation of (SOP) provision in public works contracts for the purpose of **“facilitating timely processing of contract payments and providing an interim mechanism for speedy resolution of payment disputes before the enactment of the security of payment legislation (SOPL)”**  
This provides for the first time, contractual rights to refer payment disputes to adjudicator and the prohibition of “pay if paid” or “pay when paid” provisions that had or previously crippled subcontractors and pushed many into insolvency.

(6) Ireland – Constructor Contract Acts (CCA) 2013 which provides for adjudication as a fast and relatively inexpensive means of dispute resolution and helped to resolve interim payment disputes and keep the project moving.



## 4.0 CONTRACTUAL AGREEMENT IN BESPOKE CONTRACT AND STANDARD FORM CONTRACT TO ADJUDICATE REGULATED BY STATUTE

### 4.1 BESPOKE CONTRACT

Non – Standard Contracts entered into by parties who draw up terms that are acceptable to them are referred to as bespoke contracts. Such contracts can include terms making disputes or differences referable to adjudication while accepting any institutional rules such as the **ICIARrb Rules 20223** as applicable.

### 4.2 STANDARD FORM CONTRACT

1. Standard Form Contracts can include terms (as amendment) making dispute referable to adjudication. Thus JCT 80, was awarded in 2009/2011 editions to include adjudications as regulated by the statutes (HGCRA 1996).

Thus clause 9.2 provides **“if a dispute or difference arise under this contract which either party wishes to refer to adjudication, the scheme shall apply”**. The scheme under reference, is that created under the HGCRA 1996.

2. Option W2 of NEC 4 Standard Form of Contract is another example of a Standard Form Contract to adjudicate regulated statutes (HGCRA 1996) and provided as below **“used when adjudication is the method of dispute resolution and the United Kingdom Housing Grants Construction and Regeneration Acts 1996 applies”**.

## 5.0 CONCLUSION

Adjudication is fast gaining acceptance as a mode of interim dispute resolution in the construction industry across jurisdictions. Its unique Selling points includes:

- Speed – Normatively Adjudicator’s decision must be given within 28 days of notice of referral or other extended dates and if not repudiated within stipulated period by appropriate Notice of Dissatisfaction (NOD) becomes final and binding.
- Relatively cheaper than litigation or arbitration
- Quick cash flow relief “pay first argue later”
- Binding – decision is binding on parties

In Nigeria, an association known as Guild of Adjudicators in Nigeria (GAIN) has been established to promote adjudication practice in the construction industry with the potential prospects of collaborating with the Federal Government to enact the relevant statute to regulate adjudication in the country.

Given the absolute necessity to improve the efficiency of our judicial system, Alternative Dispute Resolution regime is the way to go and particularly so is the adoption of adjudication as an interim means of settlement of disputes especially in the construction industry. The time to do so is **NOW**.

**Thank you and God bless.**

**IFEANYI TIM ANAGO FNIQS, FICIArb, FICMC, LLB (Hons) BL**

## **6.0 REFERENCES**

- 1. Housing Grants, Construction and Regeneration Act 1996.**
- 2. Micheal Latham's: Constructing the Team; Final Report July 1994.**
- 3. FIDIC Conditions of Contract for Construction (Red Book) 2017.**
- 4. New Engineering Contract 4.**
- 5. Government Contract Works (GC/WORKS/1) 1998.**
- 6. Standard Building Contract (SBC/AQ) Issued by the Joints Contract Tribunal 2009.**
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