

Construction Adjudication: Overcoming Challenges of Enforcement

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Abstract

The paper critically examines construction adjudication as a mechanism of managing disputes in the construction industry. It posits that adjudication is a viable tool for managing disputes in the construction industry. It highlights some of its advantages to this end. The paper further explores some of the concerns facing construction adjudication including challenges of enforcement. The paper further suggests solutions towards enhancing the viability of construction adjudication in managing disputes in the construction industry.

1.0 Introduction

The construction industry has been described as a complex and competitive environment in which participants with different views, talents and levels of knowledge of the construction process work together¹. In such a complex environment with participants

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¹ Cakmak. E & Cakmak. P.I., 'An analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process.' *Social and Behavioral Sciences* 109 (2014) 183 – 187

from various professions, it has been asserted that each party has its own goals and each expects to make the most of its own benefits². It has been further observed that the construction industry entails multiple and complex processes guided by contracts whereby projects are usually conducted in phases, at times by different players with diverse interests and involve large sums of money³. Due to the diverse interests and difference in perceptions among participants, it has been pointed out that disputes in the construction industry are inevitable⁴.

In construction projects, the most common disputes are likely to occur between the contractor and employer or sub-contractor and the main contractor⁵. Disputes can also occur involving consultants, clients, manufacturers, suppliers⁶. These disputes could be caused by factors such as delays in work progress, time extensions, financial failure of the contractor, technical inadequacy of the contractor, tendering and quality of works among others⁷. Disputes in the construction industry are undesirable and could potentially prevent successful completion of projects⁸. To this extent, it has been observed that protracted disputes in the construction industry that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery⁹. Further, such disputes can negatively impact on relationships which is an unfavorable situation in the construction industry since projects need teamwork in order to be implemented and

² Ibid

³ The National Assembly of Sciences, *Reducing Construction Costs: Uses of Best Dispute Resolution Practices by Project Owners*, Proceedings Report, Federal Facilities Council Technical Report No. 149 (National Assembly of Sciences)

⁴ Ibid

⁵ Muigua. K., 'Dealing with Conflicts in Project Management.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Dealing-with-Conflicts-in-Project-Management.pdf> (Accessed on 04/07/2023)

⁶ Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 204-208.

⁷ Cakmak. E & Cakmak. P.I., 'An analysis of Causes of Disputes in the Construction Industry Using Analytical Network Process.' Op Cit

⁸ Ibid

⁹ Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

delivered as planned¹⁰. Consequently, there is need for effective dispute management mechanisms in the construction industry.

Dispute management in the construction industry previously took the form of multi-tier processes involving determination by an impartial and independent engineer, followed by mediation, in the event a party was dissatisfied by the engineer's determination, and finally arbitration if agreement was not reached at mediation¹¹. However, most of such disputes ended up in arbitration due to the ineffectiveness of the first two processes being the determination by an impartial and independent engineer and mediation¹². However, arbitration which was touted to be an informal, fair, and swift form of justice in managing construction disputes has become too adversarial resulting in procrastination and cost escalation¹³. Managing construction disputes using an adversarial approach, such as modern arbitration, is considered to be in opposition to the maintenance of harmonious relationships between the parties¹⁴. Parties in construction disputes often prefer dispute management mechanisms that would preserve their business relationship in order to ensure timely and efficient completion of projects¹⁵. This gave rise to adjudication as the preferred mechanism of managing disputes in the construction industry¹⁶.

The paper critically examines construction adjudication as a mechanism of managing disputes in the construction industry. It explores the opportunities and challenges for construction adjudication including concerns of enforcement. The paper further suggests solutions towards enhancing the viability of construction adjudication in managing disputes in the construction industry.

¹⁰ Ibid

¹¹ Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

¹² Ibid

¹³ Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/ Adjudication in Hong Kong.' Available at <https://research.polyu.edu.hk/en/publications/insight-into-resolving-construction-disputes-by-mediationadjudica> (Accessed on 04/07/2023)

¹⁴ Ibid

¹⁵ Cheeks, J. R. 2003. "Multistep dispute resolution in design and construction industry." *J. Profl. Issues Eng. Educ. Pract.*, No. 129(2) of 2003, 84-91

¹⁶ Ibid

2.0 Conceptualizing Construction Adjudication

Adjudication is one of the Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts¹⁷. These mechanisms include negotiation, mediation, arbitration, neutral evaluation, enquiry, expert determination, adjudication, traditional dispute resolution mechanisms and conciliation¹⁸. In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution¹⁹. ADR mechanisms have been hailed for their advantages including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice²⁰.

Adjudication has been defined as a dispute management mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract²¹. It involves the management of disputes by an independent specialist nominated or agreed upon by the parties, who acts as an expert in the determination of disputes referred to him/her²². The adjudicator is required to focus on pertinent issues in the dispute, hear evidence, and arrive at a prompt decision within 28 days of the appointment, relying on his/her own specialist knowledge of the subject matter of the dispute²³. Adjudication has been described an informal process operating under very tight time scales wherein the

¹⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

¹⁸ Ibid

¹⁹ Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

²⁰ Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <http://kmco.co.ke/wpcontent/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-DisputeResolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 05/07/2023)

²¹ Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

²² Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit

²³ Ibid

adjudicator is supposed to reach a decision within 28 days or the period stipulated in the contract²⁴. It is a flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors²⁵. The decision of an adjudicator is binding, unless and until the dispute is finally determined by legal proceedings or by arbitration²⁶.

Adjudication is a simple and efficient method of managing disputes without resorting to lengthy and expensive court procedure²⁷. It has become the construction industry's preferred method of dispute resolution since it recognises the nature of the disagreements that arise within the construction sector²⁸. Adjudication was developed to allow for construction contract disputes to be resolved on an interim basis more quickly and cost-effectively than resolution through arbitration or litigation²⁹. Its aim is to provide a fast working solution to enable parties quickly resume or continue work under the contract³⁰. Adjudication is thus a viable mechanism of managing disputes in the construction industry.

Dispute management in the construction industry can also take the form of Dispute Boards which are normally set up at the onset of a construction project and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or

²⁴ Riches. J & Dancaaster. C., 'Construction Adjudication.' Available at https://books.google.co.ke/books?hl=en&lr=&id=U1VavyBLfOsC&oi=fnd&pg=PR5&ots=5CK-Z3qN0_&sig=34PnMjcFfTY5mU0oVwQyxEt1E7I&redir_esc=y#v=onepage&q&f=false (Accessed on 05/07/2023)

²⁵ Ibid

²⁶ Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/ Adjudication in Hong Kong.' Op Cit

²⁷ Chartered Institute of Arbitrators, Kenya Branch., 'Adjudication.' Available at <https://ciarbkenya.org/adjudication/> (Accessed on 05/07/2023)

²⁸ Ibid

²⁹ Centre for Effective Dispute Resolution (CEDR)., 'Construction Adjudication.' Available at <https://www.cedr.com/alternative-dispute-resolution-processes/adjudication/construction-adjudication/> (Accessed on 05/07/2023)

³⁰ Ibid

decisions regarding disputes referred to it by any of the parties³¹. A Dispute Board (DB) is a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project³². They are often found in large construction projects to assist parties in resolving or avoiding disputes and, ideally, preventing such disputes from escalating³³. The primary function of Dispute Boards is to assist parties to a construction contract to avoid disputes by facilitating and improving communication, encouraging the resolution of contentious issues by the parties at the job level rather than allowing them to escalate into full blown disputes and if the issues cannot be resolved at job level, to assist the contracting parties to resolve disputes quickly and cost effectively without the need for arbitration or litigation³⁴. Dispute Boards are an effective project management tool for avoiding and resolving disputes on complex projects efficiently and effectively³⁵. They can be utilized in the construction industry for effective management of disputes.

The International Federation of Consulting Engineers (FIDIC) envisages the use of Dispute Boards in Construction projects. In its 2017 Red book, FIDIC allows the use of Dispute Avoidance and Adjudication Boards (DAAB) in managing and avoiding disputes arising from construction projects³⁶. FIDIC stipulates that disputes shall be managed by a DAAB appointed by the parties within the time stipulated in the contract³⁷. In terms of avoidance of disputes, FIDIC provides that parties may jointly request the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue

³¹ Building Disputes Tribunal., 'Dispute Review Boards.' Available at <https://www.buildingdisputes tribunal.co.nz/dispute-review-board-services/> (Accessed on 05/07/2023)

³² The Dispute Resolution Board Foundation., 'Dispute Board Concept.' Available at <https://www.drb.org/> (Accessed on 05/07/2023)

³³ ACERIS LAW., 'Dispute Boards and International Construction Arbitration.' Available at <https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/> (Accessed on 05/07/2023)

³⁴ Building Disputes Tribunal., 'Dispute Review Boards.' Op Cit

³⁵ The Dispute Resolution Board Foundation., 'Dispute Board Concept.' Op Cit

³⁶ FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).

³⁷ Ibid, Clause 21.1

or disagreement that may have arisen between them during performance of the contract³⁸. It further provides that the decision of a DAAB shall be binding on both parties who shall promptly comply with it³⁹. In case a party is dissatisfied with a decision of a DAAB which has not become final and binding, FIDIC allows such a dispute to be finally settled by international arbitration⁴⁰.

From the foregoing, it is evident that various approaches have been embraced towards efficient and effective management of disputes in the construction industry including the use of construction adjudication and Dispute Review Boards. However, the viability of construction adjudication in managing disputes in the construction industry has often been questioned. It has been argued that one of the most fundamental concerns in construction adjudication is the enforcement of adjudicators' decisions⁴¹. Consequently, there have been cases whereby parties attempt to avoid complying with decisions by adjudicators' such as those mandating them to make payments⁴². The paper critically examines challenges of enforcement in construction adjudication.

3.0 Enforcement in Construction Adjudication: Challenges

Despite the fact that the decision of an adjudicator is final and binding on parties, several challenges arise in enforcement of such decisions. FIDIC envisages the use of arbitration in managing construction disputes where a party is dissatisfied with the decision of a DAAB⁴³. It has been pointed out that if a dispute previously referred to adjudication is subsequently the subject of litigation or arbitration, the new tribunal will not be dealing with an appeal from the adjudicator since a completely new process will be started in the

³⁸ Ibid, Clause 21.3

³⁹ Ibid, Clause 21.4.3

⁴⁰ Ibid, Clause 21.6

⁴¹ Redmond, J., 'Adjudication in Construction Contracts.' Available at <http://site.iugaza.edu.ps/kshaath/files/2010/10/06320565172.pdf> (Accessed on 05/07/2023)

⁴² Ibid

⁴³ FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).' Clause 21.6

same way as it would have been prior to the introduction of adjudication⁴⁴. The adjudication process may have helped to refine issues and may affect the way in which parties present and argue their cases but it will otherwise have no effect on subsequent arbitration or litigation proceedings⁴⁵. Thus, in situations where a dispute that was initially referred to adjudication ends up in arbitration or litigation, such a situation can result in delays and potential escalation of disputes which may ultimately damage business relationships and prevent timely completion of projects⁴⁶.

Further, challenges can emanate in respect of enforcing an adjudicator's award. In Kenya, courts envisage enforcement of an adjudicator's award through the same procedure adopted in enforcing arbitral awards under the Arbitration Act. This position was upheld in the case of *Republic vs Director General of Kenya National Highways Authority (DG) & 3 others Ex-parte Dhanjal Brothers Limited* where the court decided in part as follows:

'Further, the purported Adjudication Award has not even been registered with this High Court, pursuant to Section 36 of the Arbitration Act, Act No 4 of 1995 and therefore is incapable of being enforced in any proceedings as a civil claim⁴⁷.'

Such a position can potentially subject an adjudicator's award to the challenges envisaged under the Arbitration Act. Further, where a construction dispute is finally settled through arbitration after initially being managed through adjudication, then the resulting arbitral award can be challenged under the grounds set out in the Arbitration Act⁴⁸.

It has also been asserted that the decision of an adjudicator can be challenged in instances where adjudicator has acted beyond the scope of his/her jurisdiction⁴⁹. Where an

⁴⁴ Redmond. J., 'Adjudication in Construction Contracts.' Op Cit

⁴⁵ Ibid

⁴⁶ Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong.' Op Cit

⁴⁷ Republic vs Director General of Kenya National Highways Authority (DG) & 3 others Ex-parte Dhanjal Brothers Limited (2018) eKLR

⁴⁸ Arbitration Act, No. 4 of 1995, Laws of Kenya, S 35 & 37

⁴⁹ Vinden. G., 'Adjudication Enforcement: To Challenge, or Not to Challenge?' Available at <https://gateleyplc.com/insight/in-depth/adjudication-enforcement-to-challenge-or-not-to-challenge/> (Accessed on 07/07/2023)

adjudicator acts beyond the jurisdiction conferred to him/her under the contract, then the decision may be subjected to critical scrutiny through arbitration and court proceedings⁵⁰. Thus, in instances where an adjudicator did not have jurisdiction to decide the dispute, the decision will not be enforced⁵¹. Issues of jurisdiction in adjudication can arise where the dispute is not covered by an adjudication agreement and where the decision is outside the terms of reference in the notice of adjudication⁵². Thus, it is imperative for adjudicators to ensure that they have jurisdiction to hear and determine the disputes in question in order to render enforceable decisions.

Further, enforcement of an adjudicator's decisions can be challenged on grounds of breach of the rules of natural justice⁵³. Thus, an adjudicator needs to ensure that each party is given enough opportunity to present their case in order to render enforceable decisions. To adhere to the rules of natural justice, the adjudicator needs to be impartial, act without bias and ensure that he/she does not have a personal interest in the dispute and give both parties fair opportunity to present their cases⁵⁴. In instances where an adjudicator breaches the rules of natural justice, the decision can be challenged and possibly set aside⁵⁵. Compliance with the rules of natural justice is thus vital for the success of adjudication proceedings.

Finally, the enforcement in adjudication can be challenged on grounds that the decision was influenced by bribery or fraud⁵⁶. Bribery and fraud can taint adjudication proceedings and the sanctity of an adjudicator's decisions⁵⁷. Thus in cases where the

⁵⁰ Redmond. J., 'Adjudication in Construction Contracts.' Op Cit

⁵¹ Ibid

⁵² Adjudicator jurisdiction across Jurisdictions.' Available at <https://www.minterellison.co.nz/insights/adjudicator-jurisdiction-across-jurisdictions> (Accessed on 07/07/2023)

⁵³ Ibid

⁵⁴ Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' *Earth Environ. Sci*, No. 233 of 2019.

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ Coulson. L.J., 'Principles of Enforcement.' Available at <https://academic.oup.com/book/41076/chapter-abstract/349875645?redirectedFrom=fulltext> (Accessed on 07/07/2023)

making of an adjudicator's decision was influenced by bribery and fraud, such a decision can be challenged and possibly set aside⁵⁸. Thus, it is important for adjudicators to ensure that they act in a professional manner and determine disputes based on the facts and evidence before them and avoid being influenced by fraud or bribery in order to guarantee the enforcement of their decisions.

From the foregoing, it is evident that several concerns can hinder enforcement of decisions in construction adjudication. Addressing these concerns is essential in guaranteeing the success of adjudication proceedings.

4.0 Way Forward

Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya and across the globe⁵⁹. There is need to put in place governing laws and regulations on adjudication in countries such as Kenya which currently do not have such laws in place⁶⁰. Such laws would enhance the viability of adjudication by providing parties access to adjudication, stipulating the procedural and substantive elements of adjudication proceedings, ensuring that payments are made promptly and where disputes arise, ensuring that they are dealt with in a timely manner⁶¹.

Further, it is imperative for parties in construction projects to strive towards conflict avoidance. This will ensure timely and efficient performance of obligations by eliminating conflicts or mitigating their effects to prevent them from escalating and affecting the construction project⁶². Thus causes of conflicts should be properly identified

⁵⁸ Ibid

⁵⁹ Muigua. K., 'Dealing with Conflicts in Project Management.' Op Cit

⁶⁰ Ibid

⁶¹ Dancaster. C, 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

⁶² Gajaman. K et al., 'Conflict Avoidance in Construction Stage through Proper Practice in Pre Contract Stage.' *Proceedings of the International Conference on Industrial Engineering and Operations Management Bangkok, Thailand, March 5-7, 2019*

and managed to avoid unnecessary issues in construction projects⁶³. FIDIC envisages the use of conflict avoidance in construction projects. To this extent, it provides that parties may request the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the contract⁶⁴. Parties should thus adopt conflict avoidance strategies such as the use of DAAB in order to ensure efficiency during construction projects.

In addition, it is important for parties to ensure that they incorporate effective adjudication clauses in their contracts. Such clauses should be comprehensive and should stipulate pertinent issues such as the dispute management process including amicable management of disputes, appointment of an adjudicator, the jurisdiction of the adjudicator, applicable laws, timelines for managing disputes, binding nature of decisions and enforcement of decisions among others⁶⁵. This will ensure the viability of adjudication in managing construction disputes.

Further, there is need to redefine the role of courts in adjudication in order to ensure consistent court decisions on enforcement of adjudication awards in order to promote the growth of construction adjudication⁶⁶. It has been argued that the role of courts in other ADR mechanisms such as arbitration has hindered the growth of these mechanisms due to the lack of uniformity in aspects such as setting aside and enforcing decisions⁶⁷. Thus, it is important to redefine the role of courts in adjudication in order to enhance its

⁶³ Ibid

⁶⁴ FIDIC., 'Construction Contract, 2nd Edition (2017 Red Book).' Clause 21.3

⁶⁵ Ipleaders., 'Drafting a Dispute Resolution Clause in Construction Contracts.' Available at <https://blog.ipleaders.in/drafting-a-dispute-resolution-clause-in-construction-contracts/> (Accessed on 07/07/2023)

⁶⁶ Dancaster. C., 'Construction adjudication in the United Kingdom: Past, present and future,' Op Cit

⁶⁷ Kariuki. F., 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Recognition-and-Enforcement-of-Foreign-Arbitral-Awards.pdf> (Accessed on 07/07/2023)

growth⁶⁸. Courts should also adopt a uniform approach towards enforcement of decisions in order to promote consistency and certainty in construction adjudication⁶⁹.

Finally, it is paramount for adjudicators to ensure that their conduct is appropriate during adjudication proceedings. Adjudicators should act within jurisdiction and conduct the proceedings in a fair manner that aligns with the rules of natural justice⁷⁰. They should also ensure that their decisions are appropriate and grounded in law and not influenced by bribery or fraud⁷¹. This will enhance the viability of adjudication and guarantee enforcement of decisions.

5.0 Conclusion

Construction adjudication is a viable mechanism of managing disputes in the construction industry⁷². It has the ability to provide expeditious, flexible and cost effective management of disputes and restoration of relationships to enable parties quickly resume or continue work under the contract⁷³. However, the viability of construction adjudication can be inhibited by challenges of enforcement. Factors such as reference of disputes to arbitration or litigation, lack of jurisdiction, failure to adhere to the rules of natural justice and influence of bribery and fraud on decisions can hinder enforcement of decisions in adjudication⁷⁴. Measures that can be adopted in order to enhance the viability of construction adjudication include promoting conflict avoidance, enacting governing laws and regulations, ensuring that parties draft effective

⁶⁸ LexisNexis., 'Role of the Court during the Adjudication.' Available at <https://www.lexisnexis.co.uk/legal/guidance/role-of-the-court-during-the-adjudication> (Accessed on 07/07/2023)

⁶⁹ Ibid

⁷⁰ Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' Op Cit

⁷¹ Ibid

⁷² Riches. J & Dancaster. C., 'Construction Adjudication.' Op Cit

⁷³ Chau. K.W., 'Insight into Resolving Construction Disputes by Mediation/ Adjudication in Hong Kong.' Op Cit

⁷⁴ Hassan. A.A et al., 'Challenges against Adjudication Decisions on Payment Disputes within the Construction Industry.' Op Cit

adjudication clauses, redefining the role of courts in adjudication and adoption of appropriate conduct by adjudicators⁷⁵. Through these measures, the efficacy of construction adjudication in managing disputes in the construction industry will be strengthened. It is indeed possible to overcome the challenges of enforcement in construction adjudication.

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⁷⁵ Gajaman. K et al., 'Conflict Avoidance in Construction Stage through Proper Practice in Pre Contract Stage.' Op Cit

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