



Statutory Adjudication

A consensus is growing amongst national lawmakers that the construction and engineering industry is not to be trusted.

Contracts are generally treated as sacrosanct under the common law. Except where consumers are concerned, or in certain narrow categories of illegality and public policy, the contract as written and agreed by the parties will strictly govern their respective rights and obligations.

If one party has made a bad bargain then the standard attitude of the Courts is 'tough'; commercial organisations are big boys – if they fail to properly protect their interests (for instance failing to secure a right to fair and timely payment) then why should the courts intervene to help them?

This hardened attitude, forged over hundreds of years in first the English courts and then exported around the globe, undoubtedly can create injustice. However, lawmakers and Courts alike have upheld the laissez faire nature of contracts – let the parties negotiate the terms of their contracts and stand and fall by them.

Except in relation to the construction and engineering industry. The big boys in this industry play rough; smaller and weaker boys are likely to be trampled.

Lengthy contractual chains, from employer to main contractor, to sub contractors, to sub-sub-contractors/suppliers etc, encourage abuse. Money withheld at the upper reaches of the contractual chain causes a ripple effect as these parties seek to protect their own positions, often by denying vulnerable sub-contractors and suppliers of monies correctly due. If money does not find its way to these sub-contractors and suppliers the projects themselves can suffer from the delays and disruption caused by the lack of funds for labour and materials. Weaker members of the supply chain can be forced into insolvency.

This is obviously undesirable and (as economists might say) entirely inefficient. In a growing trend, the lawmakers in common law countries have decided that enough is enough. The construction and engineering industries are structurally flawed, dysfunctional and incapable of regulating themselves. The industry needed to be tamed. Laws needed to be made, imposing rules on the abusive elements.

Adjudication Around the World

The UK was the first jurisdiction to act on this problem, leading to the Housing Grants, Construction and Regeneration Act 1996 ("the UK Act"). New South Wales was not far behind with the Building and Construction Industry in 1999 ("the NSW Act"), followed closely by other Australian states/territories. Singapore issued its own act in 2004 ("the Singapore Act"), New Zealand and Malaysia in 2012 ("the Malaysian Act") and Ireland in 2013.

These acts all have features in common. They approach the dysfunctionality from two directions:

- Firstly, they establish rules as to the entitlement of the receiving party to regular payment for works and restrict the paying party from raising late excuses for non-payment (i.e. they establish a payment regime); and
- Secondly, they provide a process to provide quick, dirty and (most importantly) enforceable dispute resolution to support the payment regime, known as 'adjudication' (i.e. they establish an adjudication regime).

Concentrating on the UK, NSW, Singapore and Malaysian Acts these common features can be seen as follows:

	UK	NSW	Singapore	Malaysia
General				
The act applies to construction contracts performed within the jurisdiction.	s. 107	s. 7	s. 4(1)	s.2
The parties cannot 'contract out' of the Act.	s.108(6) S.109(3)	s.34	s.35	*1
The act generally binds the government	s.117	s.33	s.36	s.2
However, contracts for certain works are specifically excluded from the application of the Act.	s.105(2) s. 106 s.109(1)	s.5(2)	s. 4(2)	s.3
The Payment Regime				
The contractor has a right to progress payments.	s.109	s.8	s. 5	*2
The value of the progress claim is subject to assessment by the Employer/contract administrator within a limited period.	s.110 s.111	s. 14	s.11	s.6
A default payment regime is imported into the contract if one is not agreed	s.110	s.8(2) s.11	s.8(b) s. 10 – 11	s.36
'Pay when paid' clauses are unenforceable.	s. 113(1)	s. 12	s. 9	s.35
The Adjudication Regime				
There is a right to 'adjudication' regarding payment disputes (at least)	s. 108 ³	s.17	s.12	s.7
The Adjudicator must act independently, impartially and comply with the principles of natural justice.	s.108(2)(f) *4	*5	s.16(3)	s.24
The Adjudicator has wide powers to set his own process within a limited period to reach a decision	s.108(2) s.108(2)(e)	s.21(4) s.21(3)	s.16(4) s.17	s.25 s.12(2)
A valid decision of the Adjudicator is binding on an interim basis and will be (generally) enforced by the national courts	s. 108(3) *6	s.23 s.25	s.21(1) s.23(2) s.27	s.13 s.28
A party who is unhappy with the decision of the Adjudicator may refer the same dispute to the courts/arbitration for a final decision.	s.108(3)	S.23(2)	s.21	s.13
There is an additional right of unpaid party to suspend works.	s. 112	s.24(1) s.15-16	s.23(1)(b)	s.29

¹ The Malaysian Act is silent on this issue, but it is assumed that contracting out is prohibited.

² Arguably the Malaysian Act does not impose a right to progress payments, although it will apply a progress payment regime if no regime is agreed between the parties.

³ The UK adjudication scheme allows for adjudication of any dispute, not restricted to disputes which arise out of the payment regime – see below..

⁴ The obligation to comply with the rules of natural justice is implied by law in the UK

⁵ Implied by law

⁶ The right to enforce payment of the adjudicator's decision as a debt has been established as a matter of law

Key differences Between the Acts

However, despite these common features, there are fundamental differences between the payment and adjudication regimes across the different jurisdictions. These present a number of different strategic considerations – in some jurisdictions there is still lots of scope for bad behaviour!

Some key differences are as follows:

What Contracts are Caught by the Acts?

Each of the Acts carefully sets out which operations fall within the remit of the Acts. Firstly, each Act is careful to exclude contracts for residential developments in certain circumstances (see s. 106(2) of the UK Act, s. 3 of the Malaysian Act, s. 4 of the Singapore Act and s. 7 of the NSW Act). Equally, none of the Acts apply to employment contracts.

Here is where the similarities end. For instance, the UK act covers construction “work” – i.e. there must be a ‘services’ or ‘labour’ element (whether installation works, labour only sub-contracting, design or project management). However, ‘supply only’ contracts for plants and materials do not qualify (s. 105(2)(d)). In contrast, ‘supply only’ contracts are caught by the NSW, Malaysian and Singapore Acts.

Each of the Acts identifies industries which, it seems, the lawmakers trust to regulate themselves and therefore are not subject to the Acts. The following summarises the application of the various Acts:

	UK	NSW	Singapore	Malaysia
Residential Property?	Exempted	Exempted	Exempted	Exempted
Supply Only contracts	Exempted (s.105(2)(d))	No exemption (s.5(1)(e)(iv))	No exemption (s.3(1)(d)(v))	No exemption (s.4(B))
Other Exceptions	Contracts for (s.105(2)): Drilling for/ extraction of oil and gas. Extraction of minerals. Nuclear processing, power generation or water treatment. Production, processing or storage of chemicals, pharmaceuticals, oil, gas, steel, food or drink. Artistic works.	Contracts under loan and other financial agreements. Contracts for (s.5): Drilling for/ extraction of oil and gas. Extraction of minerals	No additional exemptions under the Act	Government contracts for: Urgent works due to natural disaster, emergencies and other unforeseen circumstances. National security, including police and military camps, power and water treatment plants.
Do different rules apply to different contracts?	No exemptions	No exemptions	No exemptions	Government contracts where the contract sum is less than RM 20m (around USD6.3m)

It can be seen that, although the Act applies to most government contracts in Malaysia, some are excepted completely and others (below a certain threshold in value) are subject to different rules. The main effect of these different rules is that the government entity is allowed a much longer period to respond during the payment and adjudication processes.

Each of the Acts provide for the additional exempted activities to be listed by the relevant Secretary of State, which are beyond the scope of this analysis.⁷

⁷ Please see for instance the UK Exclusion Order (SI 1998 No 648) which excludes contracts relating to the private finance initiative, certain finance agreements and development agreements.

The Payment Regimes

One of the examples of bad behaviour that the various acts seek to curb was the raising of counterclaims to extinguish a receiving party's right to payment. For instance, if a sub-contractor was entitled to payment for its works by a contractor, it might be forced into a position where it had to commence legal proceedings or arbitration to recover the debt. Often the main contractor could avoid an early award/judgment against it by raising a spurious counterclaim and setting it up as a defence of set-off in the proceedings.

There was little the sub-contractor could do in these circumstances. If he had the funds and the patience, he could pursue the claim to trial, possibly taking years and tens/hundreds of thousands of dollars. If he did not have the funds he might have to offer a substantial discount to secure any cash payment, accept that he had no effective remedy and give up or, in the worst cases, be forced into insolvency.

Playing the 'set-off' game was very rewarding for main contractors and employers alike.

Most Acts level the playing field by limiting the time period in which the paying party has to value the claim and/or raise counterclaims. However, the approach differs:

- The **Singapore Act** envisages that the paying party will serve a "Payment Response" within a short period of time (maximum 21 days) after receiving the receiving party's payment claim. Importantly, the Payment Response "shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld." (s.11)⁸. In the ensuing adjudication the paying party is **barred** from relying upon any reason for non-payment (whether a valuation issue or the raising of a set-off) which is not contained within a valid Payment Notice (s.15(3)). However, the adjudicator must still make a decision upon the true value of the monies due under the payment claim based upon the documents before him (s.17(3)).
- The **NSW Act** requires the paying party to serve a "Payment Schedule" within 10 days (at the latest) of receipt of the Payment Claim. Where a Payment schedule is served in time, and the scheduled amount is less than the claimed amount "the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment." (s. 14(3)). In these circumstances (or where no Payment Schedule has been served) the receiving party may refer the dispute to Adjudication (s.17). Again, the Adjudicator must then determine the true value of the progress payment and, as with the Singapore Act, the Adjudicator is not entitled to take into account any reasons which were not raised by the paying party in the Payment Schedule.
- Unlike the Singapore and NSW Acts, the **UK Act** separates (1) issues regarding the valuation of the progress payment; from (2) any attempt by the paying party to withhold or 'pay-less' by setting off its own claim. Although a paying party must file a "Payment Notice" valuing the progress payment (s. 110(2) (subject to the terms of the contract) a failure to issue this notice will not prevent the paying party from raising new 'valuation' issues by way of defence in an adjudication. However, if the paying party wishes to raise a defence of set-off (i.e. raising its own counterclaim against the receiving party) it must also serve a "withholding notice" or "pay-less notice." (s. 111) When the adjudicator determines the monies to be paid he is **not** entitled to take into account and defence of set-off which has not been raised in the withholding (s.111(1)).
- The **Malaysian Act** takes a completely different approach. Although, within 10 days of receipt of a payment claim, the paying party must serve a "Payment Response" which shall state "the amount disputed and the reason for the dispute" (s.6(2)). However, in contrast to the NSW, UK and Singapore Acts s. 6(4) states that "A non-paying party who fails to respond to a payment claim in the manner provided in this section is deemed to have disputed the entire payment claim." Therefore, there is absolutely no bar to the paying party from raising any argument against payment in a subsequent adjudication, whether the argument relates to valuation or is by way of set-off. All of the paying parties' submissions in the adjudication must be taken into account when the adjudicator decides the true value of the progress payment.

⁸ It is worth noting that this Payment Response can be effectively served or varied at any point until the right of the receiving party to refer the issue to adjudication arises (s. 11(4) and 12(4)(b)).



The positions can be summarised as follows:

	UK	NSW	Singapore	Malaysia
Is there an obligation on the paying party to issue a Payment Notice (or similar)	Yes ⁹	Yes	Yes	Yes
Will the absence of a timely and complete notice dealing with valuation issues bar the paying party from raising new valuation issues in Adjudication?	No	Yes	Yes	Yes
Will the absence of a timely and complete notice raising a defence of set-off bar the paying party from raising grounds for withholding/set-off defences issues in Adjudication?	Yes	Yes	Yes	No
Even in the absence of timely and complete valuation/withholding notices, must the Adjudicator still decide and determine the true value of the progress payment?	Yes	Yes	Yes	Yes

Although a conscientious employer/main contractor may be able to protect its position by raising both valuation and setting-off issues within the statutory timeframe in all these jurisdictions, parties involved in international contracting need to understand that the consequences of failing to issue certain notices can differ greatly.

The Adjudication Regimes

Perhaps the greatest differences between the regimes is in relation to the Adjudication processes themselves. These differences can lend themselves to the adoption of different strategies in the different jurisdictions.

What Disputes Can be Subject to Adjudication?

There is a clear split between the position under the UK Act (followed in the New Zealand Act) and those of NSW, Singapore and Malaysia as to the type of dispute which can be referred to adjudication. In essence:

- In the UK and New Zealand any dispute arising out of a construction contract may be referred to Adjudication (see s. 108(1) of the UK Act); but
- In NSW, Singapore and Malaysia only a payment dispute, specifically related to a particular application for payment, can be referred to Adjudication.

This is a huge difference between the regimes. In NSW, Singapore and Malaysia the adjudication regime is inextricably linked to the payment regime i.e. the contractor applies for a progress payment, there is a disagreement as to the value of the progress payment as set out in the payment notice and this disagreement alone can be the subject of an adjudication.

On the other hand, in the UK, disputes as to a plethora of issues can be adjudicated. This can encompass the valuation of payments due under the contract, defective work, declarations as to factual positions or the correct interpretation of the contract, and even highly complicated issues such as disputed terminations.

⁹ There is a requirement in the UK to issue both a Payment Notice (dealing with valuation) and a Pay-less Notice (formerly a Withholding Notice) setting out any defence of set-off

Who Can Commence the Adjudication?

Again, there is very important split between the UK position (followed by New Zealand) and those of NSW, Singapore and Malaysia:

- In the UK and New Zealand, either party may refer a dispute to Adjudication;
- In NSW, Singapore and Malaysia, only the receiving party (i.e. the party actually carrying out the construction works under the contract) may refer a dispute to Adjudication.

The ability of either party to start an adjudication, coupled with the fact that any dispute in relation to the contract is capable of adjudication, lends itself to a variety of strategic options under the UK regime, particularly in the paying party's favour (for instance the employer). It often leads to counter adjudications or single issue references which a savvy employer could use to head off claims for money by the contractor.

There is also nothing to stop an aggrieved employer from claiming a money award from a contractor in an Adjudication for (say) defective design or workmanship, LADs or even damages for wrongful termination; if the employer gets his decision successful the contractor will have to pay the sums awarded to the employer.

In contrast, the strategic options available to the paying party (e.g. the employer) in NSW or Singapore are very limited indeed. An employer in these jurisdictions will have to be very careful to have properly complied with its obligations to issue payment notices in accordance with the Act if it expects to be able to properly protect its position in any adjudication.

When can the Adjudication be commenced?

Again, the split in philosophy is between the UK/New Zealand regimes and the regimes of NSW, Singapore and Malaysia:

- In the UK and New Zealand, either party may refer a dispute to Adjudication "at any time";
- In NSW and Singapore the receiving party may only refer its payment dispute to Adjudication within a very tight period following the issue of the Payment Notice (or similar) under the applicable payment regime; and
- In Malaysia, the right to refer a payment dispute to Adjudication arises following the period for the service of the payment notice. However, subject to issues regarding limitation, there is no 'window' within which the adjudication must be commenced.

Again, the ability for either party to refer any dispute to adjudication at any time under the UK regime provides for a wide range of strategic options to paying and receiving parties alike. Commencing adjudications over the Christmas period is one tactic which is frequently adopted, as is commencing an adjudication during the final account process (often concurrently with arbitration/litigation).

In contrast the adjudication regimes in NSW, Singapore and Malaysia are essentially an extension of the payment regime. However, these adjudication regimes are also different from one another and provide traps for the unwary.

For instance, under the NSW regime, an intention to refer a payment dispute to adjudication must be notified within 20 business days following the due date for payment (s.17(2)(a)). If the receiving party fails to notify such an intention within this time period he will lose his right to refer this progress payment to adjudication.

In Singapore the period for action is even more restricted; the right to refer the payment dispute to adjudication only arises in a very short 7 day window which:

- commences after the expiry of a 7 day "dispute settlement period", following the last day for the service of the Payment Response (s.12); and
- concludes 7 days thereafter (s.(13)(a)).

Commencing the adjudication within this 'window' is vital. A reference before the dispute settlement period has expired will be a nullity; a reference after the 7 day window has passed will mean that the receiving party has lost its right to adjudicate in respect of that progress payment (s.16(2)).

Other Procedural Differences

Again, as the NSW and Singapore adjudication regimes are an extension of their respective payment regimes, there are very strict provisions as to how the paying party must respond to the Adjudication. In both these regimes, the Adjudication Response must be limited to the reasons set out in the Payment Response and, in the absence of a Payment Response, the Adjudicator cannot consider an Adjudication response at all. Equally, if the Adjudication Response is issued outside of the statutory timeframe, the Adjudicator is not permitted to consider its contents at all in making his decision.

Although the Malaysian adjudication regime provides for a statutory periods for the filing of both the Adjudication Response and (uniquely) the Reply, there are no consequences stated under the Act for a failure to meet these deadlines. It is worth noting at this stage that, whereas in the UK, Singapore and NSW the respondent might have (say) 7 to 14 days to serve its Adjudication Response, the Malaysian adjudication regime permits up to 9 weeks (longer than the period allotted for service of a defence in most legal systems).

The UK Act leaves the timetable for the service of submissions (including the Adjudication Response and Reply) to the Adjudicator. However, as set out above, the paying party cannot raise any withholding or set-off in an adjudication which he did not properly notify in a Pay-less (i.e. withholding) Notice.

Across each of the jurisdictions, subject to the restrictions set out above and the time for making a decision (discussed below), the Adjudicator has a free rein to set his own procedure and issue his own directions. If one of the parties fails to comply with the Adjudicator's directions, then in each jurisdiction the Adjudicator may continue with the Adjudication and make a decision.

The Time for the Decision

All the adjudication regimes require (1) the Adjudicator to make a decision within a specific time frame, failing which (2) the decision is invalid and therefore not binding save that (3) the parties are permitted to extend the period for the decision by agreement.

However, this is where the similarities end. The periods within which a decision must be made falls into three camps:

- At one end of the spectrum are the Singapore and NSW's regimes. These both provide for decisions (in default of agreement) within very short periods of time – 14 days from the commencement of the Adjudication (Singapore) or 10 business days from the date upon which the Adjudicator notified his/her acceptance of the appointment (NSW). These periods are entirely commensurate with the adjudication regimes being extensions of the applicable payment regimes.
- In the middle is the UK, where a decision ordinarily has to be made within 28 days of the service of the Referral Notice. As seems appropriate in an adjudication regime where 'any party' can refer 'any dispute' at 'any time', there is an inbuilt option for an extension of the period for a decision by a further 14 days with the consent of the referring party. This option is often utilised where a dispute is sufficiently complicated to raise the possibility of procedural unfairness i.e. the 28 day period is insufficient for the responding party to make its submissions and for the adjudicator to make his decision.
- At the extreme end of the spectrum is Malaysia. The time scales for the appointment of the Adjudicator, the service of the Adjudication Claim, Response and Reply and the period for which the Adjudicator must make his decision are all very long by international standards. Therefore, although (like Singapore and NSW) all adjudications must be linked to disputes arising from the payment regime, the Adjudicator may have up to 19 weeks to make a decision.

¹⁰ s. 108 of the UK Act along with ss. 13 to 15 of the Scheme for Construction Contracts 1998; s.21(4) and (5) of the NSW Act; s. 16(4) to (7) of the Singapore Act and s.25 of the Malaysian Act

Summary of the Adjudication Regimes

	UK	NSW	Singapore	Malaysia
Can 'any dispute' be referred, or just a 'payment dispute' over a particular progress payment?	Any Dispute (s.108(1))	Payment dispute (s.17(1))	Payment dispute (s.12)	Payment dispute (s.7(1))
Who can commence an Adjudication?	Either party (s.108)	Receiving party only (s.17(1))	Receiving party only (s.12)	Receiving party only (s.8(1))
Is there a restriction upon when an Adjudication be commenced?	No - "at any time" (s.108(2))	Yes – a 'window' (s.17(2))	Yes - a 'window' (s.12-13)	Yes – but no 'window' (s.7(2))
Is there a statutory period for the Adjudication response by the defending party?	No	Yes (s.20(1)) ¹¹	Yes (s.15) ¹²	Yes (s.10(1))
Is there a statutory bar to raising issues in the adjudication if no Adjudication response served?	No	Yes (s. 21(3))	Yes (s.16(2))	No
Is there a statutory period for the service by the claimant of a reply to the Adjudication response?	No	No	No	Yes (s.11)
By when must the Adjudicator provide his decision following commencement (in calendar days)?	28 days s.108(2)(c) ¹³	14 days (s.21(3))	14 days (s.17(b)) ¹⁴	Up to 133 days ¹⁵

Conclusion on the Adjudication Regimes

The above shows that it is unhelpful to refer to 'Adjudication' as an international term of art, reflecting agreed norms and conventions across different jurisdictions. In fact, the nature of adjudication even across these four jurisdictions is so very different as to make the adjudication regimes almost at odds with one another.

For instance, in NSW or Singapore a respondent has a very short period in which to prepare and submit his case – this is assuming that he has not already been 'locked out' of the adjudication process by failing to comply with the payment regime. The decision of the Adjudicator must follow very soon afterwards and it is going to closely support the payment regime.

In contrast, the respondent to an adjudication in respect of very similar issue in Malaysia might have up to 9 weeks to serve its response and can raise any issue that he likes – for instance there is nothing to stop him from raising new counterclaims, or revaluing work completed to date. As the decision itself would not be due for another 9 or 10 weeks thereafter, the respondent would have lots more opportunity to refine (and even change) his case.

Finally, the adjudication regime in the UK constitutes unrestricted warfare. Parties can carefully chose the dispute to be referred and then time the reference to cause maximum disruption. A party at the receiving end of an adjudication might issue its own counter-adjudication. Save for issues of set-off raised by the employer, there are no restrictions whatsoever as to defences that can be raised in any adjudication. The adjudicator sets his own timetable, keeping an eye upon whether the process is fair to both parties to attempt to limit the possibility of challenges to enforcement at a later date.

These adjudication regimes bear little resemblance to one another. To confuse matters further, they also do not necessarily resemble contractual adjudication processes (for instance the Dispute Adjudication Board procedure under FIDIC) which may often provide yet another route for dispute resolution in a particular contract.

¹¹ The paying party may only issue an Adjudication response where it has already issued a valid a Payment Schedule (s.20(2A)).

¹² The paying party may only issue an Adjudication response where it has already issued a valid a Payment Response (s.15(3)).

¹³ The referring party may extend the period for the decision by 14 days to 42 days (s.108(2)(d)).

¹⁴ Assuming that the paying party successfully served both a Payment Response and an Adjudication Response

¹⁵ This assumes the following maximum time table (all in working days) (1) Notice of Adjudication; then (2) 10 days to seek to agree an adjudicator (s.21(a)); then (3) 5 days for nomination of adjudicator by KLRC (s.23(1)); then (4) 10 days for negotiation of terms of appointment (s.23(2)); then (4) 10 days for the service of the Adjudication Claim (s.9(1)); then (5) 10 days for the service of the Adjudication Response (s.10(1)); then (6) 5 days for the service of the Adjudication Reply (s.11(1)); and finally (7) 45 days for the Adjudicator's decision.

Enforceability of Adjudicator's Decisions

As set out above it is a shared feature of all the adjudication regimes that the adjudication process results in a decision which is binding on an interim basis. This is often described as a “pay now, argue later” regime.

This means that both the employer and contractor:

- must comply with the Adjudicator's decision (i.e. “pay now”); but
- can seek to have the dispute finally determined through litigation or arbitration (i.e. “argue later”)

This is all very well, but what if one party just doesn't want to pay?

Arguments Against Enforceability

Again, the different adjudication regimes lend themselves to very different strategies regarding non-payment. However, the general rule applying to all adjudication regimes can be summarised as follows:

- The decision of the adjudicator is enforceable except where:
 - ▶ No ‘dispute’ has arisen between the parties capable of reference to adjudication – i.e. where a reference to adjudication is premature;
 - ▶ The adjudicator has failed to answer the dispute referred to him (either because he has not dealt with all the issues arising or because he determined additional disputes which were not part of the dispute originally referred);
 - ▶ Where the procedure adopted by the adjudicator was so unfair as to breach the laws of natural justice;
 - ▶ Where the adjudicator showed actual or apparent bias; or
 - ▶ That the parties or the adjudicator have failed to comply with the adjudication regime (classic examples might be where the adjudicator was not properly appointed, the adjudication was launched outside the ‘window’ for commencement in the NSW/Singapore regimes or the adjudicator has made a decision outside the period allotted to him under the applicable act/agreement by the parties).

It should be noted that “the adjudicator got the answer wrong” is not a reason for his decision to be unenforceable! An aggrieved party would have to refer the dispute to full arbitration/litigation to obtain a final determination of the issue in dispute.

Given (1) the very specific nature of the dispute that must be referred to the Adjudicator and (2) the strict adjudication processes set down in the Acts, there is much less opportunity for a losing party in these jurisdictions to challenge the enforceability of the decision in the NSW, Singapore and Malaysian adjudication regimes on the first three grounds when compared to adjudications under the UK regime.

Enforcement Procedure

As set above, a valid decision of an adjudicator will be routinely upheld by the Courts, normally by an early judgment being awarded. The only common exception to this is where a Court exercises its inherent power to ‘stay’ enforcement where, for instance, the party attempting to enforce is insolvent.

However, the Malaysian Act contains a major exception to this general rule. Under s. 16 of the Malaysian Act where “the subject matter of the adjudication decision is pending final determination by arbitration or the Court” the High court may grant a stay of the adjudication decision.

There is no guidance within the Malaysian Act as to the circumstances in which this discretion might be exercised by the High court and, as yet, there are no decisions on this issue. However, if the effect of an adjudicator's decision can be avoided by starting arbitration or litigation proceedings this entirely undermines the adjudication philosophy of “pay now, argue later”. In fact, it permits the possibility of “argue now, pay later”, rendering the entire point of the Act null and void.

Conclusion

There is no doubt that there is a developing consensus that the construction industry is not able to properly regulate itself and national lawmakers are prepared to intervene.

At present this seems to be a phenomenon restricted to common law countries, although there is talk in Germany of introducing adjudication style provisions. However, the growth of statutory adjudication seems to be followed by the uptake of contractual versions of adjudication in international contracting, for instance the DAB procedure under FIDIC.

It may be that the industry is starting to behave itself after all.

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