CONSTRUCTION ADR IN UGANDA

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About the Presenter

- Civil engineer and a recognized expert in the field of dispute resolution and construction claims.
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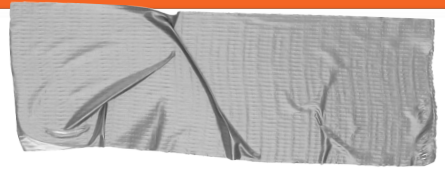


"I rather cavil at the suggestion that construction adjudication is somehow ‘just a part of ADR’. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgement within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town."- **Coulson LJ in John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516**

What is adjudication?

A procedure under which an independent third party,within a fixed time period and in accordance with agreed procedures, will give an interim decision on a dispute.

Independent third party= Adjudicator

Tip

Why's the decision normally referred to as "temporarily binding?"

Forms of Adjudication

- Statutory adjudication
- Contractual adjudication
- Ad Hoc adjudication

Tip

Uganda does not have statutory adjudication. Most prominent forms are contractual and Ad hoc adjudication.

Background to Statutory Adjudication in the UK

Construction industry during the 1970s/1980s

- Inefficient
- Disputes prevalent
- High levels of insolvency

Sir Michael Latham - “Constructing the Team”

- Disputes
- Payment

Recommendation 25 and 26 from the Latham Report : HGCRA(Housing Grants, Construction & Regeneration Act) 1996
-Payment
-Disputes

Amended by LDEDCA (Local Democracy Economic Development and Construction Act) 2009.

Secondary Legislation : The Scheme for Construction Contracts

Adjudication in Uganda

- No act governing Adjudication in Uganda; Staple in Construction Industry.
- About 80% of disputes in industry

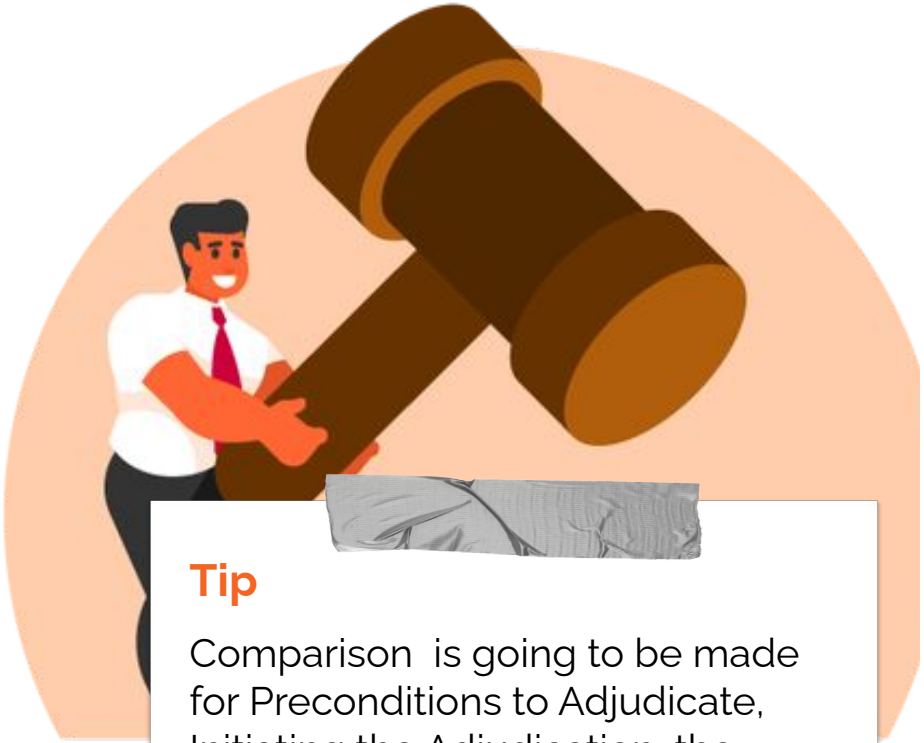
➔ **Main forms of adjudication in Uganda**

Contractual and Ad Hoc Adjudication

➔ **Contractual Adjudication**

Standard forms of Contract used

- ◆ FIDIC forms of contract : Red and Yellow Books common; 1999 more common (DAB/DAAB)
- ◆ PPDA form of contract : Prepared by the Public Procurement and Disposal Authority as a SBD. Part 3 -Contract



Tip

Comparison is going to be made for Preconditions to Adjudicate, Initiating the Adjudication, the Adjudication Process and the Adjudicator's Decision.

Preconditions to Adjudicate

- Is there a dispute ?
- More than one dispute
- Dispute arising “under” the contract
- Commencing an adjudication ‘at any time’

Is there a dispute?

Statutory Adjudication

- Statutory Adjudication: s.108(1) of HGCRA
- Meaning of Dispute-Normal Meaning

AMEC Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339

- Crystallisation: Claim must have been made, other party must have denied the claim

Fastrack Contractors Ltd v Morrison Construction Ltd [2000] EWHC Technology 17

S. 108 (1) of HGCRA

A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose, 'dispute' includes any difference

Is there a dispute?

Contractual Adjudication

PPDA

Crystallisation : Claim ; PM's decision; Disagreement

FIDIC

Crystallisation : Claim; Engineer's Determination ; Disagreement

Part 3: Section 7 Sub Clause 24.1 (PPDA)

If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.

More than one Dispute

Statutory Adjudication

- Right is restricted to a single dispute

Fastrack Contractors Ltd v Morrison Construction Ltd [2000] EWHC Technology

- Two adjudications with different disputes permitted
- Issues vs Dispute

Contractual Adjudication in Uganda

PPDA

Refers to a single PM's decision for referral.

FIDIC

Restricted to one dispute for referral

No preclusion to two different adjudications at the same time in both

Substantially the same dispute

Statutory Adjudication

- When a party is dissatisfied in a previous adjudication
- A party cannot adjudicate a dispute already decided

Vertase F.L.I. Ltd v Squibb Group Ltd [2012] EWHC 3194 (TCC).

- s.108(3)- Decision binding until final determination

Contractual Adjudication in Uganda

PPDA

- In case of dissatisfaction= Arbitration ; does not provide for re-adjudication
- Adjudicator's decision binding unless referred to arbitration for final determination.

FIDIC

Same as PPDA

Dispute arising “under” the contract

Statutory Adjudication

s.108(1)

- Only available for disputes arising “under” the contract

Meaning : Cause of action must arise from the contract between the parties

- Not available for non-contractual claims

Contractual adjudication in Uganda

PPDA

Provide for disputes arising “under” the contract. Not available for non-contractual claims.

FIDIC

Provides for both Contractual and non-contractual claims : ***Ashville Investments v Elmer Contractors [1987] 37 BLR 55***- “..in connection with..”

Commencing an Adjudication ‘at any time’

Statutory Adjudication

- s.108(1), s.108(2)
- A party can commence adjudication during or after a project; cuts through multi-tiered procedures

City Basements Ltd v Nordic Construction UK Ltd [2014] EWHC 4817 (TCC)

- Contractual provisions that fetter that right ? Replaced by those of the Scheme

Contractual Adjudication in Uganda

PPDA

Parties can only adjudicate within 14 days after receiving the PM’s decision

FIDIC

Permit the parties to refer to adjudication within a fixed time period

Initiating the Adjudication

- Notice of Adjudication
- Appointing the Adjudicator
- Adjudicator’s jurisdiction

Notice of Adjudication

Statutory Adjudication

- Defines scope of the dispute
- Formal notice of Dispute is required: ***Griffin & Anor v Midas Homes Ltd [2000] 78 Con LR 152***
- Dispute must have crystallised
- Referring party should set out the relief sought

Contractual Adjudication in Uganda

PPDA : Part 3: Section 7 Sub clause 24.1

- Adjudicator seized of dispute upon referral
- No formal notice of adjudication is required. Referral is sufficient

FIDIC

- DAB is seized of dispute when it is referred in writing with copies to the other party.
- No formal notice of adjudication is required

Appointing the Adjudicator

Statutory Adjudication

- The Scheme paragraphs 2,3,5,6
- SA gives 7 days from the date the notice of adjudication is served.
- Sub paragraph 2(1)= Distinction between a Specified Nominating Body and Adjudicator Nominating Body

Contractual Adjudication in Uganda

PPDA: Part 3: Section 7 Sub Clause 24.1

Within 14 days of the Notification of the PM's decision.

Adjudicator Nominating Body(ANB)= UIPE

FIDIC

Subclause 20.2 = 28 days after the referring party gives notice to other party of its intention to refer a dispute to a DAB.

Adjudicator's Jurisdiction

- Jurisdiction precedes powers, and the exercise of powers by an adjudicator presupposes the inherence of jurisdiction.

Jurisdiction challenges:

1. Threshold challenges
2. Process based challenges
3. Decision based challenges

Threshold challenges

- No contract : Both Statutory and Contractual
- Contract is not a construction contract: s.104 of HGCRA, s.105(2) of HGCRA
- Contract is not in writing : s.107 of 1996 Act
- Dispute settled
- Dispute not under the contract : SA and PPDA similar; FIDIC different
- More than one dispute

Adjudicator's Jurisdiction

Process challenges

- Incorrect parties named in notice : ***Estor Ltd v Multifit (UK) Ltd [2009] EWHC 2565 (TCC)***
- Adjudicator not correctly appointed
- Referral notice served out of time
- Arguments outside the scope of the dispute
- Change to the relief claimed

Decision based challenges

- Lien over the decision: ***St Andrews Bay Development Ltd v HBG Management Ltd and Mrs Janey Milligan [2003] ScotCS 103***; PPDA; FIDIC
- Failure to reach the decision in time: SA; PPDA, FIDIC
- Insufficiency of written reasons : SA; PPDA, FIDIC
- Scope of the decision : Same approach
- Errors : Not addressed by PPDA; SA; FIDIC

Adjudicator's Powers and Duties

Statutory Adjudication

S. 108(2)- sets out minimum powers; Scheme paragraphs 12 to 17

- Duty to act impartially (s.108(2)(e) and Scheme p. 12(a))
- Power to take the initiative (s. 108(2)(f) and Scheme p. 13)
- Power to make requests or directions (Scheme p. 14 and 15)
- Power to seek assistance (s.108(2)(f) and Scheme p. 13(f)):
- Power to award interest (Scheme p. 20(c))
- Power to award damages
- Adjudicator's immunity (Act s. 108(4), Scheme p. 26):

Contractual Adjudication in Uganda

FIDIC

- Establish procedure
- Decide upon own jurisdiction
- Conduct hearing as he thinks fit
- Initiative + specialist knowledge

PPDA

- Not expressly pointed out but industry processes have been closer to FIDIC practices.

Adjudicator’s Decision

- Purpose and nature of the decision
- Structure, format and content of the decision
- Reasons
- Timing
- Effect and Compliance

Adjudicator's Decision

Structure, format and content of the Decision

- Act and Scheme do not prescribe any requirements for the structure and format of the decision.
- PPDA and FIDIC also do not prescribe
- Overarching : Clear, concise and cogent

Reasons

- Act does not require reasoned decisions.

Reasons

- Scheme does for SA-paragraph 22- if one of the parties asks.
- FIDIC requires the award to be reasoned.
- PPDA does not express itself about this.

Adjudicator's Decision

Timing

- Act, Scheme= 28 days after the date of receipt of referral notice Deadline may be extended to 42 days by the referring party or longer by both parties

- PPDA = Within 28 days of receipt of a notification of a dispute, provided that the adjudicator is in receipt of all information required. No extension provided for.

- FIDIC= Sub clause 20.4 or other period proposed by the DAB and approved by both parties.

Effect and compliance

s.108(3);Paragraph 23 in 2011 Scheme

PPDA = Part 3: Section 7 Subclause 25.3

FIDIC

Effect : Decision is temporarily binding.

Closing

- Adjudication resolves more than 80% of disputes in Uganda.
- Marked similarities and differences between SA ,PPDA and FIDIC in preconditions to adjudicate, Initiating the Adjudication and the Adjudicator’s Decision.
- Need for more sensitization and training of Adjudicator’s in Uganda(ref: KCL Report)