

Enforcement of Construction Adjudication Decisions - Perspectives from the United Kingdom, South Africa and Uganda.

By Gavamukulya Charles, MCI Arb¹

Introduction

Adjudication is a form of Alternative Dispute Resolution (ADR) in which a neutral third party delivers a decision that is temporarily binding on the parties involved. This process has become increasingly popular in the construction industry due to its advantages, such as flexibility, cost-efficiency, speedy dispute resolution, and the involvement of experts. A significant factor supporting adjudication's use as a primary dispute resolution method in the construction sector is the enforceability of its decisions. This article explores the enforcement of adjudication decisions, drawing insights from the United Kingdom, South Africa, and Uganda, with a focus on recognising adjudication as a first-tier dispute resolution mechanism and examining the subsequent enforcement of adjudicator's decisions.

Enforcement of Adjudication Decisions in England and Wales

The United Kingdom operates under a mandatory statutory adjudication regime which was established in response to challenges in the construction industry during the 1970s and 1980s. These issues prompted the commissioning of Sir Michael Latham in 1993 to review Procurement and Contractual Arrangements in the construction industry. Latham's Report, *Constructing the Team*, introduced radical aspects concerning the implication of particular payment provisions into building contracts and the adoption of adjudication as a mandatory dispute resolution mechanism (Pickavance, 2016).

Consequently, this led to the enactment of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 (herein referred to as "HGCRA"). Under the HGCRA, construction contracts as defined in Sections 104, 105, and 106 must include adjudication provisions. If they fail to comply, the adjudication terms from The Scheme for Construction Contracts (herein referred to as "The Scheme") will automatically apply. The legislation reflects the UK Parliament's recognition that without an interim mechanism, players in the construction industry could face insolvency due to the wrongful withholding of payments and lengthy dispute resolution. The statutory scheme addresses this by prioritizing contractors' and subcontractors' cash-flow needs and emphasizing speed in decision-making over absolute correctness.

Section 108(3) of the HGCRA specifies that adjudicators' decisions are binding unless overturned through agreement, arbitration, or litigation, a principle echoed in Paragraph 23(2) of The Scheme. This mandates compliance with valid adjudication decisions until they are set aside in final proceedings.

Initially, the lack of an explicit enforcement mechanism within the legislation was viewed as a significant shortcoming of the HGCRA (Maritz & Hattingh, 2015). However, the courts in England and Wales have had a robust approach towards enforcement of adjudicator's decisions which has served the purpose of buttressing the aspirations of HGCRA for example in *Macob Civil Engineering Ltd v Morrison Construction Ltd*² where courts acknowledged that adjudication would impose a provisional and speedy dispute resolution procedure on the construction industry. The

¹ **MSc Construction Law and Dispute Resolution Candidate; Leeds Beckett; MSc Civil Engineering Candidate; MUK; BSc Civ (Hons) MUK; MCI Arb; Executive Director CG Engineering Consults. Email: gavacharles85@gmail.com**

² [1999] EWHC 254 (TCC).

principles set out in *Macob*³ were elaborated in *Carillion Construction Ltd v Devonport Royal Dockyard*⁴ where court held that adjudicator's decisions must be enforced even if they result from errors of procedure, fact or law. The Court of Appeal approved⁵ the first instance decision and addressed the court's approach towards enforcement by holding that the courts ought to respect and enforce the adjudicator's decision and that only in rare circumstances would the courts interfere with the adjudicator's decision. This was in order to achieve the objective which underlies the HGCRA which required the courts to do the same (Pickavance, 2016).

In monetary disputes, the principle of "pay now; argue later" is frequently cited to describe the court's approach to enforcement as seen in the case of *Alstom Signalling Ltd v Jarvis Facilities Ltd (No.2)*⁶. This principle aligns with Sections 110 and 111 of the HGCRA which mandate that payments due on interim certificates must be made without set-off or deduction unless specific procedural notices, such as withholding or pay less notices are issued on time. If a paying party fails to adhere to these notice requirements, they are obligated to "pay now, argue later". However, the party retains the right to initiate adjudication to seek compensation for cross-claims that were not raised in time, potentially bringing the "later" phase sooner than expected (Pickavance, 2016).

An adjudicator's decision is binding on the parties involved until it is formally challenged. According to Section 108(3) of the HGCRA, construction contracts must stipulate that an adjudicator's decision remains binding until the dispute is finally determined. As such, when an adjudicator makes a decision concerning a dispute, the decision is binding on the parties and cannot be re-adjudicated. This was reaffirmed in *Quietfield Ltd v Vascroft Construction Ltd*⁷ where court held that a party should not face the same issue twice, applying the common law principle of *res judicata* to adjudications. However, if a court finds an adjudicator's decision to be invalid, the parties may initiate a new adjudication as if the original decision never occurred as seen in the case of *Joinery Plus Ltd (In Administration) v Laing Ltd*⁸.

In England and Wales, adjudicator's decisions can be enforced through various methods, with the most common being the initiation of a claim (typically in the Technology and Construction Court (TCC)) alongside an application for summary judgment. Since the HGCRA does not provide a specific enforcement procedure, the TCC relies on an approach developed organically by judges under the Civil Procedure Rules (CPR), particularly CPR Part 24. Summary judgment under CPR Part 24 is readily granted in adjudication enforcement as seen in the case of *Canary Riverside Development (Private) Ltd v Timtec International Ltd*⁹. This is because the court's role is not to review or appeal the adjudicator's substantive reasoning but to determine whether the decision is enforceable. The grounds for challenging enforceability are limited with courts refusing enforcement only when the adjudicator has exceeded their jurisdiction or committed a significant breach of natural justice (Pickavance, 2016). Courts have consistently regarded adjudication as "rough justice" and will decline enforcement only in the clearest cases of unfairness as seen in *Primus Build v Pompey Centre*¹⁰.

Additional methods of enforcing adjudicator's decisions include an adjudicator in an adjudication under The Scheme ordering immediate compliance with their decision under paragraph 23 of the Scheme with the court empowered to enforce such orders under paragraph 24. Another option is

³ Ibid.

⁴ [2005] EWHC 778 (TCC) per Akenhead J at [80].

⁵ [2005] EWCA Civ 1358.

⁶ [2004] EWHC 1285 (TCC), per Lloyd J at [19-20].

⁷ [2007] BLR 67(CA), [2006] EWCA Civ 1737 (CA).

⁸ [2003] EWHC 3513 (TCC), per Thornton J at [97].

⁹ 19 Const LJ 283 per Oliver J at [28-29].

¹⁰ [2009] EWHC 1487 (TCC) Per Coulson J at [35].

seeking a mandatory injunction from the courts which is a right provided under Section 37(1) OF the Senior Courts Act 1981. However, in *Multiplex Construction (UK) Ltd v Mott MacDonald Ltd*¹¹, court clarified that a mandatory injunction is not available when a party seeks to enforce an adjudicator's decision through a summary judgment application. Consequently, the most obvious and practically used enforcement procedure remains obtaining a summary judgement under CPR 24.

Enforcement of Adjudicator's decisions in South Africa

Unlike the United Kingdom, South Africa does not have a mandatory statutory framework for adjudication (Barter, 2024). Instead, adjudication was introduced as a requirement for resolving disputes in construction contracts by the Construction Industry Development Board (CIDB) in 2003 (Maritz, 2013). As such, adjudication is a creature of agreement between parties to a construction contract in South Africa. It has been widely adopted in the construction industry particularly on major infrastructure and energy projects through dispute resolution clauses in Standard Form Contracts which include FIDIC, NEC and JBCC (Barter, 2024).

South African courts have shown a clear willingness to adopt the robust approach of the English courts in *Balfour Beatty Construction Ltd v The Mayor & Burgess of the London Borough of Lambeth*¹² in enforcing adjudicator's decisions. This approach is evident in cases such as *Basil Reed (Pty) Ltd v Regent Devco (Pty) Ltd*¹³ and *Freeman, August Wilhelm NO v Eskom Holdings Limited*¹⁴. Maritz (2007) rightly notes that enforcement of the adjudicator's decisions is crucial to the success of the adjudication process in the construction industry. As such, there has been a growing incorporation of adjudication into South African jurisprudence and construction practice as the first-tier dispute resolution mechanism which has paved the way for conversations on the development of a legislative framework on adjudication (Maritz & Hattingh, 2015).

In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*¹⁵ which dealt with the interpretation of the Subclause 20.4 of the FIDIC Conditions of Contract 1999, court ordered DBT Technologies to comply with the Dispute Adjudication Board's (DAB) decision. The court emphasized that parties are obligated to promptly implement the DAB's decision, even if dissatisfied, and that dissatisfaction should be addressed through a notice of dissatisfaction which initiates the arbitration process. The adjudicator's decision can only be overturned through successful arbitration. Similarly, in *Esor Africa (Pty) Ltd/ Franki Africa (Pty) JV v Bombela Civils JV*¹⁶, which also dealt with the interpretation of Subclause 20.4, court held that the adjudicator's decision must be enforced according to its terms.

In *Sasol Chemical Industries Ltd v Odell and another*¹⁷, the first South African court case addressing an application to set aside an adjudicator's decision rather than enforcing it, the court reaffirmed its robust stance on adjudication. It held that the adjudicator's decision should remain binding even if the adjudicator erred by not considering the applicant's request for an extension of time during the adjudication process. The court emphasized that adjudication is intended as a swift remedy to support cash flow and avoid delaying the progress of the contract.

¹¹ [2007] EWHC 20 (TCC), per Jackson J at [47].

¹² [2002] EWHC 597.

¹³ Unreported decision of the South Gauteng High Court handed down on 9 March 2010.

¹⁴ Unreported judgement of the South Gauteng High Court dated 23 April 2010.

¹⁵ Unreported judgement of the South Gauteng High Court dated 3 May 2013.

¹⁶ Unreported judgement of the South Gauteng High Court dated 12 February 2013.

¹⁷ Unreported judgement of the Free State High Court, Bloemfontein dated 20 February 2014.

In *Radon Projects v N V Properties*¹⁸, the South African Supreme Court of Appeal overturned the lower court's ruling by stating that an arbitrator lacked jurisdiction to arbitrate the dispute because it arose before practical completion and should have been referred to adjudication under Clause 40 of the Fourth Edition of the JBCC which was the contract adopted by the parties in this case. The appellate court clarified that adjudication under Clause 40 is designed for the summary and interim resolution of disputes with final resolution through arbitration where necessary.

Therefore, South African courts have not only recognised adjudication as a first-tier dispute resolution mechanism on construction contracts but have also robustly moved to enforce adjudicator's decisions.

Enforcement of Adjudicator's Decisions in Uganda

Similar to South Africa, Uganda does not have a statutory mandatory adjudication regime. As such, the obligation to adjudicate arises only when there is a specific agreement to do so and this agreement is included in the dispute management provisions of the relevant construction contract. Adjudication has become more commonly used in Uganda especially on donor-funded projects that incorporate the use of the FIDIC Contracts.

The Uganda Institution of Professional Engineers (UIPE) serves as the Adjudicator Nominating Body (ANB) under the local standard form contract - The Public Procurement and Disposal of Public Assets Authority (PPDA) Contract. In this regard, UIPE has developed guidelines on construction adjudication although their effectiveness has not yet been studied. It is also important to note that the East Africa Institute of Architects Contract (Blue Book), another local standard form contract, does not provide for adjudication as a dispute resolution method.

Courts in Uganda have acknowledged the use of adjudication as a dispute resolution mechanism in the construction industry as seen in the case of *The Attorney General of Uganda v Networth Consulting Ltd*¹⁹. In this case, the court drew a distinction between litigation and adjudication in the context of the construction industry. However, the judicial approach towards adjudication has been mixed. In the case of *Dolomite Engineering Services Limited v Board of Governors, James Ochola Memorial S.S.S Tororo & Another*²⁰, court recognised the dispute resolution clause in a PPDA contract (clauses 24 and 25 of the General Conditions) that provided for adjudication as the first instance dispute resolution method followed by arbitration. Yet, the court referred the parties directly to arbitration without first utilising adjudication as stipulated in the contract.

In contrast, in *Fort Portal Municipal Council v Plinth Technical Services Ltd*²¹, the court reviewed the same clauses of the PPDA contract and determined that the arbitrator did not have jurisdiction to hear a claim under Clauses 24 and 25 until after the adjudicator had made a determination in the first instance. In this case, the court upheld adjudication, stayed the arbitration proceedings, and ordered the continuation of adjudication until its conclusion. This approach is similar to the one adopted by South African courts in *Radon Projects*²². There is a need for a more consistent judicial approach to recognising adjudication as the first-tier dispute resolution mechanism in construction contracts in Uganda.

Enforcement of adjudicator's decisions has been a very lightly tested principle in the Ugandan courts. In *Uganda National Roads Authority v TK Engineers & Bank of Uganda*²³, which dealt with

¹⁸ (2013) 3 All SA 615 (SCA).

¹⁹ Miscellaneous Application No. 1830 Of 2022 [Arising from Civil Suit No. 541 Of 2022].

²⁰ (Civil Suit 413 of 2013) [2024] UGCommC 277 (22 February 2024).

²¹ (Miscellaneous Application No. 231 of 2019) [2020] UGCommC 8 (20 March 2020).

²² *Radon Projects* (n 17).

²³ Misc. Application No. 750 of 2019 [Arising from EMA 689 of 2019].

the enforcement of an adjudication decision, court distinguished between an adjudicator's decision and an arbitral award. It noted that, unlike an arbitral award which becomes final on the date it is issued, an adjudication decision is governed by the terms of the contract which specify when it is binding. Basaza-Wasswa J emphasized that the distinction between the two is clear and unmistakable. Court further held that registration of an adjudication decision as an arbitral award was both erroneous and illegal. Consequently, an adjudication decision which was improperly registered as an arbitral award cannot be enforced through execution proceedings nor can such registration be validated by a court of law as established in *Makula International Ltd v His Eminence Cardinal Nsubuga and Anor*²⁴.

Therefore, whereas there have not been many cases on the enforcement of adjudication proceedings, it is evident that the courts in Uganda recognise the existence of the adjudication process, adjudication decisions and understand the difference between them and arbitral awards. It could be the case the differing judicial approach to adjudication has caused skepticism towards the process for parties. However, it could also be that due to the lack of clear enforcement procedures, parties are hesitant to opt for adjudication as a dispute resolution process or even attempt enforcement proceedings in the courts.

Conclusion

In conclusion, this article explores the different approaches that courts in these three jurisdictions have taken towards enforcement of adjudication decisions. The United Kingdom has a mandatory statutory adjudication regime and the courts have robustly supported the legislation in the enforcement of decisions. South Africa, unlike the United Kingdom, has adjudication as a creature of contract. The courts in South Africa, however, have adopted a similar robust approach to the English courts towards fostering enforcement of adjudication proceedings. Uganda, like South Africa, has had proliferation of adjudication as a creature of contract mostly on the donor funded public works. However, the courts in Uganda have had contrasting approaches towards recognition of adjudication as a first-tier dispute resolution mechanism. Enforcement of decisions has also been a lightly tested principle in Ugandan courts.

²⁴ [1982] UGSC 2 (8 April 1982).

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