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## PERCEIVING POTENTIALITY OF LEGAL RECOGNITION TOWARDS CONSTRUCTION ADJUDICATION: EVIDENCE FROM SRI LANKA

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### ABSTRACT

Adjudication is no longer new to the Sri Lankan construction industry. Standard bidding documents incorporate adjudication as a form of dispute resolution. However, sufficient attention has not yet been given to its effective use. In Sri Lanka, there is no statutory authority for adjudication, and the adjudicator's award has no legal recognition. This paper reviews current practice of construction adjudication and offers a future direction. T-test was adopted to gauge the perception of disputants towards the potentiality of statutory adjudication. It was revealed that it is high time adjudication received legal recognition. This study further makes recommendations in order to make adjudication a method that is more effective and efficient.

**Keywords:** adjudication, disputes, public sector, Sri Lanka

### 1. INTRODUCTION

Complex construction activities often result in complex disputes. In Sri Lanka, the construction industry is engaged with a sizeable amount of local and international components. Along with its recent increase in construction activities, a need for a fast and cost effective dispute resolution method arises (Abeynayake, 2012). Since the number of construction contracts which ends with disputes getting increased, involvement of a dispute resolution mechanism is essential (Ren, 2002). Disputes among contracting parties hamper the progress on site, waste time and money, affect the parties' relationship and jeopardize the industry performance. Unfortunately, this situation has portrayed the construction industry with a reputation of being ineffective, adversarial, and dispute prone. Lack of an effective dispute resolution is really challenging (Barrett & Barrett, 2004). This is often acute, particularly in the public sector projects due to lack of mechanisms alternative to or in addition to courts. Court procedures are time taking and costly. The ultimate result is cost and time overrun, delay in beneficial use, opportunity costs etc (Cheung & Pang, 2013). Thus, the thwarting concomitant with litigation and sometimes

arbitration compelled an increased plea for other alternatives, one of which is adjudication.

Though the adjudication decision is contractually binding, it is not directly enforceable and only binding up until finally resolved by other settlement procedure (Merwe, 2009). However, adjudication has been found to be really effective on payment disputes (Bowes, 2007). Ranasinghe and Korale (2011) while explaining the ad hoc nature of adjudication argue that cooperation from each party is a must for the success of adjudication. Harshi and Thanuja (2016) argue that although adjudication is being practiced as a resolution method in the Sri Lankan construction industry, it is not effective in its own right. There are debates on the relative merits and demerits in both local and international contexts. Hence, this research paper is to address the impending legal recognition to adjudication as an alternative dispute resolution mechanism in the Sri Lankan construction industry.

### **1.1. Research Aim & Objectives**

The aim of this research is to gauge the industrial enthusiasm towards statutory adjudication as an alternative method of resolving disputes in the construction industry. The objectives are to expose the current practice of adjudication, identify the relative merits and demerits, gauge the perception of the disputants towards adjudication and explore the potentiality towards assigning a legal recognition.

## **2. RESEARCH METHODOLOGY**

A particular attention was focused on research publications by the key authors and journals in the study domain. The broad research topics that were addressed during the literature review were construction disputes, dispute resolution methods, adjudication and connected issues in that regime. The results empirically reported is a result of fully structured questionnaire, disseminated amongst 15 employers and 15 contractors who have been experiencing adjudication in their projects. These questions were to assess several areas typically confronted when disputes are dealt with. The key research question was 'whether there is a potential for statutory adjudication in the Sri Lankan construction industry'.

## **3. LITERATURE SURVEY**

Disputes are not uncommon within the industry (Chappell, Smith & Sims, 2005). Unpredictability of payments has in certain instances resulted in extremely negative outcomes. In addition, the traditional means of resolving the construction disputes have not helped at all, and the time and cost associated with litigation have made the process undesirable. Hence, there have been concerns on how to strengthen the industry to face the present and future challenges. In this backdrop, adjudication was introduced in the UK by the

Housing Grants, Construction and Regeneration Act in 1996, which came into force on 1<sup>st</sup> May 1998. The concept behind adjudication was aided by the recommendations of Sir Michael Latham's fundamental review published in the report 'Constructing the Team' in 1994 (Sims, 2003).

Gould (1998) defined adjudication as a process "where a third neutral party gives a decision that can be binding on the parties in dispute unless or until revised in arbitration or litigation". Maritz (2009) stated that "adjudication is often defined by reference to what it is not. Maiketso and Maritz (2012) stated that there is no universally accepted definition for adjudication. However, a couple of characteristics are inherent in those definitions. Accordingly, adjudication can be explained as a process of obtaining an interim decision within a limited time stipulated, binding on the parties unless or until revised by the next level of hierarchy.

In the *Macoh Civil Engineering Ltd. Vs. Morrisson Construction Limited* case, the Court held that 'Adjudication is intended to be a speedy mechanism for settling disputes in construction contracts on a provisional interim basis'. An advantage identified by Bowes (2007) is that adjudication can be taken up in any stage of a project and parties have the right to seek adjudication "at any time" without having to wait until the end of the contract. However, adjudication is not suitable to resolve 'any dispute' according to Gorse, Ellis & Hudson-Tyreman (2005). Adjudication might not be effective for complex and technical disputes, which cannot be revised once it was implemented (Gorse et al., 2005). Latham (1994) pointed out that the temporarily binding nature of adjudication decisions is not a drawback. Latham's viewpoint on adjudication is optimistic.

Adjudicators in many sectors, by custom or duty, seek to settle claims by exercising an inquisitorial role (Palmer & Roberts, 2008). Adjudication came under the rubric, 'pay now, argue later' (Homer Burgess Ltd v Chirex (Annan) Ltd [1999 ScotCS 264 (10 November 1999)] and in Australia, Multiplex Constructions Pty Ltd v Luikens and Anor [2003 NSWSC 1140 (4 December 2003)]. This was accepted as a sensible way of dealing expeditiously and relatively inexpensively with disputes. In the UK, the issue of enforceability of the adjudicator's decision was confirmed, shortly after the promulgation of the Construction Act (*Macob Civil Engineering Ltd. v. Morrison Construction Ltd.*, a 1999 decision of the Technology and Construction Court (High Court of Justice, Queen's Bench Division). In that case, Justice Dyson held that "(c)rucially, (Parliament) has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

In essence, adjudication is a process where a neutral third party gives a decision, which is binding on the parties in dispute unless or until revised in some other manner such as arbitration or litigation (Roberts & Palmer; 2005). Quite importantly, adjudicators are allowed to conduct proceedings as he or she sees

fit. This is how the inquisitorial role is envisaged in typical adjudication (Sander, Allen and Hensler, 1996). The HGCR Act in the UK provides statutory right to either of the parties to invoke adjudication unilaterally. However, the adoption of adjudication provision in Sri Lanka is often made by agreement between the parties. The practice of contractual adjudication is not without some limitations. In effect, contractual adjudication depends arguably on the negotiating strength of the parties.

A problem that arises is when adjudication is not being adopted as a primary resolution mechanism. It is just one of the three tiered dispute resolution mechanisms only invoked by agreement between the contracting parties. Therefore, the take-up of adjudication was limited due to the fact that it can only be adopted at secondary level, following mediation (Hill & Wall, 2008). However, this limitation has been addressed in many countries by making adjudication a law of the country. Following the UK HGCR Act (1996), Australia, New Zealand and Singapore have enacted similar legislations to give adjudication a legal recognition. At present, there is concerted effort within the Sri Lankan construction industry to shift from contract based adjudication to statute based adjudication (Jayalath, 2019).

In principle, adjudication has been recognized as an ADR mechanism by the Construction Industry Development Act of Sri Lanka No.33 of 2014. As per section 51(1) of the Act, "a party to any contract relating to an identified construction work, if unable to settle any dispute by conciliation or mediation by the Authority may refer such dispute for adjudication". Adjudication has been incorporated in the SBD series. SBD stands for Standard Bidding Documents issued by the Construction Industry Development Authority (CIDA) in Sri Lanka. SBD series offer contract modalities while spelling out rights and obligations of the parties, including the dispute provisions. CIDA acts as an agency nominating adjudicators too.

According to the SBD versions, the adjudicator shall be a single person appointed by agreement between the parties. If parties are unable to reach agreement within 14 days of such request of agreement, the adjudicator shall be appointed by CIDA. Either party may initiate the reference of the dispute to the adjudicator by giving seven days' notice to the other party. The adjudicator shall give its determination about the dispute within 28 days or such other period agreed to by the parties - of receipt of such notification of a dispute. However, this is arguable with regard to binding finality due to the lack of a statute for adjudication.

CIDA set up a pool of construction adjudicators and introduced guidelines in the year 2013. These guidelines delineate, in a generic fashion, the professional and ethical responsibilities of adjudicators. Given the wide variety of settings in which dispute boards are called upon to adjudicate, it is recognized that not all

provisions in the guidelines will prove to be appropriate at all times. These guidelines serve only as a model which may be adapted to fit the particular circumstances. The setting up of the pool of adjudicators and the introduction of the adjudicator guidelines is considered as a significant landmark in the history of construction adjudication in Sri Lanka, particularly when a statute to govern the practice of adjudication does not exist.

According to analysis of Harshi and Ramachandra (2016), 71% (out of 92) of disputes referred to adjudication were unsuccessful. However, 94% of 71% of those disputes were subsequently resolved amicably on the basis of adjudicators' determination, while the remaining 6% were referred to arbitration. This suggests that although adjudication is being practiced as a resolution method, it is not effective in its own right and does spark some limelight to gauge the potentiality behind application of adjudication in the construction sector. This is gauged empirically via a set of questions that backdrop of which has been based upon the aspects encountered during the literature survey such as ad hoc nature of the conduct of adjudication, as an acceptable means of dispute resolution, as an inquisitorial role, as an option to arbitration, as a temporarily binding format and as a reliable form of dispute resolution as well as the limitations identified by Hill and Wall (2008) and Harshi and Ramachandra (2016).

#### **4. FINDINGS & DISCUSSION**

The target sample was (a) a group of 15 contractors in the C1 category according to the national grading system applicable for registering construction contractors in Sri Lanka and (b) a group of employers representing 15 state sector employer organizations undertaking public projects. A prerequisite to participate in the research is to have previous experience on adjudication. Individual perception of the respondents was obtained using 5 point Likert scale (1. Strongly Disagree 2. Disagree 3. Neutral 4. Agree 5. Strongly Agree).

The mean scores were used to judge the perception. A score of 3 denoted neutral perception, a mean score of less than 3 denoted negative perceptions, and a mean score of above 3 denoted positive perceptions. The overall perception was attained by summing up the mean scores of all respondents ( $\Sigma ms$ ) and divided by the number of respondents. The findings perception towards the statutory adjudication are shown in Table 1.

**Table 1: Mean Square and Perspective**

Respondents	Mean square	Perspective
Contractors	2.49	Negative
Employers	2.32	Negative

The findings reveal that the perception is positive; the mean score was 2.49 meaning that parties are pleased with the statutory adjudication. To find the differences in perception between two student categories, t-test was executed on the mean scores of contractors and employers. The findings are presented in Table 2.

**Table 2: Mean difference and P Values of Empirical Study**

Determinant	Mean difference	Standard error for the mean difference	95% confidence limits (95% CL) on mean difference Lower limit/Upper limit	Df	P Value
Methods	-0.17	0.12	-0.41/0.07	363	0.1594

Mean difference = Average score for the contractors - Average score for the employers

The difference in average perception is -0.17 (95% CL: -0.41, 0.07). This difference is statistically non-significant (p-value=0.1594). It was found that the overall perception of two groups is not that poles apart. Respondents were asked the extent to which they agree for statutory adjudication, and it is perhaps not surprising that respondents are very much positive with the statutory adjudication. Almost everyone is in constructive concordance with the need of statutory adjudication.

## 5. CONCLUSION

It is hoped that statutory adjudication will definitely impede the constraints in the use of adjudication as an alternative form of dispute resolution and for that, a potential exists.

The study adds to the body of knowledge by creating an insight into the potential of adjudication in resolving disputes among construction contracting parties in Sri Lanka. The study also alerts the industry to give adequate consideration to factors that can promote more effective usage of adjudication provisions. In line with the plan to introduce statutory adjudication in Sri Lanka, the CIDA has a

pivotal role. Adjudication regulations must be gazetted for public comments. Once enacted, adjudication would carry legal enforcement within the Sri Lankan construction industry. This development promises a better and greater result for the industry as far as dispute resolution is concerned. However, the potential inherent in the process of statutory adjudication would only be realized if the factors that constraints the effective usage are recognized and appropriate application measures are put in place.

## DATA AVAILABILITY STATEMENT

All data, models, and code generated or used during the study appear in the submitted article.

## REFERENCES

- Abeynayake, M. D. T. E., & Weddikara, C. (2012). Critical analysis on success factors of adjudication and arbitration practices in the construction industry of Sri Lanka. In *proceedings of 9th International Conference on Business Management 2012, 28 February-1 March 2013* (pp. 209-222).
- Bowes, D. (2007, September). Practitioners' perception of adjudication in UK construction. In *Procs 23<sup>rd</sup> Annual ARCOM Conference* (pp. 3-5)
- Chappell, D., Powell-Smith, V., & Sims, J. H. (2008). *Building contract claims*. John Wiley & Sons
- Cheung, S. O., & Pang, K. H. Y. (2013). Anatomy of Construction Disputes. *Journal of Construction Engineering and Management*, 139(1), 15-23. [https://doi.org/10.1061/\(ASCE\)CO.1943-7862.0000532](https://doi.org/10.1061/(ASCE)CO.1943-7862.0000532)
- Gorse, C. A., Ellis, R., & Hudson-Tyreman, A. (2005, September). Prospective delay analysis and adjudication. In *21st Annual ARCOM Conference* (Vol. 2, pp. 1133-1174). SOAS, University of London. Association of Researchers in Construction Management.
- Gould, N. (1998, September). Alternative dispute resolution in the UK construction industry. In *14th Annual ARCOM Conference* (pp. 9-11).
- Harshi M and Thanuja R (2016) Adjudication Practice and Its Enforceability in the Sri Lankan Construction Industry, *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction /Volume 8 Issue 1 - February 2016*.
- Hill, T., & Wall, C. J. (2008). Adjudication: Temporary Binding and Tiered Dispute Resolution in Construction and Engineering: Hong Kong Experience. *Journal of Professional Issues in Engineering Education and Practice*, 134(3), 306-308. [https://doi.org/10.1061/\(ASCE\)1052-3928\(2008\)134:3\(306\)](https://doi.org/10.1061/(ASCE)1052-3928(2008)134:3(306))

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- Homer Burgess Ltd v Chirex (Annan) Ltd, No. 264 (ScotCS November 10, 1999).
- Housing Grant Construction and Regulation Act of 1996, § United Kingdom legislative enactments (1996).  
[http://www.dgahk.com/media/18027/housing\\_grants\\_construction\\_and\\_regeneration\\_act\\_1996](http://www.dgahk.com/media/18027/housing_grants_construction_and_regeneration_act_1996)
- Jayalath C. (2019) An Empirical Study On the Effectiveness of CIDA Form of Construction Adjudication; Disputants' Perspective. *International Journal of Advanced Research and Publications*, Volume 3 Issue 7, July 2019.
- Jerome T. Barrett with Joseph P. Barrett. (2004). *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement*.
- Latham, M. (1994) *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report, HMSO, London.
- Macob Civil Engineering Ltd v Morrison Construction Ltd, No. 739 (CLC 1999).
- Maiketso, N. C., & Maritz, M. J. (2009). What are the requirements for the South African construction industry to fully utilise adjudication. In *International Conference: RICS COBRA*.
- Maiketso, N. C., & Maritz, M. J. (2012). Adjudication as an alternative dispute resolution method in the South African construction industry. *Journal of the South African Institution of Civil Engineering*, 54(2), 65-70.
- Maritz, M. J. (2009). Adjudication of disputes in the construction industry. *Essays Innovate*, 3(1), 78-79.
- Maritz, M., & Hattingh, V. (2015). Adjudication in South African construction industry practice: Towards legislative intervention. *Journal of the South African Institution of Civil Engineering*, 57(2), 45-49.  
<https://doi.org/10.17159/2309-8775/2015/v57n2a6>
- Multiplex Constructions Pty Ltd v Luikens and Anor, (NSWSC December 4, 2003).
- Ranasinghe, A., & Korale, J. C. (2011). Adjudication in construction contracts. *Engineer: Journal of the Institution of Engineers, Sri Lanka*, 44(2).
- Ren, Z. (2002). *A multi-agent systems approach to construction claims negotiation* (Doctoral dissertation, Loughborough University).



- Roberts, S., & Palmer, M. (2005). *Dispute processes: ADR and the primary forms of decision-making*. Cambridge University Press.
- Sander, Frank E., H. William Allen, and Debra Hensler. "Judicial (Mis) Use of ADR? A Debate." *University of Toledo Law Review* 27 (1996): 885-896.
- Sims, J. (2003). *Construction industry arbitrations* (J. Tackaberry, A. Marriot(Eds)).