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Enduring Transience: The Illusion of 'Temporary Finality' in Construction Adjudication Decisions

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Abstract

Construction Adjudication is not adequately regulated in Kenya. Despite its benefits in quickly resolving disputes, it is poorly understood and not widely used except when mandated by a contract or on an ad hoc basis. There are efforts to usher in statutory adjudication, as prescribed in the National ADR policy, through the enactment of a proposed Construction Adjudication Bill to strengthen its legal framework. Indeed, other jurisdictions have utilised Construction Adjudication to streamline dispute resolution and improve cash flow in construction contracts. To achieve this, a statutory adjudication regime rides on unique features that prioritise speed over due process as its decisions are temporarily binding until contested in a final forum. However, these decisions are not always temporary. Some events and circumstances can make them final and binding, potentially leading to unfair and unjust outcomes that may infringe the constitutionally guaranteed right of access to justice. The paper urges caution while establishing a statutory adjudication regime to ensure robust safeguards are incorporated to mitigate these risks. It also encourages legislation that is customised to the specific and unique attributes of the Kenyan construction industry.

Keywords: *Construction adjudication, temporary finality, natural justice, due process, access to justice*

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I. Introduction

Construction adjudication is a dispute resolution mechanism where an interim decision-making power is vested in a third party – the adjudicator. To ensure neutrality, adjudicators are typically not involved in the daily management of the contract; they do not act as arbitrators, nor are they affiliated with the state like judges.[1] It is also described as a process by which disputes concerning construction contracts are resolved temporarily, with decisions that are binding and enforceable, pending a final determination by a subsequent dispositive forum[2] stipulated in the contract.

It is characterised by short timelines, shortened procedures, and limited grounds for contesting decisions until the time of final resolution,[3] usually after project completion. Its initial use in the construction industry was in the United Kingdom (UK) in the late 1970s to resolve disputes over payments between main contractors and subcontractors.[4] It was subsequently incorporated in the UK's commonly used Joint Contracts Tribunal (JCT)[5] standard forms for domestic sub-contracts, in response to issues raised in *Modern Engineering v Gilbert-Ash.*[6] The mechanism remained as a contractual option for parties until an economic recession[7] caused significant volatility in the UK's construction sector,[8] and financial frailty among many contractors.[9] This led to a review of procurement and contractual arrangements, resulting in the seminal 'Constructing the Team' report, popularly known as 'the Latham report'.[10] The report recommended construction adjudication as a compulsory first step in resolving construction disputes,[11] and prompted the enactment of the Housing Grants Construction and Regeneration Act (HGCRA,)[12] establishing the first statutory adjudication

1 McGaw M, *'Adjudicators, Experts and Keeping out of Court', Legal Obligations in Construction*, Construction Press 1992.

2 LLoyd H, 'Adjudication', *International Construction Law Review* (2001) 437, 438–9.

3 LLoyd H, 'Adjudication'

4 Dennys N, Clay R, Atkin Chambers, *Hudson's building and engineering contracts: including the duties and liabilities of architects, engineers and surveyors,* 14th ed, Sweet & Maxwell, 2022, para 11-001.

5 Published by the Joint Contracts Tribunal Limited.

6 *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd,* [1974] AC 689.

7 Coulson P, *Coulson on Construction Adjudication*, 4th ed, London, Oxford University Press, (2020), Para 1.04.

8 Coulson, *Coulson on Construction Adjudication*, Para 1.02

9 Dennys *et al, Hudson's Building Contracts*, para 11-002

10 Latham M, *Constructing the Team: Final Report of the Government/Industry, Review of Procurement and Contractual Arrangements in the UK Construction Industry*, 1994, HMSO ISBN011752994x.

11 Latham, *Constructing the team,* Chapter 9.

12 *Housing Grants, Construction and Regeneration Act* 1996 *(c.53)* as amended by the *Local Democracy, Economic Development and Construction Ac*t 2009 (UK)

regime.[13]

After the HGCRA was enacted, construction adjudication became the main method for resolving disputes in the UK, gaining considerable success. Other countries are increasingly adopting this approach. As discussed in this paper, a successful statutory adjudication system relies on a key principle: that adjudication decisions are temporarily final until the dispute reaches a final, prescribed forum. To achieve its goals, the mechanism allows certain derogations from the usual due process principles, which are essential for fair dispute resolution. These derogations allow the system to produce what is often called 'rough and ready' or 'quick and dirty' justice, and since decisions can be reviewed later, parties are encouraged to 'pay now, argue later'. Further, to limit court intervention and promote enforcement of adjudicators' decisions, the 'unreviewable error doctrine' is employed to enforce even manifestly incorrect decisions.[14]

This paper, therefore, seeks to review the intersection of two key limbs of statutory adjudication referred to in the preceding sentences. In the first limb, the paper will demonstrate that there are features within the mechanism that encourage derogation from due process, which can result in procedural or substantive unfairness in the decisions, albeit temporarily. In the second limb, the paper will highlight instances when the core premise of temporary finality can fail, causing decisions that were otherwise temporary to become final and binding. The paper argues that where the two limbs intersect, the chance to address injustices caused by due process derogations in final decisions is lost. Such outcomes conflict with the expectation that adjudication, like other dispute mechanisms, should ensure access to justice as guaranteed by the Constitution.

While the specific derogations are outlined in Part V, it is important to consider the context in which the term 'due process' is used in this paper. Specifically, it refers to the guarantee that proceedings are fair, and that parties are given an opportunity to be heard and a reasonable chance to present their cases. Essentially, it relates to the principles of natural justice, procedural fairness, and equal treatment.

The paper's concerns are relevant to Kenya. Like the Latham report, the proposed Bill seeks to transform construction adjudication, which is currently an optional contractual mechanism, into a statutory mandate. This will benefit the construction industry by creating a coherent regulatory framework for construction disputes and payments, and providing an alternative to the

13 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93.

14 See Part V (iv) for a detailed explanation

commonly used, slow, and costly litigation and arbitration processes. It will address economic inefficiencies and injustices inherent in markets that are reliant on private contractual rights such as construction contracts.[15] It is expected to improve cash flow and curtail crippling payment practices such as 'pay when paid'. It is inexpensive for both parties because, unless otherwise agreed, each party bears their costs, unlike in litigation or arbitration, where the unsuccessful party may be required to cover the winning party's costs. Codification is also expected to increase its awareness and enhance its attractiveness by allowing adjudicators' decisions to be enforced in summary proceedings, subject to any relevant bars to enforcement. Overall, decisions made by independent adjudicators are anticipated to be more accurate than those made by individuals involved in the contract.[16] It is also a sustainable form of private justice, since it requires no infrastructure, no technology and no state resources.[17]

To establish its claim, the paper relies on comparative jurisprudence from the UK, Ireland, and Scotland, which operate statutory adjudication schemes and have developed a body of law that clarifies and guides construction adjudication practices. For context, Part II outlines various forms of construction adjudication: statutory, contractual, and *ad hoc*. Part III discusses the current law and practice of construction adjudication in Kenya, while the proposed statutory regime is compared with similar regimes in selected jurisdictions in Part IV. Part V introduces the initial segment of the primary thesis of the paper, illustrating how statutory adjudication can permit derogations from due process that might result in inequitable and unjust determinations, protected by provisional finality. Part VI identifies scenarios supporting the second part of the core thesis – that adjudication decisions can override their temporary finality and become final and binding determinations of parties' rights. Part VII evaluates the validity of such flawed determinations of rights in light of constitutional protections for access to justice and fair dispute resolution. In Part VIII, the paper concludes with concerns about establishing a statutory adjudication regime in Kenya. It shows that, in a jurisdiction with an overarching constitutional imperative of access to justice, the regime is an onerous one. It proposes safeguards to mitigate inherent risks, primarily by limiting disputes that can be referred to adjudication. It also urges courts to broadly interpret any provisions that could render adjudication decisions final and binding, in the interest of justice.

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15 Clayton P, 'International Security of Payment Legislation for the Construction Industry: Evolution, Revolution and the Search for an Optimum Model', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 90 (2024), 288–321

16 Clayton, 'International Security of Payment Legislation', 288–321

17 Kim F, 'Construction Adjudication – a Peek into the Future', *36 Construction Law Journal* (2020) 521

II. Construction Adjudication Regimes

Jurisdiction is everything.[18] For an enforceable decision, an adjudicator must therefore be within their jurisdiction.[19] Reference to adjudication regimes in this section refers to an exposition of the various power-conferring methods through which an adjudicator derives their authority to conduct an adjudication. This section will also establish whether adjudication's due-process derogations apply differently depending on the applicable adjudication regime.

i. Statutory Adjudication

Statutory adjudication occurs when a specific law is enacted to provide for adjudication as the mechanism for settling disputes in construction contracts. It is usually stipulated that the adjudicators' decisions are binding and enforceable on a provisional basis pending final determination.[20] The existence of such law creates a right, and not merely a compulsory obligation, to refer a dispute to adjudication.[21] The HGCRA, for instance, requires all construction contracts to have adjudication provisions that are compliant with it, and when such provisions do not comply with its provisions or are missing, the provisions of the statute are implied into the contract.[22] The classification of this regime as purely statutory has been contested. This is because most adjudication statutes operate by implying their substantive and procedural requirements into construction contracts. Hence, ultimately, an adjudicator's jurisdiction still stems from the construction contract, not directly from the statute, thus making all adjudication contractual in one way or another.[23] While this is a valid contention, this paper prefers the proposition that such classification is with merit, considering that the primary power-conferring tool is the statute, and it is through the exercise of this statutory power that it is implied into the construction contract.

ii. Contractual Adjudication

The other method, which confers power to an adjudicator, is directly through the construction contract. This is referred to as contractual adjudication,

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18 *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] eKLR

19 Coulson, *Coulson on Construction Adjudication*, para 7.26

20 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93

21 Coulson, *Coulson on Construction Adjudication*, Para 2.79

22 Section 108(5), *Housing Grants, Construction and Regeneration Act* 1996 *(c.53)* as amended by the *Local Democracy, Economic Development and Construction Ac*t 2009 (UK).

23 Coulson, *Coulson on Construction Adjudication*, Para 5.09

and it can arise in two ways. First, as a corollary to statutory adjudication. As indicated in the previous section, adjudication statutes require that all construction contracts contain adjudication provisions that are compliant with the Act. For instance, as a consequence of the HGCRA, commonly used standard forms of contracts in the UK, such as the JCT and the New Engineering Contracts (NEC) suites, contain elaborate adjudication provisions that comply with the minimum requirements prescribed at Section 108(5) of the HGCRA. Such provisions create contractual adjudication by precluding the automatic application of the default provisions of the Act. They arguably beget 'adjudications subject to the Act but governed by contractual rules'. This form of contractual regime was validated in *Cubitt Building Ltd v Fleetglade Ltd* where Coulson QC stated that 'if contractual adjudication provisions comply with the Act, then they must be at the forefront of the court's consideration of the parties' respective rights and liabilities'.[24]

Secondly, statutory regimes often create exclusions to their application by defining qualifying construction contracts and operations. When this occurs, a form of contractual adjudication happens when the exclusions remove a contract from the scope of the Act, but the parties still agree to resolve their disputes through adjudication.[25] In the UK, the two contractual regimes are distinguished by the fact that in the second form, provisions of the HGCRA, such as the right to refer a dispute to adjudication 'at any time', or the requirement that the contract be entirely in writing, do not apply.[26]

However, the distinctions disappear in how the courts approach challenges to adjudicators' decisions arising from either regime. In *Fleming Builders v Forrest or Hives,*[27] it was held that there was 'no justification for a distinction between how the Court will approach the decision of an adjudicator who has dealt with a dispute under the Act and the Scheme, and the way in which the Court will deal with an adjudicator who has dealt with a dispute under the contract'.

iii. Ad hoc Jurisdiction

The last regime that grants power to an adjudicator is the *ad hoc* adjudication. This occurs when adjudication is not mandatory, but parties agree, or are presumed to have agreed, to submit their dispute to adjudication. The phrase 'or are deemed to have agreed' means that *ad hoc* jurisdiction can be established

[24] *Cubitt Building and Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413 (TCC), [2006] 110 Con LR 36

[25] Pickavance J, *A Practical Guide to Construction Adjudication*, Wiley Blackwell, 2015, Para. 5.03

[26] Pickavance, *A Practical Guide,* Para 5.07

[27] *Fleming Builders Ltd v Forrest or Hives* [2008] Scot CS CSOH_103, per Lord Menzies at [105]

even without a prior contractual agreement to adjudicate.[28] It arises where an adjudicator may not otherwise have the necessary jurisdiction to decide the dispute, but the parties expressly or through their conduct agree to create such jurisdiction.[29] In *Westminster Chemicals v Eicholz & Loeser,*[30] it was considered whether an arbitrator had *ad hoc* jurisdiction to deal with the dispute. It was held that if two people agreed to submit a dispute to a third person, they were deemed to have conferred jurisdiction and to be bound by the person's award. Although *Westminster* was an arbitration case, the principle was later applied to adjudication in *Consultancy Group v The Gray Trust* where it was affirmed that the principles in *Westminster* are 'equally applicable to an adjudication'.[31] Therefore, *ad hoc* adjudication is essentially a creature of contract or implied conduct. It has no independent legal status outside the contract or its implied terms. Such a contract, or one established by implication, should encompass all the legal matters necessary to facilitate adjudication, ensuring that the adjudicator has the authority to issue a legally binding decision.

In conclusion to this section, the classification of adjudication regimes is significant. Based on party autonomy, a dichotomy arises, pitting statutory adjudication on one side against the contractual and *ad hoc* regimes on the other. The latter allow parties to add, omit, supplement or modify substantive or procedural provisions governing their adjudication as far as allowable.[32] Therefore, with sufficient skill, it is possible to deliberately consider how much due-process derogations might apply in these regimes, potentially reducing the risk of unfair or unjust decisions. The paper proceeds on the basis that the risks are more likely in a statutory adjudication regime, such as the one currently being considered in Kenya, which provides limited opportunity for party-led adaptation or mitigation.

III. Construction Adjudication in Kenya

This part will discuss the current contractual and legal framework supporting construction adjudication in Kenya, including the proposed changes. Although construction adjudication is not widely practised in Kenya, when it is utilised, it generally occurs on a contractual or *ad hoc* basis. As the analysis of decided

[28] Pickavance, *A Practical Guide,* Para. 5.19

[29] Coulson, *Coulson on Construction Adjudication*, Para 6.14

[30] *Westminster Chemicals and Produce Ltd v Eicholz & Loeser,* [1954] 1 LLR 99 at 105– 106

[31] *The Project Consultancy Group v The Trustees of The Gray Trust* [1999] BLR 377

[32] Coulson, *Coulson on Construction Adjudication*, Para 5.03 - 5.04

cases in sub-section VI below will demonstrate, this has led to inconsistent and fragmented outcomes without a clear logical approach. This may be attributed to the common use of arbitration in construction contracts and the lack of a statutory requirement for construction adjudication. Nevertheless, the recent National Policy on Alternative Dispute Resolution (ADR) seeks to alter this situation by supporting a draft bill to regulate construction adjudication. Currently, the legislative progress of the bill is at the public participation stage.[33]

i. The Constitution

ADR mechanisms in Kenya generally enjoy an enviable status owing to their express recognition by the Constitution of Kenya, 2010. Article 159(2) lays out the basis for the courts and tribunals to promote the adoption of ADR mechanisms, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[34] The provision is construed to be wide enough to encompass construction adjudication.[35] The planned codification of construction adjudication is therefore facilitative in achieving the intents of the Constitution with respect to the promotion of ADR.

ii. The National ADR Policy (Sessional Paper No. 4 of 2024)

To actualise the ideals of Articles 1, 10, 48, 67(2)(f), 113, 159(2) and 189(4) of the Constitution of Kenya, the policy states that it seeks to establish a unified, robust framework for strengthening, guiding and supporting the coordinated growth of ADR practice and uptake in Kenya.[36] The policy, in particular, signals a new dawn for construction adjudication. It acknowledges that adjudication renders justice expeditiously. It also identifies challenges hindering adjudication in Kenya, including the perception that it is a preserve of the construction sector, and calls for a distinction between court-mandated adjudication and non-court-mandated adjudication.[37] Finally, it proposes strengthening the legal framework through the eventual enactment of a distinct legislation to guide and direct the growth of construction adjudication.[38]

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33 This is the position at the time of authoring this paper.

34 Article 159 (2)(c), *Constitution of Kenya* (2010)

35 'Chacha O, Kwaka M, Speedy Resolve: Adjudication as a Means of Effective Alternative Dispute Resolution' https://www.oraro.co.ke/speedy-resolve-adjudication-as-a-means-of-effective-alternative-dispute-resolution/ on 2 August 2024.

36 Republic of Kenya, Sessional Paper No. 4 of 2024, On The National Alternative Dispute Resolution Policy, para. 2.4.5

37 Republic of Kenya, Sessional Paper No. 4, para. 3.6.1

38 Republic of Kenya, Sessional Paper No. 4, para 4.4

iii. Draft Construction Adjudication Bill

The ADR policy proposes a draft Construction Adjudication Bill.[39] Despite being in its early stage, the bill is of considerable importance for the construction industry, warranting an examination of its potential impact. The paper avoids a comprehensive analysis of the bill, instead focusing on only the relevant parts to support its argument.

The bill's stated purpose is to provide for a speedy dispute resolution through adjudication, to facilitate regular and timely payment and to provide remedies for the recovery of payments in the construction industry.[40] The bill provides that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication.[41] It has been settled that the creation of the right to adjudicate is not synonymous with a compulsory obligation to adjudicate and that what exists is merely a discretionary right to adjudicate.[42] Keeping to this, the bill proposes that the Act shall not apply to construction contracts where a different procedure is prescribed by law or contract.[43]

The bill proposes that an adjudicator's decision has to be complied with mandatorily,[44] failure to which the claimant may request the adjudicator to provide an adjudication certificate,[45] which when accompanied by the adjudicator's decision and an affidavit by the applicant, may be enforced as a decree of the High Court.[46] A party may apply to set aside an adjudicator's determination or enforcement decree, provided they pay into court as security any unpaid amounts pending final determination of the proceedings. Concerning timelines, the adjudicator is required to decide an adjudication application within 14 days or any other extended period with the consent of both parties.[47]

IV. Comments on The Provisions of The Bill

The following four remarks are relevant to this paper's claim that the likelihood of injustice increases when temporary adjudicators' decisions become

39 Republic of Kenya, Sessional Paper No. 4, para. 5.5 and Annexure (ii)

40 Preamble, *Draft Construction Adjudication Bill*

41 Section 2(2), *Draft Construction Adjudication Bill*

42 *Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd* [2008] EWHC 1020 (TCC); [2008] BLR 354.

43 Section 2(3), *Draft Construction Adjudication Bill*

44 Section 9, *Draft Construction Adjudication Bill*

45 Section 10(1), *Draft Construction Adjudication Bill*

46 Section 13, *Draft Construction Adjudication Bill*

47 Section 7(4), *Draft Construction Adjudication Bill*

permanent and ultimately binding, especially within a statutory regime as the one proposed. First, the bill respects party autonomy by allowing parties to 'opt-in' to the statutory regime with the freedom to choose other resolution mechanisms. This is commendable and aligns with good ADR practices, which emphasise party autonomy and voluntary submission. However, the provision is restrictive when considering the broader goal of promoting widespread adoption of construction adjudication to harness its economic benefits. Consequently, the success of the proposed scheme may not be comparable to jurisdictions, such as the UK, where parties to a construction contract cannot 'opt-out' of adjudication.

Second, adjudication has been termed as a distinct mechanism that purposely subordinates the need to have the right answer to the need to have an answer quickly[48] for purposes of meeting legitimate cashflow requirements of contractors and their subcontractors.[49] This is demonstrated in the speed with which adjudication has to be completed, with the 'risk that both the process and its end product will or might be unfair, certainly compared to an arbitration or a court hearing.'[50] To this end, the bill proposes a 14-day timeline for completing an adjudication. This brief period raises concerns about the adjudicator's ability to apply the rules of natural justice, particularly when a dispute involves complex issues. These concerns were highlighted in *CIB Properties v Birse Construction,*[51] where the suitability of adjudication for large cases was questioned. For this reason, some Australian states are more cautious, granting adjudicators the explicit power to decide that a dispute is not suitable for adjudication.[52] This conclusion does not ignore the provision that a further period can be agreed upon between the claimant and the respondent, but acknowledges an inherent inequality: the referring party will have had ample time to prepare a claim, whereas the respondent is often caught unprepared to respond on short notice. This provides a procedural advantage to the referring party, who may be reluctant to relinquish it by agreeing to a time extension.

Third, besides speed, another attraction of construction adjudication is the enforceability of its decisions. Accordingly, the proposed bill mandates compliance with such decisions and provides a pathway for their enforcement as a High Court decree. The bill also introduces a detailed mechanism for applying to set aside an adjudicator's decision. The natural question arising from the claim

48 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*, [2005] EWCA Civ 1358; [2006] BLR 15

49 Coulson, *Coulson on Construction Adjudication*, para 7.179

50 Coulson, *Coulson on Construction Adjudication*, para 13.04

51 *CIB Properties v Birse Construction Ltd* [2004] EWHC 2365 (TCC); [2005] 1 WLR 2252; [2005]

52 Coulson, *Coulson on Construction Adjudication*, para 2.13

that unfair and unjust decisions can become final and binding, is whether an application to set aside an impugned decision can be used to prevent this outcome. The answer is not necessarily. Firstly, because a decision or its effects can become final before an application to set it aside is filed. Secondly, the requirement for a party to deposit, as security, an amount in court equal to that specified in the decision may be sufficiently onerous and effectively tantamount to complying with the decision anyway.

Fourth, as the comparative discussion in Part IV will reveal, statutory adjudication schemes can be fashioned to achieve two objectives: resolving disputes solely related to payments or addressing general disputes under a construction contract. The bill adopts the latter approach by permitting both payment claims and 'any other difference' to be adjudicated. It has already been argued that some disputes may not be suitable for adjudication,[53] and this approach could increase the likelihood of injustices in decisions, which may become final and binding. A robust statutory framework should consider existing laws regarding individual rights and freedoms, the application of natural justice principles, and the powers of the High Court to intervene and verify whether powers have been exercised lawfully.[54] Therefore, this effort to strengthen the legal framework is commendable. Whether, if and when enacted, the proposed bill will suffice to foster the growth and development of construction adjudication in Kenya remains uncertain.

v. Standard contracts

There are three common standard forms of contract used in Kenya. These are: the Agreement and Conditions for Building Works used by the private sector and produced by the Joint Building Council (JBC);[55] The Fédération Internationale des Ingénieurs-Conseils (FIDIC) conditions, produced by the International Federation of Consulting Engineers, used for civil engineering projects and those involving multilateral development banks and international players; and the Standard Tender Documents Suite (STD),[56] produced by the Public Procurement Regulatory Authority (PPRA) for use by government agencies within Kenya. The

53 *CIB Properties v Birse Construction Ltd* [2004] EWHC 2365 (TCC); [2005] 1 WLR 2252; [2005]

54 Muigua K, 'A lecture on The Housing Grants, Construction, and Regeneration Act 1996' delivered at the Chartered Institute of Arbitrators-Kenya Branch, Introduction to Construction Adjudication Course held at Nairobi Club on 23 September, 2008, updated on 11 October 2011.

55 The Joint Building Council, a registered Company founded by The Architectural Association of Kenya (AAK) and the Kenya Association of Building and Civil Engineering Contractors (KABCEC) in 1980.

56 Refers to the 2021 revised edition which contains 23 Standard Forms for various categories of work

dispute resolution mechanisms framework outlined in these standard contracts is discussed in the following three paragraphs.

The JBC (1999) edition is popular in the private sector. An updated (2024) edition was briefly released but quickly withdrawn for unclear reasons. The 1999 edition does not provide for adjudication and relies on arbitration and amicable settlement with or without third-party help. The withdrawn 2024 edition proposed the introduction of adjudication except for 'arbitration events' under clause 45. It stipulated that an adjudicator's decision would be made within 14 days, which would be temporarily binding but not final. A party dissatisfied with a decision by the adjudicator would serve a Notice of Dissatisfaction within 5 days, or the decision would become final and binding. Otherwise, the matter could proceed to arbitration after an attempt at amicable settlement.

The STD outlines in clauses 20.1 and 20.2 how the contractor's and procuring entity's claims should be considered. None involves construction adjudication. In the event a dispute arises, the desired initial procedure is an attempt at amicable settlement. The referring party is also given the liberty to institute arbitration proceedings either when the amicable settlement fails or, in any case, after 60 days from the day on which a notice for claim was given.

The FIDIC 1999 edition (red book) is used in Kenya alongside the 2017 edition. The 1999 version prescribes a pre-appointed Dispute Adjudication Board (DAB) that provides reasoned decisions within 84 days, which are binding but not final. The 2017 edition emphasises dispute avoidance with a Dispute Adjudication/Avoidance Board (DAAB) that offers informal assistance and has broader powers. A party dissatisfied with a decision of either board must serve a notice within 28 days, then seek an amicable settlement or arbitration. Despite the term 'adjudication', FIDIC's dispute boards are not traditional construction adjudications but distinct dispute resolution mechanisms.

Therefore, the preceding analysis of the standard forms aligns with the finding in part II above that only contractual or *ad hoc* adjudication regimes are currently applicable in Kenya. Even then, its use remains limited since none of the widely used standard forms promote its use, a situation exacerbated by the statutory vacuum.[57]

[57] Muigua, 'A lecture on The Housing Grants, 2011

vi. Judicial Attitude to Construction Adjudication in Kenya

Because adjudication decisions are usually only temporary, judicial pronouncements on adjudication are few. Where and when court cases have resulted, such intervention or supervision has been based solely on the factual circumstances of the cases, as determined by the specific construction contracts. It has even been argued that, given the nascent and unregulated state of construction adjudication in Kenya, there is the danger that courts would be 'ambivalent and inconsistent' in dealing with challenges to adjudicators' decisions.[58] Indeed, this paper found a few construction adjudication matters that have been the subject of the court's interpretation in Kenya. While the outcomes perhaps tend to confirm the bold claim asserted regarding ambivalence and inconsistency, the paper prefers the conclusion that this number of cases can hardly be deemed sufficient corpus to deduce the judicial attitude towards construction adjudication in Kenya.

The following is a brief overview of some of the key cases. In *Kenya Wildlife Services v Associated Construction Co. Ltd,*[59] the court applied the adjudication clause, concluding that once the time stipulated for adjudication expired, the matter could no longer be adjudicated.[60] It was argued that if the referring party had opted for litigation, it would have obtained the court's audience despite the adjudication clause, as there are no provisions to stay proceedings for parties to undertake adjudication similar to those in the Arbitration Act 1995.[61]

In *Republic v Director General of KENHA ex parte Dhanjal Brothers,*[62] an adjudicator was appointed and determined a dispute between the parties in favour of the *ex-parte* applicant in accordance with the rules of adjudication of the Chartered Institute of Arbitrators (Kenya Branch). The underlying contract was a FIDIC Conditions of Contract. The *ex-parte* applicant made an application thus for an order of mandamus directed at the respondent to comply with the adjudicator's decision. The court observed that the contract provided for settlement of disputes through arbitration but required the parties to attempt amicable settlement as a first option; this is the reason the parties engaged in adjudication first. The court thus found that the adjudicator's decision was not final as per the contract and stayed the judicial review proceedings pending a

58 Muigua, 'A lecture on The Housing Grants, 2011

59 *Kenya Wildlife Services v Associated Construction Co. Ltd* HCCC NO. 247 0f 2001

60 Cited in Muigua, 'A lecture on The Housing Grants, 2011

61 Muigua, 'A lecture on The Housing Grants, 2011

62 *Republic v Director General of Kenya National Highways Authority (DG) & 3 others, Ex-Parte Dhanjal Brothers Limited* [2018] eKLR

final determination through arbitration. While this case seemingly affirmed the temporary finality of an adjudicator's decision, by enforcing non-payment, it is unclear how the court addressed the need for parties to comply with the decision pending final determination.

In *Intex Construction v Kenya Rural Roads Authority,*[63] the applicant submitted time-related claims, under a FIDIC contract, for remaining on the site longer than the expected period, which were rejected by the respondent. A dispute arose and was referred to adjudication in accordance with the Adjudication Rules for the Construction Industry. The adjudicator found in favour of the applicant. The aggrieved party was allowed an option to appeal within 30 days, not to the court, but to the same adjudicator. The respondent appealed, and the appeal was dismissed. The applicant then sought orders to enforce the adjudicator's 'award'. The court granted the applicant's prayer to enforce the adjudicator's award.

That these adjudication cases were argued based on the Civil Procedure Rules and the Arbitration Act, 1995 is evidence of what Professor Muigua referred to as a statutory vacuum.[64] The adjudications were all contractual, and the applicable adjudication rules varied in each case. The uniqueness of each contract and rules justifies the courts' inconsistent outcomes. This underscores the need for a unified statutory framework to cover both substantive and procedural aspects, guiding construction adjudication in Kenya.

IV. Statutory Adjudication: Comparative Jurisdictions

The paper has thus far outlined the various construction adjudication regimes and explored the *status quo* of the practice in Kenya. It has also derived the premise that a statutory regime offers little room for adaptation and enlists, for its effectiveness, features that exacerbate the risks of derogation from due process. This may lead to unfairness when temporary decisions fortuitously become final and binding. As Kenya is at a crucial moment and desires to introduce a statutory regime, this section provides a comparative analysis of other jurisdictions that have crossed that Rubicon, what motivated the transition, and the different ways that statutory adjudication operates. It will conclude with a call for Kenya to consider the idiosyncrasies of its construction industry in comparison to other jurisdictions if it is to enact an effective statutory regime of adjudication.

63 *Intex Construction Limited v Kenya Rural Roads Authority* [2020] eKLR

64 Muigua, 'A lecture on The Housing Grants, 2011

The UK's HGCRA, applicable within England, Wales and Scotland, may be viewed as the touchstone of any consideration of statutory adjudication. Its application, complemented by the specialised Technology and Construction Court (TCC), has generated case law that clarifies and guides the law relating to construction adjudication in that jurisdiction. As alluded to in the introduction, the financial woes of contractors in the UK during the recession were the primary catalyst for mandating adjudication as a compulsory first step to resolve construction disputes. This also explains why the architecture of construction adjudication is tailored to prioritise cash flow among contractors. The scheme remains relevant in the UK as this problem persists where in 2022, over 4,000 companies in the UK construction sector became insolvent.[65]

Other jurisdictions, such as the eight territories comprising Australia[66], Ireland[67], Isle of Man[68], Malaysia[69], New Zealand,[70] and Singapore[71] have adopted statutory adjudication and enacted enabling legislation. A keen look reveals that statutory adjudication in these jurisdictions was motivated by a similar objective to that of the UK, namely improving cashflow in the construction industry.

In the Australian territories, the enactment was driven by the realisation that businesses operating in the construction industry faced an unacceptably higher risk than any other stand-alone industry of either entering into insolvency themselves or becoming a victim of insolvency further up the contracting chain.[72] It was also noted that the construction industry's rate of insolvencies was out of proportion to its share of national output, accounting for 20% to 25% of all insolvencies in Australia.[73] The principal cause of insolvency was poor payment practices.[74]

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65 Nazzini R, Kalisz A, *Construction Adjudication in the United Kingdom: Tracing trends and guiding reform.* King's College London, 2023, https://doi.org/10.18742/pub01-161, chapter 7

66 *Building and construction Industry security of payment Act* 2009 (Australian capital Territory); *Building and construction Industry security of payment Act* 1999 (New South Wales); *Construction Contracts (Security of Payments) Act* 2004 (Northern Territory); *Building and construction Industry security of payment Act* 2004 (Queensland); *Building and construction Industry security of payment Act* 2009 (South Australia); *Building and construction Industry security of payment Act* 2009 (Tasmania); *Building and construction Industry security of payment Act* 2002 (Victoria); *Construction Contracts Act* 2004 (Western Australia)

67 *Construction Contracts Act* 2013 (Ireland)

68 *Construction Contracts Act* 2004 (Isle of Man)

69 *Construction Industry Security of Payment and Adjudication Act* 2012 (Malaysia)

70 *Construction Contracts Act* 2002 (New Zealand)

71 *Building and Construction Industry Security of Payment Act* 2004 (Singapore)

72 Australian Government, *Review of Security of Payment Laws: Building Trust and Harmony,* December 2017

73 Australian Government, *Review of Security of Payment Laws*, December 2017

74 Australian Government, *Review of Security of Payment Laws*, December 2017

In Ireland, statutory adjudication was introduced in the height of the global financial crisis between 2009 and 2012 necessitated also by the need of Irish construction industry to adopt survival tactics for continued solvency.[75] In Malaysia, before the Act, the Malaysian construction industry was beset by cash flow problems in governmental and private-funded projects affecting all the parties involved, especially small sub-contractors down the contractual ladder.[76] In Singapore, statutory adjudication was introduced with the intention of easing cash-flow support for contractors and subcontractors amidst a slowdown in the industry.[77] In fact, all adjudication statutes state that their primary aim is to ensure that a party undertaking construction work under a contract is entitled to receive and recover progress payments related to that work, under a swift dispute resolution process scheme. While there is a commonality in the *a priori* conditions leading up to the adoption of statutory adjudication, the laws do not all operate in the same way, as shown in the following section.

i. Operational Distinctions between the Statutory Schemes

Did introducing statutory adjudication in these jurisdictions achieve the intended objectives? It has been argued that to meet these objectives, more than just legislation is required.[78] Other considerations include: clarity of drafting, ease of use of the legislation, quality and regulation of adjudicators, the willingness of courts to swiftly enforce adjudicators' decisions, the associated regulations and explanatory case law, and industry understanding of the legislation.[79] Despite similar aims, the statutory adjudication schemes mentioned above reveal varying operational differences. This variation is expected because each jurisdiction has its own unique political, commercial and cultural practices.

Off the bat, a subtle distinction can be observed in the nomenclature used to name the compared statutes. Most of the Acts are titled 'Security of Payments Act' except in the UK, Ireland, Isle of Man, and New Zealand. A name indeed serves as a good indicator of what to expect, as it has been observed that the titles have a bearing on how the statutes function. In Australia, the application of construction adjudication is almost exclusively about payment disputes initiated

[75] O'Malley P, 'The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 86, no. 2* (2020), 133–156

[76] Prof. Rajoo DS, (2017) 'A Practical Guide to Statutory Adjudication in Malaysia', 2nd Edition, 2017

[77] Singapore Academy of Law. Law reform committee, *Report on the Building and Construction Industry Security of Payment Act and Corporate Insolvency and Restructuring,* April 2020

[78] Clayton, 'International Security of Payment Legislation', 288–321

[79] Clayton, 'International Security of Payment Legislation', 288–321

by contractors, except in Western Australia and the Northern Territory.[80] This matches the practice in Ireland[81] as well as Singapore.[82] The Malaysian Act similarly limits its application to payment disputes but allows parties to agree in writing to extend the adjudicator's jurisdiction to disputes unrelated to payment or outside the scope of the Act. The HGCRA and the New Zealand schemes permit the resolution of all types of disputes provided they arise under a construction contract.

Hence, two general categorisations, perhaps three, have emerged on how statutory schemes operate. Brand and Davenport suggest two categories: the *defined schemes* (also referred to as the East Coast Model) – being those that only allow adjudicable claims by one party and only for payment for work done; and the *Non-specific schemes* (also referred to as the West Coast models) – being those that do not specify that only one party can make claims and are not limited to a specific type of money claim under the contract.[83] Munaaim suggests an additional categorisation, namely a hybrid scheme that combines both the defined and non-specific schemes.[84]

What emerges from the review above, is a clear case that statutory adjudication is primarily driven by policy objectives to increase cash flow within construction projects. It follows that the *defined schemes* are more faithful to this rationale while *non-specific schemes* pursue the dual objectives of increasing economic efficiency as well as cash flow through rapid dispute resolution.[85] Additionally, the latter scheme promotes party autonomy to refer non-payment disputes.[86] This dichotomy is instructive. As discussed in the next section, there has been a considerable debate that the short duration stipulated by statutes raises practical difficulties when extensive disputes are referred to adjudication

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80 'Jeremy Glover, Adjudication In Australia: An Overview', https://www.fenwickelliott.com/-sites/default/files/Adjudication%2022%20%20Adjudiation%20in%20Australia%20%20an%20overview.pdf on 4 August 2024

81 'A Practical Guide to Adjudication on the Island of Ireland', https://www.arthurcox.com/-knowledge/a-practical-guide-to-adjudication-on-the-island-of-ireland/ on 4 August 2024

82 'Dr Philip Chan, Statutory Adjudication in Singapore: An Overview', https://v1.lawgazette.com-.sg/20077/feature2.htm#:~:text=In%20statutory%20adjudication%2C%20the%20right,provision%20of%20the%20SOP%20Act on 4 August 2024

83 Brand MC, and Davenport P, 'Proposal for a 'Dual Scheme' Model of Statutory Adjudication for the Australian Building and Construction Industry', *International Journal of Law in the Built Environment* (2011) Volume 3, No 3, 252-268, doi:10.1108/ 17561451111178452

84 Munaaim MEC, 'Statutory Adjudication Around the World', *Construction Law Journal (2020)* 36(2), 132–163

85 Clayton, 'International Security of Payment Legislation', 288–321

86 Munaaim MEC, 'Statutory Adjudication Around the World' 132–163

that are incapable of being fairly determined within that period.[87] It has even been doubted whether parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under a statutory scheme or if such disputes were suitable for adjudication.[88] Arguably, limiting adjudication to only payment disputes may minimise the risk of unfairness inherent in statutory adjudication.

V. Due Process Derogations in Statutory Adjudication

Construction adjudication is a unique process.[89] To describe it as a dispute resolution mechanism has been considered a misnomer since an adjudicator's decision does not settle a dispute; unless the parties choose to accept it and take the matter no further.[90] It is also unique because while a dispute resolution mechanism should accord due process rights to the parties, case law highlighted in this part demonstrates that it permits derogation from this tenet under the guise of temporary finality. Six features that facilitate statutory adjudication are discussed here from the perspective of how they are deployed to permit derogation from and to temporarily violate parties' due process rights.

i. 'Rough and Ready' Justice

> *'The essence of an adjudication is that it should be quick . . . adjudication produces rough justice, but it is a rough justice which can be put right at a later stage.'*[91]

Statutory adjudication was introduced to provide parties with a swift, and possibly rough but effective, machinery for enforcing their entitlements under a contract on a provisional basis.[92] It has been referred as a quasi-legal proceeding, 'a form of arbitration, albeit the arbitrator has a discretion as to the procedure he uses, and the full rules of natural justice do not apply'.[93] A precursor to an

87 Coulson, *Coulson on Construction Adjudication*, para 2.116 – 2.117

88 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*, [2005] EWCA Civ 1358; [2006] BLR 15

89 Riches J, and Dancaster R, *Construction Adjudication*, 2nd ed, Oxford: Blackwell Publishing, 2004, 11

90 Riches and Dancaster, *Construction Adjudication,* 12

91 Lord Howie, Hansard, 22.4.06, column 985, proposing an alternative to the scheme then being proposed

92 *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC); [2015] BLR 233.

93 *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] BCC 333

enforceable award by the court.'[94] In *Lanes Group v Galliford Try Infrastructure,* [95] an issue of apparent bias was considered. It was held that adjudication was a rough and ready process carried out at great speed and courts were reluctant to strike down decisions for breach of natural justice or on similar grounds, unless the complainant's case was clearly made out. In *RSL Ltd v Stansell Ltd*[96] it was starkly stated that adjudication was 'inevitably somewhat rough and ready and carried with it the risk of significant injustice'. This prevailing sentiment was repeated in *Balfour Beatty Construction v The Mayor & Burgesses of the London Borough of Lambeth* that 'Adjudication is necessarily crude in its resolution of disputes …and the standard required in practice is not that which is expected of an arbitrator.'[97]

By its very nature, adjudication predisposes decisions to imperfection.[98] Its characterisation as a rough and ready mechanism inevitably produces impure justice compared to cases which proceed to a full trial in court or a substantive hearing before an arbitrator.[99] A position that nonetheless 'parliament must be taken to have been aware of.'[100] Ultimately, any lingering sense of injustice felt by a party is part of the rough and ready nature of the adjudication process.[101] It is self-evident that this feature, while important to ensure decision are dispensed quickly, permits a derogation from due process.

ii. Quick and Dirty

Closely related to the 'rough and ready' characteristic is another feature that defines adjudication as a form of 'quick and dirty' dispute resolution mechanism. During the debate for the HGCRA, it was aptly asked, 'Is this cheap and cheerful, or just quick and dirty'?[102] The 'dirtiness' moniker likely referring to its tendency to bypass due process, which, were it not for its temporary nature, no dispute

94 Adrian Bell, 'The Role of Privilege In Adjudication', Meeting of the Society of Construction Law, London, 9 April 2013.

95 *Lanes Group PLC v Galliford Try Infrastructure Ltd* [1] [2011] EWCA Civ 1617; [2012] Bus LR 1184; [2012] 1 CLC 12n; [2012] BLR 141; 141 Con LR 46.[2011] EWCA Civ 1617; [2012] Bus LR 1184; [2012] 1 CLC 12n; [2012] BLR 141; 141 Con LR 46.

96 *RSL (Southwest) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC).

97 *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC); [2002] BLR 288

98 Mark Entwistle, 'Adjudication under The 'Construction Act 2009': An Adjudicators Perspective', Society of Construction Law Annual Conference, Leeds, March 2012.

99 *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC), [8] (Akenhead J).

100 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B.L.R. 93, 97 (Dyson J).

101 *Broughton Brickwork Ltd v F Parkinson Ltd* [2014] EWHC 4525 (TCC).

102 Lord Lucas, Hansard, 22.4.06, column 996, responding to an alternative proposal to the scheme as then formulated.

resolution mechanism could tolerate. It is believed that the relatively short timeline within which an adjudicator has to reach a decision justifies its inherent 'unfairness'; and on this basis, one cannot sustain a challenge that the adjudicator has acted in a procedurally unfair manner.[103] For instance, adjudicators have been observed to forego site visits, as a disproportionate use of time,[104] even where this would be beneficial to fully resolving a dispute. Granted, it is good practice for an adjudicator, where time constraints prevent reaching a reasonable and fair decision, to inform the parties and invite them to agree on further time,[105] and if the time is not extended, an adjudicator ought to resign.[106] However, this safeguard is not absolute as it has been observed that in reality, very few do.[107]

iii. 'Pay now, argue later'

It has been said that 'it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now.'[108]

Another key feature of construction adjudication arises during enforcement of adjudicator's decisions, which are made within jurisdiction, no matter how mistaken the decision might seem. The courts in this regard rely on the principle of 'pay now, argue later' built into the statute,[109] and based on the premise that the decisions are only temporary, as outlined in *RJT Consulting v DM Engineering.*[110] The principle was earlier referred to as 'pay up now and litigate or arbitrate the dispute later.'[111] This approach was considered a sensible way of dealing expeditiously and inexpensively with disputes which might hold up the completion of important contracts.[112] The process aims to enforce decisions in a manner similar to how an Engineer's or an Architect's decisions are implemented, but with the distinction that the adjudicator is an impartial person owing no allegiance to the Employer.[113]

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103 Pickavance, *A Practical Guide,* Para 17.66.

104 *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC)*, Wickham Demolition v Topevent Ltd* [2015] EWHC 2692 (TCC)

105 Pickavance, *A Practical Guide,* para. 17.69

106 Pickavance, *A Practical Guide,* para. 17.69

107 Coulson, *Coulson on Construction Adjudication*, Para 5.03 - 2.13

108 *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813.

109 Coulson, *Coulson on Construction Adjudication*, Para 2.13

110 *RJT Consulting Engineers Ltd v DM Engineering (N.I.) Ltd* [2002] EWCA Civ 270, [2002] 1 WLR 2344, 2346

111 *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] A.C. 689, 726D

112 Hansard, H.L. Vol 571, cols 989–90. The phrase had been previously used by Lord Howie: see Hansard, HL Vol 570, cols 1933–4.

113 Uff J, *Construction law: law and practice relating to the construction industry,* 12th ed, Sweet & Maxwell and Thomson Reuters, 2017

A recent report[114] found that 95% of adjudication decisions are not argued later, except for enforcement proceedings, which are routinely allowed given the courts' robust pro-enforcement stance to adjudicators' decisions. This may suggest confidence in the system. It may also suggest that if a decision is unjust due to these specific adjudication features, the chance for redress is lost.

iv. 'Unreviewable Error Doctrine'

'As long as the answer is right, who cares if the question is wrong?'[115]

Construction adjudication is closer to expert determination than any other form of dispute resolution.[116] As a result, enforcement of adjudicators' decisions follows the law developed in expert determination. Particularly, the law that mistakes in law and fact are considered subordinate to the process itself, and therefore ignored. This is called the unreviewable error doctrine. Decisions of the TCC and the Court of Appeal have repeatedly made it plain that errors of fact, errors of law and procedural errors will not, without more, justify a failure to comply with the adjudicator's decision.[117] The doctrine is distinguished from the slip rule which is only used to correct slips but not to correct what was done deliberately, but wrongly.[118]

The doctrine was adopted into construction adjudication in the case of *Bouygues Ltd v Dahl-Jensen Ltd.*[119] The Judge held that 'If the mistake was that the adjudicator decided a dispute that was not referred to him, then his decision on that dispute was outside his jurisdiction, and of no effect….but if the adjudicator decided a dispute that was referred to him, but his decision was mistaken, then it was and remains a valid and binding decision, even if the mistake was of fundamental importance'.[120] It has subsequently been referred to as the 'doctrine of unreviewable error of an adjudicator within jurisdiction'.[121]

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114 Nazzini R, Kalisz A, '*Construction Adjudication in the United Kingdom',* 2023

115 Juster N, *The Phatom Tollbooth*, New York, Random House, 1961, Chapter 12

116 Riches and Dancaster, *Construction Adjudication,* 11

117 *Shimizu Europe Ltd v Automajor Ltd* [2002] BLR 113; *Leeds City council v Waco UK Ltd* [2015] EWHC 1400 (TCC), 160 Con LR 58, [2015] BLR 484

118 Justice Edwards-Stuart, 'When The Adjudicator Gets if Horribly Wrong', A paper based on a talk given to the Society of Construction Law and Scottish Building Contract Committee, Edinburgh, 3 March 2011.

119 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [1999] 182 (TCC), [2000] BLR 49

120 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [1999] 182 (TCC), [2000] BLR 49, Para 25

121 *Domsalla v Dyason* [2007] EWHC 1174 (TCC), [2007] BLR 348 para 99(3)

It is not argued that the doctrine requires adjudicators to give incorrect answers to the correct questions. But in cases where errors of law and fact occur, and they occasionally do,[122] the doctrine is deployed as a shield to uphold the validity and enforceability of such decisions. The application of the doctrine has led to the enforcement of decisions that are obviously wrong, which has been referred to as 'perhaps the worst aspect of the process'.[123] It has also been argued that the doctrine arises in a statutory regime of adjudication to give effect to the statutory policy of a contractor's cash flow.[124] To secure payments to receiving parties, it is clear that statutory adjudication allows for denying justice to the paying party; with the reassurance that the decision is only temporary. This relies on two commercial assumptions. First, that the party that made wrongful payments will have the time and additional resources to pursue further proceedings; and second, that the party receiving wrongful payments will remain solvent to refund the amounts, as well as costs made against it.[125]

v. Truncated Rules of Natural Justice

Natural justice is an established legal principle that developed in common law, through equity, to enhance fairness and proper administration of justice in decisions that impact the rights of others. In *Lloyd v McMahon,*[126] it was observed that 'the requirements of fairness demand that when anybody, domestic, administrative or judicial, has to make a decision which would affect the rights of individuals…will demand so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.' The construction adjudication process involves a third party determining, albeit temporarily, rights between parties to a dispute and is thus expected to observe natural justice.

While jurisprudence on the application of natural justice in construction adjudication has evolved remarkably, this paper argues that it still falls short of the ideal. The evolution began with a general stance that natural justice had no role in construction adjudication. It was held that challenging an adjudicator's decision based on an alleged breach of natural justice was futile provided an adjudicator acted within jurisdiction.[127] It was reaffirmed that procedural

122 *Grove Developments Ltd v S&T(UK) Ltd* [2018] EWHC 123 (TCC)

123 Dennys *et al, Hudson's Building Contracts*, para 11 -082

124 *Steve Domsalla (t/ aDomsalla Building Services) Ltd v Kenneth Dyason* [2007] EWHC 1174 (TCC)

125 Dennys *et al, Hudson's Building Contracts*, Para 11 - 084

126 *Lloyd v McMahon* [1987] AC 625

127 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC TCC 254

errors could not invalidate an adjudicator's decision.[128] During this period, an adjudicator's decision, even when made in serious breach of a natural justice principle, would nonetheless be enforced as a matter of law. Indeed, some commentators described this as a 'startling proposition'.[129]

Fortunately, this 'dark era', where natural justice did not apply in statutory adjudication, began waning after the decision in *Glencot Development v Ben Barratt & Sons,*[130] where it was stated that 'the adjudicator has to conduct proceedings following the rules of natural justice or as fairly as the limitations imposed by parliament permit'. *Glencot* was further reinforced in *Discain Project Services v Opecprime Development,*[131] where the notion that natural justice was merely 'procedural errors' was rejected. It was held that there must be 'some breaches of natural justice that would persuade the court not to enforce the decision of the adjudicator'; but acknowledged that 'the adjudicator is working under pressure of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a court or an arbitrator'. The judge significantly added that for statutory adjudication to work, and repugnant as it may seem, some breaches of the rules of natural justice with no demonstrable consequences must be disregarded. This position, with minor refinements, is now considered the most practical guide for applying natural justice in statutory adjudication. Thus, natural justice applies to the extent possible within the constraints of adjudication.[132]

The minor refinements referred to in the preceding paragraph allude to a reviewed standard of natural justice christened 'materiality of the alleged breach' as determined in *Balfour Beatty v The London Borough.*[133] It provides that in order to successfully challenge an adjudicator's ruling based on a breach of a rule of natural justice, it must be demonstrated that the alleged breach was material and/or causative of potential prejudice. The spirit of truncating natural justice was, however, not abandoned as the judge reiterated the fundamental approach that the purpose of adjudication is not to be thwarted by an 'overly sensitive concern for procedural niceties.'

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128 *Ce&B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46

129 Ian Duncan Wallace Construction Law Journal (2000) 16 Const LJ 102 quoted at para 36 of *Discain Project Services Ltd v Opecprime Development Ltd [2001] BLR 287*

130 *Glencot Development and Design Co Ltd v Ben Barratt & Sons (Contractors) Ltd* [2001] BLR 207 where HHJ Lloyd QC

131 *Discain Project Services Ltd v Opecprime Development Ltd* [2001] BLR 287

132 Coulson, *Coulson on Construction Adjudication*, Para 13.08

133 *Balfour Beatty Construction Limited v The mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597

vi. Temporary Finality

The effect of adjudication decisions is regarded to be beyond a recommendation or an advisory, but one to be complied with at least until practical completion.[134] The envisaged decisions were characterised as 'decisions of temporary finality only';[135] or of 'provisional interim basis.'[136] This concept is unique and only known to the adjudication process.[137] It was custom-made so that adjudication would circumvent the delays incumbent in other dispute resolution mechanisms, which are bogged down by their quest for finality.[138] Construction adjudication paid a heavy price to accommodate this concept as it is expressly admitted that the standard required in adjudication is not that which is expected, say, of an arbitrator.[139]

In concluding this part, this paper agrees that the six features discussed above indeed facilitate statutory adjudication and support its success, given the temporary finality of its decisions. Their tendency to amount to derogation from due process has also, without doubt, been demonstrated. The paper's argument, however, is that adjudication can propagate unfairness and injustice when these derogations intersect with the second limb, discussed in the following part, where an opportunity to access a subsequent dispositive forum is lost.

VI. The Collapse of Temporary Finality to Final and Binding Decisions

The previous section has highlighted how some features that operationalise effective statutory adjudication can involve a derogation of due process, sometimes leading to apparent unfairness. Access to a subsequent forum is designed as a fail-safe mechanism to address any temporary anomaly. This section examines the second aspect of the paper's argument—that this temporary finality becomes an insufficient safeguard when a party cannot access a subsequent forum because decisions that are supposed to be temporary become final. It discusses five situations when this can occur.

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134 Coulson, *Coulson on Construction Adjudication*, Para 1.29

135 Hansard, 18.6.96, columns 331 and 332: Standing Committee F.

136 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B.L.R. 93, 97 (Dyson J)

137 Coulson, *Coulson on Construction Adjudication*, Para 4.119

138 *Herschel Engineering Ltd v Breen Property Ltd* [2000] EWHC 178 (TCC), [2000] BLR 272, 70 Con LR 1, para 20

139 *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC); [2002] BLR 288, para 302

i. By 'Smash-and-Grab' Claims

To achieve its goal of improving cash flow, statutory adjudication enforces a strict notice regime for submitting payment claims and sets clear due dates for payments. For example, if an employer fails to issue a payment notice or a payless notice, the contractor is entitled to receive the full claimed amount immediately. Such adjudications are often called 'smash and grab' because of their straightforward nature and the absence of a defence by the employer. Whether the employer's failure is accidental or not, they lose the chance to thoroughly review the payment claim for any exaggeration by the contractor. This creates a risk of overpayment, which is mitigated by the principle that the employer can challenge the valuation used in the original claim at a later time.[140] This is based on the 'pay now, argue later' principle discussed above. However, it is possible that an exaggerated smash-and-grab payment claim results in a substantial payment being made, leaving the employer unable to afford subsequent recovery proceedings. Alternatively, the payee may become insolvent before the payer initiates recovery actions.[141] In this manner, this paper argues that an adjudicator's decision, by its effects, would have automatically become final and binding, potentially leading to an unjust outcome. Section IV highlighted numerous insolvent construction companies, indicating increased volatility in the industry, making this scenario a real possibility.

ii. By time-bar and 'conclusivity' clauses

In statutory adjudication, it is rare for laws or contracts to make the adjudicator's decision final. But in contractual or ad hoc regimes, parties can agree that decisions are final if not challenged within a set time, known as conclusivity clauses.[142] Two germane issues arise: how strictly should these clauses be interpreted, and how reasonable should the time limit be?

The first issue has already been litigated, resulting in the interpretation that clauses should be interpreted strictly,[143] as they would be meaningless otherwise.[144] This indeed aligns with the law that contracts can limit rights. The

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140 *Rupert Morgan Building Services Ltd v Jervis* [2003] EWCA Civ 1563.

141 Charalampos Meliniotis, 'Statutory Payment Notification Obligations Pursuant to HGCRA and BCISPA (NSW): A comparative study from the perspective of preventing smash-and-grab adjudications whilst improving the legislation's effectiveness', Society of Construction Law, A commended entry in the Hudson essay competition, 2020

142 Pickavance, *A Practical Guide,* Para 15.07.

143 *LaFarge (Aggregates) Ltd v Newham LBC* [2005] EWHC 1337, per Cooke J at [17–30].

144 *Jeramam Falkus Construction Ltd v Fenice Investments* [2011] EWHC 1935 (TCC).

paper does not oppose party autonomy but proposes a broad interpretation of such clauses, particularly in adjudication. This is rooted in legitimate concerns that an adjudication can be conducted unfairly and the need to balance the effect of conclusivity clauses with the fundamental notion that adjudication is meant to be temporary.

The second issue, admittedly, challenges the maxim that equity favours the vigilant and does not aid the indolent. However, it is possible that an imposed timeline is unreasonably short to justify a party's loss of the right to challenge an otherwise temporary decision. A time bar period should be reasonable to prevent administrative lapses, illness, or a lack of immediate understanding of complex factual or legal issues from causing a party to be barred. Some standard contracts, such as the JCT and the FIDIC suites, specify 28 days for issuing a notice if dissatisfied with an adjudicator's decision. Although this period can be subjective, by industry standards, it is considered reasonable. Conversely, the withdrawn JBCC standard contract, 2024 version, required a dissatisfied party to issue a notice within 5 days; failure to do so would render the adjudicator's decision final and binding. This duration was unreasonable. Therefore, a court interpreting such a clause should consider a broader interpretation, given its implications.

A path towards this proposed direction has already been laid out. The English Court of Appeal has held that even where a time bar clause is couched as a condition precedent, the court may refuse to interpret it that way. This is in situations where such an interpretation would render the implication that the arrangement 'could be properly described as a commercial nonsense'.[145] Further, in *Skanska Construction v Egger Ltd,*[146] it was argued that the proper approach to time-bars should be one based on common sense and practicality, in a sensible and pragmatic approach. However, until such an approach becomes commonplace, time-bar and conclusivity clauses are another way which can make an unfair adjudicator's decision final and binding.

iii. By Agreement

Closely related to time-bar and conclusivity clauses, is the reality of an adjudicator's decision becoming final and binding by agreement of the parties, either explicitly or implicitly. For instance, in *Khurana and another v Webster*

[145] *Chiemgauer Membran-und Zeltbau GmbH (formerly Koch Hightex GmbH) v New Millennium Experience Co Ltd (formerly Millenium Central Ltd) (No.1)* [1999] CILL 1595, CA, 1999 WL 1019561

[146] *Skanska Construction UK Ltd v Egger (Barony) Ltd* [2004] EWHC 1748 (TCC)

Construction,[147] parties to a construction contract had agreed that if they failed to reach an agreement on a final account, they would engage an independent Quantity Surveyor to deal with the issue whose decision would be binding on the parties' 'on a final basis'. In contested enforcement proceedings the court held that no principle of law prevented the parties from agreeing to oust either party's unrestricted access to the law. This evokes similar concerns as those discussed above and constitutes yet another way in which an unfair decision can become final and binding escaping the safety net offered by temporary finality.

iv. By Practice

Coulson agrees that claiming adjudicators' decisions are temporary is misleading, as their determinative effect does not fade over time. Once made, such decisions are binding unless challenged in arbitration or court. Typically, the losing party must raise the issue again; without challenge, the decision becomes binding default.[148] This reasoning, combined with the reported statistic that 95% of the decisions are not argued again on their merits,[149] exacerbates the possibility of uncontested unfair determinations.

v. Decisions on Liability to Pay Fees

Generally, an adjudicator is entitled to a reasonable payment in fees. Parties to an adjudication are jointly and severally liable for the fees. In practice, adjudicators direct each party to pay half of the fees. However, following the outcome of an adjudication, and in the interest of justice and fairness, it is not unusual for an adjudicator to direct that payment of his fees to follow the event.[150] Due to the temporal finality of adjudication decisions, subsequent proceedings can determine that the adjudicator's decision, which informed the liability for his fees, was incorrect and the previously successful party becomes the losing party in a final determination. Ideally, like in litigation, a party should be entitled to recover the amount of fees which the adjudicator had ordered should be paid based on the overturned decision. However, this does not apply in adjudication. In *Castle Inns Ltd v Clark Contracts Ltd*[151] a Scottish case adopted in the UK,[152] it was held that an adjudicator's decision as to liability to pay fees is final and is not

147 *Khurana and another v Webster Construction Ltd* [2015] EWHC 758 (TCC); [2015] BLR 396

148 Coulson, *Coulson on Construction Adjudication*, Para 14.40

149 Nazzini R, Kalisz A, '*Construction Adjudication in the United Kingdom',* 2023

150 Coulson, *Coulson on Construction Adjudication*, Para 10.25

151 *Castle inns (Stirling) Ltd v Clark Contracts Ltd* [2005] Scot CS CSOH 178

152 *Halsbury Homes Ltd v Adam Architecture Ltd* [2016] EWHC 1422 (TCC); [2016] BLR 419

subject to challenge in subsequent final proceedings. This case and others that followed its reasoning have recently been considered in *A&V Building Solutions Ltd v J&B Hopkins Ltd*[153] and was upheld as correctly stating the law. This is a unique instance where an injustice would transcend the protection offered by temporary finality. Substantial sums can be paid out for adjudicator's fees and they would not be recoverable even if the adjudicator's substantive decision is later found to be wrong.

VII. Construction Adjudication and the Constitution

So far, the law and practice of construction adjudication in Kenya, and comparatively, has been outlined. Features that constitute due process derogations have been discussed, as well as how the opportunity to redress unfair decisions can be lost when temporary finality collapses. This section now shifts to examining how the rights of a party are affected by such loss, with particular emphasis on the right of access to justice. Kenya has yet to enact statutory adjudication, but concerted efforts are ongoing. While the primary concerns addressed in this paper may seem hypothetical at present, it will not be long before cognate issues are brought before Kenyan courts.

This section considers the threshold for resolving construction disputes through adjudication within the context of the Constitution of Kenya, 2010. Consideration is made to Article 2 which is exhaustive on the supremacy of the Constitution, Article 10 on the national values and principles of governance which include the rule of law, equity, social justice and equality, Article 40 on the right to property, and Article 48 that guarantees all persons, unimpeded access to justice by the state. It is also acknowledged that the majority of those who seek justice use numerous options that have now been affirmed in Article 159(2)(c) of the Constitution.[154] Notwithstanding the growth of ADR mechanisms such as adjudication, the Supreme Court has stated that 'courts of law remain the ultimate guardians and protectors of justice and hence, they cannot be completely shut off from any process seeking justice'[155] adding that even when promoting arbitration, it cannot be at the expense of real and substantive justice.[156]

[153] *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2024] EWHC 2295 (TCC)

[154] Republic of Kenya, The Judiciary, 'Social Transformation through access to justice' 2021

[155] *Synergy Industrial Credit Limited v Cape Holdings Limited* (2019) eKLR, Petition No. 2 of 2017, para 68

[156] *Synergy* para 84

Have there been constitutional challenges to construction adjudication as a means of access to justice in other jurisdictions? In the UK, before Brexit, challenges were raised in the face of Article 6 of the European Union (EU) convention which compelled a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[157] It was held that Article 6 did not apply to adjudication since 'at all times' the decision was only provisional and did not determine parties' rights.[158] Further, it was held that Article 6 applied only to public authorities yet an adjudicator was not a tribunal to which legal proceedings could be brought.[159]

In Scotland, an adjudication was successfully challenged based on Article 1 of the First Protocol to the EU convention, which prohibits deprivation of property 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.[160] Refusing enforcement of a decision, the judge agreed that the adjudication process had not identified the parties' true rights and obligations.

In Ireland, challenges to adjudication have been more vociferous given a more robust constitutional backdrop than in the UK. Here, it has been contended that imposing statutory adjudication is 'arguably the most radical interference by the legislature in respect of the right to contract on such terms as the parties deem appropriate.[161] Secondly, it was stated that it is not known 'what type of procedures are required if construction adjudication is to be conducted in a constitutionally compliant manner'.[162] Given such sentiments, it was not surprising that in *Eurofood IFSC,*[163] an Irish case, a clear distinction was drawn between the UK and Ireland regarding the former's robust support for adjudication to the extent of enforcing manifestly incorrect decisions. It was stated that the principle of fair procedure in all judicial and administrative proceedings derives from constitutional guarantees of personal and individual

157 Andrew Bartlett, 'The Limits of adjudication: The impact of the European Convention on Human Rights', A paper presented to a meeting of the Society of Construction Law and the Technology and Construction Bar Association, London, 2 December 2014

158 *Elanay Contracts Ltd v The Vestry* [2001] BLR 33, TCC.

159 *Austin Hall Building Ltd v Buckland Securities Ltd* [2001] EWHC 434 (TCC), [2001] BLR 272, (2001) 17 Const LJ 325, 80 Con LR 115, (2001) 3 TCLR 18

160 *Whyte & Mackay Ltd v Blyth & Blyth Consulting engineers Ltd* [2013] CSOH 54, 2013 SLT 555

161 Hussey A, *Construction Adjudication in Ireland,* Routledge 2017, Quoted in O'Malley P, 'The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 86, no. 2* (2020), 133–156

162 Paul Brady BL, 'Statutory adjudication and the constitution – some preliminary observations', Construction Bar Association of Ireland conference, Dublin, 5 July 2014

163 *Eurofood IFSC, Re,* [2004] 4 IR 370

rights and, therefore, Irish courts' approach to issues arising out of adjudication would be different.[164]

Ireland has a similar constitutional guarantee of access to justice as Kenya. It is thus argued that, for the same reasons cited in Eurofood, it will be possible to challenge unfair adjudication decisions on grounds of the denial of access to justice and the right to property under Article 40 and Article 48 of the Kenyan Constitution. For example, in the context of arbitration, numerous challenges have been filed on the grounds of the right to a fair hearing being violated during arbitral proceedings. Yet, in comparison, arbitration has a more developed and robust legal framework, with adequate safeguards that promote fair outcomes more effectively than construction adjudication.

VIII. Conclusion

Construction adjudication is conducted in a manner that those familiar with the grinding details of traditional construction dispute resolution approaches find difficult to accept.[165] This paper has examined key operational aspects of construction adjudication in Kenya compared to other jurisdictions. It has highlighted the proposed introduction of statutory adjudication aimed at revitalising the practice in Kenya and demonstrated how different jurisdictions have utilised statutory adjudication to their advantage. While it is expected that the proposed changes will bring significant benefits, such as faster dispute resolution and payments, doubts remain about whether its 'opt-in' nature will lead to widespread adoption. It is also uncertain whether there are sufficient baseline conditions or specific failures in the current dispute resolution mechanisms that warrant such a radical shift. This shift is considered radical because the success of the proposed regime will inevitably depend on features that may compromise due process in favour of speed. As the paper illustrates, the risk lies at the intersection of these features and the potential undermining of the temporary finality safeguard inherent in adjudication. This could lead to outcomes incompatible with constitutional guarantees of access to justice and could deprive an aggrieved party of rights to appeal to courts or arbitration if such appeals become unenforceable. The paper has called on courts to interpret these restrictions broadly when they arise.

164 O'Malley P, 'The Irish 'Construction Contracts Act 2013', (2020), 133–156

165 Coulson, *Coulson on Construction Adjudication*, Para 2.03

These concerns are sufficient to counterweigh the eagerness towards the proposed changes. The paper calls for reflection on whether ideal conditions exist that necessitate codification, and if so, what form of operation the Act should adopt. For instance, since the sustainability of making adjudication a one-stop shop for all construction disputes has been called into question,[166] the paper expresses the desirability of confining statutory adjudication to payment issues only, akin to the discussed *defined scheme*. Besides reducing the spectrum of dispute referrals, this will also reduce the complexity of matters referred to adjudication and consequently reduce the chances of unfairness. In the alternative, the paper associates itself with the proposal to ostracise certain categories of disputes such as those of professional negligence, as being wholly inappropriate to be decided on a summary basis.[167] Ultimately, the proposed changes should not undermine efforts to improve the effectiveness of existing mechanisms for resolving construction disputes, such as arbitration, or hinder the promotion of less onerous processes like mediation.

166 Gerber P, and Brennan O, *Best Practice in Construction Disputes*, Sydney, LexisNexis, 2013

167 Dennys *et al, Hudson's Building Contracts*, para 11-083