Conciliation v Adjudication – Is the Tide Turning in Favour of Adjudication?

A Paper given by Anthony Hussey to the Construction Bar Association on 29th March 2019

Background

Conciliation was introduced into Ireland in the mid-1990's as a means of resolving construction disputes. Prior to that the standard contracts provided for arbitration and for no other method of resolving disputes. Given that disputes inevitably arose then as much as they do now in respect of construction contracts, it is quite extraordinary to think that there was no machinery available other than arbitration.

Conciliation had been introduced into the UK forms of contract some years previous to this with considerable success. However when the Housing Grants, Construction and Regeneration Act 1996 came into force in 1998 conciliation quickly faded into oblivion. The last contract to be published providing for conciliation was the ICE Contract of 2001. That form of contract gave way to the new Engineering Contract (NEC) which did not provide for conciliation. Although the ICE lists conciliation among its services in dispute resolution it is very much as an aside, mediation being preferred to it. As a matter of fact however where a formal dispute resolution mechanism is required the option of choice is almost invariably adjudication.

The Construction Contracts Act was introduced as a Bill in the Seanad in 2010. It had no opposition in either the Seanad or the Dail. When it was eventually enacted in 2013 and implemented by Statutory Instrument in 2016, it was anticipated by the industry that it would be availed of extensively and would in time replace conciliation. Prior to its implementation Dr. Bunni, the Chair of the Panel appointed by the Minister held a meeting with the representatives of the various professional bodies having an interest in adjudication, including the Bar Council and the Law Society. One of the issues for discussion was the number of disputes likely to be referred to adjudication on an annual basis. The consensus was that this was likely to be in the order of 150. In fact in the first year only one appointment was made from the panel with one other appointment being made by agreement of the parties. In the second year nine appointments were made from the panel, mainly towards the end of that year. Anecdotal evidence would suggest that there may be about thirty appointments made in all in the current year which ends in August. The experience in the UK was that there were 187 appointments by nominating bodies in the first year and 1,309 in the second year. In recent years there have been about 1,500 appointments a year by nominated bodies. The number of appointments made by agreement is unknown but would probably be relatively few.

The nominating bodies and the adjudicators appointed by them in the UK have operated to high standards and the quality of the decisions is for the most part impressive. Adjudication in the UK has therefore acquired a good reputation although there is a concern that the expenses involved, particularly legal expenses, have sometimes been excessive.

The fact that adjudication has got off to a slow start in Ireland is not necessarily indicative of a lack of success. My own experience arising from five adjudications in which I have been involved has been a good one in the sense of the quality of the adjudicators' decisions in terms of reasoning and the fairness of the results. Other legal specialists in the area have I believe had similar experiences. It may be just a matter of time before the industry realise the benefits of adjudication.

Conciliation

Conciliation has been very successful in Ireland since its introduction. Anecdotal evidence would indicate that most conciliators have a success rate in the order of 80%. Dr. Brian Bond, an engineer who has been appointed as a conciliator in a very large number of cases has had a success rate above 95%. Such is Dr. Bond's belief in conciliation that he was a strong advocate against adjudication. His view was that conciliation was so successful it should not be replaced i.e. if it is not broken, why fix it? The majority of successful conciliations are settled without a recommendation. Where the respondent is a State or Semi-State Body, very often a recommendation is made by the conciliator purely for the purpose of the public body being in a position to justify the settlement to the relevant authorities. Where the parties do not settle, and the conciliator makes a recommendation that recommendation may be rejected by either party and in that event the recommendation is not binding and the entire process is confidential with the effect that an arbitrator appointed will not know the outcome of the conciliation.

Conciliation has many advantages, the main ones being:

- It is a relatively inexpensive process.
- Relationships between the parties are not necessarily marred by a conciliation.
- The emphasis is usually more on the merits of the claim than on legal issues.

However conciliation does have disadvantages particularly when compared with adjudication. Chief among these is the fact that the conciliator's recommendation is not binding except in the case of a Public Works Contract where the successful claimant can insist upon being paid provided he obtains a bond for the amount of the payment. To all practical intents and purposes, however, the conciliator's recommendation is not binding and therefore the dispute can only be resolved through arbitration.

Linked to this is the other major disadvantage. While in most conciliations the parties genuinely seek to achieve a settlement which is fair, in some cases a respondent uses the conciliation to force upon the claimant a settlement which is unfair but which the claimant has to accept because he simply cannot afford to refer the dispute to

arbitration. Every conciliator at the outset of the conciliation reminds the parties of the huge expense involved in arbitration. If one factor more than another accounts for the success of conciliation, that is the one. Conciliation of its nature requires that both parties compromise. One starts from the position therefore that the Claimant is not going to get all he wants or, in many cases, all he deserves.

In one of the adjudications I have been involved, the claimant was a small contractor who had been doing earthworks for a developer on various sites for many years. The claimant was due a sum of about €140,000 in respect of a contract to which the Construction Contracts Act applied. The money was clearly due to the contractor but when it sought payment the developer raised counterclaims that had not previously arisen in respect of that contract and other works. The adjudicator dismissed the spurious counterclaims and awarded the contractor the entire of the sum claimed. In addition the developer had to pay the fees and expenses of the adjudicator. Had that case been run in conciliation, the reality is that the contractor would have had to take whatever he could get because he simply could not afford to bring the matter to arbitration.

Although the relationship between the parties in that case was that of developer and contractor, in reality the relationship was far more akin to that of main contractor and domestic sub-contractor. As we know the main purpose of the legislation was to avoid the abuse of such sub-contractors. It was satisfying to see the system work so well in achieving that fundamental goal in that particular case.

Adjudication

Why have we got adjudication to resolve disputes in the construction industry and not in other industries? The answer is to avoid injustice. That answer begs the question as to what potential injustice besets the construction industry that does not apply to other industries. It is this: unlike any other industry disputes in large numbers are an inevitable feature of construction projects. In a large construction contract, there will inevitably be numerous disputes as between the employer and the contractor and the contractor and its sub-contractors / suppliers and down the chain to sub-sub-contractors. The vast majority of these disputes will be resolved amicably without availing of any formal dispute resolution mechanism. The disputes will typically relate to the risk relating to unforeseen conditions (very often ground or weather) extra works undertaken, delays and who caused them, and defects. Very often there are numerous individual areas of dispute which remain unresolved until the final account so that what is one final account dispute may very often comprise twenty or thirty elements each having its own complexities. The industry needs a means of resolving such disputes finally and efficiently and arbitration / litigation is not the answer and never can be. Most businesses outside the construction industry find themselves embroiled in arbitration or litigation once in a decade or so and the cost can be justified by the rarity of the event. Large contractors however find themselves constantly involved in arbitration and they simply cannot afford it not just in terms of the financial outlay involved but more importantly in terms of management time

expended in preparing the narrative, the proofs, the discovery, the witness statements and the other materials required by the process. Smaller contractors and sub-contractors are engaged in arbitration to a lesser extent but that is probably because they can afford to partake to a lesser extent. Furthermore, arbitration does not offer a solution where the claim is for a sum of less than €250,000. One might commence an arbitration for such a sum in the hope of achieving a settlement but one would have to question whether it would be worth having a hearing that might last several weeks where such a sum is involved. This is particularly the case where the claim is brought under the public works form of contract as that contract provides that each party will bear its own costs in arbitration (unless the respondent makes a successful calderbank offer, in which case the claimant pays its own and the respondent's costs).

Adjudication provides the answer to this dilemma. An adjudicator's decision is binding unless and until an arbitrator or a court gives a different award or judgment. The reality is that the adjudicator's decision is both final and binding. It is extremely rarely that an arbitration takes place after an adjudicator's decision. This is probably for a number of reasons:-

- Once the unsuccessful party has paid the successful party, the dispute loses its momentum and the will to fight on is very often lost.
- Although adjudication takes place over a very short period of time, both parties usually make full submissions setting out the relevant facts and arguments in considerable detail and attaching all backup documentation. Both have usually given the process their best shot. The adjudicator then gives a reasoned decision. Adjudicators tend to be from the same pool of professionals as arbitrators. An unsuccessful party therefore might with justification question whether there is any reason to believe that an arbitrator would come to a different decision.
- The adjudicator's decision, unlike the conciliator's recommendation, is not confidential and an arbitrator may be made aware of it. An arbitrator would not of course be bound in any way by the decision. Nonetheless if that decision by an independent third party is clear and logical, the same logic will be relied upon in the arbitration by the successful party. The unsuccessful party therefore is always going to be on the back foot.

Within a few years of adjudication being introduced into the UK, construction arbitration was literally decimated. Suddenly a large number of very eminent specialist Queens Counsel were redundant with the result that they were obliged to seek briefs in other common law nations including Ireland. Whatever the ultimate fate of conciliation in Ireland, presumably adjudication will have that result also in Ireland. Even if a party brings a dispute to conciliation, it is extremely unlikely that if the conciliation is unsuccessful, it would then embark upon arbitration. It would make far more sense to refer the same dispute to adjudication and undoubtedly this is what would occur.

Limitations of Adjudication

The Construction Contracts Act does not of course apply to every contract. The main limitation arises from the fact that it applies only to disputes *"relating to payment"*. What exactly that term means awaits a court decision. It would appear from the initial draft of the Code of Practice that the draftsman had intended that the only disputes which could be referred to adjudication were those arising from a payment claim notice served under the payment provisions of the Act. However it is widely accepted that, whether by accident or otherwise, there is no link between the payment provisions and the adjudication provisions, and that therefore any dispute relating to payment can be referred to adjudication.

Those referring disputes to adjudication have been tending to use the form of notice of intention issued by the Construction Contracts Adjudication Service which requires a party to state the *"Payment Claim Date"* for the amount in dispute. It is extremely easy to get the payment claim date wrong and in my experience this occurs more often than not. The Respondent invariably claims as a result that the proceedings are void because they are founded on a payment claim notice which doesn't comply with the Act. The response is to say that the claimant is not relying upon the payment claim notice being a valid payment claim notice under the Act but is simply saying that it made a payment claim and the payment claim is being disputed. It is that dispute which is being referred to adjudication. So far, in my experience, adjudicators accept that point.

Even if a payment claim notice is fully compliant with the requirements of the Act, it may be unwise to rely upon the terms of the schedule to the Act which set out the consequences of a valid payment claim notice because the schedule states at paragraph 5:

"The aggregate of payments made under a construction contract shall not exceed:

(a) the amount provided for in the construction contract as originally concluded, and

(b) amounts provided for by any <u>amendments</u> to that contract agreed between the parties". (Emphasis added)

Assuming that the reference to *"amendments"* should be read as a reference to variations or change orders, this provision would appear to rule out claims for delay and disruption and many other claims that might arise under a contract. If one makes it clear that one is not relying upon a payment claim notice as such but is simply referring a dispute relating to payment to adjudication, this issue should not arise. Adjudicators appear to accept that their jurisdiction extends to claims for delay and disruption in appropriate circumstances.

My experience, and, I believe, that of colleagues is that adjudicator's are inclined to interpret their jurisdiction under the Act widely. Whether the Courts take a similar approach remains to be seen. For instance I am aware of cases where the adjudicator has included losses attributable to prolongation in his award in circumstances where

an extension of time should have been granted and I am aware of one case where the Claimant was not seeking a monetary award from the adjudicator but merely a decision as to whether or not the employer was entitled to enforce a liquidated damages provision. Arguably all such matters do relate to payment.

An adjudication in which I was involved arose out of a termination of the contract that the contractor claimed to be unlawful. The contractor had a claim for the value of the work done up to the date of termination. The quantum was in dispute but not the principle. The contractor also had a claim for damages for unlawful termination. We took the view that the claim for damages would probably fall outside the ambit of the Act. We therefore dealt with the value of the work through an adjudication procedure and the damages for breach through conciliation and arbitration.

The Act does of course exclude a number of contracts such as contracts below the value of €10,000, contracts for the construction of certain houses and Public Private Partnership contracts. In the UK parties have got into the habit of including adjudication clauses in their contracts even if the contract is exempt and the terms are not implied therefore by law. In Ireland, it is interesting to note that even before the Act it was a common feature of contracts between Public Private Partnerships and public bodies to include an adjudication provision, at least in relation to the payment aspects of the contract. Unlike the conciliation provisions in the Public Works Contracts the adjudicator's decision is binding pending arbitration without the necessity of providing a bond. This would suggest that the benefit of adjudication was appreciated by both the public and private sector prior to the Act being implemented.

One firm of solicitors reports a *"smash and grab"* application of the nature provided for under the amending legislation of 2009 applicable to adjudication in the UK. This arises where the responding party fails to respond to a payment claim notice within the time required by the legislation. Section 4(3) of the Act provides that if the other party contests that the amount claimed is due and payable it must respond within the time and manner specified. The argument is that if it does not respond then it does not contest the claim in which the case the sum must be deemed to be agreed. My understanding is that the argument was rejected by the adjudicator. In that case the party making the claim had to rely upon the validity of the payment claim notice as the failure to respond would be of no consequence if the payment claim notice itself had not been served in strict conformity with the requirements of the Act. The adjudicator found that it had in fact not been served in accordance with the Act and was therefore invalid.

It would appear that adjudicators are being quite dismissive of technical infringements such as failure to provide with the referral a copy of the notice of intention or a failure to provide a copy of the contract at the same time. Provided the respondent or adjudicator are not prejudiced by delay in providing these documents objections of this nature are not being entertained.

The Cost of Adjudication

The Code of Practice at paragraph 28 states that the adjudicator shall use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost.

The Adjudication Society's paper on adjudication fees charged in the UK dated November 2017 indicates that the average number of hours charged by an adjudicator is 43 and the average fees charged per adjudication is £8,878. The highest total fee recorded in the period in question (October 2015 to September 2016) was £46,000 representing 263 hours at £175 per hour. The average hourly fee charged by adjudicators was £210.

Under the Act the parties pay their own fees and expenses.

The following table sets out the comparable figures in relation to four adjudications under the Act in which I have been involved.

	Amount Claimed	**Hourly Rate**	**Number of Pages in Decision**	**Total Fees (Excluding VAT)**
1.	€359,279.46 €153,733.07 (Cross claim)	€245	53	€14,000.00
2.	€141,201.50	€245	27	€7,962.50
3.	€2,465,924.65		58	€40,125.00
4.	€389,902.04 €128,862.42 (Cross claim)	€350	93 87	€64,113.00

It would appear on this basis that adjudication in Ireland may be somewhat more expensive than adjudication in the UK. As indicated there is a concern that the cost of adjudication in the UK is too high.

In the cases in which I have been involved, there has been no need for the lawyers to understand fully all aspects of the dispute. The nuts and bolts have been dealt with by the client or a claims consultant. The lawyers have only dealt with jurisdictional issues and contractual issues. As a result the legal fees involved have been relatively modest. Presumably adjudicators' fees will reduce as they become more used to the process.

The Success of Adjudication in the UK

Apart from concerns regarding the cost of running an adjudication, adjudication has been very successful in the UK. There is no upper limit to the amount that can be sought in adjudication and the legislation there applies to any dispute arising under a construction contract. One quarter of the disputes dealt with in the UK are in the range of £10,000 to £50,000 and the average claim was for a sum of £344,160. The average award was for a sum of £124,145 in the year of the SCL analysis.

As I understand it, approximately 10% of adjudicator's decisions are challenged, usually on grounds of jurisdiction and / or natural justice, and that only about 15% of these challenges succeed. It is only approximately one in one hundred adjudication decisions therefore that are not enforceable.

Is There a Need for a Hearing?

Paragraph 27 of the Code of Practice states:-

"The adjudicator shall ensure that the procedure adopted is commensurate with the nature and value of the payment dispute and he / she shall be mindful of whether or not an oral hearing is required having regard to matters such as whether or not there is a conflict of fact or other relevant matter that requires such a hearing".

In one of the four cases to which I referred the respondent sought a hearing. The adjudicator decided to have a meeting to discuss whether or not he should direct a hearing. The claimant argued that there was no need for a hearing and the adjudicator agreed.

Having regard to Irish constitutional law, obviously Irish adjudicators would be concerned not to refuse a hearing where one is necessary. However a party seeking a hearing, I would submit, given the time available to conclude the process, should be in a position to convince the adjudicator that there are specific issues which may have a significant effect on the outcome and in respect of which there are conflicts of fact which can only be addressed in a satisfactory manner through oral evidence. The application therefore needs to be focused. It is unlikely that an adjudicator will direct a hearing simply because there are conflicts of fact. Many such conflicts can be satisfactorily addressed by reference to contemporaneous correspondence.

Conciliation v Adjudication

There isn't necessarily any conflict between the two. The fact that adjudication has entirely displaced conciliation to the extent that the latter rarely, if ever, occurs in the UK would suggest that the two are incompatible but this might have come about by reason of conciliation clauses being removed from the standard contracts. In Ireland, so far, conciliation clauses coexist with adjudication entitlements. The fact that conciliation has been negated in its entirety may also have something to do with the fact that the statutory entitlement to adjudication was brought about in the UK by way of implied terms with the result that those terms tend to be written into the contract

as contractual terms whereas the entitlement in Ireland arises simply by way of the legislation.

If a claimant had a relatively weak claim and / or had a strong and ongoing relationship with the proposed respondent, it would certainly be to its advantage to process the claim through conciliation if available. A conciliator will seek to bring about a settlement of even a weak claim and, except under the Public Works Form of Contract, is in a position to give a recommendation which is not necessarily based on strict contractual rights. An adjudicator is obliged to approach the dispute in a similar manner to a judge or arbitrator. A weak claim therefore should be dismissed.

It is likely therefore that conciliation will remain popular in Ireland to some extent. As of this moment in time conciliation is far more popular than adjudication. The adjudications I have been involved in have arisen in circumstances where the relationship between the claimant and respondent was extremely poor to the extent that it was unlikely they were ever going to do business with one another again. I see adjudication as being the preferred means of resolving disputes of that nature. I would anticipate that conciliation would continue to be used in those disputes where the parties wish to preserve a good relationship. In those cases the fact that adjudication is available to the Claimant should ensure that a more just result will occur. The respondent is no longer in a position to play the *"So sue me"* card because the next step following conciliation will not be arbitration but adjudication.

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