



## AN EXPENSIVE WAY TO FLIP A COIN

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Six years ago I was telling clients that Adjudication was the be all and end all of construction disputes. It was always the first point of call and often the mere threat of issuing a notice of adjudication would resolve matters. The *Macob* case was decided, adjudicators decisions would be enforced at all costs, and the bell tolled for litigators and arbitrators alike.

How things change.

Now the law reports are becoming filled with un-enforced adjudications and we are all beginning to scratch our heads.

Whilst adjudication is still working, and is working very well for small and medium sized disputes, it is often unsuitable for the large and complex ones. Big construction disputes are a complicated business - we even have a specialist court to resolve them. Yet there is nothing stopping someone referring highly complex cases for adjudication and 28-day resolution, even though the works may have been long since complete.

Something here is wrong. How can the most complicated disputes be resolved satisfactorily by the roughest of processes? The short answer is that they cannot, and that is why for large and complicated cases, we are increasingly advising clients to bypass adjudication and attempt a structured negotiation through the pre-action protocol and, if all else fails, initiate court or arbitration proceedings.

Complex adjudications can take three months to prepare for, three months to complete and three months to enforce - assuming no appeal. The costs can run into hundreds of thousands of pounds, none of which (apart from enforcement costs) can be recovered from the losing party. I even know of one case where the adjudication and its enforcement took more than a year and cost more than £1m. All this for a process that commonly splits the difference between the parties, is interim and non binding. Isn't this a rather expensive way to flip a coin?

Adjudication was always intended to be a “pay now, argue later” system. What we are starting to see is an “argue now, argue later” process. Why not cut out the middleman, go straight to court or arbitration and get a better, binding decision. Granted it may take a little longer and may be more expensive, but the chances are you will be in court anyway in the end, so the sooner you get started the better. At least if you win you should get most of your costs back.

Also, the courts can force the parties to talk to each other, to mediate where possible and to adopt a sensible and pragmatic approach to the resolution of a dispute within a reasonable timescale. Paradoxically, your best chance of getting a deal may therefore be to initiate court proceedings, via the pre-action protocol and mediation, than by going straight to adjudication.

On the other hand, adjudication forces the polarisation of the parties’ positions at the earliest of stages. There is no time for negotiation during the process, and afterwards the parties are so fed up with each other that there is little chance then either. Also, adjudicators are scared to death of being perceived to be unfair to a party and being criticised by a judge for breaching natural justice. They therefore tend to bend over backwards to accommodate all sorts of requests and applications by a party. This means that tactical procedural wrangling is common - something that would not be tolerated in court.

It is only a matter of time before the courts refuse to enforce an adjudicator’s decision because the dispute was too big or complicated for a fair decision to be made in the timescale. There has already been one attempt, in *CIB Properties Limited -v- Birse Construction Limited*, where a £12 million dispute was referred to adjudication - the reference included 49 files and sixteen witness statements. In that case, the adjudication timetable was extended to fifteen weeks and the court found there was sufficient time to reach a fair decision. I cannot imagine it will take too long for a party on the wrong end of a similar notice to refuse to extend the timetable. It is difficult to see how a fair decision could be made on very complicated matters within six weeks.

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