THE IDEAL CONTRUCTION DISPUTE RESOLVER – PROFESSIONAL VIEWPOINT ON USERS' EXPECTATIONS

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ABSTRACT

Disputes in construction contracts abound. This is because construction contracts involve multiple parties and contracts, have long durations, and involve large amounts of money. Skewed drafting of construction contracts worsens the situation. Disputes in the construction industry are resolved in a number of ways including through negotiation, mediation, contract administrator's decision, expert determination, contractual adjudication, statutory adjudication, arbitration, or litigation. The neutral person acting as the dispute resolver requires different qualifications, skills, and characteristics. This paper deals with three types of dispute resolvers – mediators, arbitrators, and adjudicators. Arbitration is the most established traditional construction dispute resolution method whilst mediation and adjudication are relatively newer and growing rapidly. The mediator requires interpersonal skills more than legal or technical skills. In contrast, the arbitrator requires legal and arbitration practice skills and the need to be decisive and directive more than persuasive characteristics. Statutory adjudication has now taken centre-stage in construction dispute resolution in many jurisdictions. Adjudicators are statutorily mandated to make decisions within days. Another set of skills has become necessary including the demanding need to balance skills in technical areas, legal skills, interpersonal skills, and time management skills including more effective and efficient communication skills. Empirical evidence on adjudications from the UK and New Zealand shows disputes on money and related issues are the most common. This paper concludes by suggesting (i) more comprehensive standards of training ought to be established in adjudicator and other dispute resolver training courses, and (ii) the appointment of a dispute resolver should ideally match the skills of a the dispute resolver with the type of dispute being referred to. This is particularly important in adjudication given the demanding timeframe within which the adjudicator is to make decisions.

Keywords: Adjudication, Arbitration, Construction Industry, Dispute Resolution, Mediation

1. METHODS OF RESOLVING CONSTRUCTION DISPUTES

Construction disputes were traditionally resolved through negotiation, arbitration, and litigation. More recently structured mediation and adjudication have become common in many jurisdictions. In this paper the neutral party who attempts to resolve the dispute between the disputing parties is generically referred to as the 'dispute resolver'. The reference to dispute resolver includes the arbitrator, mediator, and adjudicator.

1.1 Negotiation

Given the totally open and flexible nature of negotiation, parties to a dispute will invariably - in the first instance - try to resolve their disputes through some form of negotiation. But negotiation is not always recognisable as a formal or clearly marked dispute resolution method. Negotiations are often done in an ad hoc manner – sometimes over a 'cup of tea'. At other times it might take a more formal approach where the parties are given notice of what the disputes are and a meeting or series of negotiation meetings are agreed in advance.

The outcomes of negotiations are sometimes recorded but at other times they are merely given effect to by the contract administrator or the parties. The 'non-binding' nature of negotiations remains its strength as the parties have full control over their dispute. But this 'non-binding' nature is also quoted as an inherent weakness of negotiation – which sometimes results in a stalemate – leaving the dispute unresolved. To help the chances of negotiations resulting in a successful outcome, a catalyst could be introduced – enter the mediator.

1.2 Mediation

In its most basic form, mediation may be defined simply as assisted negotiation. The parties negotiate their own settlement, but with the assistance of a neutral third party who helps them to reach their own negotiated settlement. Under the purist model of facilitative mediation, the mediator merely facilitates the process of negotiation between the disputing parties. The disputing parties retain full control of the outcome of the dispute and its settlement, and the mediator retains – at the most – control of the mediation process.

Although mediation as a method of resolving disputes has been around for a very long time, it has come about as a structured formal dispute resolution method relatively recently. The amicable nature of mediation provides the opportunity to keep the good relationship among the disputing parties. This is often quoted to be among the major advantage of mediation when compared with the traditional binding dispute resolution method – arbitration.

There are also different approaches of the mediation process that have increasingly been used. These are sometimes referred to as mediation 'models'. See for example Boulle, Goldblatt, and Green, 2008, pp. 35-39[1]. Apart from facilitative mediation, there is the evaluative mediation model. In evaluative mediation the mediator starts to have a more interventionist approach by giving opinions on the merits of the case. This process is sometimes also referred to as conciliation.

Negotiation and mediation are both classified as 'non-binding' dispute resolution methods. The most common binding dispute resolution method adopted in the construction industry has traditionally been arbitration. More recently, statutory adjudication has taken centre-stage in many jurisdictions.

1.3 Arbitration

Arbitration is private dispute resolution method where disputing parties agree to have an arbitrator hear their disputes and make a binding decision. The arbitrator's decision is called an 'award' and is made based on the facts and the law.

A significant number of construction arbitrators have a technical background. However, given the elaborate and full due process of dispute resolution accorded to arbitration, there are also an increasing number of legally qualified arbitrators with or without a technical background.

Although historically and in theory the whole process is supposed to be much quicker and cheaper than taking the dispute to court, in practice, arbitration has become protracted and increasingly expensive. All the theoretical advantages of arbitration are not always present. The process sometimes mimics litigation. This has prompted some to even refer to arbitration as litigation in private.

1.4 Statutory Adjudication

Statutory adjudication is a relatively new dispute resolution method introduced to resolve construction disputes. Although contractual adjudication in the construction industry is not new, statutory adjudication was first introduced through the *Housing Grants, Construction and Regeneration Act 1996* (the UK Act) in the United Kingdom. The Act came into force on 1 May 1998. Amendments were introduced in the House of Lords in December 2008 and it now comes under the guise of the equally disguised name of *Local Democracy, Economic Development and Construction (LDEDC) Bill 2009*.

[1] Boulle, L, Goldblatt, V, and Green, P, Mediation: Principles, Process, Practice, LexisNexis NZ Limited, Wellington, 2008

Since the UK Act was first introduced, eight other jurisdictions have embraced statutory adjudication.[2] For a comparison on legislative drafting style of all nine Acts see the paper presented at the Commonwealth Association of Legislative Counsel in April 2009.[3] Some other jurisdictions are either seriously considering the possibility of introducing statutory adjudication or have started discussions on it. They include Malaysia, South Australia, Tasmania, South Africa, and Hong Kong.

Most notably comprehensive proposals have been made by the Malaysian construction industry for a *'Construction Industry Payment and Adjudication Act'* in Malaysia. See the chronology of events from the initial recommendations of the Working Group on payment (WG 10) in June 2004 in *Proposal for a Malaysian Construction Industry Payment and Adjudication Act.*[4] There has been strong support from the Malaysian construction industry for such an Act. A government cabinet paper is awaiting distribution for a cabinet discussion on whether such an Act should be considered.

There are many similarities between arbitration and adjudication. Both arbitration and adjudication:

- are considered to be binding dispute resolution methods
- require the dispute resolver to make decisions based on the facts and law
- are facilitated through legislation

But there are also important distinguishing features:

- Arbitration may only be resorted to if the parties have either pre-agreed to resolve a dispute in arbitration or agree to refer a dispute to arbitration after a dispute arises. Legislation on arbitration helps enforce the process and the award
- Adjudication is statutorily enabled – meaning the right to refer a dispute to adjudication arises through legislation – without the pre-requisite for the parties to agree to refer a dispute to adjudication. Although statutorily enabled, adjudication is ***not*** a condition precedent to the parties' rights to refer to any other dispute resolution method provided in the contract.
- A practical difference between construction arbitration and construction adjudication is that typically standard terms of construction contracts provide that most types of disputes may only be referred to arbitration after the contract or project is completed or terminated. Statutory adjudication may be initiated at any time – even during the course of work before a project is completed.
- All the nine legislations on adjudication have mandated short timeframes within which the adjudicator is to make a binding decision. These are typically stated in days. A failure to decide within the strict timeframe is often fatal to the whole process. This is a notable and important distinguishing feature of adjudication compared to arbitration. There are no equivalent mandated timeframe under arbitration Acts although institutional arbitration rules may impose such timeframes.
- Like the arbitrator's award, the adjudicator's decision binds the parties but all issued decided by an adjudicator may subsequently be re-opened and heard and finally decided in an arbitration (if there is an agreement to arbitrate) or in court. In this sense, the adjudicator's decision is typically said to be only 'temporarily binding'.
- Adjudication only covers 'construction contracts' as statutorily defined. The Acts also define the scope of dispute that may be adjudicated. For example, unlike under the UK and NZ Acts, the NSW and Sg Acts allow only payment disputes to be adjudicated.

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2 Building and Construction Industry Security of Payment Act 1999 amended in 2002, New South Wales, Australia (NSW Act); Building and Construction Industry Security of Payment Act 2002, amended in 2006, Victoria, Australia (Vic Act); Construction Contracts Act 2002, New Zealand (NZ Act); Building and Construction Industry Payments Act 2004, Queensland, Australia (Qld Act); Construction Contracts Act 2004 Western Australia (WA Act); Construction Contracts Act 2004 Isle of Man (IoM Act); Construction Contracts (Security of Payment) Act 2004 Northern Territory, Australia (NT Act); Building and Construction Industry Security of Payment Act 2004 Singapore (Sg Act)

3 N.A.N. Ameer Ali and S. Wilkinson (2009) Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User's Perspective on Legislative Drafting Style. In: *Proceedings of the Commonwealth Association of Legislative Counsel Conference*, 1-4 April 2009, Hong Kong.

4 Eds Karib, S A, Shafii, N, Muhamad Nor, N, Contributors: Ameer Ali, N A N and Lim, C F, *A Report on the Proposal for a Malaysian Construction Industry Payment and Adjudication Act.* A report for industry and government, Construction Industry Development Board Malaysia. November 2007, revised August 2008, revised December 2008, Kuala Lumpur.

2. KEY FEATURES - MEDIATION, ARBITRATION, AND ADJUDICATION

Here is a tabulation of the key features comparing mediation, arbitration, and adjudication processes (Table 1).

Table 1: Comparing key features of construction mediation, arbitration, and adjudication

DESCRIPTION	MEDIATION	ARBITRATION	ADJUDICATON
Basis of resolution of dispute	Interest based; need not be based on facts, evidence, or law. Parties may agree anything (that is lawful)	Rights based; based on facts, evidence and law	Rights based; based on facts, evidence, and law
Typical tribunal cost in Malaysia in Malaysian Ringgit* (approximate equivalent in USD shown in parenthesis)	2 K – 15 K (0.5 K – 4 K)	50 K – 300 K (14 K – 85 K)	10 K – 50 K (3 K – 14 K)
Duration**	Typically, 1 - 14 days, or longer	Typically 1 - 5 years, or longer	Typically ***statutorily limited*** to between 14 – 42 days. May be longer only if agreed by all the disputing parties
Rights to the process and pre-conditions	Mediation can always be used by the parties at any time	May only resort to arbitration if there is a written arbitration agreement or if agreed by the parties at any time	An Act statutorily enables adjudication even without an adjudication agreement
Timing	Anytime	Usually in construction contracts arbitration clauses provide that arbitrations on most disputes may only start after completion or termination	The Acts typically provide adjudication may be commenced at anytime
Extent to which it may be binding and appealed	Not binding at any time during the process. Only a settlement agreement, if reached, is binding	Binding, but the arbitrator's award may be challenged in court in very limited circumstances	Binding but the same issues may be reopened and finally decided in arbitration (if there is an arbitration agreement) or in court
Scope of dispute covered	Open to parties to decide scope	Usually very wide	Some Acts cover only payment issues – others include wider issues

Note:

*Tribunal cost means the costs associated with the sitting tribunal e.g. the dispute resolver's fees and the cost of venue, if any. The amounts shown are only an ***estimated indicative range***.

Duration: This is an indication of the ***estimated indicative time* usually required for a typical construction dispute from the start of the process e.g. one party writing to the other stating there is a dispute and suggesting it be resolved through a formal dispute resolution method through to a binding decision or settlement agreement.

3. KNOWLEDGE BASE AND SKILLS REQUIRED OF THE DISPUTE RESOLVER

Several years ago, in a letter to the editor in a British construction magazine, someone wrote about who would make the ideal project manager. The writer suggested that the ideal project manager ought to have a basic degree in architecture and a Masters degree in construction management and provided some explanation on his thoughts. The writer then signed off with his name followed by his qualifications - which were a degree in architecture and a Masters degree in construction management! Even if his views were correct, there would have been an immediate perception by a reader (fairly or unfairly and correctly or incorrectly) that he was biased.

This paper provides broad based arguments from a professional viewpoint on users' expectations and not narrowed to any specific qualification.

3.1 Legal knowledge

The outcome of a settlement following mediation has little to do with the law. The outcome in mediation is interest based – not rights based. Parties may agree anything (anything lawful) irrespective of the facts of the case or the parties' legal rights.

On the other hand, arbitration and adjudication are both rights based. So the arbitrator and adjudicator must have a thorough understanding of the law – including the law relating to construction contracts and construction law.

The adjudicator is under a much more restricted timeframe to make a decision (typically days) compared to an arbitrator (which can run into months). But despite this, there is no justification for distinguishing the level of knowledge of construction contracts and construction law expected of the arbitrator and adjudicator.

Some argue that 'rough justice' would suffice in adjudication. That is however not what the parties to the dispute would expect – at least not if rough justice is equated to injustice or incorrect justice. Whilst the adjudicator's decision may be made based on limited time and without a full hearing and the benefit of ventilating every iota written or spoken throughout the project, the adjudicator's decision must still be based on all the facts and evidence presented, and all the laws applicable. The adjudicator's decision must, at worst, be seen as an 'approximate' justice in the context of the limited time and shortened procedure adopted in adjudication. It cannot be equated to injustice or be any 'less correct' than an arbitrator's decision. Fast track arbitrations, chest-clock arbitrations (where the parties have time-limited opportunity to present and argue their cases) or the 100-day arbitration processes are not known to be producing 'rough justice'. Likewise one should not expect adjudication to be generating 'rough justice'.

It should be noted that the adjudicator or arbitrator might get the answer wrong. But the standards expected are the same – and should not be distinguishable. At the most the courts would take into consideration the time available when selecting the facts to be applied to a case. The applicable law, procedures and rules of natural justice must be maintained.

There is one further legal aspect that is important. The arbitrator and adjudicator must know the law affecting the validity of their decision when writing up their decisions or awards. Recent English judges have refused to enforce adjudicators' decisions on the grounds that the adjudicators have not fully considered all the issues and defenses that were put forward. The adjudicator is expected to consider all issues and defense put forward – even if they are rejected ***after due consideration***. What

is essential is for due consideration to be given. See Quartzelec Limited v Honeywell Control Systems Limited[5], Thermal Energy Construction Limited v AE & E Lentjes UK Limited[6] and the most recent judgment handed down by Teare J on 6 April 2009 in the case of Rupert Cordle (Town and Country) Limited v Vanessa Nicholson which is yet to be reported.

Adjudicators must equally be aware of taking the other extreme measure of considering issues beyond their jurisdiction or not giving parties sufficient opportunity to respond to a document - effectively failing to comply with the rules of natural justice. See Dobson J's judgment in Spark It Up Ltd v Dimac Contractors Limited & James W Cornish at the High Court of New Zealand on 12 June 2009.

In a mediation, there is far less law to deal with. There is the possibility that a mediator may either draft a settlement agreement or may review a settlement agreement made by the parties. Here the mediator would be expected to have the ability to understand what constitutes a complete legally binding contract. Settlement agreements are often done immediately upon the parties reaching settlement. The settlement agreement is a legally binding contract that might subsequently be sued upon if either party reneges on it – but it need not be complex. If the mediator is to draft the settlement agreement, this must be done such that it completely closes all the issues, it is an effective legally binding contract, and the parties understand its contents so that they would be prepared to sign the agreement. There is no need to incorporate redundant legalese such as whereas, hereinbefore, hereinafter, said, the said, and other convoluted drafting style such as provisos, multiple cross referencing, or introducing definitions creating legal fiction or using conflicting conjunctions such as and/or. A plain language settlement agreement means the parties know what they are signing and have less chance of reneging due to want of understanding or misunderstanding. For more on the importance of this see a paper published by the Society of Construction Law in May 2008.[7]

3.2 Technical knowledge

It is often argued that the mediator (particularly the purist facilitative mediator) ought to be an expert in the process rather than an expert in the technical field. The technical expertise would however come in useful during 'reality testing'. This is when the mediator questions the extent to which solutions generated and proposed by the disputing parties are practically achievable.

An arbitrator, who is expected to apply the facts and the law in making decisions, would have access to a complete hearing process to hear from parties, witnesses, and even experts before deciding on the quantification on these issues. The arbitrator will decide on liability and establish the facts when quantifying any amount payable.

A similar process may apply in an adjudication, but there may or may not be a complete hearing. More importantly, there may not be time to gather expert reports to assist or educate a non-technical adjudicator. Whilst a non-technical adjudicator may get away with any decision (even a wrong one) as long as the due process is followed and the rules of natural justice are complied with, parties to the dispute are unlikely to be impressed. It is thus arguable that if the type of dispute raised were technical in nature, the adjudicator would be expected to have technical knowledge and not expect to rely on having external experts.

Empirical evidence from data gathered on adjudications in the United Kingdom and New Zealand[8] shows most adjudications deal with disputes relating to technical areas. For published data see the series of reports published by the Adjudication Reporting Centre at Glasgow Caledonian University.[9] These findings show among the major technical issues raised in adjudications include issues relating to progress payment, valuation of variation work, disputes relating to claims for loss and expense, final accounts, retention sums, liquidated damages, delays and extensions of time,

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5 [2008] EWHC 3315 (TCC)

6 [2009] EWHC 408 (TCC)

7 N A N Ameer Ali *Modern Plain English Drafting And Construction: The Malaysian Subcontract Model Terms.* Society of Construction Law, April 2008, London.

8 Unpublished preliminary findings based on 73% questionnaire response rate of the total population of adjudicators listed on Authorised Nominating Authorities in New Zealand - done as part of a PhD research at the University of Auckland.

9 Glasgow Caledonian reports on adjudication between February 2000 and May 2008 accessible at http://www.adjudication.gcal.ac.uk/

completion, quality of workmanship and materials, and arguable grounds for termination such as whether work was proceeding 'regularly and diligently'. And among these issues, payment and other related financial issues consistently remain the primary area of dispute throughout the reporting period.

> *'... it is clear that the overwhelming subject in dispute is payment. The other issues, whilst important, pale into insignificance alongside the issue of payment.'*[10]

Although payment issues did not remain 'overwhelming' in subsequent reports, financial issues collectively remained the most significant issues. The adjudication Acts in many other jurisdictions including New South Wales, Victoria, and Singapore cover only payment related issue. This means technical skill specifically in financial issues is a skill that is of great importance.

3.3 Management skills

There is one important feature that distinguishes adjudication from mediation and arbitration. All provisions under the various Acts governing adjudication provide strict time frames on the process. Even taking into account the finer arguments of whether some of these time frames are mandatory or 'merely' directory, the time frame does not shift by more than a few days – at the most. Thus skills and tools dealing with managing time and the use of ICT for greater efficiency could be very useful. A failure to appreciate this can be fatal to the validity of an adjudicator's decision. A paramount skill expected of an adjudicator is the ability to make decisions precisely ***and expediently***.

The Pareto Principal

The Pareto Principal is also known as the 80/20 rule or the law of the vital few. Applying this to adjudication or other dispute resolution, it means that approximately 20% of the effort would produce 80% of results and about 20% of the issues raised would account for 80% of the disputes to be decided. Learning how to recognize which are the 20% of the vital key issues and then focusing on these vital few is the key to making the most effective use of the limited and strict time available in adjudication. The skill in recognizing what the 20% is comes from experience, but the understanding of the principal can be learnt but rarely taught (or reminded) during an adjudication or dispute resolution course. These and other management principals ought to be introduced in all adjudication courses.

Parkinson's Law

Parkinson's Law states that work expands so as to fill the time available for its completion. So if an adjudicator were given 28 days to make a decision, typically the adjudicator would fill up the time – often through to the tail end of the deadline for making the decision. And if no float is allowed, and an unforeseen event occurs, either:

(i) the decision is delayed – resulting in the serious possibility of rendering it void; or
(ii) the quality of decision is compromised – with no immediate recourse by the wronged party.

This 'law' is of course recognized and known to most construction professionals and even applied within the construction industry models in planning and programming.[11] An understanding of this and methods of coping with it are equally important in a strict time bound adjudication process. Some of these management principals might be written off as common sense. Unfortunately, good sense is not as common as it should be.

Use of ICT in information search

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10 Kennedy, P, and Milligan, J L, *Research analysis of the progress of adjudication based on questionnaires returned from adjudicator nominating bodies (ANBs) and practising adjudicators, Report No 2,* August 2000, Adjudication Reporting Centre, Glasgow Caledonian University, Glasgow, UK, August 2000, p 5

11 For example see: Scott Adams, Better Ways Than The 'Best Way'? Improving The Society Of Construction Law Delay And Disruption Protocol, Paper D 80, Society of Construction Law, July 2007

In recent times, information overload is a greater problem than getting information. Getting ***relevant*** information within a maze of information becomes critical particularly in a time-bound adjudication process. A Google search of 'adjudication' returned about 7.4 million entries in 0.23 seconds! Over 20,000 entries were found within pages in New Zealand alone.

It is important to get relevant information speedily. There exist now basic programmes built into existing commonly used software to search for documents easily and quickly. Some search functions are faster than others. Searching through the 'spotlight' search function in Apple computers, for example, is near instantaneous. But searching by words alone may often still produce masses of documents not viewable as easily as a hard copy browse.

The current operating system the Mac OS X version 10.5.7 or 'Leopard' provides a browsable view of any document searched by words. One can 'flip' or browse (and read) the cover and even inner pages of any document in any format speedily (like a physical browse) – without opening the application software itself such as MS Word or MS PowerPoint. These are basic tools built in the Mac operating system.

Video or voice conferencing

Whilst some jurisdictions governing adjudication adopt more of a 'documents-only' adjudication, others include the possibility of meetings or hearings. When such meetings are envisaged, it would be worth considering video conferencing or voice conferencing. Skype (for Windows or Mac) enables a two-way videoconference and up to 9 party voice conference. The Mac's iChat enables more than two-party video conferencing. And it enables parties to display documents remotely viewable on screen by the other parties.

All these communication modes are already available but under-utilised at present. These options should be explored further as time is truly *'of the essence'* in an adjudication, and these tools can help create greater efficiency. It is estimated that overall, the current level of video or voice conference usage is less than 10%. See for example the figures on conference calls usage in the Adjudication Reporting Centre's Report No 7, which indicates about 5.8% (up to July 2004).[12]

3.4 Interpersonal skills

Interpersonal skills are vital in a mediator. As parties to a mediation may walk out of a mediation at any time, it is essential that the mediator has an extraordinarily high level of interpersonal skill. Such skills have the capacity to even make or break a mediation.

The arbitrator on the other hand can rely on the powers provided under an arbitration Act, the powers conferred in the arbitration agreement, and any applicable institutional rules. Many of these powers are wide ranging.

The adjudicator too has powers provided under the acts, but given the tight time frame under which the adjudicator works to, the adjudicator may need to persuade the parties to agree on various issues including issues relating to timing. Issues relating to extending the statutorily imposed deadline are one, which requires a high degree of interpersonal skills. If the adjudicator fails to get cooperation and an extension to the statutorily imposed deadline from the parties, the adjudicator may be faced with a very difficult dilemma. The adjudicator has to decide based on facts to be considered against the looming deadline whilst maintaining a balance between deciding correctly and complying with the rules of natural justice – not just being fair but also seen to be being fair and giving the parties the chance to be heard.

4. TABULATING THE SKILLS WITH THE DISPUTE RESOLUTION PROCESS

The following is a tabulation matching the features of the three processes with the skills expected of the dispute resolver (Table 2):

12 www.adjudication.gcal.ac.uk

Table 2: Matching the features of the three processes with the skills expected of the dispute resolver

DESCRIPTION	MEDIATOR	ARBITRATOR	ADJUDICATOR
Legal knowledge	Interest based, therefore knowledge of law required limited to specific issues such as mediator liability, document disclosure, and drafting of settlement contracts	Requires thorough knowledge of the law and practice of arbitration, construction law, construction contracts, and other related areas of law	Requires thorough knowledge of the law and practice of adjudication, construction law, construction contracts, and other related areas of law
Technical knowledge	It is not essential for the mediator to have a high degree of technical knowledge, although this may be useful when the mediator does 'reality testing' with the parties' options when they generate potential solutions.	The historical advantage of arbitration over litigation is that the arbitrator would understand technical issues more quickly than would a judge in court. But the refined process of arbitration (such as the use of expert witnesses and complete hearings) would still enable the non-technical arbitrator to dispense fine justice – albeit at a price and over a longer period.	The adjudicator would be expected to have a high degree of technical skills to be able to expediently make decisions on technical issues. Although the adjudicator could use experts, there is limited time given the statutorily short time frame within which the decision is to be made. Financial skills would appear to be of significant importance given that the Acts governing adjudication either cover only payment disputes or the majority of disputes in the remaining jurisdictions are on payment related issues.
Management skills	The mediator is supposed to be the master of the process of mediation whilst the parties retain control of the outcome. A mediator with good management skills would help dispose the dispute expediently – keeping costs down. With good time and process management, the mediator may have read much about the	In the absence of rigid time frames, the arbitrator would be expected to manage the entire process of arbitration to a reasonable time scale,	With the statutorily imposed short time frame provided, the adjudicator would be expected to have very high time management skills. The short and quick time frame also means the adjudicator may well be expected to operate with more efficient tools and to work to the nearest hour rather than by days. Strict time frames

	case in advance and be able to resolve disputes over hours or days at the most.		also mean workload may only be taken when there is a clear period in the adjudicator's schedule.
Interpersonal skills	As the parties can walk out of a mediation at any time, the mediator would be expected to have very high interpersonal skills to keep the parties around the table and continue negotiating until they reach an amicable resolution – ideally in the form of a settlement agreement.	The arbitrator has much powers provided under the Acts and those provided under the arbitration agreement or institutional rules. These wide ranging rules means the arbitrator can, if necessary, impose orders on the parties rather than rely on persuasive powers.	Although the adjudicator has powers drawn from the relevant Act, a high level of interpersonal skill will come in useful when dealing with situations where there are outstanding issues to be resolved towards the end of the statutory period which might require the adjudicator to have more time before a decision can properly be made. Consent from both parties would be needed. Good interpersonal skills will help secure this extension.

5. RECOMMENDATIONS - ENHANCING SKILLS OF THE DISPUTE RESOLVER

> *'I would rather there were no adjudication in Malaysia than have incompetent adjudicators dispensing quick injustice.'*

This was the editor's extract and emphasis in large font of an article published in the RICS Construction Journal.[13] There have been laments within the construction industry on the deteriorating quality of arbitrators. Given that adjudicators are expected to dispense rights-based justice, and in a short time frame, the pre-requisites and training requirements should arguably be higher. Among the recommendations by WG 10 in Malaysia are the following as a minimum standard:

- a minimum of 10 years of experience
- good knowledge in construction law and construction contracts
- good knowledge on practice and procedure of adjudication, acquired over a minimum of a five-day course including training in writing decisions
- a high level of ethics
- high level management and communication skills
- pass written and oral tests on practice and procedures relating to adjudication, ethics, management, communication, and areas relating to construction law and contracts.

There were also recommendations to maintain standards beyond accreditation including mandatory continuing professional development and the submission of 'de-identified' adjudicator's decisions with the confidential details removed.

[13] Ameer Ali, N.A.N., *'One step at a time',* Construction Journal, November/December 2007, RICS, p. 18

Similar training regimes for arbitrators and mediators would also serve to make better quality dispute resolvers in the construction industry – even if the 'ideal dispute resolver' is only a laudable ideal. They create a good base. During practical implementation of dispute resolution, the appropriate dispute resolver who has the relevant skills must be appointed to match the nature of dispute to be resolved.

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