A New 'UNCITRAL Model Law on International Commercial Adjudication': How Beneficial Could It Really Be?

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The United Nations Commission on International Trade Law (UNCITRAL) has promoted Alternative Dispute Resolution (ADR) as an alternative to litigation, being the traditional method of resolving disputes. ADR has been primarily facilitated by UNCITRAL through two Model Laws, namely the UNCITRAL Model Law on International Commercial Arbitration (1985) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). The Commission has discussed, and continues to discuss, the development of an additional UNCITRAL Model Law on International Commercial Adjudication, primarily for the international construction industry. This article seeks to discuss and consider what real benefit the introduction of a new UNCITRAL Model Law for International Commercial Adjudication could provide.

Keywords: UNCITRAL, Adjudication, Arbitration, DAB, DAAB, FIDIC, World Bank

1 INTRODUCTION

In 1966 the United Nations (UN) General Assembly, as the central legal body of the UN, founded the United Nations Commission on International Trade Law (UNCITRAL)[1] comprising sixty Member States on a rotational membership basis. UNCITRAL (the Commission) was established in recognition that the 'disparities in national laws governing international trade created obstacles to the flow of trade',[2] and to thus provide 'the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles'.[3]

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1 UNCITRAL was established on 17 Dec. 1966 through Resolution 2205(XXI) of the United Nations General Assembly.

2 https://uncitral.un.org/en/about at 'Origin, Mandate and Composition' (accessed 13 Sept. 2020).

3 *Ibid.*

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In response to an increasing expansion of the global economy, the mandate of the Commission is to 'further the progressive harmonisation and modernisation of the law of international trade'.[4] Harmonization is 'the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions'[5] and modernization, or unification, is 'the adoption by States of a common legal standard governing particular aspects of international business transactions'.[6]

The Commission has promoted Alternative Dispute Resolution (ADR) as an alternative to litigation, which is considered time-consuming, expensive and exposed to public scrutiny. Litigation has limited effect in international disputes, in the absence of any bilateral or multilateral enforcement treaties, because any judgment handed down through litigation by a local court will be enforceable only within the state of the litigation.

ADR has been described as the 'range of dispute resolution processes that may be used as an alternative to litigation'.[7] The pursuit of 'equity, efficiency and expertise outside formal, established courts through alternative means is not a recent idea',[8] where ADR also 'enjoys economic advantages over formal court proceedings, being typically more expeditious and less costly'.[9]

The motives for pursuing ADR, as an alternative to litigation, can be summarized as:

> (a) finding more efficient ways of resolving disputes, (b) finding processes where parties have more control of the process and the outcome, (c) finding ways to relieve court congestion, (d) finding more "just" ways of resolving disputes than the traditional adversarial system and (e) finding ways of involving the community to a greater extent in conflict settlement.[10]

The range of ADR processes include Negotiation, Mediation, Conciliation, Ombudsman, Expert Determination, Early Neutral Evaluation, Mini-Trial, Dispute Boards, Adjudication and Arbitration,[11] together with sub-variants such as Med-Arb.[12]

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4 *Ibid.*, at 'About UNCITRAL'.

5 https://uncitral.un.org/en/about/faq/mandate_composition/history (accessed 13 Sept. 2020).

6 *Ibid.*

7 Susan Blake, Julie Browne & Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (5th ed., Oxford University Press 2018), at Preface, ISBN: 978-0-19-882309-4.

8 Alternative Dispute Resolution Guidelines, *The World Bank Group* (2011).

9 *Ibid.*, at 2.

10 Karl J. Mackie, *Chartered Institute of Arbitrators*, in *ADR, Arbitration and Mediation – A Collection of Essays* 29 (Julio Betancourt & Jason Crook eds 2014), Ch. 1, ISBN: 978-1-4918-8664-9.

11 The necessity for brevity in this article precludes an explanation of the characteristics of each dispute resolution process. There are many papers, reports, books and references for this information available from authorities such as the Chartered Institute of Arbitrators at, https://www.ciarb.org/disputes/ (accessed 24 Sept. 2020).

12 Med-Arb is the process of first seeking a facilitated consensual settlement between the parties. If this fails, the dispute continues to arbitration where the parties submit their dispute to a binding decision imposed by the arbitrator.

These dispute resolution processes, and their sub-variants, can be divided into two categories. The first category is characterized as a consensual decision determined by the parties, such as negotiation, or alternatively through a more formal process facilitated by a third-party neutral, with or without the provision of a recommendation. The second category is characterized as a decision imposed upon the parties by a third-party neutral, typically resulting in a win-lose outcome where there is a need for a final decision within a certain timeframe.

These two distinct categories of dispute resolution are already facilitated by the Commission through the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (Model Law on Mediation)[13] for consensual resolution, and the UNCITRAL Model Law on International Commercial Arbitration (2006) (Model Law on Arbitration)[14] for imposed resolution.

The Model Law on Mediation is 'designed to assist States in reforming and modernizing their laws on mediation procedure'[15] through 'uniform rules in respect of the mediation process and aims at encouraging use of mediation and ensuring greater predictability and certainty in use'.[16]

The Model Law on Arbitration seeks to 'assist States in reforming and modernizing their laws on arbitral procedure, so as to take account of the particular features and needs of international commercial arbitration'.[17] The Model Law on Arbitration 'reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States in all regions and the different legal or economic systems of the world'.[18] Common to each of the Model Laws, on arbitration and mediation, is the agreement between the parties to determine their dispute within the bounds of the private contract between them, rather than availability by right through state legislation.

In 2018 the Commission, with reference to the construction sector, noted that 'adjudication would facilitate use of a particular tool that had demonstrated its utility in efficiently resolving disputes in a specific sector'.[19] Because the two

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[13] UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018) amending the Model Law on International Commercial Conciliation 2002.

[14] UNCITRAL, *Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006.

[15] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (accessed 23 Aug. 2021).

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] UNCITRAL, *Report of the United Nations Commission on International Trade Law,* 51st Session at 245, held in New York 25 June to 13 July 2018 at 42.

primary categories of decision making, consensual between the parties or imposed by a third party, are already available, this article seeks to assess what benefit could be derived through a new UNCITRAL Model Law on International Commercial Adjudication as an additional imposed dispute resolution process for in particular the international construction industry.

2 DISCUSSION

2.1 Development of adjudication

The term adjudication, apart from its generalized meaning of 'the legal process of resolving a dispute'[20] is the 'temporary resolution of disputes by one, of more, adjudicators such that it is binding upon the relevant contract parties, until it is finally resolved by the parties' chosen method of final dispute resolution, mostly arbitration or litigation'.[21] Adjudication is an expedient dispute resolution process that is prevalent in the construction industry, particularly in common law jurisdictions.[22] The Commission recognizes that adjudication 'is a mechanism whereby parties can refer a dispute to an independent party who is then required to make a decision in a limited time frame'.[23]

There is general agreement across the world that 'timely payment between contracting parties within the construction and building industries by improving cash flow down the contractual chain is a common objective'.[24] Adjudication in supporting timely payment has a significant role in facilitating this objective, through resolving disputes quickly and cheaply. It has been said that:

> Cash flow is especially pertinent for smaller sub-contractors who rely on it to meet their debt obligations and keep their businesses solvent. Made vulnerable by their dependence on payment, these sub-contractors can be taken advantage of by upstream debtors seeking to increase their margins by deliberately withholding payment in the hope that their

[20] Thomson Reuters, *Black's Law Dictionary* (2016) editor in chief Bryan Garner, 5th pocket edition, at 17, ISBN: 978-324-844-7.

[21] Andrew Burr, *International Contractual and Statutory Adjudication* (2017) at xv, Informa Law from Routledge, ISBN: 978-1-138-23962-3.

[22] United Kingdom, Housing Grants, Construction and Regeneration Act 1996; Australia, 'Building and Construction Industry Security of Payment Acts' 1999 to 2009; New Zealand, 'Construction Contracts Act 2002'; Singapore, 'Building and Construction Industry Security of Payment Act (Cap 30B) 2004'; Malaysia, 'The Construction Industry Payment and Adjudication Act 2012'; Ireland, 'Construction Contracts Act 2013';
Canada 'Construction Act and Ontario Regulation 306/18 2019'. In addition, statutory adjudication has been actively considered in Hong Kong, South Africa and Germany.

[23] UNCITRAL Working Group II (Dispute Settlement) 69th Session, held in New York 4–8 Feb. 2019, at 2. Adjudication 38, at 10.

[24] Burr, *supra* n. 21, at xv.

> creditor will become bankrupt. Recognising that these practices could not be allowed to prevail, governments took action to address the problem.[25]

Adjudication has been extensively utilized in some business sectors since the late 1980s and early 1990s particularly in the oil industry, where for example Norway promoted its use through the NF92 form of standard contract.[26] However, the popularity of adjudication within the construction industry in a number of common law jurisdictions is generally credited to the UK Latham Report of 1994[27] where the recommended principles of adjudication were integrated into the Housing Grants Construction and Regeneration Act 1996 of England and Wales (HGCRA 1996).[28] In this regard the Commission has acknowledged 'that certain States have developed legislation on adjudication, in order to establish a right to adjudicate'.[29]

The Commission defines a Model Law as being 'a legislative text that is recommended to States for enactment as part of their national law'.[30] It considers a Model Law to be 'an appropriate vehicle for modernisation and harmonisation of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirable'.[31] The Commission has considered developing Model Law provisions on adjudication in recognizing the need for 'urgent resolution of disputes through summary proceedings'[32] and 'in particular with respect to the enforcement of the interim decision by the adjudicator'.[33]

The impetus for the development of a new Model Law for International Commercial Adjudication is not limited to UNCITRAL. The necessity for a new law is also being promoted by organizations such as DACABI (Dispute Avoidance Conciliation and Adjudication Board Institute)[34] and FICA (Forum for

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[25] Teena Zhang, *Why National Legislation Is Required for Effective Operation of the Security of Payment Scheme*, 25 BCL 376 (2009).

[26] The Norwegian standard contract form NF92, Norsk fabrikasjonskontrakt (Norwegian Fabrication Contract) 1992(Standard Contract for the Supply of Major Components to the Norwegian Continental Shelf). In this contract the Adjudicator is called the Expert Determinator.

[27] Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report (1994), HMSO.

[28] More correctly being the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996) as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 and the Scheme for Construction Contracts (England and Wales) Regulations 1988 (Amendment) (England) Regulations 2011 (LDEDCA 2011).

[29] *Supra* n. 23, at 10.

[30] *A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law* (2013), UNCITRAL Secretariat, United Nations, Vienna at s. 37, at 14.

[31] *Ibid.*, at 14, s. 38.

[32] UNCITRAL, *Report of the United Nations Commission on International Trade Law,* 50th Session at 265, held in Vienna 3–7 July 2017, at 47.

[33] *Ibid.*, at 47.

[34] DACABI (Dispute Avoidance Conciliation and Adjudication Board Institute) works to promote and enable access to adjudication worldwide, www.dacabi.org (accessed 20 Aug. 2021).

International Conciliation and Arbitration).[35] DACABI in conjunction with FICA has prepared a proposal for a Model Law on International Commercial Adjudication and has submitted this to UNCITRAL for consideration.[36]

In 2019 the Commission, in seeking to reduce the cost and time of arbitration, considered that 'contractual clauses could be developed to facilitate the broader use of adjudication'.[37] It is clear that the Commission, in being consistent with its mandate, considers there could be future benefit in the development of adjudication on an international basis. In this regard the Commission has identified the need for the urgent and efficient resolution of disputes, particularly in the international construction sector, which may be met through a new Model Law on International Commercial Adjudication.

2.2 Types of adjudication

There are essentially two types of adjudication, namely 'the statutorily-imposed and the contractually-agreed versions'.[38] Contractual adjudication was established in the UK from the late 1970s onwards,[39] but 'the extent to which these provisions had been used is unknown'.[40] The later and more modern form of statutorily imposed adjudication has been replicated in a number of jurisdictions since its introduction in the UK twenty-five years ago through the HGCRA 1996. It was introduced to a then contentious UK construction industry where 'disputes were having a major impact on construction projects, hindering cash flow and project completion until they were resolved'.[41] The introduction of adjudication through the HGCRA 1996 was not without its detractors. One commentator advised that adjudication:

> represents a disastrously misguided intervention by the DETR (Department of the Environment, Transport and the Regions) in the affairs of the construction industry. It

[35] FICA (Forum for International Conciliation and Arbitration) is a non-profit, non-governmental organization committed to the advancement of national and trans-national dispute resolution, www.fica-disputeresolution.com (accessed 20 Aug. 2021).

[36] Proposal for Model Law on International Commercial Adjudication submitted to UNCITRAL Working Group II by FICA (Forum for International Conciliation and Arbitration) and prepared by DACABI (Dispute Avoidance, Conciliation and Adjudication Board Institute), 14 Feb. 2021.

[37] *Supra* n. 23, at 10.

[38] Burr, *supra* n. 21, at xv.

[39] It is considered that the first introduction of adjudication in the UK into a standard construction contract was in the Joint Contract Tribunal (JCT) 'Green form' of Nominated Sub-Contract in 1978 under the 1963 main contract, previously known as the RIBA Contract. A new Clause 13B was added 'Contractors claims not agreed by the Sub-Contractor – appointment of an Adjudicator'.

[40] John Riches & Christopher Dancaster, *Construction Adjudication* (2nd ed., Blackwell Publishing 2004) at 2, ISBN: 978-1-4051-0635-1.

[41] Alternative Dispute Resolution Guidelines, *supra* n. 8, at 14.

> can only serve to paralyse the effective administration of construction projects and act as a powerful impetus to increased litigation and higher construction costs.[42]

It has been said that Adjudication 'is arguably the most radical interference by the legislature of any country in which it has been introduced in respect of the right to contract on such terms as the parties deem appropriate, with the possible exception of legislation prohibiting unfair terms where such legislation applies'.[43] Adjudication has continued to attract criticism due to a 'statistical bias in favour of claimants in adjudication and the difficulty of achieving fairness'[44] in the short period in which the decision is made, usually twenty-eight days. The common default timescale for statutory adjudication is twenty-eight days from referral to issuance of the decision. The twenty-eight-day period commencing on the date of receipt of the referral usually comprises fourteen days for the respondent to submit a response, five days for the claimant to submit the reply, with the final nine days to receive any further submissions and for the adjudicator to consider, prepare and issue the decision.

The essential difference between arbitration and adjudication is that whilst both have the common attribute of a decision being imposed upon the parties in dispute by a neutral third party, the former is binding whilst the latter is only temporarily binding. That is to say that upon the issue of an adjudicator's decision the unsuccessful party has an obligation to perform in accordance with the decision, but also has the right to challenge the decision. The temporarily binding nature of adjudication, whilst allowing for speed, also provides the safety valve to correct what could be an unjust decision made in a limited time frame without recourse, to avoid 'rough justice'.[45]

Further commentary on the nature of adjudication was provided in 2005 when Chadwick LJ stated that 'the adjudicator's task was simply to find an interim solution that met the needs of the case, and that the need to have the "right answer" had been subordinated to the need to have the right answer quickly'.[46] A further description was provided by Lord Ackner who said 'Adjudication is a highly satisfactory process. It comes under the rubric of "pay now, argue later"

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[42] Ian Duncan Wallace, *Contemporary Developments in Construction Law: The HGCRA 1996, the Arbitration Act 1996, and the Crouch Doctrine*, 14 Const. L.J. 164 (1998). See also Uff John, *Contemporary Issues in Construction Law, Volume II, Construction Contract Reform: A Plea for Sanity* (Construction Law Press 1997).

[43] Anthony Hussey, *Construction Adjudication in Ireland* (Routledge 2017) at 1, ISBN 978-1-138-18792-4.

[44] Burr, *supra* n. 21, at xvi.

[45] A term originally used in the context of adjudication by Dyson J in *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] 23 EWHC Technology 254.

[46] *Carillion Construction v. Devonport Royal Navy Dockyard* [2005] EWCA Civ.1538 [2006] BLR 15.

which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up important contracts'.[47]

Notwithstanding differing opinions on the success or efficacy of adjudication, it is recognized in all jurisdictions where it is established as being an expedient method of resolving construction disputes. It has been said that 'the experience of those countries that have embraced adjudication is that it has made their construction industry more effective and efficient bringing consequent economic benefit'.[48] However, it has also been said that in the case of civil law jurisdictions there would appear to be an 'inherent resistance to a system which openly provides for rough justice albeit, in theory at any rate, on a temporary basis'.[49]

At the beginning of the adjudication process the end is within sight with a decision delivered in a short timescale, which is rarely the case in arbitration. Being primarily imposed by statute through the right to adjudicate, most adjudication cases rely on statutory rather than party-agreed provisions. It follows that adjudication requires the domestic courts in the jurisdiction that the dispute takes place to support the process. It has been said of adjudication in the UK, through the HGCRA 1996, that 'the mandatory and expedited nature of the process were the principal reasons why it was catapulted to the number-one method of dispute resolution in the construction industry no more than a year after the 1996 Act was passed'.[50]

In the common law jurisdictions where adjudication has been enacted[51] the construction industry and the courts have made an investment of up to twenty-five years in the continued development of jurisprudence.[52] As statutory adjudication has been implemented within individual jurisdictions, the same principle of a temporarily binding decision has been consistently established, with minor but in some cases important differing provisions.[53] These differing provisions reflect the degree of control that each jurisdiction has sought to exert, in having regard to

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47 Lord Ackner, *Hansard (HL debates)* vol. 571, 989–990 (2013) at the report stage of the legislation in the House of Lords.

48 Damian Keogh & Niall Lawless, *Adjudication Practice and Procedure in Ireland* (Routledge 2020) at 209, ISBN 978-1-138-02030-6.

49 Hussey, *supra* n. 43, at viii.

50 James Pickavance, *A Practical Guide to Construction Adjudication* (Wiley Blackwell 2016) at 3, ISBN: 978-1-118-28152-3.

51 England, Wales and Scotland, 1 May 1998; Northern Ireland, 1 June 1998; Australia, between 1999 and 2009; New Zealand, 1 Apr. 2003; Singapore, 1 Apr. 2005; Malaysia, 15 Apr. 2014; Ireland, 25 July 2016; Canada in the State of Ontario, 1 Oct. 2019.

52 The investment in Statutory Adjudication in the UK is illustrated in the stated opinion that 'in the first 10 years from enactment it generated the equivalent of roughly 100 years of case law', attributed to Coulson J in Pickavance, *supra* n. 50, at 7.

53 For example, in the HGCRA 1996 Act at s. 108(1) includes 'the *right to refer a dispute* arising under the contract', whereas the Irish Construction Contracts Act 2013 is more restrictive at s. 6.-(1) where there is 'the right to refer for adjudication in accordance with this section any *dispute relating to payment* arising under the construction contract'.

their own national interests, over the adjudication process or the industry representations that took place during the passage of the legislation.[54] Where adjudication 'is provided for by legislation, the contractual arrangements play a central role. Often the content of the contract is described in law'[55] where this law will inevitably differ between individual jurisdictions.

2.3 A new Model Law to promote 'best practice'

For those jurisdictions that have yet to implement adjudication a new UNCITRAL Model Law on International Commercial Adjudication, adopted either in part or in whole, could assist in providing a template for national legislation, as has been previously the case with the UNCITRAL Model Law on International Commercial Arbitration.[56] It is likely that any new Model Law on International Commercial Adjudication would seek to follow the same international principle as the Model Law on International Commercial Arbitration, which makes no distinction between 'foreign' and 'domestic' procedures. The Model Law on arbitration states that 'the recognition and enforcement on "international" awards, whether "foreign" or "domestic", should be governed by the same provisions'.[57]

A new Model Law on International Commercial Adjudication could assist in providing a 'best practice' reference for a more consistent approach to statutory adjudication in those jurisdictions where adjudication is not presently available or in those jurisdictions where amendment of legislation is being considered. In addition, a new Model Law could be persuasive in informing the determination of decisions arising from contractual adjudication which incorporate the provisions of the Model Law.

In those jurisdictions where statutory adjudication has been enacted there has been a tendency to include provisions that are not strictly related to adjudication – for example, the prohibition of 'pay when paid' clauses, the empowerment of a subcontractor to obtain payment directly from an employer thereby circumnavigating the main contractor and a statutory right to suspend performance for non-payment, even where these provisions do not exist in the contract. These

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54 As illustrated by the exemptions in the HGCRA 1996 at s. 105(2) in respect of the exclusion of contracts relating to the production of chemicals, pharmaceuticals, oil, gas, steel or food and drink.

55 *Supra* n. 23, at 10.

56 The UNCITRAL Model Law on International Commercial Arbitration has been adopted in eighty-five States and 118 jurisdictions, uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (accessed 19 Sept. 2021).

57 Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration, as amended in 2006, at n. 50, at 36, UNCITRAL Secretariat, Vienna International Centre, PO Box 500, Vienna, Austria, ISBN: 978-92-1-133773-0.

differences in the legislation enacted across each jurisdiction have cumulatively resulted in a lack of consistency in adjudication provisions.

As a starting point all legislation has sought to define construction contracts to which the individual legislation applies. In several jurisdictions there are exceptions, as in the UK Act where contracts in the oil and gas sectors, mineral extraction, nuclear processing and the production of chemicals, pharmaceuticals, steel, food and drink in addition to certain supply-only contracts are exempt from the Act.[58]

In some jurisdictions, including the UK and New Zealand, any dispute arising out of a construction contract can be referred to adjudication. In other jurisdictions, including Australia, Singapore, Malaysia and Ireland, only 'payment' disputes can be referred. By way of support for adjudication, the Australian Courts 'tend towards the view that adjudicators have the power to determine their own jurisdiction and provided the determination is made in good faith, it will be upheld'.[59] This approach is at odds with the approach of the courts in the UK, who are reluctant to recognize the concept of good faith and have ruled that an adjudicator cannot determine their own jurisdiction. It has been said that in statutory adjudication 'Australia has followed a slightly different path from that followed in the UK, and it is difficult to see that many of the variations have been beneficial'.[60]

Another significant difference is that the jurisdictions of Malaysia, Singapore and the Australian East Coast Model[61] only 'allow[s] for adjudication up the contractual stream, that is to say a subcontractor could pursue a main contractor and a main contractor could pursue an employer through adjudication, but not vice versa'.[62] The difficulties of inconsistency of legislation across individual States, as in Australia, are it seems now to be repeated in Canada. The expected imminent enactment of legislation in Alberta[63] is likely to be different from that previously enacted in Ontario.[64] It will be interesting to see how adjudication legislation is developed in the remaining provinces and territories of Canada.

[58] Refer to s. 105 (2) (a) to (e) of the Housing Grants Construction and Regeneration Act (HGCRA) 1996, Part II, Construction Contracts, Introductory provisions.

[59] Hussey, *supra* n. 43, at 111.

[60] Peter Sheridan & Dominic Helps, *Adjudication Down Under: A Survey of the Adjudication Legislation in Australia*, 23(5) Constr. L.J. 364 (2007).

[61] Adjudication in Australia has separate enactments for each of its 8 States. The West Coast Model in Australia comprising the States of the Northern Territories and Western Australia is considered to closely reflect the legislation passed in the UK and New Zealand. The East Coast Model applies to New South Wales, Queensland, Victoria, South Australia, Australian Capital Territory and Tasmania where the latter all closely follow the New South Wales (NSW) Act.

[62] Hussey, *supra* n. 43, at 6.

[63] *Builder's Lien Act* to the *Prompt Payment and Construction Lien Act* (the PPCLA). Bill 37 received Royal Assent on 9 Dec. 2020 where it is anticipated that the PPLCA will come into force in spring 2022.

[64] The amended Construction Act came into effect in Ontario, Canada on 1 Oct. 2019.

Apart from the differences identified above there are many other adjudication issues that continue to be debated, including the scale and complexity of dispute that can be determined by a 'fair decision within the time limits of the adjudication process'[65] There have been calls to modify legislation such as the HGCRA 1996 to restrict disputes involving large amounts of evidence, particularly with expert evidence on planning and programming, final account issues, professional negligence issues and difficult issues of law.[66]

There is a persuasive case for a new UNCITRAL Model Law on International Commercial Adjudication to inform the further development of adjudication legislation in original enactment or through amendment. A greater harmonization of adjudication legislation could assist interpretation, provide greater consistency and enhance legitimacy of the development of an authoritative body of law with potential long-term trans-jurisdictional application.

2.4 Dispute Adjudication Boards (DABs)

Notwithstanding the availability of statutory adjudication in a limited number of jurisdictions, contractual adjudication may be available to parties on a cross-jurisdictional basis through their contractual agreement, most commonly as in the International Federation of Consulting Engineers (FIDIC) standard construction contract forms.[67] International contractual adjudication has had the benefit of support through the World Bank and other Multilateral Development Banks (MDBs)[68] 'who adopted the FIDIC Conditions of Contract for Construction, 1st edition 1999 as part of their "Standard Bidding Documents – Procurement of Works" (SBDW), that their borrowers or aid recipients had to follow'.[69]

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65 Burr, *supra* n. 21, at 24.

66 *See* Construction Act Review by the Technology and Construction Solicitors' Association (TeCSA) Sept. 2004. However, none of these amendments were incorporated into the later Part 8 of the Local Democracy, Economic Development and Construction Act 2009 and the Scheme for Construction Contracts (England and Wales) Regulations 1988 (Amendment) (England) Regulations 2011. More recently in 2017 the UK government, through the Department for Business, Energy & Industrial Strategy (DBEIS), published a 'Consultation to support a post implementation review' of the HGCRA 1996 and the LDEDCA 2011. In Feb. 2020 the DBEIS published the '2011 Changes to Part 2 of the HGCRA 1996 – A Consultation to support a Post-Implementation Review – Summary of Responses', where at 29 advises that the Department will now take forward the Post-Implementation Review, where in what form or by what date is not known.

67 For example, the FIDIC (Federation Internationale des Ingenieurs-Conseils) Red Book: Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1st edition (1999), ISBN: 2-88432-022-9.

68 Multilateral Development Banks (MDBs), such as the World Bank founded in 1945, are international financial institutions usually established by two or more countries with the objective of encouraging economic development in less developed nations. This is usually achieved through the provision of low-cost loans and grants to fund projects typically in infrastructure, energy, education and environmental sustainability.

69 The latest version of the World Bank Standard Bidding Document, Procurement of Works, Jan. 2020, incorporates the FIDIC (Federation Internationale des Ingenieurs-Conseils) Conditions of Contract for Construction for Building and Engineering Works 2017.

It could be said that construction contracts are the most complex contracts in international trade law. They are long-term anticipatory contracts involving a significant investment of capital, technical and human resource. Disputes in construction contracts create a substantial dilution of effort, diversion of capital and delay to project completion. There is a considerable vested interest for international stakeholders, such as MDBs, to minimize contractual disputes and their resultant disruption as soon as possible after they arise.

FIDIC, with the support of the World Bank, introduced the concept of a DAB[70] being either a single person, or more usually a panel of three individuals, who under the terms of the contract provide decisions in disputes. The DAB members 'are party-nominated at the time of the conclusion of the contract. They are independent, impartial and experienced on the related contract issues'.[71] The decisions, issued to the parties on their dispute issues arising, can take the form of either non-binding recommendations or alternatively binding decisions on an interim basis in relation to the dispute matters. Whilst in most contracts the unsuccessful party will comply with an adjudicator's decision, in accordance with procedures such as those promoted by FIDIC, this is not always the case. Where the parties to a contract are from two different jurisdictions, and the project is being undertaken in a third jurisdiction, the risk of non-compliance with an ADR decision as in adjudication will increase.

The mechanism of the DAB was first introduced in the FIDIC Orange Book in 1995 and then across the 1999 Red, Yellow and Silver books.[72] The World Bank expressly supported the introduction of the DAB in 1995 by making their use mandatory for all projects that they finance with a value over USD 50 million. However, the DAB process in the 1999 FIDIC contract suite received criticism because it could be manipulated by a recalcitrant party, usually the employer, to its benefit. This occurs where a Notice of Dissatisfaction (NOD) is served and as a result the DAB decision becomes binding but not final.[73]

[70] The use of a Dispute Adjudication Board is first attributed to the Boundary Dam Project in Washington, United States (US), in the 1960s, although being then simply referred to as a Joint Consulting Board. The approach became more popular throughout the US when it was used on the Eisenhower Tunnel project in Colorado in the late 1960s and early 1970s.

[71] Elham Anisi & Mehrab Darabpour, *Granting enforcement to the FIDIC Dispute Adjudication Board's Decision by the Amendment of the New York Convention 1958* (2021), American Society of Civil Engineers.

[72] The 1999 FIDIC suite of contracts comprises four different contract types known as the Red Book for Building and Engineering works designed by the employer, The Orange Book for Design and Build works, the Green Book as the Short Form of Contract and the Silver Book for Turnkey Contracts, where the Dispute Adjudication Board provisions are included at Clauses 20.2 to 20.8.

[73] For a detailed explanation refer to the article by Nael Bunni, *The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works* (Apr. 2005).

DABs are not derived from statute but from the contract between the parties. Therefore, the decisions arising from these adjudications will be 'grounded in the law of the country in which the contract is executed'.[74] As a result, the 'law of the relevant country ultimately governs the execution of the DAB's decision'.[75] DABs can provide an efficient mechanism for resolving disputes expediently, but they depend on the parties acting in a bona fide manner and a willingness to voluntarily comply with issued DAB decisions. The DAB 'can resolve disputes in real time, and thereby enable parties to plan their future activities based on the reasoned decision'.[76] It is not unusual for an unsuccessful party to let a DAB decision stand in the expectation that a future decision may be in their favour. This approach is reflected in statutory adjudication 'where parties are often content with slightly rough and ready decisions if reached fairly and promptly'.[77]

The pursuit of enforcement in contractual adjudication, such as with a DAB, is limited because there is rarely access to the courts to ensure that decisions are enforced. Reflecting the difference in law between jurisdictions it is not surprising that there have been differences and inconsistencies in how adjudication decisions, which are temporarily binding, have been treated by national or local courts. Where court support has been sought there have been differing interpretations of contractual clauses[78] 'leading to jurisdictional pitfalls and enforcement difficulties'.[79] There has been and there continues to be extensive debate as to the enforceability of a DAB adjudication decision, particularly in the absence of clear contractual provision.

Much of the continuing commentary on enforceability has been in connection with the four Persero cases, under Indonesian law, in Singapore (2010–2015). These cases, two at first instance and two in the Court of Appeal, whilst providing some guidance,[80] have been described by some as a 'legal soap opera – lengthy,

[74] Nicholas Gould Nicholas & Christina Lockwood, *Dispute Boards*, in *Transnational Construction Arbitration* (Renato Nazzini ed., 1st ed. 2018), at Ch. 13, 193, Informa Law, ISBN: 978-1-138-28152-3.

[75] *Ibid.*, at 193.

[76] Anisi & Darabpour, *supra* n. 71.

[77] Mark Goodrich, *Dispute Adjudication Boards: Are They the Future of Dispute Resolution?*, White & Case discussion paper, 5 (Aug. 2016).

[78] Clauses 20.4, 20.6 and 20.7 of the FIDIC 1999 first edition suite of contracts, where Clause 20.4 states that prompt effect should be given to a DAB decision, but it does not provide any clear enforcement mechanism to address non-compliance.

[79] Nicholas & Lockwood, *supra* n. 74, at 212.

[80] The 'Persero' cases are *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2010] SGHC 202and *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, known as Persero 1, then *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2014] SGHC 146 and *PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2015] SGHC 30, known as Persero 2.

with something for everyone including some nuggets of brilliance'.[81] In summary, the cases concluded that 'a party can seek enforcement of a DAB Decision (in these cases made under the FIDIC Red Book) via arbitration without the need to also refer the underlying dispute to be heard and determined in the same arbitration'.[82]

This decision has been interpreted by some as the 'Interim enforcement approach' being 'a just and equitable solution to the perennial problem of delayed payment; particularly that suffered by parties in international disputes who are successful before a DAB but where there is no obvious legal structure in place for the enforcement of that decision'.[83] However, it has been said of the Singapore Court's majority (rather than unanimous) decision in support of adjudication decision enforcement that, whilst 'the ruling of the Court of Appeal may be binding in Singapore, its findings are certainly not definitive outside Singapore',[84] where 'fundamental issues remain open to debate'[85] and 'it is likely that other jurisdictions may well come to the opposite view'.[86] Further commentary advises that 'a detailed review of the judgments, including the extensive dissenting judgment, indicates that the matter cannot be said to be resolved'.[87]

One leading authority has asked 'why should an arbitral tribunal convert a binding decision into a final and binding award so that it can be enforced by a national court when its true nature is that it is interim relief and when ordinarily a national court would not enforce interim relief?'[88] There are now 'a multitude of competing options as to the correct way, if at all, to enforce a not final DAB decision'.[89] Whilst the majority judgment in Persero 2 provided 'some clear answers to some of the difficulties surrounding enforcement of non-final DAB decisions, there will still be arguments in the rest of the world on whether those answers are correct'.[90] In the South Africa Court decision in *Tubular v. DBT*

[81] Giovanni Di Folco & Mark Tiggerman, *Enforcement of a DAB Decision in Arbitration* Part 1, 11 (June 2015), Techno Engineering & Associates/Kennedys.

[82] *Ibid.*, at 12.

[83] *Ibid.*, at 5.

[84] Taner Dedezade, *Enforcement of DAB Decisions Under the FIDIC 1999 Forms of Contract*, in *Transnational Construction Arbitration* (Renato Nazzini ed., 1st ed. 2018), at Ch. 14, 247, Informa Law, ISBN: 978-1-138-28152-3.

[85] Gerlando Butera, *The Persero Saga*, 19(2) DRBF Forum 14 (June/July 2015), The Dispute Resolution Board Forum.

[86] Nael Bunni, Colin Ong & Michael O'Reilly, *The Enforcement of Dispute Adjudication Board Decisions:* Persero *and the FIDIC Standard Form of Contract*, 81(4) Arb.: Int'l J. Arb. Mediation & Disp. Mgmt.374 (Nov. 2015).

[87] *Ibid.*, at 374.

[88] Taner Dedezade, *Mind the Gap: Analysis of Cases and Principles Concerning the Ability of ICC Arbitral Tribunals to Enforce Binding DAB Decisions Under the FIDIC Conditions of Contract*, (4) Int'l Arb. L. Rev. 15 (2012).

[89] Fenwick Elliott, *The 2017 FIDIC Dispute Resolution Procedure: Part 2 – Are Dispute Adjudications Boards Worthwhile: Benefits, Problems and Advice on FIDIC's Security-of-Payment Regime* 3 (2018).

[90] Dedezade, n. 84, at 248.

Technologies, it was ruled that the issuance a NOD in relation to a DAB decision had no effect on the party's duty to promptly comply with that decision 'unless or until' it is changed in arbitration.[91] More recently, and in contrast, the Romanian High Court of Cassation and Justice has recently ruled that a decision issued by a DAB for which a NOD has been served cannot be enforced.[92]

In response to criticism of the dispute provisions within the Red Book 1999 contract, FIDIC issued a guidance memorandum[93] in April 2013 with an amended Clause 20.7 that expressly provides for DAB decisions to be enforced through arbitration. The guidance memorandum sought 'to make explicit the intentions of FIDIC in relation to the enforcement of the DAB decisions that are binding and not yet final'.[94] The guidance memorandum was not universally well received and attracted criticism from some commentators.[95]

The 2017 edition of the FIDIC suite of contracts,[96] whilst incorporating the April 2013 guidance memorandum wording, has sought to further rectify this situation through the introduction and emphasis on dispute avoidance.[97] This emphasis on avoidance is facilitated by a Dispute Avoidance and Adjudication Board (DAAB) where the priority is in seeking an amicable settlement to disputes without recourse to adjudication. The 2017 edition provides that the decision of the DAAB issued within eighty-four days of a dispute being referred to it 'shall be binding on both Parties, who shall promptly comply with it'[98] Further, if the DAAB determines that a payment is due 'it shall be immediately due and payable without any certification or notice'.[99] The more considered approach to dispute avoidance, and adjudication if necessary, of the FIDIC 2017 edition seeks to ensure that parties are more likely to accept an adjudication decision as a final solution.

It has been said that compliance depends on the 'desire to resolve the dispute and the cultural context of the project'.[100] This position, shared with statutory adjudication being specific to a single jurisdiction, illustrates the difficulties that have arisen in cross-jurisdictional interpretation, with the resultant lack of

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91 *Tubular Holdings (Pty) Ltd v. DBT Technologies (Pty) Ltd* (06757/2013) [2013] ZAGPJHC 155, 3 May 2013 (South Africa: South Gauteng High Court [Johannesburg]).

92 Government Decision no. 1/10 Jan. 2018, Romanian High Court of Cassation and Justice.

93 FIDIC (Federation Internationale des Ingenieurs-Conseils), *Guidance Memorandum to Users of the 1999 Conditions of Contract* (1 Apr. 2013).

94 *Ibid.*

95 Andrew Tweedale, *FIDIC's Guidance Memorandum to Users – A Half-Baked Solution*, 9(2) Constr. L. Int'l (June 2014).

96 FIDIC (Federation Internationale des Ingenieurs-Conseils), *Red Book: Conditions of Contract for Construction* (2nd ed. 2017), ISBN: 978-2-88432-084-9.

97 *Ibid.*, at Clause 21.3.

98 *Ibid.*, at Clause 21.4.3.

99 *Ibid.*, at Clause 21.4.3(ii).

100 Queen Mary University of London and Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes* 18 (School of International Arbitration 2019).

consistency and inability to rely on court support for enforcement outside the jurisdiction of the contract.

Adjudication through a DAB will rely upon the expertise of the board in specific subject matters, performing its own investigations with or without submissions from the parties. In comparison, an arbitrator is chosen to exercise judicial function and to resolve a dispute based on submissions from the parties. Whilst arbitral awards can be judicially enforced internationally, an adjudicator's decision is, in the majority of jurisdictions, unenforceable by local courts as it is not considered to be an arbitral award. The FIDIC approach that provides for the referral of a dispute to arbitration in the absence of compliance with a DAB decision can assist in mitigating or alleviating the legitimacy difficulties that can arise in DAB provisions within contracts. However, it should be borne in mind that arbitrators 'may be reluctant to make an award requiring compliance with a DAB decision without examining the merits of that decision'.[101] On this basis, it must be accepted that in at least the short to medium term a new Model Law is unlikely to assist in resolving the present difficulties of cross-jurisdictional enforcement of contractual adjudication decisions.

2.5 So why not continue with arbitration?

Adjudication as a comparatively new ADR process prioritizes expediency over compliance with strict legal niceties, context and process. In comparison, arbitration has an established adopted process, heritage and widely accepted legitimacy, being long recognized across the world as an appropriate substitute to court proceedings both domestically and internationally.

A 2019 survey on arbitration advised that 25% of respondents considered that it was infrequent that the same conclusion was reached in an arbitral award to that of a previous pre-arbitral decision.[102] The same survey confirmed that the three most important reasons why international construction disputes continued to international arbitration after the pre-arbitral decision were significance (53%), complexity (49%) and necessity to resolve multiple claims (36%). This indicates that 'parties are likely to continue to an arbitration after pre-arbitration procedure in high stakes and complex disputes'.[103] In the same survey, respondents confirmed that parties did not voluntarily comply with pre-arbitral decisions, such as in adjudication, in over 40% of instances,[104] representing a significant proportion. Furthermore, the 'vast majority of respondents (67%) showed support for

[101] Goodrich, *supra* n. 77, at 5.
[102] Queen Mary University of London and Pinsent Masons, n. 100, at 20.
[103] *Ibid.*, at 21.
[104] *Ibid.*, at 18.

mandatory compliance with pre-arbitral decisions as a pre-condition to arbitration'[105] where the respondents further expressed that 'it is non-compliance which causes arbitrations to continue'.[106]

A slightly earlier 2018 survey confirmed that arbitration continues to be the 'preferred dispute mechanism for cross-border commercial disputes'.[107] However, it must be asked if this is simply due to its existence as the imposed default position, without the availability of an alternative resolution process. It was said in 1984 that arbitration 'is often the only dispute resolution process acceptable in business contexts where parties from different countries have rejected recourse to each other's legal system at the outset of the contractual relationship'.[108] Over thirty-five years later it could be said that this view still holds true today. The previously referred-to 2018 survey advised that 'parties are increasingly resorting to various forms of ADR in the hope that a swifter and more cost-efficient resolution can be found to disputes before having them resolved by arbitration'.[109] However, for arbitration it remains that 'cost continues to be its worst feature',[110] together with a 'lack of speed'.[111] A survey in 2011, albeit now dated, confirmed that the average cost for an international commercial arbitration, across all business sectors, was circa GBP 1.35m, of which 63% was spent on external legal costs and 11% on the cost of barristers.[112] There is no reason to think that international commercial arbitration is any less expensive today.

An indication of the present cost of arbitration can be determined using the International Chamber of Commerce (ICC) Cost Calculator.[113] The calculator advises that for a disputed amount of USD 2,000,000, with one arbitrator and 2,000hrs of legal work, the Estimated Total Cost is likely to be circa USD 613,000 for each party. Using the calculator for a disputed amount of USD 20,000,000, with three arbitrators and 4,000hrs of legal work, the Estimated Total Cost increases to circa USD 1,640,000 per party. This would seem to indicate that

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105 *Ibid.*, at 19.
106 *Ibid.*, at 20.
107 White & Case and Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration* 5 (School of International Arbitration 2018). At 8 the survey confirms that 67% of respondents considered 'cost' to be the worst characteristic of international arbitration with lack of speed cited by 34%.
108 William W. Park, *Arbitration of International Contract Disputes*, 39(4) Bus. Law. 1783 (Aug. 1984).
109 *Supra* n. 107, at 5.
110 *Ibid.*, at 2.
111 *Ibid.*, at 2.
112 *CIArb Costs of International Arbitration Survey 2011*, at 2, 10 and 15. The average cost being GBP 1,348,000 in common law jurisdictions and GBP 1,521,000 in civil law jurisdictions with claimants spending 12% more than respondents. The survey sample was from 254 international arbitrations where 25% of the disputes were in the construction and engineering sector.
113 *See* https://www.international-arbitration-attorney.com/icc-arbitration-cost-calculator/ by the International Chamber of Commerce, for the 'Total ICC Cost Calculator' (accessed 06 Oct. 2020).

there is a minimum level of dispute where the cost of an international commercial arbitration may be justified. The 2011 survey confirmed that the average time for an international commercial arbitration was 'between 17 and 20 months, depending on the nature of the dispute'.[114] The London Court of International Arbitration (LCIA) reported in 2017 that the total average duration of an arbitration procedure was sixteen months.[115] In 2019 the ICC reported that the average duration of arbitration proceedings was twenty-six months,[116] with the same period of twenty-six months reported for 2020.[117] Given the correlation between time and cost, it is understandable that in the minds of many users international commercial arbitration has now outpriced itself.

It has been said that international commercial arbitration is 'an expensive way of resolving disputes'[118] where it 'might not be commercially sensible to pursue disputes below a minimum threshold of US$11m'.[119] This position is reflected in the reporting of the ICC for the year 2020 where the average amount in dispute referred was USD 54m. The cases pending at the end of 2020 had an average value of USD 145m and a median value of USD 10m.[120] There is now an established body of opinion that believes international commercial arbitration is now of a scale of cost and duration where it is only the very largest of disputes that can justify the associated level of expenditure. In this context there would seem to be a clear case for UNCITRAL considering adjudication to supplement arbitration as a further choice of Model Law in resolving small to medium-scale construction or other industry disputes.

Whilst there is an increasing preference for pursuing ADR, this would seem conditional on the availability of arbitration as last resort. The 2018 survey confirmed that the two most valuable characteristics of international arbitration are enforceability of awards and avoiding specific legal systems/national courts.[121] These two important characteristics, although related to, are not derived from the UNCITRAL Model Law on International Commercial Arbitration, but from the unique presence of the New York Convention (the Convention)[122] for the enforcement of arbitral awards. The influence of the Convention cannot be

[114] *Supra* n. 112, at 12.
[115] London Court of International Arbitration (LCIA), *Facts and Figures, Costs and Duration* (2013–2016).
[116] International Chamber of Commerce (ICC), *2019 ICC Dispute Resolution Statistics* 17 (2020), ICC Publication No. DRS 901 ENG.
[117] International Chamber of Commerce (ICC), *2020 ICC Dispute Resolution Statistics* 19 (2021), ICC Publication No. DRS 895 ENG.
[118] Queen Mary University of London and Pinsent Masons, n. 100, at 15.
[119] *Ibid.*, at 15.
[120] International Chamber of Commerce (ICC), *supra* n. 117, at 17.
[121] *Supra* n. 107, at 7.
[122] United Nations Secretary General, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations conference on International Commercial Arbitration (10 June 1958).

overstated – it has been said that it is 'the most successful multilateral instrument in the field of international trade law'[123] and 'the touchstone of the entire system of international commercial arbitration. It is in practice the one truly international source of law in arbitration'.[124] The Convention currently has a body of 'more than 2,500 court decisions from more than 90 countries'[125] from both Common Law and Civil Law jurisdictions. The primary objective of the Convention is to provide 'common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards'.[126] Accordingly, recognition and enforcement under the Convention 'applies to all foreign awards, that is, all awards made outside a treaty country, thus anywhere else in the world'.[127]

The Convention is rendered more remarkable because its implementation, over a period of more than sixty years, is wholly reliant upon local courts in the 168 Convention signatory states,[128] all of whom have 'diverse legal and cultural perspectives'.[129] A fundamental tenet of the success of the Convention has been its narrow construct and interpretation by individual state courts, which cannot be underestimated. This narrow interpretation and limited grounds[130] on which to refuse enforcement allows justice to be dispensed and upheld where it is most appropriate, 'in order to ensure the efficacy and enforceability of international arbitral awards'.[131]

The narrow grounds for refusal under Article V of the New York Convention can be summarized as 1(a) incapacity or lack of valid agreement, 1(b) a party not being given notice or opportunity to present their case, 1(c) the award being made outside the terms of the case, 1(d) the composition of the tribunal was not in accordance with the agreement between the parties, 1(e) the award is not binding or has been set aside, 2(a) the subject matter is not capable of settlement under the law of the country in which the award was made, and 2(b) enforcement would be contrary to the public policy of the country in which enforcement is being

[123] International Council for Commercial Arbitration (ICCA), *ICCA's Guide to the interpretation of the 1958 New York Convention* v (2011), ISBN 978-90-817251-1-18.
[124] Pierre Karrier, *Enforcement of Arbitral Awards Globally*, International Arbitration Group, 1 (Littleton Chambers, London 2005).
[125] Newyorkconvention.org at homepage (accessed 23 Aug. 2021).
[126] Karrier, n. 124, at 1.
[127] *Ibid.*, at 2.
[128] Iraq has become the 168th state signatory to the New York Convention, where the Convention came into force on 23 Mar. 2021.
[129] Albert Jan van den Berg, *Refusals of Enforcement Under the New York Convention of 1958: The Unfortunate Few*, Arbitration in the Next Decade – Special Supplement (1999), ICC International Court of Arbitration Bulletin at 75.
[130] United Nations Secretary General, *supra* n. 122, at Arts V 1. (a) to (e) and 2. (a) and (b).
[131] van den Berg, n. 129, at 94.

sought.[132] In the absence of similar narrow grounds for refusal, being previously agreed through a convention, for an international adjudication decision there is an excessively wide latitude for differing interpretation and inconsistency for enforcement by local courts. Such latitude can only serve to undermine the legitimacy of any enforcement process for international adjudication, as has been demonstrated by past local court judgments.

Arbitral tribunals do not have the power to enforce arbitral awards under the New York Convention. It is the domain of national courts through their coercive powers under the New York Convention that enables the enforcement of arbitral awards. Although there is no single agreed definition of an arbitral award it is now well established internationally that an 'award' can only be made by an arbitral tribunal. Accordingly, a 'decision' made by an adjudicator, a DAB or a DAAB can never avail of the international, or cross-jurisdictional, enforcement capability of the Convention.

A possible solution to allow for adjudication enforcement could be to amend the Convention to provide for international adjudication. This approach is likely to be problematic in undermining the clarity of the existing Convention, as much of its success is accorded to its brevity, where the operative part of the Convention comprises only sixteen Articles over 6 pages.[133] For the Convention signatories there is little incentive to complicate what is widely considered to be the continued success of the Convention in its present form. Furthermore, the securing of agreement for what would be a significant amendment to the Convention across the 168 state signatories could be an almost impossible proposition.[134]

A second alternative would be to establish an additional convention to support a new Model Law on International Commercial Adjudication. This approach has been adopted for mediation[135] where the Singapore Convention of 2019[136] has sought to create a harmonized framework for the enforcement of international mediation settlement agreements. In 2014 UNCITRAL determined to consider the enforcement of settlement agreements, in recognition that enforcement was

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[132] Refer to United Nations Secretary General, *supra* n. 122, ArtsV 1. (a) to (e) and 2. (a) and (b) for the full text of grounds upon which the enforcement of an arbitral award may be refused.

[133] United Nations Secretary General, *supra* n. 122, at 8–13.

[134] There are some who consider that the New York Convention should now after sixty years be amended. *See* e.g., Albert Jan van den Berg, *The Proposed New New York Convention* (2018) which identifies amendment in a number of areas including: the absence of a global field of application of the Convention; the written form requirement of the arbitration agreement; the possibility of enforcement of interim measures; discretionary power to enforce an award where a ground for refusal exists; waiver of a ground for refusal of enforcement; the annulment of the award in the country of origin; and procedure for enforcement of a Convention award. The author would suggest that whether these amendments could be further supplemented with a procedure to include the enforcement of a temporarily binding adjudication decision is questionable.

[135] UNCITRAL, *supra* n. 13.

[136] *Ibid*.

difficult across international jurisdictions.[137] It took a further five years to develop the Singapore Convention to the point of being available for signature on 7 August 2019. Despite significant early interest only six nations have ratified, thus bringing into force, the Singapore Convention.[138] The more nations that ratify the convention the more effective it will be in supporting the swift enforcement of cross-jurisdictional mediation settlement agreements. In 2021, some sixty-three years after the New York Convention was enacted, the States of Belize, Malawi, Sierra Leone and Iraq have only just become Convention signatories. This would suggest that, despite the declarations of good intentions by the early signatories, the widespread adoption of the Singapore Convention, in securing the necessary critical mass of signatories, may be a long way into the future.

It should be appreciated that mediation prior to the Singapore Convention already had the benefit of worldwide awareness, being previously promoted through the UNCITRAL Model Law on International Commercial Conciliation (2002). This Model Law was then amended to become the UNCITRAL Model Law on International Commercial Mediation (2018). Thus, the concept of a consensual decision made between parties in dispute, as opposed to being imposed by a third party neutral as in arbitration, had already been well established as a global dispute resolution process.

Adjudication in comparison is presently limited in use, or consideration of implementation, to circa twelve jurisdictions. It is unlikely that a new convention for the international enforcement of temporarily binding adjudication decisions would have the benefit of the same impetus for expediency that was present for the Model Law on mediation. This is particularly so where the two concepts of consensual and third-party-imposed decision making appear to be now already adequately catered for. Even if widespread support could be secured for the development of a new Model Law for International Commercial Adjudication, it could take more than ten years to establish a new convention to support the enforcement of international adjudication decisions.

In the absence of a new Model Law on International Commercial Adjudication the criticisms over time and cost regarding arbitration remain, and

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[137] UNCITRAL, *Report of the United Nations Commission on International Trade Law*, 47th Session, held in Vienna, 22 (7–18 July 2014).

[138] By June 2020 a total of forty-six states including China and the United States had signed up for the Convention. In this context 'signing' is an expression of intention to comply with the treaty, which is not binding. Only on ratification does it formally become binding upon the individual State. However, it remains that only Belarus, Ecuador, Singapore, Saudi Arabia, Qatar and Fiji have committed to the convention as coming into force, where Belarus and Saudi Arabia have committed with reservation. Honduras and Turkey are expected to commit to bringing the convention into force in 2022. Neither the EU nor any of its Member States have signed up, possibly because they already have the benefit of the Mediation Directive No.2008/52/EC which allows the enforcement of cross-border mediated settlement agreements through the national courts of EU Member States.

it may be here that attention and resource should be directed. Where an agreed resolution cannot be secured, arbitration provides an imposed solution that can be availed of by parties in dispute. Furthermore, in an international context, arbitration is critically supported by the New York Convention in providing for cross-jurisdictional enforcement.

A further criticism of arbitration is the direct result of one of its primary virtues, that of privacy. Because arbitrations are confidential, 'arbitrators around the world are grappling with recurrent issues',[139] where without accepted guiding precedent arbitrators must prepare awards 'largely in ignorance of what their colleagues are deciding'.[140] In going some way to address this issue, new international courts are emerging in many jurisdictions to provide an alternative and attractive forum to develop precedent, such as the Technology and Construction Court (TCC) in London. However, this approach assumes that State courts have an easily accessible and efficient procedural framework such as that enjoyed by the TCC, which is not always the case.

Nonetheless it has been suggested that 'it would be helpful to the construction industry if a body of case law on construction issues emerges from the international courts'.[141] It has been said that 'a general *lex constructionis* may emerge from the decisions of the new breed of international courts'.[142] Given the prolonged time scale that would be required to develop an accepted and comprehensive body of international case law on adjudication decisions, which would likely evolve with differing interpretation as demonstrated by the Singaporean Persero cases, an accepted *lex constructionis* may be just wishful thinking. It may be more expedient to pursue a new convention for adjudication enforcement rather than wait for an accepted body of *lex constructionis* to be established.[143]

[139] Sir Rupert Jackson, *Construction Contracts and Adjudication, Webinar Presentation at the Astana International Financial Centre Court* 1 (11 June 2020).

[140] *Ibid.*, at 1.

[141] *Ibid.*, at 2.

[142] *Ibid.*, at 2, where *lex constructionis* is the construction derivation of *lex mercatoria*, the body of legal rules and principles developed by the international business community based on custom, industry practice and general principles of law that are applied in commercial arbitrations.

[143] A recent England & Wales case *Motacus Constructions Ltd v. Paolo Castelli SPA* [2021] EWHC 356 (TCC) concerned whether a construction contract for works in England with an exclusive jurisdiction clause in favour of a foreign court precludes the English court from entertaining proceedings for breach of the term implied by the Scheme for Construction Contracts such that the decision of an adjudicator binds the parties until the final determination of the dispute, with reference to Art. 7 of the 2005 Hague Convention. The Court concluded that adjudication constitutes an interim measure of protection within the meaning of Article 7of the 2005 Hague Convention, and that the reality of the granting of summary judgment in the context of an adjudication is to grant an interim, rather than a final and conclusive, remedy. As such, the court was not required to suspend or dismiss the proceedings. Whilst there are some who would purport that this is an international commercial adjudication precedent, in preventing a contracting party 'side-stepping' adjudication through a foreign jurisdiction clause, there are others who would say that this is simply a reaffirmation of well established domestic law.

For many arbitration users, the incumbent presence of arbitration is now a dispute resolution process that has become increasingly distant and economically unattainable for those parties with small or modest claims. The warning signs have been there for some time; as far back as 2012 it was said that arbitration is 'a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts',[144] and that 'arbitration is now seldom the economic alternative, the complexity and comprehensiveness of the modern-day process has led to an explosion of costs to the detriment of clients who are its end-users'.[145]

It has been said that 'in recent years there has been a growing sense of frustration amongst businessmen involved in international arbitration, because of the lengthy delays involved in obtaining the hoped-for promised land of the arbitral tribunal's award'.[146] For many users of international commercial arbitration the preference is to take advantage of the presence of arbitration in conjunction with another dispute process, with the aim of avoiding arbitration if at all possible.[147] This approach is promoted in the FIDIC suite of contracts through the stepped dispute resolution clauses, where the stated objective is to secure resolution without the necessity for arbitration.

2.6 Could expedited arbitration provide a more appropriate solution?

It has been said that 'increasing judicialization through institutional arbitration comes at a cost, expedition, where informality and efficiency, the attributes traditionally associated with arbitration are sacrificed'.[148] There are already significant changes being implemented by arbitral institutions to acknowledge recognized shortcomings and to actively accommodate the demand for small claims resolution.[149] The ICC has reported 'the increasing number of cases with an amount in dispute not exceeding US$2m'.[150] In response, the ICC procedure

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[144] Sundaresh Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, Paper presented at the Opening Plenary Session of the ICCA Congress 2012, Singapore, 13 (10 June 2012).

[145] *Ibid.*, at 13.

[146] Alan Redfern & Martin Hunter, *International Arbitration* 361 (6th ed., Oxford University Press 2015), ISBN: 978-0-19-871425.

[147] *Supra* n. 107, at 7.

[148] Redfern & Hunter, *supra* n. 146, at 13.

[149] For example, the ICC has established the Expedited Procedure Provisions (EPP) in seeking a proportionate resolution to the increasing number of cases with an amount in dispute of less than USD 2m. ICC Dispute Resolution, 2019 Statistics at 14, ICC Publication No. DRS 901 ENG.

[150] International Chamber of Commerce (ICC), n. 116, at 12.

referred to as 'Expedited Procedure Provisions' (EPP)[151] seeks to issue an arbitral award within six months of the first case management conference.[152]

Perhaps in recognition of the likely limitations of a new Model Law on International Commercial Adjudication and the increasing demand for arbitration reform, UNCITRAL has recently developed and published Expedited Arbitration Rules[153] which came into force on 19 September 2021, supported by a Draft Explanatory Note.[154] The rules include a similar period to the ICC Expedited Procedure Provisions for the issue of the arbitral award of 'six months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties'.[155]

But in many cases six months will still be considered too long and remains an extended duration that requires considerable commitment and commensurate cost. Given the time to constitute the tribunal, or to hold the first case management conference, it would not be unusual to have a total dispute resolution time scale of seven to eight months, or possibly more. This duration cannot be considered near real time or near contemporaneous in the duration of a typical contract. Instead of disputes being contained and addressed at pace, this time scale still encourages procedural prolongation through increasing complexity, increasing scale and the coadunation of what would otherwise be lesser, more easily resolved issues in dispute.

It has been demonstrated that other dispute resolution methods such as mediation and conciliation can regularly reach decisions in much shorter periods of time, where the default decision time for adjudication in many jurisdictions is twenty-eight days.[156]

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[151] *Ibid.*, at 18. The ICC Expedited Procedure Provisions (Art. 30 and Appendix VI of the ICC Arbitration Rules 'EPP') provide for streamlined arbitration ending with a final award within six months of the case management conference, under a reduced scale of arbitrator fees. Unless the parties have explicitly opted out, the EPP applies automatically in cases where the arbitration agreement was concluded post 1 Mar. 2017and the global amount in dispute does not exceed: USD 2 million for arbitration agreements concluded on or after 1 Mar. 2017 and before 1 Jan. 2021; and USD 3 million for arbitration agreements concluded on or after 1 Jan. 2021.

[152] A similar provision of seeking to publish the award within six months has been adopted through the Hong Kong International Arbitration Centre (HKIAC), whilst the Dubai International Financial Centre (DIFC) is seeking to introduce expedited procedures in 2021. Most arbitral institutions are now considering or have some form of expedited procedure in place.

[153] The UNCITRAL Expedited Arbitration Rules can be found at, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_ear-e_website.pdf.

[154] The UNCITRAL Expedited Arbitration Rules, Draft Explanatory Note can be found at, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9-1082-add1-e.pdf.

[155] *Supra* n. 153, Art. 16 1.

[156] For the year 2018/2019, in the UK, 53% of adjudication decisions were made within the twenty-eight-day period, with a further 33% issued within forty-two days where the 14% remaining decisions were issued within seven weeks and all decisions being made within six months. Adjudication Society Report no. 18, *Construction Dispute Resolution*, at 2.6, at 28.

There are established methods to reduce the procedural time in arbitration, such as 'without hearing' or 'documents only'. In this context it is not unrealistic to have, and to promote, a truly expedited arbitral process conducted over eighty-four days, a dispute resolution timescale promoted by the FIDIC contract forms, or less. This would result in a substantially lesser period than 180 days, or six months for expedited procedure, as presently promoted by many leading arbitral institutions.

The process of truly expedited arbitration procedure, as opposed to what could be presently seen as simply shortened traditional arbitration procedure, could be set out as a default provision in the contract. Applicable law, the forum and certainty of the procedure would be known to the contracting parties from the outset, in balancing flexibility and certainty. Truly expedited procedure incorporated as a future amendment to the FIDIC suite of standard contracts is likely to be supported by the World Bank and other MDBs, thus securing early and widespread legitimacy.

The precise detail of truly expedited procedure amendment to standard construction contracts is beyond discussion in this article but the particulars of the procedure, including limiting criteria such as scale and complexity, would be known and agreed upon entering into the contract. For example, an upper claim limit could be predetermined depending on the scope of the contract. In addition, the preference to resolve disputes during the currency of the contract, thus avoiding retrospective disputes long after completion, could be achieved through long-stop time-period provisions. In creating this amendment to promote truly expedited procedure, the process of arbitration could be seen as being more relevant for its users in reflecting the fundamental business needs of the parties in dispute, namely certainty, expediency and finality.

3 CONCLUSION

Adjudication has become a successful dispute resolution mechanism within the context of primarily State legislation, or contract law, in a limited number of almost exclusively common law jurisdictions. Whilst the legislation differs between these jurisdictions, a degree of consistency could be introduced through a new UNCITRAL Model Law on International Commercial Adjudication. The extent of adoption of the new Model Law, where adjudication is already well established, would depend on the identification of a compelling need to change existing legislation. Given the accepted and continuing success of adjudication in these jurisdictions, this compelling need for change may be difficult to identify. However, a new Model Law could be immediately beneficial for those jurisdictions that are presently considering statutory adjudication, but have yet to pass

legislation, to assist in facilitating adjudication as a further choice in dispute resolution.

Contractual adjudication, as promoted by the FIDIC suite of construction contracts, is presently available to parties in any jurisdiction. Whilst it is the case that the majority of DAB or DAAB decisions are complied with, there continues to be doubt about the available remedy for non-compliance on a cross-jurisdictional basis. There is now uncertainty about how effective the international enforcement objective of a new Model Law on adjudication could be without the support of its own convention framework. This uncertainty is well founded, as the amendment of the New York Convention to allow enforcement of adjudication decisions, the establishment of a new convention in support of adjudication decision enforcement, or an established and consistent body of *lex constructionis* would appear to be unlikely, or at best protracted in development.

This negative view of the certainty for international enforcement is further accentuated by the context that the international enforcement framework for the two concepts of consensual decision-making[157] and imposed decision-making[158] are already available. As a result, and in the absence of a framework for international adjudication enforcement, there is a risk that any new UNCITRAL Model Law on International Commercial Adjudication may in practical terms only serve to add further to the continually evolving body of disputology,[159] such as that of the differing bodies of opinion that have arisen out of the Singaporean Persero cases.

Alternatively, a greater commitment by arbitral institutions to truly expedited arbitration, as a primary dispute process, would meet the clearly expressed demand of at least the international construction industry for the availability of a more expedient imposed dispute resolution process. This demand may now be met in part by the expedited arbitration rules as now promoted by institutions such as the ICC, the Hong Kong International Arbitration Centre (HKIAC) and more recently by UNCITRAL. But the question still remains, have these rules gone far enough in terms of expediency to satisfy the users of the arbitral process?

Alternatively, the demand could be met by amendment to standard construction contracts such as those provided by FIDIC to include truly expedited arbitration, with a substantially shorter time scale than six months as presently promoted

157 UNCITRAL, *supra* n. 13.
158 UNCITRAL, *supra* n. 14.
159 'Standard forms of international contracts produce a second layer of legal principles through their standard forms of contract, which are superimposed on the applicable law of the contract between the employer and the contractor. It is difficult and unhelpful for anyone to be involved in the solution of disputes arising from such contracts unless the person is very familiar with, if not an expert in, the areas and forms of disputology incorporated in them'. Dr Nael Bunni, *Recent Developments in Construction Disputology*, 17 J. Int'l Arb. 105–115 (2000).

by many arbitral institutions. In this process the parties in dispute would retain the benefit of the overarching capability for international enforcement through the New York Convention, where this can be provided without undermining the preservation of party autonomy.

A reduction in the further complexity of dispute resolution, where it could be argued that this has to some degree already been established through the concept of ADR, would suggest that the limitations of each dispute resolution process should be recognized. In this regard adjudication, whilst being successful in a domestic context, is limited in an international or cross-jurisdictional context. Despite good intentions, this limitation is unlikely to be resolved through the introduction of a new Model Law on International Commercial Adjudication. A new Model Law would probably fall short in providing certainty of cross-jurisdictional enforcement, without excessive complexity on enforcement that may still prove tenuous, as a fundamental requirement of the international construction industry.

In comparison, the process of arbitration and its supporting framework is already well established on a worldwide basis. The further realignment of the arbitration process, already recognized as required by many to better reflect the needs of its users, is likely to be well received and accepted. Truly expedited arbitration, which is of a timescale of weeks rather than months, is capable of being implemented with relative ease in meeting the clear demand of the international construction industry. This would result in a more appropriate 'fit for purpose' and final dispute resolution process that is more time-concurrent. It would be achieved through a greater expediency of time in procedure and corresponding reduction in cost, thus recapturing the essence and reputation of arbitration as originally intended. The author asserts that this could be secured without the necessity of introducing a new UNCITRAL Model Law on International Commercial Adjudication.