Does Adjudication spell the death of Mediation?

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In recent years mediation in Hong Kong has successfully resolved a good number of major disputes in building and civil engineering projects. It has firmly established itself as the preferred alternative to arbitration and litigation. However, the Government of the HKSAR has now introduced adjudication as a further alternative on some projects, albeit on a pilot basis. So what is this new alternative and how will it affect mediation in HK?

What is adjudication?

Some people say adjudication is fast-track arbitration. Like an arbitrator, the adjudicator has to decide on issues based on findings of facts and law in a judicial process. The adjudicator has to act impartially and follow the rule of natural justice. There is a strict timetable for the publication of an adjudicator's decision once the process is set in motion. In a nutshell, adjudication gives the parties a temporary fix for their problem so that they can put their difference aside and move on whilst retaining a right to challenge the decision through arbitration at a later date. The difference with arbitration is that one does not have to wait until project completion before commencing adjudication proceedings and the strict time limit means that adjudication should be cheaper than full-blown arbitration.

Adjudication has taken a firm hold in the UK construction industry because it is mandated under the provision of the Housing Grants, Construction and Regeneration Act 1996, which amounts to a statutory interference of the civil rights of contracting parties under Construction Contracts[1]. Such success may not be repeated in HK unless the Government were to provide similar legal infrastructure and judicial support to the process as their counterpart in the UK.

Proponents of adjudication say the temporarily binding effect of an adjudicator's decision will re-focus the parties' attention and effort on the project, which avoids hardening of attitude and mistrust should the difference be allowed to become a protracted dispute. They argue that speed is of the essence and the process is particularly apt to handle differences over interim payment or standard and quality of workmanship without adversely affecting the progress of the Works.

However, anecdotal evidence from the UK suggests that adjudication might actually create more stress and tension amongst employers, project teams and contractors because the tight timescale for delivering the adjudicator's decision leads to:

(a) complaints that some parties abuse the process with tactical play in order to ambush the opposing party, and
(b) rough justice for want of a proper evaluation of the issues involved.

Whilst retaining the right to appeal the adjudicator's decision in arbitration later aggrieved losing party might not be amenable to work co-operatively in the meantime. It is not uncommon to find a series of adjudication referrals on a tit-for-tat tussle between the parties on the same project. This has the undesired counter effect of engendering mistrust between the stakeholders which might deteriorate into outright hostility, further endangering the wider success of the project.

Adjudication – v – Mediation

Much has already been written about mediation as an appropriate alternative resolution process to confrontational, antagonistic and costly processes such as arbitration and litigation to resolve construction and engineering project disputes. Under the right circumstance, the benefits of mediation over these traditional processes are real. It is often said that one of the most valued benefits of mediation is how it empowers the parties to take control of the process to resolve mutual problem or difference in a collaborative spirit, which has the added benefit of preserving or mending frail commercial relationships. So how will it fare against adjudication?

First and foremost, these are different processes and it would be wrong to compare them and say one is necessarily better than the others. Horses for courses, they are both appropriate alternatives to traditional processes in their own right and their suitability will depend on the nature as much as the timing of their introduction in the life cycle of the dispute. Another consideration is the expectation of the parties. How much control of the process and outcome do they intend to retain? In this respect, mediation offers more flexibility and the parties have more power over the eventual outcome.

It is important to understand the different features of the processes so that parties can make an informed decision on which process to adopt to facilitate the resolution of their issues. The following table highlights some of the differences between the two processes. These are representative and not intended to be exhaustive.

Characteristics of the Processes	Adjudication[2]	Mediation
Voluntary & confidential	Yes	Yes
Administration authority	HKIAC[3]	No
Involvement of a third party neutral	Yes	Yes
Strict time limits	Yes[4]	No
Strict rule of evidence	No	No
Private meeting with one or the other party	No	Yes
Investigate inquisitorially to establish facts and law	Yes	No
Findings of facts and law	Yes	No
Formal hearing/meeting with the parties	Sometimes	Yes
Making order for directions	Yes[5]	No
Based on contractual rights and obligations	Yes	No
Based on commercial reality and acceptable compromise	No	Yes
Process conclude with enforceable Decision by other	Yes	No
Process conclude with enforceable agreement by parties	No	Usually
Party autonomy in choice of options for resolution	No	Yes
Decision subject to challenge in subsequent arbitration	Yes	No[6]

So, the choice is not, which is a better process? Rather, the question is what do the parties want from the process and how do they intend to achieve that objective. If the parties expect a deterministic approach with a declaration of respective rights and obligations in accordance with the contract then adjudication fits well. On the other hand, in many disputes parties just want to find a reasonably acceptable solution so they can draw a line in the sand, close the chapter on the particular issue involved and move on. In that case, mediation is more suited since it allows the parties to maintain their relationship without facing each other in confrontation. Mediation gives them a non-threatening forum to negotiate with the assistance of a neutral mediator in a confidential basis. In collaboration, it has been demonstrated that parties with genuine effort and intent can and will achieve breakthrough in mediation to resolve their difference, sometimes with amazing options that no tribunal or the Court could imagine or be able to deliver.

Unless one were to accept the perceived notion, rightly or wrongly, that parties in dispute subscribe to the axiom that 'a problem given away is a problem solved' then adjudication, like arbitration, may just represent the answer to their prayer. Why? Because it is not difficult to see it is easy to wash one hands of responsibility by passing the buck and hiding anonymously behind the process, the adjudicator and the advisors for a 'wrong' decision. The alternative of taking responsibility and being accountable for one's choice and decision can be daunting and harrowing for some particularly when the organisation culture does not encourage individual's proactive initiatives or endorse and support collective responsibility and accountability within a team or a department. In this circumstance an adjudicator's decision is a convenient way out for them since the decision by a third party under a judicial process legitimately takes the decision making out of their hands and accountability of the decision becomes impeachable. However, the argument for accountability is often an extension of the excuse to abdicate responsibility because the manager does not want to make hard decisions himself.

It is uncommon to find arguments involving complicated issues of law in the majority of construction disputes. It is probably more important to consider commercial reality and the impact on the business relationship if the parties were to go through an acrimonious fight. With an international acknowledged statistical success rate of around 70% in both voluntary and mandated mediation one is bewildered to answer why so many parties still fail to give mediation a go before adopting other processes to resolve their disputes.

It may not be the panacea for all things but mediation allows management to retain maximum control of the procedure and outcome without compromising on legal rights. Responsibility is accountability. Properly prepared, negotiation can achieve responsible and accountable win-win compromise in mediation. Should responsible managers give up the control and management of the resolution process to other people and allow a third party to dictate the terms of settlement for their disputes? Shouldn't they and their advisers explain why mediation is not used or considered before the matter is turned over to judicial process such as adjudication?

What would you rather have, draw of the luck by referring your dispute to an adjudicator or take control of your destiny with the assistance of a mediator to fashion a compromise that both sides can live with?

[1] Ref. Sections 104, 108 of Part 2 of the Housing Grants Construction and Regeneration Act 1996
[2] Ref. Government of the HKSAR proposed Construction Adjudication Rules (2004)
[3] Ref. Clause 1.3 nominating the HKIAC to administer the adjudication
[4] Ref. Clause 9.1 adjudicator shall make his decision within 56 days from the Commencement Date or within such other period by consent of the parties in writing and, shall not extend by more than 28 days on his own accord
[5] Ref. Clause 8 Power of the Adjudicator
[6] There is no decision on right or wrong and entitlement or damages in mediation