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## Adjudication? from the Perspective of Hong Kong's Contractors

### Introduction

Mr James Bowling, a barrister from 4 Pump Court, London, delivered a seminar, ***“Has the time come for mandatory adjudication in Hong Kong?”*** to members of the Society of Construction Law Hong Kong in June 2013. Afterwards, I attended a few seminars that discussed adjudication in Hong Kong followed by taking an adjudication course organised by the HKIA/HKIS from April-May 2016. All these events give me insights into adjudication in Hong Kong, especially from the perspective of contractors, since they could be one of the parties that will frequently use this means of alternative dispute resolution (ADR) in the future.

Before writing this article, I used questionnaire and telephone interviews to collect first-hand opinions from 16 professional and senior management practitioners (with an average of 23 years of work experience) working for 11 local major contractors (including main and sub-contractors) to answer the following five questions:

1. Have you heard of adjudication?
2. Have you encountered any dispute that required ADR to resolve?
3. In case a dispute arose, which parties were involved?
4. Which ADR(s) did you use to resolve the dispute(s)?
5. If adjudication were to be launched in Hong Kong, would you try to use it?

The results are below.

### Contractors' Views on Adjudication

#### 1. Have you heard of adjudication?

Most/nearly all respondents had heard of adjudication. Only one out of the 16 (6.3%), a QS with over ten years of experience, had not heard about it. This revealed that the majority of Hong Kong's major contractors were aware of the existence of adjudication as an ADR.

#### 2. Have you encountered any dispute that required ADR to resolve?

Among the 16 returned questionnaires, only eight (50%) experienced disputes that could not be resolved through negotiation, thereby requiring ADR to resolve, whilst the other eight (50%) did not have any dispute that required ADR. This was mainly due to the strategy employed by each contractor in reaction to the dispute it faced. Among the eight that had no dispute, they mentioned that their companies tried their utmost to resolve any dispute through internal negotiations, commercial settlements, etc, but never escalated to adopting ADR or litigation. This seemed a good sign for resolving disputes.

#### 3. In case a dispute arose, which parties were involved?

Disputes mainly arose between: 1) main contractors and their clients/consultants and 2) main contractors and sub-contractors. This was expected, as the contracting parties tended to be the main contractor and the client/consultant or the main and sub-contractors. In this way, adjudication may be a suitable ADR for disputes in the future, since it is suitable for all contracting party tiers, including clients, consultants, main contractors, and sub-contractors.

#### 4. What ADR(s) did you use to resolve the dispute(s)?

Among the eight replies that required ADR, one was resolved through commercial settlement. This is strongly recommended, since it is prompt, less costly than other common means of resolving disputes like mediation, arbitration, etc., and the best for maintaining a good relationship between the parties. Among the other seven, three were resolved through

mediation (43%) and four through arbitration (57%). These results were as expected, as most contractual conditions nowadays stipulate mediation as a first-tier ADR, although it may not be mandatory, while arbitration is usually a second-tier ADR. Thus, if contracting parties have disputes that require ADR to fix, their most common options are currently mediation and arbitration.

### 5. If adjudication were to be launched in Hong Kong, would you try to use it?

Among the 16 replies, one respondent said that depended on the extent of the dispute and the cost and time required for adjudication. From what I understand about adjudication, it is suitable for all payment disputes. Hence, no matter how big a dispute is, it is suitable for adjudication. Furthermore, its cost is nominal and the results are prompt, since it has a fixed time frame (i.e., a maximum of 55 working days to resolve the dispute). Hence, adjudication costs less and is faster than arbitration.

Two respondents hesitated to use adjudication. One claimed to have never encountered a dispute, while the other said that adjudication was “expensive and time-consuming”. In my opinion, adjudication, when compared to mediation, may be a bit more expensive, but it is final and binding (only subject to minimal review through arbitration). While the time to reach a decision under adjudication (up to 55 working days) may be a bit longer than under mediation (which may take up to seven days), adjudication costs less in both money and time, even though it comes with the same binding decision and final award. Hence, the latter respondent might not have fully understood what adjudication involves. If she did, she might have changed her stance.

Thirteen out of the 16 (about 81%) respondents firmly supported adopting adjudication as an ADR because it usually ensures:

- (a) Faster/quicker cash flow
- (b) Prompt/immediate action
- (c) More concise decisions by an adjudicator

- (d) Preventing the disadvantage of like arbitration that could only start after the completion of a project
- (e) Low cost
- (f) The resolution of a dispute while it is still fresh
- (g) Simplicity
- (h) That both the client and consultant would not procrastinate in resolving the dispute(s)

One respondent raised the point that it was difficult for him to adopt adjudication because today’s contracts do not state that adjudication is an option. Instead, mediation/arbitration are still the most commonly-stated choices for resolving disputes. This is a good point. As far as I know, when adjudication becomes mandatory under the relevant ordinance, the relevant contract provisions will very likely be amended accordingly to include it.

### Conclusions

The above analysis noted that disputes exist at all tiers, as expected and revealed from the 11 local leading contractors. Furthermore, it found that local contractors (including main and sub-contractors) were fully aware of the existence of adjudication, even though they might not have kept fully abreast of its mechanism and advantages when compared to other means of ADR. Most of the contractors experienced disputes at work and some used internal negotiations to resolve them, while the remainder employed mediation or arbitration. All of the respondents, when choosing ADRs, considered both the time consumed and costs encountered. They agreed that if there were another ADR apart from mediation and arbitration that could be simple, fast, less costly, final, and binding, they would definitely consider it. Adjudication could be that possible alternative.

Most of the respondents (13 out of 16, or around 81%) would consider using adjudication in the future, while taking into consideration my explanation of the advantages to it. Is this a good sign that Hong Kong’s local leading contractors and sub-contractors are ready for the coming of adjudication? I can only hope so.