Dispute Resolution

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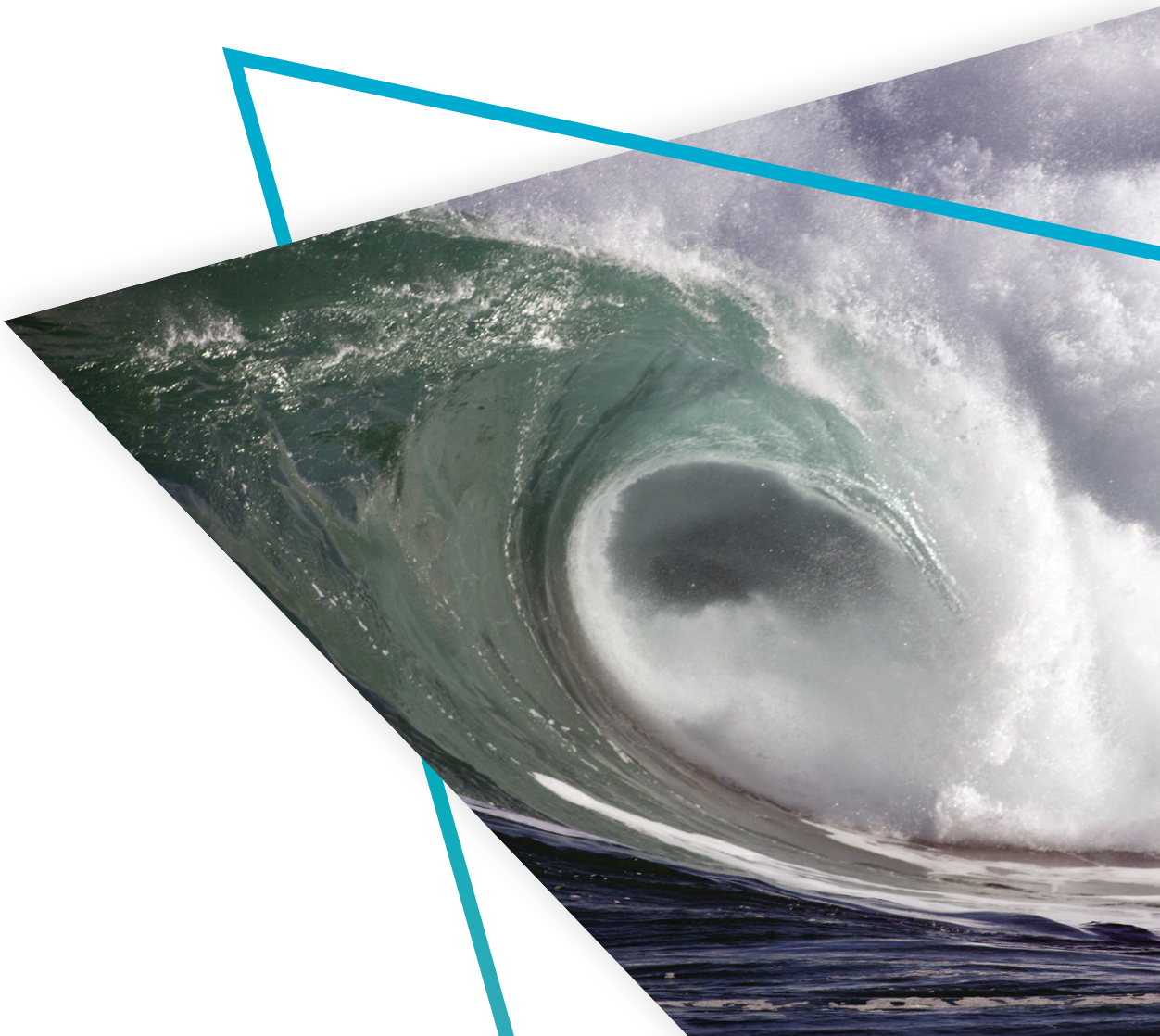

DISPUTE RESOLUTION ALERT

Should Kenya adopt statutory adjudication for construction disputes?

Africa's growing infrastructure is a critical and transformative development that has the potential to drive the continent's economic and social progress, with significant investments in key sectors such as transportation, energy, housing, water supply and telecommunications driving this growth. The construction industry is therefore crucial to Africa's economic and infrastructural development. However, some of the biggest challenges Africa's construction industry faces are project overruns and contractor distress caused by inefficient management of construction disputes, particularly those related to cash flow and payments.

Dispute resolution over cash flow and payments in construction contracts through traditionally adversarial approaches such as arbitration and litigation may be incongruent with the need to maintain harmonious relationships between parties to a construction contract. The more popular approach in recent times has been arbitration. However, arbitration often emulates litigation, leading to delay and high costs of resolving the dispute.

Consequently, in order to address disputes efficiently, the construction industry has increasingly turned to adjudication, which is a dispute resolution mechanism designed to provide quick and cost-effective decisions through a process where an independent third party, known as an adjudicator, makes a binding decision on a dispute. Unlike arbitration or litigation, adjudication is designed to be fast and cost-effective, ensuring that construction projects continue with minimal disruption

Key benefits of adjudication include speedy resolution; continuity of work, as the speed of the adjudication process helps ensure that construction is not disrupted, thus limiting cash flow issues; balancing power, since adjudication addresses power imbalances in relationships, providing weaker subcontractors a clear path for resolving disputes with more powerful contractors; allowing parties to choose the adjudicator's background and discipline based on the required technical expertise; confidentiality; and resulting in a binding decision. While Kenya relies on contract-based adjudication, the UK has a statutory framework that mandates adjudication for construction disputes. Below we explore the key differences between the two systems and examine whether Kenya can benefit from a statutory approach similar to that of the UK.

Adjudication in Kenya: A contractual approach

Adjudication in Kenya is not established by law, rather, parties to a construction adopt it through inclusion of an adjudication agreement in their construction contracts. Interestingly, adjudication is not mentioned as one of the alternative dispute resolution mechanisms in Article 159(2)(C) of the Constitution of Kenya, 2010. Nonetheless, adjudication is commonly employed as a dispute resolution mechanism within the Kenyan construction industry.

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Common standard form contracts employed in the construction industry in Kenya include the Joint Building Council's Agreement and Conditions of Contract for Building Works, 1999 (JBCC Green Book) and the International Federation of Consulting Engineers' (FIDIC) contracts.

FIDIC's standard contracts couch the adjudication process in the form of dispute boards, which are specialised bodies established to efficiently and impartially resolve disputes that may arise between parties to a contract, or dispute adjudication boards where the parties intend the decision to be binding. The JBCC Green Book, on other hand, provides for the architect as the neutral party to address disputes such as delay, disruption of works and liquidated damages, and ultimately arbitration as its preferred method of dispute resolution. The JBCC Green Book notably does not include an adjudication clause.

These standard forms, however, allow parties to negotiate and incorporate or amend the standard form to suit their needs, including the introduction of an adjudication agreement. Therefore, parties that want to settle their disputes through adjudication may include an adjudication agreement to the contract at this point, setting out terms such as: appointment of the adjudicator, the scope of the adjudicator's powers, timelines for determination of the dispute, and place of adjudication. It is also important to note that adjudicators' decisions are usually expressed as being binding until the end of the contract, when either party may seek a review of the decision, most commonly by arbitration.

Limitations of contract-based adjudication

Although contract-based adjudication offers a flexible approach to resolving disputes, it has several limitations, including:

- **Inconsistent rules:** Each contract may have different adjudication provisions, leading to uncertainty.
- **No universal right to adjudication:** Unlike in the UK, Kenyan contractors cannot automatically refer disputes to adjudication unless their contract explicitly allows it or the parties agree to adjudication.
- **Enforcement issues:** Without statutory backing, enforcement of adjudication decisions can be difficult, especially if one party refuses to comply.
- **Potential delays:** Disputes over the choice of adjudicator or the terms of adjudication can slow down the adjudication process.

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Statutory adjudication in the UK

Unlike Kenya, the UK has a statutory adjudication system under the Housing Grants, Construction and Regeneration Act, 1996 (HGCRA). This law grants parties in construction contracts the right to refer disputes to adjudication at any time.

Key features of UK adjudication include:

- **Right to adjudication:** Any party in a construction contract can refer a dispute for adjudication, even when their contracts do not provide for such a right. See *Herschel Engineering Ltd v Breen Property Ltd* [2000] where the court confirmed that parties have the right to refer disputes for adjudication even if their contract did not explicitly provide for it.
- **Fast process:** The adjudicator is required to commence adjudication within seven days of referral of the dispute, and to reach their decision within 28 days of referral or upon such extension as agreed by the parties. The adjudicator is allowed to extend the initial 28-day period by up to 14 days with the consent of the party that referred the dispute, thereby ensuring that disputes do not delay projects. In *MR Dawnays v FG Minter* [1971] 1 WLR the court highlighted that cash flow is the "*lifeblood*" of the construction industry, emphasising the need for quick dispute resolution.
- **Enforceability:** UK courts enforce adjudicators' decisions, making them legally binding unless overturned by arbitration or litigation. In *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] Build. L. R. 93 the court confirmed that the intended purpose of the HGCRA was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. In *A&D Maintenance and Construction Ltd vs Pagehurst Construction Services Ltd* [2000] 16 Const LJ 199 the court reaffirmed that the court with jurisdiction to grant enforcement has no power to review and amend the decision issued at the end of the adjudication when the adjudicator has been properly and legitimately entrusted with the performance of their function.
- **Independence:** Adjudicators are typically appointed through recognised professional bodies, ensuring impartiality and expertise.

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What can Kenya learn from the UK model?

Kenya's reliance on contract-based adjudication limits its effectiveness in resolving disputes efficiently. Introducing a statutory framework similar to the UK's could offer several benefits, namely:

- **Standardised procedures:** A law on adjudication would ensure consistent rules and timelines for dispute resolution, making the process more predictable.
- **Automatic right to adjudication:** Contractors would be able to refer disputes to adjudication even if their contract does not include a specific clause.
- **Stronger enforcement mechanisms:** Court-backed enforcement would ensure that adjudication decisions are implemented pending the final determination of the dispute by arbitration or litigation or agreement.
- **Reduced costs:** A formal adjudication system could help avoid lengthy and expensive arbitration or litigation.
- **Increased industry awareness:** A statutory framework would promote greater use of adjudication and provide training opportunities for adjudicators.

However, in recent developments, the Office of the Attorney General has come up with Sessional Paper No. 4 of 2024 on the National Alternative Dispute Resolution Policy, which includes a Draft Construction Adjudication Bill. If passed, the statute would give parties to a construction contract a statutory right to refer a dispute arising under a contract for adjudication in accordance with the statute, set timelines within which the adjudication should be undertaken, and allow an adjudication certificate to be enforced as a decree of the High Court.

The Joint Building Construction Council has also recommended amending the JBCC Green Book to incorporate additional alternative dispute resolution mechanisms before resorting to arbitration proceedings, with one of the proposed mechanisms being the inclusion of adjudication. The revised standard form contract suggests introducing pre-arbitral steps, including the lodging of complaints with a pre-selected adjudicator appointing body that would appoint an adjudicator on an ad-hoc basis.

Conclusion

Adjudication has proven to be an effective method for resolving construction disputes quickly and cost-effectively. While Kenya currently relies on contract-based adjudication, a statutory approach, like the one in the UK, could provide greater clarity, consistency, and enforceability. By adopting a legal framework for adjudication, Kenya can enhance dispute resolution in the construction sector, promote smoother project delivery, and support the country's growing infrastructure ambitions.

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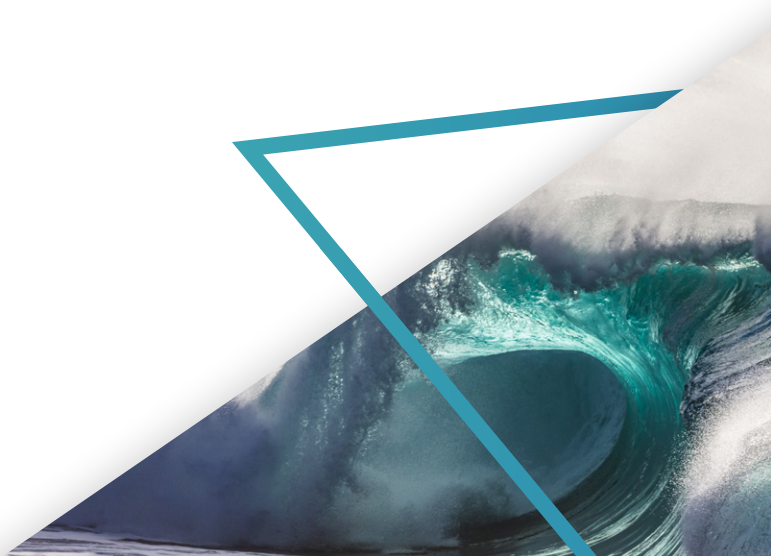

DISPUTE RESOLUTION ALERT

All's fair when it comes to business and rescue

It is well known that one of the benefits of business rescue is that it provides breathing room for the company in financial distress through the temporary moratorium on the rights of claimants against the company. The creditors of a company in business rescue are usually found scrambling to determine what their rights are in the event of a debtor going into business rescue. Business rescue affords the business rescue practitioner certain powers when it comes to contracts in general, which means that any party that has contractual relations with the company may have its rights affected by the exercise of such powers. Therefore, it does not mean that if one is not a creditor of the company, they will not be affected by the business rescue.

Section 136(2)(a) of the Companies Act 71 of 2008 (Act) allows business rescue practitioners to suspend, during business rescue proceedings, *"any obligation"* of the company that *"arises under an agreement to which the company was a party at the commencement of the business rescue proceedings"* and *"would otherwise become due during those proceedings"*. Section 136(2)(b) of the Act, permits business rescue practitioners to urgently apply to a court to *"cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company"* as contemplated in the Act.

Knoop NO and Another v Pillay and Others [2024] (3) SA 116 (GJ) concerned an application for eviction brought by the first applicant, a business rescue practitioner, to evict the first to fourth respondents from three properties owned by the second applicant, a company in business rescue. The business rescue practitioner's objective with the eviction was to market and sell the properties. It is important to note that the rent payable in terms of the properties was about R15,000 for properties worth in excess of R20 million. The court was tasked with considering whether cancellation of the lease agreement and subsequent eviction from the properties were just and reasonable in the circumstances in terms of section 136(2)(b).

The respondents did not contest the business rescue practitioner's mandate and power to sell the properties but argued that there was no need to cancel the lease agreement in order for the sale of the properties to go ahead, as they alleged that they were not in breach of the lease agreement. The business rescue practitioner argued that the objective of marketing and selling the properties to realise the most optimal price as part of the business rescue process would be frustrated if the respondents remained in occupation. Furthermore, the business rescue practitioner presented evidence that the lease agreement was a simulated transaction, based on the rent payable, the timing of the conclusion of the agreement (which was two weeks before the company was placed in business rescue), and the burdensome dispute resolution process outlined in the lease agreement.

All's fair when it comes to business and rescue

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Findings

The court agreed with the business rescue practitioner that the objective to get the most value from the properties would be more likely to be achieved in the absence of a tenant who enjoyed the benefit of lease that made no commercial sense. In considering what is just and reasonable in the circumstances, the court held that the effect of cancellation on the sanctity of a contract was only one consideration to keep in mind, and should be considered alongside the purpose of business rescue and its impact on the various stakeholders.

The court ordered that the lease agreement between the second applicant and the respondents be cancelled in its entirety in terms of section 136(2)(b) of the Act as it found it to be just and reasonable in the circumstances.

What is just and reasonable depends on the facts of the case, and therefore, a lease that was concluded in good faith and with commercially reasonable terms may be able to escape the fate of the lease agreement in the *Knoop* case. However, it is always important to obtain legal advice if a company that one has contractual relations with, in any capacity, is placed into business rescue.

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