

INTERNATIONAL  
CONTRACTUAL  
AND STATUTORY  
ADJUDICATION

ANDREW BURR

informa law  
from Routledge



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# INTERNATIONAL CONTRACTUAL AND STATUTORY ADJUDICATION

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## FOREWORD

Adjudication has been growing in popularity over the last 30 years as an initial form of dispute resolution, particularly in construction and engineering projects. Usually, adjudication involves the temporary resolution of disputes by one, or 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. There are basically two types of adjudication: namely the statutorily-imposed and the contractually-agreed versions. These two types raise, in general, the same types of issues of enforceability and the courts of the relevant country will seek to determine the extent to which adjudicators' decisions are to be enforced. There is legislation in force in about a dozen countries, or states, with draft legislation, or statutes, not yet in force in others in relation to adjudication for construction contract disputes. Many international contracts provide for adjudication, in particular those incorporating the *FIDIC Conditions of Contract*.<sup>1</sup> Other international institutions, such as the Beijing Arbitration Commission<sup>2</sup> and the Chartered Institute of Arbitrators,<sup>3</sup> provide for optional adjudication.

A relatively common policy thread throughout the world is the facilitation of timely payment between contracting parties within the construction and building industries by improving cash flow down the contractual chain.

Although there are many similarities between the different systems of adjudication and the approaches adopted by the domestic courts on issues of enforceability, there are some significant differences. One prime example is the restriction in certain jurisdictions of adjudication to payment disputes and the differences as to what this encompasses. There is in at least one jurisdiction a proposal that adjudication should only apply to disputes above a certain financial limit.

Whilst legislatures will have regard to their own national interests (often including the importance to their economies of the construction and engineering industries and the need to provide cash flow and at least temporarily binding certainty upon disputes), this book

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1 See chapter 11 below and [Appendix 1.1].

2 The Beijing Arbitration Commission (BAC) is currently consulting with a sub-committee with regard to the revision of its *Construction Dispute Board Rules* (effective as from 1 March 2005), that sub-committee being co-chaired by the present author. It is anticipated that the existing *Rules* [Appendix 1.1] will be revised and updated during the course of 2017.

3 See [Appendix 10].



provides the first compendious comparative analysis of the approaches of every country in the world that has legislated, or is seriously considering legislation, for adjudication.

The differences between the jurisdictions are extremely interesting. By way of example, in some countries (such as Ireland), there could well be a constitutional challenge to adjudication as not complying with the fair trial requirement in the *European Convention on Human Rights*. That is not a problem in the United Kingdom, or, apparently, in other jurisdictions that have a written constitution. There is, however, considerable criticism of adjudication in various jurisdictions, in particular with regard to a statistical bias in favour of claimants in adjudication and the difficulty of achieving fairness in an adjudication, which (from start to finish) can run to 28 days, albeit relating to disputes that would take a court, or arbitrator, 10 to 20 times longer to resolve. The different courts' approach may be more, or less, supportive of adjudication, with challenges in the United Kingdom succeeding relatively infrequently and on the East Coast of Australia in some 80% of adjudication cases.

It is clear that professionals and people in the construction and engineering industries can learn from what is practised in other jurisdictions. Indeed, legislatures (and the judiciary) can and should learn from adjudication models other than their own.

This should be considered as an immensely useful book for all those involved in the adjudication business, from construction clients (whether employers, contractors, or sub-contractors) and construction industry professionals (whether architects, surveyors, engineers, or project managers), to academics, legislators and lawyers who practise in the field. It should give them ideas as to how to seek to support, or challenge, adjudications, as well as providing fertile grounds for seeking to change legislation, in order to incorporate the better aspects of adjudication in other countries. This book provides the first serious analysis of adjudication worldwide and should be most welcome to all those involved, or seeking to become involved, in adjudication, or in promoting it elsewhere.

Sir Robert Akenhead (formerly QC and High Court Judge  
in charge of the Technology and Construction Court, London, and  
now arbitrator, adjudicator and mediator, Atkin Chambers, London)

## PREFACE

My perception of the “gap in the (legal publishing) marketplace”, which fuelled my enthusiasm for this project, was originally brought home to me when I was proofreading the twelfth edition of *Hudson’s Building and Engineering Contracts (Hudson)*,<sup>1</sup> for my good friends and long-standing colleagues at my then chambers, Nicholas Dennys QC, Mark Raeside QC (as he then was, prior to his elevation to the TCC judiciary in Leeds) and Robert Clay. That perception was markedly reinforced when I performed a similar rôle for the *First* and *Second Supplements*<sup>2</sup> to that highly-esteemed publication and when I was later writing the fifth edition of *Delay and Disruption in Construction Contracts*,<sup>3</sup> during my extended editorial sabbatical from Atkin Chambers.

What struck me most was not what *had* been included,<sup>4</sup> but by how much had (no doubt because of page constraints) been necessarily *missed out*. In addition to adjudication in the United Kingdom, the *Hudson* main work addresses (in a mere 22 pages) statutory adjudication in certain Commonwealth jurisdictions, with the *Second Supplement* increasing that page count by 10 pages.

To a certain extent, this *lacuna* has subsequently been filled by James Pickavance’s excellent *A Practical Guide to Construction Adjudication*,<sup>5</sup> in which specialist editors contribute separate chapters on Scotland (Tony Jones), Northern Ireland (Michael Humphreys QC), Australia (Peter Wood and Phillip Greenham), Ireland (Dermot McEvoy), Malaysia (Philip Koh), New Zealand (Tómas Kennedy-Grant QC) and Singapore (Steven Cannon). Appendix 7 thereto contains a helpful comparison of United Kingdom and international statutory régimes.

In appendices A to D inclusive to this publication, the indefatigable Anne Eckenroth (who has moved on to pursue a career as an English solicitor) and I have set out to compare both the United Kingdom statute (the *Housing Grants, Construction and Regeneration Act 1996* (the *HGCRA*), as amended by the *Local Democracy, Economic Development and Construction Act 2009* (the *LDEDCA*)) and the *Schemes* published thereunder with, first, their Australian, and secondly, their international equivalents.

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1 Sweet and Maxwell/Thomson Reuters (2010): see the Acknowledgments page.

2 Sweet and Maxwell/Thomson Reuters (2012): again, see the Acknowledgments page.

3 Informa law from Routledge (2016).

4 See the main work of *Hudson*, at paras 11–014 to 11–020 inclusive and 11–053 to 11066 inclusive and the corresponding paragraphs in the *Second Supplement* thereto.

5 Wiley Blackwall (2016).

This book could not have been completed without my expert team of specialist contributing editors. Anne Eckenroth and Ruta Kersyte (now returned to work in her native Vilnius, in Lithuania) performed immaculate project management in London and the Foreword was kindly contributed by Sir Robert Akenhead, who has now returned to international arbitral practice in my former chambers in Gray's Inn. First-rate word-processing services were provided by Nancy Menyere and Sara Meli.

Two friends and colleagues from my new chambers, ArbDB Chambers, on Fleet Street, London, namely Michael Cover and Murray Armes (now practising solely from Sense Studio, London), prepared the first drafts of the chapters on the *Chartered Institute of Arbitrators'* and the *FIDIC Dispute Board Rules*, whilst my long-standing friends and colleagues, Ragnar Harbst (of Baker & McKenzie, Frankfurt) and John Lyden (of Cork, Ireland), covered Germany and Ireland respectively. Tony Canham (of ArbDB Chambers, London) provided a helpful note regarding Mauritius, which will be developed in the first Supplement, which will also deal with Kenya, whose proposed legislation was learned about as this book went to press.

My now friends and colleagues, Samer Skaik (of Deakin University, Australia), Philip Davenport (of New South Wales, Australia), Vincent Liu (of Holman Fenwick Willan, Hong Kong), S Maginathan (of Essex LLC, Singapore), Rebecca Saunders (of Lane Neave, Christchurch, New Zealand), David Carrick and Tim Pettigrew-Smith (both of Hill International, Edinburgh, Scotland) and Vaughan Hattingh (of MDA Consulting (Pty) Limited, South Africa) each provided erudite contributions (or peer reviews thereof) on their local jurisdictions, and managed (without exception) to comply with the extremely strict deadlines set for them by Anne and Ruta.

Ruta assisted greatly with the first drafts of the chapters on the ICC's revised *Dispute Board Rules* and Northern Ireland and Anne researched the position in the United States of America with her customary care and enormous attention to detail.

Whilst the end result could not have been achieved without each of the above individuals (and the personal support and encouragement of my partner, Kesarin Jaitham), any and all remaining editorial infelicities are mine alone.

Andrew Burr  
31 August 2016

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Enormous thanks are due to all the members of the expert team of specialist contributing editors for their magnificent efforts.

In addition, the publishers wish to express their grateful thanks to the following bodies and organisations for their permission to include excerpts from their publications in this book:

1. Joint Contracts Tribunal (various excerpts in chapter 1);
2. NEC (for the excerpt in chapter 1);
3. Chartered Institute of Arbitrators (the *Dispute Board Rules*);
4. FIDIC (*Dispute Board Rules*);
5. DIS (*Rules on Adjudication*);
6. ICC (*Dispute Board Rules*);
7. JBCC (*Principal Building Agreement 2000*);
8. AIA A201-2007 (*General Conditions of the Contract for Construction and Standard Form of Agreement between Owner and Contractor*).





# BIOGRAPHIES OF THE EXPERT TEAM OF SPECIALIST CONTRIBUTING EDITORS

Chapter	Contributor	Biography
Foreword	Sir Robert Akenhead	<p><i>Sir Robert Akenhead</i> was, until 1 December 2015, one of Her Majesty's High Court Judges, sitting primarily in the Technology and Construction Court of England and Wales (the TCC), was called to the Bar in 1972 and practised from Atkin Chambers from 1973 until 2007, almost exclusively in construction and engineering. His work as a barrister took him all over the world, to places such as Hong Kong, Singapore, many parts of Europe, Fiji, Australia, South Africa, Indonesia and the West Indies. He was made QC in 1989. In 2007, he was made a High Court Judge, sitting in the Queen's Bench Division and, in particular, in the TCC. From September 2010, for three years, he was the judge-in-charge of the TCC. He is the co-author of several books, <i>Site Investigation and the Law</i> and <i>Technology and Construction Court Practice and Procedure</i>, as well as being, since 1999, a joint editor of the <i>Building Law Reports</i>. He practises now as arbitrator, mediator and adjudicator, at Atkin Chambers, Gray's Inn.</p>
Chs 1 and 2 Introduction and the United Kingdom	Andrew Burr	<p><i>Andrew Burr</i> is an adjudicator, arbitrator and barrister, having been a member of Atkin Chambers since 1983; he now practises from ArbDB Chambers, on Fleet Street and as Legal Counsel at Silver Shemmings LLP. He specialises primarily in construction and technology matters and is also an affiliated foreign lawyer with PRIMUS (Vilnius, Lithuania). Andrew is a past chair of the European Branch of the Chartered Institute of Arbitrators and has worked throughout Europe and internationally on a wide range of construction and infrastructure matters. He is general and articles editor of <i>Construction Law Journal</i> and recently sat on the advisory committee for the revision of the ICC's <i>Dispute Board Rules</i>. Andrew is a listed arbitrator at the Beijing Arbitration Commission (whose <i>Construction Dispute Board Rules</i> he is helping to revise) and the Vilnius Court of International Arbitration and is a member of the Independent Standards Board of the International Mediation Institute.</p>

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Chapter		Contributor	Biography
Ch. 3	Australia: the East Coast model with New South Wales as the principal legislation	Samer Skaik	<p><i>Samer Skaik</i>, BEng, MSc, CPM, PMP, MIEAust, ACI Arb, is an accredited adjudicator (NSW), a project management and claims consultant and a lecturer in construction management. Samer is the Founder and Director of Construction Management Guide (cmguide.org), which has been providing claim and project management consultancy services internationally since 2008. Samer has extensive experience in managing large construction projects, alongside lecturing, advising and writing on construction management and law. In 2017, he completed his PhD thesis on "Statutory Adjudication" with a "Scholarship Grant" from Deakin University. Skaik has published various peer-reviewed research articles, with a particular focus on statutory adjudication worldwide. In 2016, Samer received a High Commendation in the Australian Brooking Prize in Construction Law for his paper "Taking Statutory Adjudication to the Next Level: Legislative Review Mechanisms of Erroneous Determinations". He usually appears as a regular speaker and panellist in international conferences and seminars and as a peer reviewer for academic conferences, such as RICS Cobra and AUBEA.</p> <p>Samer's work was very kindly peer-reviewed by Philip Davenport, a solicitor and previous Head of the Legal Branch of the NSW Department of Public Works and Services; he assisted in drafting the local statute and its amending legislation.</p>
Ch. 4	Australia: the East Coast model: Victoria, Tasmania, The Australian Capital Territory and South Australia		
Ch. 5	Australia: The East Coast model: Queensland		
Ch. 6	Australia: The West Coast model		
Ch.7	CI Arb DB Rules	Michael Cover	<p><i>Michael Cover</i> is an arbitrator, mediator and adjudicator. He is on the panel of many United Kingdom and international administering institutions and is a Member of ArbDB, the Arbitration, Mediation and Dispute Board Chambers (www.arbdb.com).</p>
Ch. 8	FIDIC DB Rules	Murray Armes	<p><i>Murray Armes</i> is a chartered arbitrator, mediator and adjudicator and is on the FIDIC President's List of International Adjudicators. He trained as an architect, but now devotes all his time to the avoidance and resolution of international construction disputes. He has a long-standing interest in dispute avoidance and is currently on the panel of dispute adjudicators for the F4E ITER prototype nuclear fusion project, one of the largest energy projects in the world. As arbitrator and adjudicator, he has given decisions in a wide variety of construction and engineering disputes and regularly gives seminars and runs workshops across the world on dispute resolution under FIDIC and other international contracts and dispute procedures.</p>

<i>Chapter</i>		<i>Contributor</i>	<i>Biography</i>
Ch. 9	Germany	Ragnar Harbst	<i>Ragnar Harbst</i> is a partner with Baker & McKenzie in Frankfurt, Germany. He is qualified as Rechtsanwalt (Germany) and Solicitor (England and Wales). His practice, both as counsel and arbitrator, is devoted to international infrastructure disputes.
Ch. 10	Hong Kong	Vincent Liu	<i>Vincent Liu</i> is a construction lawyer, admitted as a solicitor in Hong Kong, Western Australia, New South Wales and the Australian Capital Territory. His principal areas of practice have included construction and engineering (front and back end). He has advised and acted for clients in construction disputes, involving mediation, arbitration, litigation and adjudication, under the security for payment legislation, and has acted in more than 40 statutory adjudications, involving some of the largest infrastructure and mining and resources projects in Australia (including the Perth to Mandurah Railway, North West Shelf Expansion Project, Gorgon Project and the Sino Iron Ore Project in Cape Preston). Vincent holds a Certificate in Adjudication from the Institute of Arbitrators and Mediators Australia, is a Fellow of the Chartered Institute of Arbitrators and was also a New South Wales Law Society Accredited Construction Litigation Specialist.
Ch.11	ICC DB Rules	Ruta Kersyte and Andrew Burr	See above.
Ch. 12	Ireland	John Lyden	<i>John Lyden</i> is a construction contract consultant, chartered quantity surveyor, arbitrator, conciliator and mediator based in Cork, Ireland. For over 25 years, he has specialised in delay and disruption claims and dispute resolution. He has written and lectured extensively on construction law from an Irish perspective. John has been appointed by the Minister under section 8 of the Irish <i>Act</i> as a member of the Panel of Adjudications.
Ch. 13	Malaysia	S Magintharan	<i>S Magintharan</i> LLB (Hons) Essex, Dip ICARB, Barrister of the Inner Temple, Advocate of the Supreme Court of Singapore, has been in active legal practice over 20 years, specialising in construction law, international commercial arbitration and construction adjudication. He is the Managing Director of Essex LLC, Singapore, and holds Fellowships at the Chartered Institute of Arbitrators, Singapore Institute of Arbitrators and the Malaysian Society of Adjudicators. He is a practising Barrister, Arbitrator and Adjudicator.

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<i>Chapter</i>		<i>Contributor</i>	<i>Biography</i>
Ch. 14	Mauritius	Tony Canham	<i>Tony Canham</i> has been a practising arbitrator since 1977. He has a wealth of expertise in the field, having been appointed as arbitrator in more than 250 cases throughout his career. By profession a Chartered Engineer, he is a Past President of the Society of Construction Arbitrators; he is also a Chartered Arbitrator and a Past President of the Chartered Institute of Arbitrators (CI Arb), a Fellow of the Institution of Civil Engineers and a Fellow of The Academy of Experts. He is listed on the panels of arbitrators of various bodies, including the CI Arb, the Hong Kong International Arbitration Centre, the Kuala Lumpur Regional Centre for Arbitration, the Dubai International Arbitration Centre, the JAMS Global Engineering and Construction Panel of Arbitrators and Mediators and, of course, the MARC Panel of Arbitrators.
Ch. 15	New Zealand	Rebecca Saunders	<i>Rebecca Saunders</i> LLB, BSc, Barrister and Solicitor of the High Court of New Zealand, Solicitor (England and Wales, non-practising), is a partner at Lane Neave, in Christchurch, New Zealand. Rebecca is a construction law specialist, with extensive experience in construction adjudication, arbitration, mediation and litigation in New Zealand and the United Kingdom.
Ch 16	Northern Ireland	Ruta Kersyte and Andrew Burr	See above.
Ch. 17	Scotland	David Carrick	<i>David Carrick</i> is a senior vice president at Hill International (UK) Limited's Edinburgh office. He has more than 35 years' experience in claims analysis and resolution, as an arbitrator, mediator, conciliator, expert witness and advisor. He is a Chartered Arbitrator, Chartered Surveyor and Accredited Adjudicator.
		Trevor Pettigrew-Smith	<i>Trevor Pettigrew-Smith</i> is an arbitrator and Chartered Surveyor, FRICS, FCI Arb and FCICES. He is a Director at Hill International, based in Edinburgh, Scotland, and has over 35 years' quantity surveying experience in the construction sector, working at a senior level on building and civil engineering projects. Mr Pettigrew-Smith is a quantum expert and adjudicator, skilled in preparing claims and expert reports and is on the panels of adjudicators for the RICS, CI Arb and CIC. He has varied project experience, both throughout the United Kingdom and internationally, in a number of sectors, including marine, on and off-shore oil and gas, infrastructure, civil engineering and building.
Ch. 18	Singapore	S. Magintharan	See above.