

Tech disputes adjudication: A new forum for dispute resolution

A new adjudication procedure for the resolution of technology disputes is set to launch in October 2019.

The Society for Computers and Law (“SCL”) announced in June 2019 that it is developing a contractual adjudication process for the resolution of technology disputes (the “SCL Procedure”). The SCL Procedure will provide an alternative forum for the resolution of all disputes arising from contracts for the provision of tech-related goods and services, including software development contracts, outsourcing arrangements, smart contracts and cloud computing contracts (“tech disputes”). As the launch date for the SCL Procedure approaches, we consider how the SCL Procedure may work in practice, and the benefits of using the SCL Procedure for future tech disputes.

What is the new SCL Procedure?

Adjudication is a form of alternative dispute resolution (“ADR”) which enables parties to resolve disputes without resorting to lengthy and expensive court procedures. In adjudication, decisions are typically made within a tight timeframe, by a single adjudicator and with limited grounds of appeal, unless and until reviewed in litigation or arbitration. As a result of these features, adjudication is currently one of the most preferred methods of resolving disputes in the construction industry as it enables parties to resolve disputes quickly, maintain the going concern of the project and limit disruption to cash flow.¹

The announcement of the SCL Procedure has therefore been welcomed by many in the technology sector, as the need for a process facilitating the rapid resolution of tech disputes has become ever more vital. Technology is becoming integral to

all aspects of business life, with tech disputes increasing as a result. The English courts, for example, have seen a particular upsurge in tech disputes, with a 13% increase in claims in the London Technology and Construction Court (“TCC”) between October 2017 and September 2018. It is therefore important that the legal industry acts to ensure that suitable dispute resolution options are available to address the increasing volume of disputes in this area.

It is hoped that, once launched,² the SCL Procedure will assist the parties to tech disputes to resolve any disputes both quickly and efficiently, while preserving the goodwill in any ongoing projects.

Key features of the SCL Procedure include:

- A three-month procedure for resolving tech disputes with no restriction on the size or scope of tech dispute that may be referred.
- Choice of specialist adjudicators from a pre-selected panel of adjudicators set up by the SCL, including lawyers and (non-lawyer) IT specialists.
- The adjudicator’s decision is provisionally binding, unless the parties reopen the dispute in subsequent litigation or arbitration (within six months of the decision).
- Express obligation on the parties to act in good faith and co-operate throughout the procedure.

Adjudication for tech disputes vs. adjudication for construction disputes

Like construction disputes, many tech disputes can be well suited to being resolved by adjudication. Construction and

¹ Arcadis Global Construction Disputes Report 2019: Laying the Foundations for Success, p17 (https://www.arcadis.com/media/D/4/3/%7BD4316C0C-A706-4906-A660-8133DAA1399E%7DRP_GCDR_AL20190620_FINAL.pdf).

² The SCL has announced that the new adjudication procedure is almost complete and anticipates applications for the adjudicator panel to open shortly, once all materials relating to the procedure has been published on the SCL website.

technology are often intertwined because large infrastructure projects (for example, the construction of nuclear power plants) require high levels of technological sophistication, usually at a significant cost. Given the parallels between construction and tech disputes, a comparison of the adjudication regimes provides some insight into how the SCL procedure may work in practice.

A notable key difference between the SCL Procedure and the construction adjudication procedure is that the resolution of tech disputes will not be mandated by statute. Under the Construction Act 1996, all parties to construction contracts are automatically subject to statutory adjudication. In contrast, the SCL Procedure is not underpinned by statute and the parties must agree if they wish to use it. While this of course upholds party autonomy and enables parties to opt in to this specific forum for the resolution of tech disputes should they wish to do so, it remains to be seen what the uptake will be for the new procedure.

Full details of the SCL Procedure have yet to be announced, but given that the procedural timeline will follow a three-month timetable, parties will seemingly have more time to resolve their disputes than under the statutory construction adjudication procedure. Under the construction adjudication regime, a referral notice must be served within seven days of a notice of adjudication, setting out the referring party's case in detail. The construction procedure only provides respondents with 7 days (unless the parties agree to an extension) to respond to the allegations made in a referral notice. This has led some commentators to criticise construction adjudication as "*quick and dirty*" justice.³ The SCL Procedure still maintains a tight timetable but appears to seek to avoid such criticism by providing more time for respondents to respond, and for adjudicators to reach a decision.

Similar to construction adjudication, a decision under the SCL Procedure will be final and binding, provided it is not challenged by subsequent arbitration or litigation within six months. To this extent, the SCL Procedure will enable tech disputes to be dealt with in an expeditious manner, with limited disruption and inevitably curtailed costs. Given that legal costs have been voted the most important factor in deciding whether or not to initiate formal proceedings for Technology,

Media and Telecommunications ("**TMT**") disputes, this could be a significant factor in attracting parties to use the SCL Procedure.⁴

The success of adjudication in the construction industry has, however, been assisted greatly by the legislative framework around it. Moreover, challenges to adjudicators' decisions have rarely succeeded in the TCC because of the court's robust approach to enforcement. The TCC is the specialist court which handles factually or technically complex cases arising in the field of technology and construction. These cases include engineering and IT disputes, as well as enforcement of adjudication decisions and challenges to arbitrators' decisions. As the SCL Procedure does not have a legislative footing, it may be difficult for the courts to refuse challenges to adjudicators' decisions in the same way that it does for construction disputes. Nonetheless, if the SCL Procedure proves to be popular with parties, there could be a push to introduce statutory support in the future.

Comparative analysis against different fora for the resolution of tech disputes

Dispute resolution methods have developed over many years in order to service the needs of different types of disputes and the parties involved. In a recent TMT survey, respondents' preferred mechanisms to resolve TMT disputes were: arbitration (43%), mediation (40%), litigation (15%) and expert determination (4%).⁵ Despite these preferences, in practice, litigation was the most popular mechanism (44%) that was resorted to, followed by mediation (37%). It will be interesting to see the impact the SCL Procedure has on parties' preferred methods of dispute resolution, and whether parties will opt to adjudicate tech disputes rather than use more traditional forms of dispute resolution.

(i) Advantages of adjudication

As mentioned above, adjudication offers a number of advantages to parties over competing dispute resolution fora.

Costs

The cost of proceedings is one of the most important consideration for parties to consider when choosing a

3 Adjudication in UK Construction Contracts – A Critical Look, John Tackaberry QC, 39 Essex Chambers (2015), p. 6 (<https://www.39essex.com/wp-content/uploads/2015/03/2015-04-02-39-ESSEX-ADJDN-SEMINAR-TRACKING-ADJUDICATION-WEBSITE-VERSION.pdf>).

4 Pre-empting and Resolving Technology, Media and Telecoms Disputes – 2016 International Dispute Resolution Survey Pinsent Masons and Queen Mary University of Law, p.23 (http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf).

5 Ibid. p.20.

dispute resolution method.⁶ In this regard, adjudication has a considerable advantage over other dispute resolution methods because costs are significantly lower due to the short time frame of the procedure. Moreover, in adjudication the parties do not face the same exposure to the other side's costs if they lose. Unlike traditional litigation where "costs follow the event" (i.e. the loser pays the winner's costs), typically in adjudication the losing party only becomes liable for the adjudicator's fees and each party bears their own costs.

Binding nature

A key advantage of the adjudication process is that it provides parties with a binding decision (at least until successfully challenged in litigation or arbitration) within a short time-frame. For many parties, the adjudication will bring an end to their dispute, and also enable them to preserve business relations and ongoing projects, something which can be difficult in litigation and arbitration. Mediation is another form of dispute resolution which also attempts to preserve the business relationship. However, in contrast to adjudication, it is a non-adversarial mechanism which seeks to find a solution to the dispute that is acceptable to both parties, with the parties typically required to agree to any resolution reached—this means that it may not always resolve the issue that has arisen.

Expertise of decision makers

One significant attraction of resorting to adjudication for the resolution of tech disputes is likely to be the availability of a specialist body of adjudicators with industry knowledge. In a recent survey, 52% of respondents stated that arbitration was not well suited to TMT disputes due to a perceived lack of arbitrators with the requisite expertise.⁷ The specialist adjudicators appointed by the SCL will ensure this concern does not arise in relation to adjudication as they will provide a body of technology specialists with in-depth knowledge of the subject matter.

Similarly, in the 2018 White & Case Arbitration survey, respondents stated that the technology industry would be more inclined to arbitrate disputes if there were more publicly available rosters of arbitrators with specialist industry or sector experience.⁸ It seems likely that a similar sentiment would apply in relation to adjudication. The SCL has indicated that it intends to provide publicly available lists of adjudicators with set experience; a feature which is not readily available for any

other dispute mechanism in the UK. A similar system has been established in the US at the Silicon Valley Arbitration & Mediation Centre which has established a public database of 54 of the world's leading technology arbitrators and mediators—this is something which the SCL may look to replicate going forward. Parties are more likely to feel confident in the speed and process of adjudication if they have confidence in the adjudicator's ability to understand the issues in dispute.

(ii) Disadvantages of adjudication

While there are many advantages to adjudication, it is not without its drawbacks.

Lack of finality

Some parties may still ultimately decide to resort to litigation or arbitration after receiving an adjudicator's decision. As a result, the total cost of proceedings may in fact become more expensive. Enforcement of decisions is often a key factor which leads parties to either utilise more traditional methods of dispute resolution or to initiate litigation or arbitration proceedings following an adjudication procedure. Arbitration, for example, enables parties to receive a binding and final award which can be enforced with relative ease internationally.

Speed

While the speed of the adjudication proceedings is certainly an advantage, it can also be perceived as a disadvantage, especially for the respondent party, which will have less time to prepare its defence. Moreover, in complex disputes, the tight timetable for the adjudication makes it very challenging for parties and their advisors to review all the relevant facts, speak with witnesses, and prepare their arguments. This creates a risk that an adjudicator's decision will contain errors, which will in turn lead to challenges to adjudicators' decisions or further proceedings (as has been seen in construction cases) which could undermine the intended efficiency gains of adjudication.

Challenges going forward

While the SCL procedure is one response to the increased demand for efficient, cost-effective dispute resolution, other solutions are also being developed which may provide competition in terms of the adoption of the SCL procedure. For example, there has been the introduction of 'online

6 Ibid. p.23, 50% of respondents thought costs of proceedings were the most significant factor in deciding whether or not to initiate formal proceedings.

7 Ibid. p26.

8 White & Case and Queen Mary 2018 International Arbitration Survey, p. 31 (<https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>)

arbitrations', which can provide legally binding or non-binding decisions for less complex tech disputes, due to increasingly sophisticated technology and automation solutions.⁹ Other dispute resolution methods such as litigation and arbitration are also responding to parties' concerns, e.g. by creating opt-in expedited procedures, which will no doubt attract tech disputes. The market is, however, by no means saturated with ADR for tech disputes and the SCL Procedure is expected to fill a gap in the market for the swift resolution of **all** types of tech disputes.

Further, much of the success of the construction adjudication procedure has resulted from the statutory underpinning of the Construction Act 1996. The lack of a legislative basis for adjudication for tech disputes may therefore result in less informed and varying decisions. However, further guidance on the procedure is expected from the SCL, which, together with the expertise and experience of the SCL tech adjudicators, will help ensure that the adjudication runs smoothly and efficiently.

Cost, time to resolution and decision-makers lacking the requisite expertise top the challenges facing tech companies with disputes; something it is hoped the SCL Procedure will address and help bring the UK legal industry to the forefront of tech disputes.

Future Outlook

Applications for the tech adjudication panel will open in October 2019 and the SCL will begin building its neutral body of expertise. The strength of this panel may result in an influx of tech disputes to the SCL Procedure either before, or instead of, other forms of dispute resolution.

Once launched, the SCL Procedure will provide a welcomed additional option for those looking to resolve tech disputes, addressing some of the perceived shortcomings identified in more traditional forms of dispute resolution.

⁹ Blockchain arbitration is a new form of online dispute resolution for disputes arising from smart contracts, such as CodeLegit. CodeLegit conducted its first blockchain-based smart contract arbitration proceedings in July 2017 based on a set of Blockchain Arbitration Rules.

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