



Statutory Adjudication for the Sri Lankan Construction Industry

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ABSTRACT

Disputes are pervasive in the Sri Lankan construction industry, causing project delays and financial burdens. Common dispute resolution methods include negotiation, conciliation, mediation, adjudication, and arbitration. While adjudication is mandatory in Sri Lankan construction contracts, its ineffectiveness and lack of enforceability have prompted the exploration of statutory adjudication. This study investigates the barriers to implementing statutory adjudication in Sri Lanka's construction industry and proposes solutions. Using a qualitative approach, the study involves literature reviews and interviews with industry professionals. Findings indicate a growing preference for adjudication due to its efficiency and reduced adversarial impact. However, the absence of legislative support poses a significant obstacle. Recommendations include enacting statutory adjudication laws, government involvement, creating frameworks and guidelines, and establishing dispute resolution organizations and court systems. Comparable systems in the UK, Australia, and Singapore provide insights into the types of disputes eligible for resolution. Overcoming operational issues such as biased authority nominations,

short adjudication timeframes, and insufficient adjudicator regulations is crucial. Implementing statutory adjudication can enhance confidence among stakeholders, cash flow management, and dispute resolution in Sri Lanka's construction industry, ultimately fostering its growth and sustainability. This study emphasizes the need for legislative backing, government engagement, and comprehensive system development to facilitate statutory adjudication's successful integration. Recommendations also include promoting awareness, training adjudicators, and encouraging professionals to become adjudicators in the industry, ensuring the construction sector's continuous improvement.

1. INTRODUCTION

Disputes are an inevitable phenomenon that is constantly existent in the construction industry, and they have become one of the main causes of delay in construction.¹ As a result, all stakeholders in a construction project are keen on taking steps to control or avoid disputes, or at least minimize the transaction costs arising from dispute resolution.² Frequently used alternate dispute resolution methods in the construction industry are negotiation, conciliation, mediation, adjudication and arbitration.³ According to the form of contracts used in the Sri Lankan construction industry, adjudication and arbitration have become a contractual obligation in dispute resolution in construction contracts, with adjudication being a

1 Murali Sambasivan and others, 'Analysis of Delays in Tanzanian Construction Industry: Transaction Cost Economics (TCE) and Structural Equation Modeling (SEM) Approach' (2017) 24 Engineering, Construction and Architectural Management 308."plainCitation": "Murali Sambasivan and others, 'Analysis of Delays in Tanzanian Construction Industry: Transaction Cost Economics (TCE)

2 Roxene Thompson, Michael Vorster and James Groton, 'Innovations to Manage Disputes: DRB and NEC' (2000) 16 Journal of Management in Engineering.

3 Vajira Edirisinghe and others, 'Attributes of ADR in the Sri Lankan Construction Industry' 1 Journal of Advances in Engineering and Technology 33.

pre-requisite to arbitration.⁴

However, due to the ineffectiveness and lack of enforceability of the adjudicator's decision, construction industry stakeholders are looking for the ways to develop the adjudication practice.⁵ This study focuses on the implementation of statutory adjudication practices in the Sri Lankan construction industry by reviewing the barriers and suggesting means to overcome them. The significance of striving to adopt statutory adjudication methods is because this technique of alternate dispute resolution has a lower rate of appeal and most of the final decisions produced through this procedure are justifiable.⁶

1.1. Background

Alternate dispute resolution (ADR) methods are adopted by project participants to resolve these disputes without referring to any litigation procedures.⁷ Adjudication is one such alternate dispute resolution method, where the parties involved mutually agree to refer the dispute to an independent and impartial third party, known as an Adjudicator. Upon inquiring the facts of the dispute and referring to the relevant laws, the Adjudicator is expected to decide with regards to the dispute and declare an award within a given time frame, thus resolving the dispute.⁸ Adjudication was implemented as an ADR method in the construction industry to ensure that the

4 Institute of Training and Construction Development, *Standard Bidding Document: Procurement of Works* (2nd edn, 2007).

5 Vajira Edirisinghe and others, 'An Investigation into the Significant Causes of Disputes in the Sri Lankan Construction Industry' (Associated Schools of Construction: 56th Annual International Conference, 2020) <<https://easychair.org/publications/paper/zp1N>> accessed 12 March 2023.

6 Robert Lopez and Alberto Amara, 'Comparison of Dispute Boards and Statutory Adjudication in Construction' (2018) 171 Proceedings of the Institution of Civil Engineers

7 Modupe Mewomo and Marthinus Maritz, 'The Experts' Views on Factors Influencing the Effective Implementation of Statutory Adjudication' (2017) 7 Journal of Construction Project Management and Innovation 1877.

8 A Ranasinghe and JC Korale, 'Adjudication in Construction Contracts' (2011) 44 Engineer: Journal of the Institution of Engineers, Sri Lanka 73.

cashflow within a construction project is subjected to minimum disturbance in the event of a dispute.⁹

Depending on the terms of enforceability, adjudication in the construction industry can be categorized into two distinct types: contractual and statutory adjudication. Both methods aim to provide a resolution to construction disputes, but they differ in their legal basis and procedural requirements. Statutory adjudication is based on legislation, while contractual adjudication is dependent on the terms and conditions of the contract.¹⁰

In contractual adjudication, the binding power of the decision made by the Adjudicator, along with the entitlement of the project participants to employ adjudication as a resolution method, is dependent on a clause found in the form of contract or the agreement between the two disputing parties. In contrast, in statutory adjudication, these terms are bound by a legislative provision in a judicial act.

The concept of statutory adjudication for the construction industry originated in England through the Housing Grants, Construction and Regeneration Act 1996, and was then included in the New Engineering Contracts (NEC) and the Joint Contracts Tribunal (JCT) Conditions of Contract. Since construction projects in Sri Lanka only utilise either the Construction Industry Development Authority (CIDA) or the International Federation of Consulting Engineers (FIDIC) Conditions of Contract, statutory adjudication is yet to be implemented in the local industry.¹¹

9 Siti Suhaidah Sahab and Zulhabri Ismail, 'Construction Industry Payment and Adjudication Act; Enhancing Security of Payment in the Malaysian Construction Industry' (International Conference on Business, Engineering and Industrial Applications, Kuala Lumpur, June 2011) <<http://ieeexplore.ieee.org/document/5994231/>> accessed 15 September 2023.

10 Ping Yung and Kieran Rafferty, 'Statutory Adjudication in Western Australia: Adjudicators' Views' (2015) 22 *Engineering, Construction and Architectural Management* 54.

11 Mahesh Abeynayake and Chitra Weddikkara, 'Special Features, Experiences and New Trends in Arbitration in the Construction Industry of Sri Lanka' (The Second World Con-

1.2. Research Aim and Objectives

This research aims to explore the factors preventing the successful establishment of statutory adjudication methods in the Sri Lankan construction industry and provide substantial plans and actions to overcome these obstacles. To achieve this goal, this study embraces three research objectives:

1. Review the procedures and importance of the current adjudication practices in the Sri Lankan construction industry.
2. Examine the barriers in developing statutory adjudication in the construction industry.
3. Propose suitable measures to overcome the abovementioned barriers in developing statutory adjudication in the construction industry.

2. MATERIALS AND METHODS

To accomplish the study's objectives, a qualitative approach was employed, comprising an extensive literature review and interviews with professional arbitrators and adjudicators in Sri Lanka. The literature review aimed to enhance understanding of current adjudication practices in the Sri Lankan construction sector and underscore the significance of introducing statutory adjudication. Simultaneously, interviews were conducted to identify practical barriers to implementing statutory adjudication in Sri Lanka and gather recommendations for overcoming them.

The literature review primarily addressed the first research objective, while the interviews supported the second and third objectives. It involved analysing Sri Lankan publications related to alternate dispute resolution, particularly

construction Symposium: Socio-Economic Sustainability in Construction, Colombo, June 2013) <<https://ciobwcs.com/downloads/WCS2013-Proceedings.pdf>> accessed 15 September 2023.

adjudication, to gauge its usage and necessity in the country's construction industry. These findings underscored the need for improving adjudication systems in Sri Lanka through the introduction of statutory adjudication procedures.

Semi-structured interviews were conducted to assess obstacles in implementing statutory adjudication in Sri Lanka and suggest solutions. A questionnaire consisting of 12 open-ended questions guided the interviews. The first two questions assessed participants' experience levels, while the remaining 10 delved into their perspectives on construction adjudication in Sri Lanka. The interviews aimed to gather insights on challenges in establishing statutory adjudication in the country and potential measures to support its development.

The selection of participants for the interviews was done by utilising a purposive sampling method. The participants chosen were six experts from the Sri Lankan construction industry who are involved with adjudication, either as an independent adjudicator/arbitrator or as a part of a Dispute Adjudication Board. Four of the interviewees were professional adjudicators, while the remaining two participants were professional arbitrators with experience in adjudication. Their responses to the interview questionnaire survey revealed the following:

Table 1: Participants of the interviews and their respective experience

Participant	Experience in the construction industry (years)	Experience in adjudication processes (years)
Adjudicator 1	11 to 20	Less than 10
Adjudicator 2	11 to 20	11 to 20
Adjudicator 3	More than 30	11 to 20
Adjudicator 4	11 to 20	Less than 10
Arbitrator 1	21 to 30	11 to 20

Arbitrator 2	21 to 30	Less than 10
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3. RESULTS AND DISCUSSION

3.1. Results from the Literature Review

The research material that was evaluated suggested that adjudication has become more popular in the past few years, as opposed to arbitration, due to its ability to resolve disputes with less adversarial impacts on the relationship between parties. Adjudication is also capable of resolving disputes by limiting the overrunning of resources¹² and is therefore the preferred alternate dispute resolution method in the Sri Lankan construction industry. In the adjudication process, the Adjudicator aims to reach an enforceable interim or final decision within the given time period. Failure to do so would result in the dispute being escalated to arbitration or litigation.¹³

According to the common form of contract that is used for local construction contracts, the Standard Bidding Document, the Construction Industry Development Authority (CIDA) will nominate adjudicators for a project from their registered pool of adjudicators. However, statutory adjudication cannot be observed in the industry as there are no legislative measures governing this procedure. This absence of a legal provision results in complications arising from both parties opting to adjudicate under different conditions for the same matter.¹⁴ Due to this reason, it was identified through the literature that the implementation of statutory adjudication would prove to be beneficial to the Sri Lankan construction industry.

¹² Harshi Madhuka Jayasinghe and Thanuja Ramachandra, 'Adjudication Practice and Its Enforceability in the Sri Lankan Construction Industry' (2016) 8 Journal of Legal Affairs and Dispute Resolution in Engineering and Construction C4515005.

¹³ Chandana Jayalath, 'An Empirical Study on the Effectiveness of CIDA Form of Construction Adjudication; Disputants' Perspective' (2019) 3 International Journal of Advanced Research and Publications.

¹⁴ Ranasinghe and Korale (n 8).

3.2. Results from the Interviews

To determine the barriers that prevent the implementation of statutory adjudication in Sri Lanka, information was obtained from the interviews and analysed. Several significant obstacles were identified in the context of Sri Lanka's construction industry.

Adjudicators 1 and 4 noted the absence of recommendations for statutory adjudication provisions in the current Sri Lankan construction landscape. They highlighted a shortage of qualified adjudicators and the absence of a suitable legislative framework for statutory adjudication. Arbitrator 1 mentioned the absence of security of payment legislation and other supportive legal acts necessary for statutory adjudication. Additionally, government reluctance to implement statutory adjudication due to potential revenue constraints was emphasized. Adjudicators 2 and 3, and Arbitrator 2, revealed a lack of acknowledgment and laxity in drafting laws related to statutory adjudication by the Sri Lankan government and relevant authorities. They also pointed out that the construction industry stakeholders often find statutory arbitration cost-prohibitive and inappropriate for minor disputes.

Recommendations provided by the participants included legal recognition of adjudicators' decisions and awards, the development of guidelines and a legal framework for the adjudication process, and the establishment of a streamlined one-step approval process for adjudication. Improvements in the judicial system, infrastructure, and specifying time and cost components of the adjudication process tailored to the Sri Lankan industry were also suggested. Adjudicators 3 and 4 emphasized the need for the CIDA and the Ministry of Construction to play a more significant role in developing legal principles and regulations for statutory adjudication. They proposed raising awareness, educating additional adjudicators, establishing dispute resolution organizations,

adjudication institutes, technical court systems, and a multi-tiered disputes resolution system. Moreover, providing comprehensive information about the adjudication process to participating parties was deemed essential. These recommendations collectively provide a roadmap for enhancing the statutory adjudication system in Sri Lanka.

3.3. Discussion of Results

This study's findings reveal that contractual adjudication is the prevailing method in Sri Lanka's construction industry, primarily based on FIDIC and the Construction Industry Development Act No. 33 of 2014. These regulations guide Adjudication Boards and independent adjudicators in resolving various disputes, encompassing payment delays, time extensions, variation orders, and disagreements stemming from engineers' decisions. Notably, there is no statutory adjudication system in Sri Lanka, nor has the government acknowledged its existence.

The study underscores the potential benefits of introducing statutory adjudication techniques in Sri Lanka. Such an initiative could instil confidence among international investors regarding dispute resolution mechanisms. Moreover, a legally bound adjudication system would foster trust among contractors, suppliers, and subcontractors concerning payments, thereby facilitating cash flow management, and reducing errors in the current practices. However, substantial barriers impede the implementation of statutory adjudication in Sri Lanka. The absence of a legal framework recognizing adjudication as a dispute resolution method is a significant hindrance. Government bodies like the CIDA and the Ministry of Construction remain unaware of the legally binding nature of adjudication, thwarting the development of statutory adjudication. Additionally, the lack of suitable infrastructure and a shortage of trained adjudicators further deter its progress.

To establish a robust statutory adjudication practice in Sri Lanka, the study recommends legislative acknowledgment and provisions for statutory adjudication. Government agencies, especially CIDA and the Ministry of Construction, should play a pivotal role in formulating these legislative systems and ensuring the requisite framework and infrastructure are in place. This framework should specify criteria tailored to the Sri Lankan context, covering aspects such as time and cost. Addressing the knowledge gap and the adjudicator shortage entails establishing a dedicated dispute resolution organization within the construction industry. Additionally, implementing a technical court system within the existing judicial framework can efficiently manage statutory adjudication proceedings. These measures collectively pave the way for the effective introduction of statutory adjudication in Sri Lanka's construction industry.

3.4. Comparative Study with Other Jurisdictions

Statutory adjudication in the construction industry is recognized in various jurisdictions. This study compares these systems to explore statutory adjudication's implementation and effectiveness in Sri Lanka. Three Acts were examined: the UK's Housing Grants, Construction and Regeneration Act 1996; Australia's Building and Construction Industry Security of Payment Act 1999; and Singapore's Building and Construction Industry Security of Payment Act 2004.¹⁵ Australia has two statutory adjudication models for its West and East Coasts under one act.

In the UK and Australian West Coast model, any party in the contract can apply for adjudication, while the Singaporean and the Australian East Coast model limit it to contractors who haven't

15 Nur Ilylia Iryani Mohamed Nasir, Zulhabri Ismail and Nur Khodijah Muhd Fadhlullah Ng, 'Comparative Analysis on Construction Adjudication System Towards Effective Implementation of Statutory Adjudication in Malaysia' (2018) 30 Malaysian Journal of Civil Engineering.

received payment.¹⁶ Therefore, the potential statutory adjudication regime to be implemented in Sri Lanka should take into consideration as to what parties involved in a construction project should be given the liberty to request for an adjudication in the event of a dispute.

Singapore and Australia limit statutory adjudication to payment-related disputes, unlike the UK, which includes all disputes.¹⁷ This suggests that, when implementing statutory adjudication in Sri Lanka's construction industry, the types of disputes eligible for resolution must be considered.

Furthermore, examining Australian and Singaporean systems revealed operational issues like biased authority nominations, short adjudication timeframes, insufficient adjudicator regulations, jurisdictional challenges, and complex legislation drafting. Addressing these issues in Sri Lanka could involve legislative reviews and a peer review process before statutory adjudication enactment.¹⁸

4. CONCLUSION

The Sri Lankan construction industry faces frequent disputes, impacting project timelines, finances, and stakeholder relationships. To address this, alternative dispute resolution, notably adjudication, is common. This study focuses on implementing statutory adjudication practices in Sri Lanka's construction industry, identifying obstacles and solutions.

Currently, contractual adjudication relies on agreements rather than legislation. The study highlights the benefits of statutory adjudication, such as improved clarity, enforceability, and

16 Adrian Chan, 'Briefing: Statutory Adjudication for Construction Disputes: An Overview' (2015) 168 Proceedings of the Institution of Civil Engineers - Management, Procurement and Law 255.

17 Chan (n 10).

18 Samer Skaik, 'An Empirical Study: How to Introduce Effective Review Mechanisms into Statutory Adjudication?' (2017) 33 Construction Law Journal 291.

efficiency in resolving disputes. Obstacles include the absence of statutory adjudication laws, a shortage of qualified adjudicators, government reluctance due to revenue concerns, and legislative neglect. The study suggests solutions like enacting statutory adjudication laws with government involvement, creating frameworks and guidelines, and establishing dedicated dispute resolution organizations and court systems.

In conclusion, successful statutory adjudication in Sri Lanka necessitates legislative support, government engagement, and system development. This approach can boost stakeholder confidence, cash flow, and effective dispute resolution in the construction industry. The study offers valuable insights into implementation challenges and practical measures for improved dispute resolution practices in Sri Lanka.

5. RECOMMENDATION

A set of crucial recommendations were derived from this study with regard to the adjudication practice in the Sri Lankan construction industry. Firstly, legal provisions should be enacted and developed to recognize statutory adjudication for the Sri Lankan construction industry. CIDA should seek the needed support of other institutions to develop the necessary legislation for the statutory adjudication. Meanwhile, adequate framework, guidelines and infrastructure should be established to improve the current adjudication practice in the Sri Lankan construction industry, with the involvement of CIDA. They should take the initiative to provide awareness programs to construction industry professionals on contractual adjudication practice in Sri Lanka. CIDA should also provide adequate training to adjudicators and promote the construction industry professionals to become adjudicators in the industry.

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