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Abstract

Firstly introduced in the UK following Sir Michael Latham's suggestion, who saw it as «the key to settling disputes in the construction industry» and then spread out in many common law Countries, adjudication allows each party to a construction contract to get a quick decision over «any dispute» which may arise during the works, while guaranteeing the losing party the opportunity to have the case reheard afresh by national court or arbitral tribunal. Indeed, the adjudicator's decision is immediately binding, but just until the dispute is finally determined by legal proceedings, by arbitration or by agreement.

The introduction of this kind of interim arbitration (as it may be defined) has benefited not only the parties, but the whole legal system too, thanks to the externalization of dispute resolution in construction field. Even so, despite its success abroad, adjudication remains almost unknown in civilian Countries, where there are no studies investigating its consistency with Constitutional restraints.

By contrast, it seems desirable to reproduce this mechanism in civil law systems too, with a view to ensure a faster and more efficient justice with no further expenses for the State. Its constitutionality will thus be investigated from the point of view of an Italian observer.

1. *Introduction*.

Once upon a time, in China, there ruled an Emperor who strongly wanted to promote arbitration.

He did so in an odd, but possibly effective way: «[t]he Emperor, considering the immense population of the empire, and the great division

of territorial property and the notoriously litigious character of the Chinese, is of the opinion that lawsuits would tend to increase to a frightful extent if people were not afraid of the tribunals and if they felt confident of always finding in them ready and perfect justice [...] I desire, therefore, that those who have recourse to the courts should be treated without any pity and in such a manner that they shall be disgusted with law and tremble to appear before a magistrate [...] In this manner the evil will be cut up by the roots; the good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice that is due to them» (1).

Over 300 years later and almost 8000 km away, the UK's Parliament enacted the *Housing Grant, Construction and Regeneration Act* 1996 (HGCRA (2)), which introduced a «new» kind of dispute resolution — the Statutory Adjudication (3) — in the Construction field, while naming it a «right». And, suddenly, the Technology and Construction Court — the specialised Court in construction matters — emptied.

The power of good manners? Not exactly.

2. *Background*

On 5 July 1993, the House of Commons formally announced that Sir Michael Latham had been asked by the Department of the Environment and six representative bodies operating in the Construction Industry to carry out a Joint Review of Procurement and Contractual Arrangements (4). His findings — firstly revealed by the Interim Report «*Trust and Money*» — were published on July 1994 in a Final Report (entitled «*Constructing the Team* (5)»: hereinafter «*Latham Report*»).

It is not possible to explain Latham's project in details.

Suffice here to say that its primary purpose was to prevent disputes,

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(1) Emperor Kang-hsi, whose reign ran from 1661 to 1722; his decree is cited by F. J. Goodnow, *The Geography of China: The Influence of Physical Environment on the History and Character o f the Chinese People*, National Geographic Magazine, 1927, p. 51, pp. 661-662.

(2) The HGCRA will also be called «the Act» or «the Construction Act» hereinafter.

(3) P. Coulson, *Coulson on Construction Adjudication*^{2}, Oxford, 2011; J. Pickavance, *A practical Guide to Construction Adjudication*, Oxford, 2016; J. Redmond, *Adjudication in Construction Contracts*, Oxford, 2001; J. L. Riches, C. Dancaster, *Construction Adjudication*^{2}, Oxford, 2004.

(4) Such a joint mandate is not surprising, given that in common law Countries public procurement is not distinctly regulated from private sector tenders. See A. Brabant, *Les marchés publics et privés dans l'U.E. et outre-mer. Tome II, Le droit et les faits*, Bruxelles, 1996, pp. 53 ff.

(5) M. Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report*, London, 1994.

rather than identify new ways to settle them: indeed, he proposed the adoption of partnering techniques, i.e. a «structured management approach to facilitate team working across contractual boundaries (6)».

Further, since «[t]he cascade system of payment in the industry — normally client to main contractor, main contractor to subcontractor, and so on down the chain — makes the exposure of different parts of the process to the insolvency of one participant particularly serious» (7), he thought that contractors (and subcontractors) should have been granted a Statutory right to stage payments. Again, and for the same reasons, he suggested to forbid «pay-when-paid clauses» (i.e. payment clauses stating that the contractor has to pay his/her subcontractors — only — following receipt of payment from his/her client).

Finally, he was aware that «disputes may arise, despite everyone's best efforts to avoid them (8)». So, moving from US experience in ADR, he reviewed a number of dispute resolution mechanisms, eventually identifying adjudication as «the key to settling disputes in the construction industry (9)». In so proposing, he was inspired by NEC contracts (10), which already provided a form of adjudication, albeit under many aspects different from the one proposed by Latham.

Adjudication under NEC standard forms, indeed, was only available to the contractor against the project manager or the supervisor. The former had to inform his/her counterparty of the contrast within 4 weeks from its rise (in default, the claim was barred); following such notice, there was a 2-weeks cooling off period, within which a settlement could be attempted. Should any agreement have proved to be impossible, the claimant would have had 2 weeks to refer the dispute to the adjudicator, whose decision would have to be returned within 4 weeks from the end of the preliminary investigation phase (that, in turn, lasted 4 weeks at least). The entire procedure could therefore last more than 4 months (11).

Latham, by contrast, suggested that adjudication (as well as other ADR mechanisms) should have been available to any party (client, contractor and sub-contractor), at any time (without waiting any cooling off period) and whatever the size of the contract or the complexity of the dispute were (12). Moreover, compliance with the adjudicator's decision

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(6) Construction Industry Board, *Partnering in the Team: A Report by Working Group 12 of the Construction Industry Board (CIB Reports)*, London, 1997, p. 1.

(7) M. Latham, *Constructing the Team*, cit., p. 93.

(8) *Ibid*, p. 87.

(9) *Ibid*, p. 87.

(10) Namely, by the New Engineering Contracts First Edition, issued in 1993; but something similar, albeit with a different *nomen juris*, had already been provided by 1992 ICE Design and Construct Contract and by the 1988 Supplementary Provision S1 to Standard Form of Contract With Contractor's Design (JCT 81).

(11) J. Redmond, *Adjudication in Construction Contracts*, cit., p. 6.

(12) In should be noted, however, that Latham himself acknowledged that, for biggest

should have been not only granted by legislation, but also underpinned by Courts, through the adoption of special and quick enforcement proceedings. By contrast, «[a]ny appeals to arbitration or the courts» should have been precluded until the end of the works (13).

3. *Nothing but a right*.

British Parliament, soon emulated by many other common law Countries (14), endorsed Latham's project: section 108 (1) HGCRA — enacted on 24th July 1996, but entered into force on 1st May 1998 — provides that «[a] party to a construction contract (15) has the *right* to refer a dispute arising under the contract for adjudication» (16).

This means that, for parties signing a construction contract for works to be carried out in England, Wales or Scotland (17), there is no opt-out: if the contract fails to comply with this obligation, the Scheme for Construction Contracts (England and Wales) Regulations 1998 (18) applies.

Therefore, every construction contract shall and will contain an adjudication clause whose minimum content is established by section 108 (19), which enshrines the so-called «eight compliance points».

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contracts, a multi-tiered ADR clause (or, at least, the provision of a panel of 3 adjudicators, instead of a sole member) would have been preferable. M. Latham, *Constructing the Team*, cit., pp. 89-90.

(13) M. Latham, *Constructing the Team*, cit., pp. 91-92. This is consistent with Latham's idea that «the authority of the adjudicator/expert must be upheld, and that the decisions should be implemented at once», because such a system «appears to induce the parties to reach their own settlement without recourse to [...] further appeal or litigation». On the other hand, the Author acknowledged that «it would be difficult to deny a party which feels totally aggrieved by an adjudicator's decision any opportunity to appeal either to the courts or arbitration» (*ibid*, p. 88).

That is why the adjudicator's decision ended up not being constructed as an award *tout court* (thus challengeable), but as an interim measure, that does not affect the final determination of the dispute. In fact, in any subsequent litigation or arbitration, the cause of action would not be the validity of the decision, but *the same underlying dispute*, that will be re-heard afresh.

In this sense, and notwithstanding the fact that the Act is silent about the adjudicator's decision nature, it can be considered as an interim award.

(14) Following UK's example, many common law Countries — namely: New South Wales, New Zealand, Victoria, Queensland, Western Australia, Northern Territory, Isle of Man, Singapore, South Australia, Tasmania, Malaysia, Ireland, Ontario — have now adopted adjudication.

(15) As defined by s. 104 HGCRA, which, in turn, refers to the definition of «construction operations» provided by s. 105 HGCRA. It is to be noted that s. 106 exempts «contracts with residential occupier» from the application of the whole «Part II - Construction Contracts» of the HGCRA.

(16) S. 108(1) HGCRA.

(17) S. 104 (6)(7) HGCRA; the Act also applies when works are to be carried out in Northern Ireland, by virtue of the Construction Contracts (Northern Ireland) Order 1997.

(18) Which contains a detailed fall-back adjudication clause.

(19) Whose text is reproduced hereinafter.

«108 Right to refer disputes to adjudication.

(1)A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

First of all, once consecrated the right, for each contracting party, to refer disputes to adjudication (paragraph 1) at any time (paragraph 2, lett. a), it imposes — both on the parties and on the adjudicator — a strict time-table in order to secure a rapid appointment and that the whole process will end within 28 days from the referral (paragraph 2, lett. b and c), unless otherwise agreed by both parties (paragraph 2, lett. c).

It is worth noting, however, that the referring party alone holds the unilateral power to extend the proceedings' time limit up to 42 days (paragraph 2, lett. d) ([20]).

Secondly, it states the basic adjudicator's powers (paragraph 2, lett. f),

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For this purpose «dispute» includes any difference.

(2)The contract shall—

(a)enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b)provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c)require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d)allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e)impose a duty on the adjudicator to act impartially; and

(f)enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3)The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4)The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5)If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6)For England and Wales, the Scheme may apply the provisions of the M1Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision».

([20]) Instead, any provision being absent, State Courts cannot interfere with the proceedings duration: as stressed in AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd [2007] EWHC 1360 at [27], since, in adjudication, «accuracy [is] sacrificed for speed», «[i]t would be odd [...] if the parties, having made that sacrifice, discovered that in practice speed was not the most important thing, and that the pace of the adjudication could, effectively, be dictated, not by the statutory requirements, but by a complex (and potentially ever-changing) kaleidoscope of factors comprised of the consequences of the adjudicator's failure to comply with those requirements. That would not provide certainty to the adjudication community and those who operate within it. It would instead be a recipe for confusion and uncertainty, and might encourage the adjudicator, or indeed one of the parties, to string out the process beyond the 28 days or the agreed extended period, on the basis that it would always be difficult for the other side to demonstrate that the delay had caused discernable prejudice».

By contrast, both section 50 Arbitration Act 1996 and article 820 c.p.c. allow parties and the arbitral tribunal to apply to the Court for an order granting an extension of time for maxing award.

his/her main duty to act impartially (paragraph 2, lett. e) and his/her status (with regard to his/her immunity: paragraph 4).

Lastly, it sets the value of the adjudicator's decision, which, once issued, immediately binds the parties, but is not final (unless they so agree; but, in any case, *after* the end of the proceedings). Indeed, the decision is not *res judicata* and, therefore, is not able to preclude that the same cause of action could be re-litigated — before a State Court or an arbitral tribunal — or otherwise (finally) settled by agreement.

It follows from the above that parties are free to set-up their own *ad hoc* adjudication clause (or to refer to one of the numerous available standard forms of contact), provided that it is not inconsistent with the eight compliance points.

But, as the Technology and Construction Court (21) (TCC) — the UK's specialized court in construction matters (22) — has long specified, «if there is *any* non-compliance», whether due to parties' express exclusion, indirect hindering, or simply omission of the adjudication clause (or even of a *sole compliance point*), «the adjudication provisions in Part I of the Scheme are brought in — lock, stock and barrel» (23).

Thus, parties consent is unnecessary and, in any case, irrelevant: even when the contract does contain an adjudication clause, «what look like freely adopted contractual arrangements on dispute resolution may be no more than the parties' reaction to the statutory threat of the Scheme; and the application of the Scheme no more than the result of the parties' failing to opt out, though this is arguably still the consequence of their choice» (24).

However, it is worth noting that, while the adjudication clause is mandatory — in the sense that it is invariably attached to every construction contract —, adjudication is not, in itself, a pre-condition, nor a pre-action protocol. And this conclusion is not a direct consequence of the Legislator's technique.

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(21) Until 9 October 1998 known as the Official Referees' Court.

(22) Previously a Queen's Bench sub-division; since July 2017, it has become a part of the Business and Property Court of the High Court of Justice.

(23) *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCC) at [61].

In *Epping Electrical Company Ltd v Briggs & Forrester (Plumbing Services) Ltd* [2007] EWHC 4 (TCC) at [19], for instance, the Court found paragraph 25 of the CIC procedure — which stated that «[i]f the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator» — to be invalid, because «[t]he apparent effect of paragraph 25 of the CIC procedure is inconsistent with the mandatory nature of section 108(2)»; the same has been hold in *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007] EWHC 131 (TCC) with reference to Clause 38A.5 of GC/Works sub-contract conditions, which established that «[t]he adjudicator's decision shall nevertheless be valid if issued after the time allowed».

(24) P. Britton, *Court Challenges To Adr In Construction: European And English Law*, December 2008, SCL, p. 7.

Actually, the Act, in providing for the automatic integration of the adjudication clause in every construction contract, could have well established adjudication as a necessary first step to take before going to trial or to arbitration, thus obtaining, by way of substantial discipline, the same result that normally — at least in Italy — is pursued through procedure law ([25]). Further, should it have been Parliament's will, the adjudication nature of pre-condition to arbitration or litigation would not have been excluded by the lack of a provision allowing the Court to raise the question on its own motion. Suffice to think to Italian article 40, paragraph 6, d.lgs. 17 January 2003, no. 5 ([26]), which shows the absence of a necessarily one-to-one relationship between «pre-condition» and «*ex officio* raising» of the same.

The Act, anyway, made a different choice: since it defines adjudication as a *right*, parties are not compelled to refer their disputes to adjudication before (or instead of) going to Court or to arbitration; nor ought they to start other legal proceedings after the adjudicator's decision.

On the other hand, the right to adjudication cannot be forsaken preventively (i.e. in the contract), not even by the joint determination of the parties; it is only *de facto* waivable after the dispute has arisen ([27]) and with limited reference to it.

In addition, such a right cannot be prevented by the counterparty's initiative to start other legal proceedings. Adjudication, indeed, might run on in parallel with arbitration or litigation (since it is only intended to provide a provisional measure ([28])), but the two proceedings will not interfere with each other.

([25]) As is the case for mediation (see d.lgs. 4 March 2010, n. 28, as amended by D.L. 24 April 2017, n. 50 — converted with amendments by L. 21 giugno 2017, n. 96 — and by D.Lgs. 6 agosto 2015, n. 130) and for assisted negotiation (see d.l. 12 September 2014, n.132), but not exclusively.

([26]) Which states that «when the memorandum or the articles of association provide for a conciliation clause and the attempt is not made, the judge, *at the request of the interested party* proposed in the first defence, orders a stay of the proceedings before him/her [...]».

([27]) Indeed, it may be the (unlikely) case that neither party decides to go to adjudication, thus substantially waiving his/her right. But it has to be reminded that, even if litigation or arbitration are started first, this does not prevent *any party* to refer the same dispute in adjudication, until the first proceedings are pending.

In this case, on the one hand, as stated in *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2007] EWHC 1584 (TCC) at [12], «[t]he court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same dispute». On the other hand, in *Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd* [2008] EWHC 1020 (TCC) at [72] the Court has stressed that «[a] party who has started court or arbitration proceedings is entitled to have those proceedings resolved as reasonably expeditiously as the Court can achieve and justice demands; it should not be forced to have those proceedings delayed or stayed by it itself being forced to adjudicate when it does not want to exercise its right to do so». Thus, the two proceedings may (and, most probably, will) run in parallel.

Once a final judgement or award issued, instead, the principles of *res judicata* apply, so that *the same dispute* cannot be referred to adjudication.

([28]) Indeed, adjudication has originally been conceived as a way to ensure the cash

This has been exemplarily demonstrated in *The Trustees of the Marc Gilbard v OD Developments* ([29]), where the contract provided that the Final Certificate would be conclusive evidence, save in relation to the matters raised in any proceedings commenced within 28 days of the date of its issue. OD firstly went to litigation within the time limit, disputing the validity of the certificate; then (8 months later), pending the trial, he started adjudication proceedings over the same matters and argued that, because of the identity of the claim, «there was nothing to stop [him] from issuing subsequent adjudication proceedings in respect of [the same matters already appealed during litigation]» and suggested that «if the defendant could not do that, then that would be an unwarranted prohibition or fetter on their right to adjudicate 'at any time'» ([30]).

The Court rejected the defendant's suggestion, by considering that «conclusivity provisions [...] provide a useful limit on (but not a bar to) post-completion disputes, and are therefore in accordance with the spirit and purpose of the 1996 Act», thus demonstrating the incommunicability between adjudication and other legal proceedings: any benefit (or preclusion) ripened in a legal action cannot be extended to the other ([31]).

On the other hand, the above-mentioned judgment — while excluding that the conclusivity provisions may be considered as an attempt to the right to adjudicate at any time — shifts the discussion towards the question over the possible existence of legal or contractual limits to the right to adjudication.

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flow (defined as «the very lifeblood of the enterprise» in *Dawnays v Minter* [1971] 1 WLR 1205) and a quick resolution of disputes during the carrying out of the works, since their mere rising is potentially fatal for the project.

It is thus intended to provide urgent relief. In respect to this function, it is possible to equate the adjudicator's decision and the Italian urgent provisional measure issued under article 700 c.p.c.

([29]) *The Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd* [2015] EWHC 70 (TCC).

([30]) *Ibid.*, at [20].

It may be added that such clauses are wholly consistent with s. 20(a) Scheme, which gives the adjudicator the power to «open up, revise and review any decision taken or any certificate given by any person referred to in the contract *unless the contract states that the decision or certificate is final and conclusive*».

Further, the conclusivity provisions do not entail the inadmissibility of complaints concerning the validity and effectiveness of the contract (as Cass., Sec. I, 5 December 2003, n.18626 stated, with reference to bank statements).

([31]) This does not contrast with the proposed parallel between the adjudicator's decision and the Italian order issued *ex* article 700 c.p.c.

Indeed, both are autonomously able to impede forfeitures: for adjudication, it can be inferred *a contrario* from the *Gilbard case.* As for 700 c.p.c. proceedings, see, for instance, Cass., Sec. Lab., 25 May 2016, n. 10840, which derived that conclusion from the circumstance that orders issued at the end of such legal actions are now self-standing.

By contrast, while a claim under 700 c.p.c. has been held to impede forfeiture once and for all (with the consequence that subsequent proceedings may be started even after the expiry of the prescribed term), the TCC has evidently interpreted the mutual autonomy of adjudication and other legal proceedings in a stricter way, thus retaining the requirement that *every legal action* has to be started within 28 days from the issue of the final certificate.

4. *Any dispute, at any time.*

As already seen, in fact, section 108(2)(a) HGCRA requires the construction contract to provide that any party may «give notice *at any time* of his intention to refer *a dispute* to adjudication».

That means, firstly, that the referring party is not to wait the expiry of a cooling-off period before starting adjudication (32): even «a perfectly sensible provision deferring for a modest period the time at which the contractor could commence an adjudication» would be contrary to the scope of the Act (33). On the other hand, the dispute has to be crystallized, since «[t]he mere fact that one party [...] notifies the other party [...] of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted» (34). Despite this, any attempt to introduce a «period for crystallization» (35) would evidently contrast with section 108(2)(a) (36).

In any case, it seems that the problem is more a theoretical than a practical one: as a matter of fact, whenever payments are at stake — that is, in the majority of cases — it is sufficient for the referring party to attach that they have not been made at the expiration. Therefore, «the crystallisation argument is almost never successful» (37).

Secondly, Courts have found that the proper construction of the scope of the Act implies that s. 5 *Limitation Act* 1980 — which states that «[a]n action founded on simple contract shall not be brought after the expiration

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(32) A different solution is adopted in Singapore, where s.12(1) BCISPA entitles the claimant to make an adjudication application only after a «dispute settlement period», during which «the claimant or the respondent may seek clarification from the other party on any matter relating to the relevant payment claim; and [...] the respondent may provide the claimant with a payment response where he has failed to do so [...], or vary the payment response»: see s. 12(4).

(33) *Midland Expressway Ltd v Carillion Construction Ltd & Ors (No. 2)* [2005] EWHC 2963 (TCC) at [65].

(34) *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) at [68].

(35) As suggested by C. Dancaster, *A Commentary on the 2004 Construction Act Review*, October 2004, on www.scl.org.uk, p. 16, during the 2004 Review — committed by British Government to the Construction Umbrella Bodies Adjudication Task Group (CUB) — that led to the 2009 Reform.

(36) It would therefore be impracticable to set-up a mechanism similar to the one provided for the Italian *Arbitro Bancario Finanziario*, who may only be seized after an unsuccessfully client's direct claim to the stockbroker: see sec. VI, art. 1, Banca d'Italia, *Disposizioni sui sistemi di risoluzione stragiudiziale delle controversie in materia di operazioni e servizi bancari e finanziari*, on http://www.bancaditalia.it, 18.

(37) *St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd* [2015] EWHC 96 (TCC) at [16]. Indeed, as it has been considered in *Cowlin Construction Limited v CFW Architects* [2002] EWHC 2914 (TCC) at [88], the Court should not «giv[e] a narrow meaning to the word dispute which would in turn permit a responding party to introduce uncertainties which might be difficult for an adjudicator to deal with. Otherwise, there is a risk that the purpose of HGCRA may be defeated».

of 6 years from the date on which the cause of action accrued» — does not apply to adjudication. As hold in *Connex v MJ Building* ([38]) (where an adjudication had been started 18 months after practical completion), «at any time means exactly what it says. It would have been possible to restrict the time within which an adjudication could be commenced [...] But this was not done» ([39]).

In addition, as section 1(1) Scheme specifies, what may be referred to adjudication is «any dispute» (or, in other words, «any difference» ([40])).

Actually, Parliament first intention must be deemed to have been narrower: as noted earlier, Latham himself identified the payment chain as the Industry's main problem and, having said that «his» adjudication would fit with «any dispute», suggested a different kind of ADR for bigger contracts (impliedly assuming the existence of a one-to-one relationship between contract's size and dispute's complexity). It is not by chance that the right to adjudication, in other legal systems, is limited to payment disputes.

Anyway, words carry weight. As a result of the combination of the wording «any dispute» and «at any time» — as Toulmin LJ said in the *AWG case* ([41]) — «disputes referred to adjudication have become ever more complex, and referrals are made (in contrast to the original purpose of the legislation) long after the relationship between the parties is at an end, there might be a conflict for an adjudicator between reaching a decision within the stringent time limits permitted under ss.108 and 109 of the Housing Grants Construction and Regeneration Act 1996 (the Act), and the adjudicator's duty under the Act to act impartially».

Notwithstanding the same judge (but not only ([42])) «raised the possi-

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([38]) *Connex South Eastern Limited v MJ Building Services Group Plc* [2005] EWCA Civ 193 at [38].

([39]) Indeed, the question arose during Parliament debates: and, while Lord Howie of Troon expressed the view that adjudication should not have been admitted «long after the project had been completed» (see *Hansard*, 23 July 1996, c. 1343), the arguments advanced by Lord Lucas ended up to prevail. As he said: «I am of course aware that some have doubted the wisdom of allowing parties to refer a dispute to adjudication long after work under the contract has ceased. However, as long as there is any possibility of disputes arising under a contract, parties will have to live with the fact that an adjudicator's decision may be sought. Indeed there may be times, even at such a late stage, where it is desirable to have a quick and cheap procedure that can produce an effective temporary decision, particularly since this will not prevent parties from seeking a permanent decision through arbitration or the courts.

As long as there is a possibility of a dispute arising under a contract, the right to seek adjudication will remain. There is no evidence that this will cause any particular difficulties in practice and on balance we feel that it is likely to be helpful. We should, of course, always be prepared to look again at the legislative framework if persistent problems emerged». See *Hansard*, 23 July 1996, c. 1344.

([40]) S. 108(1) HGCRA.

([41]) *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC) at [11].

([42]) In *London and Amsterdam Properties v Waterman Partnership* [2003] EWHC 3059 at [146], for instance, Wilcox LJ considers that «there may be some disputes, particu-

bility that there may be disputes which are so complex and the advantages so weighted against a defendant that there is a conflict between the right to refer to adjudication and to obtain a decision under s108(2)(c) and (d) of the Act, and the adjudicator's duty to act impartially under s108 (e) of the Act and that this may be a conflict which it is impossible to resolve» (43), however, TCC has long stated that «[t]he test is not [...] whether the dispute is too complicated to refer to adjudication but whether the Adjudicator was able to reach a fair decision within the time limits allowed by the parties» (44).

It follows from the above that, whatever the Legislator's intention was, adjudication's scope may be exactly the same as the one of litigation and/or arbitration. At the opposite end of the spectrum, however, the adjudicator may also be asked to settle controversies involving mixed issues of fact and law (e.g. the right to an extension of time) and even mere issues of fact (e.g. the assessment of quality of the utilized materials (45)).

In both cases, adjudication may result in a broader protection for the parties that the one actionable by means of other legal proceedings.

Indeed, on the one hand, the Act guarantees that the right to adjudication can be exercised «at any time», while it is admitted — at least, in the UK — that filing court or arbitration proceedings may be delayed (by contract) up to the end of the work.

On the other hand, if it is debatable that parties cannot split their dispute (at least, when involving rights) before nationals Courts (46), there

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larly arising at the end of a project, which are too complex to permit a fair adjudication process within the time limits of the scheme».

(43) *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* at [123].

(44) *CIB Properties Ltd. v Birse Construction* [2004] EWHC 2365 (TCC) at [26].

(45) See the examples given by J. L. Riches, C. Dancaster, *Construction Adjudication*^{2}, 265. In any case, as stated in *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd* [2002] BLR 125 at [15], neither the Scheme, nor other standard contracts give the adjudicator the power to «adapt, vary or otherwise modify a contract»; in addition, as held in *Vaultrise Ltd v Paul Cook* [2004] ADJCS 04/06, if it is true that the adjudicator may «open up, revise and review any decision or certificate of a contract administrator», he cannot release a substitutive certificate. This marks the distance between the adjudicator's role and the Italian *arbitratore*'s one (regulated by article 1349 c.c.): this latter, indeed, acts at the genetic stage of the contract in order to fill a gap left by the parties (see C. Punzi, *Disegno sistematico dell'arbitrato*^{2}, I, Padova, 2012, pp.14-15); the adjudicator, by contrast, as an arbitrator, is asked to settle a dispute arisen during the fulfilment of the contract.

In addition, adjudication and arbitration, unlike *arbitraggio*, are conducted as proceedings.For a more detailed analysis of adjudication qualification under Italian categories, see V. Capasso, *Adjudication: may arbitration be only interim final?*, in course of publication on *Riv. arb.*, 2018, 3.

(46) While agreeing with G. Verde, *Abuso del (e nel) processo*, in Verde G., *Il difficile rapporto tra giudice e legge*, Napoli, 2012, pp. 122 ff.; Id., *Sulla «minima unità strutturale» azionabile nel processo (a proposito di giudicato e di emergenti dottrine)*, in *Riv. dir. proc.*, 1989, 573 ff., it is to be acknowledged that his position is not shared by the Italian Supreme Court, which recalls, in its rulings, the duty to ensure a reasonable delay in litigation: see, *ex multis*, M. Bove, *Il principio della ragionevole durata del processo nella giurisprudenza della Corte di cassazione*, Napoli, 2010, pp. 99 ff.

is certainly no reasons for the State to prevent them from conducting a private process limited to one or more simple issues (47).

5. Heterogonie der Zwecke*: adjudication as a way of outsourcing dispute resolution.*

Such a broad scope — both under the objective and temporal profile —, makes adjudication an attractive alternative to other legal proceedings.

It is true that, as already pointed out, there is no obligation for parties to refer disputes to adjudication, and that, in any case, the adjudicator's decision is binding, but not final (unless parties so agree), with the consequence that each party may refer the same dispute already adjudicated to litigation or arbitration (as the case may be).

Theoretically, thus, adjudication is not «through and through» an alternative to other legal proceedings. But, as a matter of fact, it has experienced an outstanding success since its introduction, in terms of both

i) number of referred disputes;

ii) rate of unchallenged decisions.

As for the first point, it is intuitive that — absent the need to get his/her counterparty consent —, the referring party is free to start adjudication as it was an ordinary legal action before any Court: in other words, it can be said that *the (potestative) right to adjudication is to section 108 HGCRA as the right of action is to article 24 Italian Constitution.*

That said, there are several reasons why the claimant may prefer adjudication: it is quicker and cheaper than litigation (or arbitration), it does not require lengthy disclosure and it does not prevent the referring party — if failing its claim — to have «a second bite of the cherry».

Concerning the second point, given that the adjudicator's decision is self-standing and almost always enforced by Courts, the winning party is usually satisfied with it. This is especially true because — despite adjudication's broad scope — the vast majority of construction disputes involve payments: once paid the adjudicated amount, there is no need to re-litigate in order to get *res judicata* (48).

The losing party, on the contrary, may challenge the decision during the enforcement proceedings and, if s/he fails to do so, s/he can still refer the same dispute to arbitration or to the State Court. But, despite this, adjudicator's decisions enjoy a high spontaneous compliance rate.

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(47) M. Bove, *La perizia arbitrale*, Torino, 2001, pp. 177-178; but see also F.P. Luiso, *L'oggetto del processo arbitrale*, in *Riv. arb.*, 1996, 4, pp. 669 ff.; M. Fornaciari, *Lineamenti di una teoria generale dell'accertamento giuridico*, Torino, 2002, p. 217.

(48) A phenomenon akin to the one experienced by Italian urgent relief measures issued under article 700 c.p.c.; see, *ex multis*, G. Verde, *Considerazioni sul procedimento d'urgenza (com'è e come si vorrebbe che fosse)*, in Aa. Vv., *I processi speciali. Studi offerti a Virgilio Andrioli dai suoi allievi*, Napoli, 1979, pp. 409 ff.

The explanation is easy to understand.

Adjudication, indeed, works as a sounding board: parties may advance all their argument before the adjudicator, whose decision is likely to predict the one that the Court or the arbitral tribunal would reach if asked to settle the same dispute ([49]). This means that, provided that the winning party will hardly be interested in starting subsequent proceedings, the losing party too is surely discouraged to do so (unless s/he deems to have a strong case) ([50]).

As it can be inferred from the above, therefore, although the primary purpose of the Parliament was undoubtedly the good performance of the construction industry — for the sake of the parties, but of the Industry (and therefore the Country) too —, adjudication explains a number of further indirect effects:

i) in the first place, the outsourcing of a significant portion of the public management of disputes in the field. As it has been pointed out, «the legislature has in effect left the resolution of disputes under construction contracts to experts in the private sector, at that sector's expense, rather than requiring them to be resolved by judicial officers or public administrators at the State's expense ([51])»;

ii) secondly, it widens parties' protection opportunities;

iii) thirdly, it simplifies the proceedings that end up being held before the ordinary judicial authority.

Indeed, adjudication allows the emergence of a significant number of disputes that, in default, would have been most likely neglected during the works and merged into more complicated and time consuming proceedings concerning the final account (which probably would have been brought before the TCC).

([49]) Adjudication is thus comparable to Early Neutral Evaluation, that, in turn, has been found to be similar to the Italian Arbitro Bancario Finanziario proceedings: see C. Consolo, M. Stella, *Il ruolo prognostico-deflattivo, irriducibile a quello dell'arbitro, del nuovo ABF, «scrutatore» di torti e ragioni nelle liti in materia bancaria*, in *Corr. giur.*, 2011, pp.1653 ff.; Id., *L'"arbitro bancario finanziario" e la sua "giurisprudenza precognitrice"*, in *Le Società*, 2013, 2, pp. 185 ff.; G. Finocchiaro, *L'Arbitro Bancario Finanziario tra funzioni di tutela e di vigilanza*, Milano, 2012, pp. 297 ff. However, by contrast with ENE, adjudication normally ends with an enforceable decision.

([50]) Notwithstanding the above, it should be stressed — once more — that the subsequent proceedings (whether arbitration or litigation) would not be affected by the adjudicator's decision.

Indeed, this latter does not reverse the burden of proof on the losing party, so that it will still be for the claimant to prove his/her right, following the ordinary rules of evidence: see *City Inn Ltd v Shepherd Construction Ltd [2001] ScotCS 187; Citex Professional Services Limited v Kenmore Developments Limited* [2004] ScotCS 20; *Stiell Ltd v Riema Control Systems Ltd [2001] 3 TCLR 9;* P. Coulson, *Coulson on Construction Adjudication*, cit., p. 384.

([51]) J. Bailey, *Public Law and Statutory Adjudication*, June 2008, on www.scl.org.uk, p. 5, note 25.

Statistics (52) confirm all the above statements.

As a matter of fact, adjudication referrals have always been from 2 to 5-fold higher than TCC claims; in addition, data show a decrease among the latter and a change in their composition.

It has to be acknowledged that the lowering of TCC cases cannot be ascribed in full to the advent of adjudication: between 1995 and 1998 claims before the Court already halved (53), most likely because of the influence of the Woolf Report (54) and the consequent introduction of new Civil Procedure Rules 1998.

Nonetheless, it is submitted that adjudication has been «one of the principal factors accounting for the significant reduction in litigation and arbitration in the construction field» (55). In fact — setting aside data about the period immediately before and after the Wolf Reform —, between 1999 and 2014 TCC claims fluctuated between almost 400 and 500, while, in the same period, adjudication referrals were on average 1500 a year.

Indeed, though less and less construction disputes are firstly brought before the TCC, the Court has taken on a new competence, i.e. to provide assistance — above all, but not only — to the enforcement of the adjudicator's decisions (56).

This last circumstance partially offsets the decrease deriving from the parties' choice for a first referral of the disputes to the adjudicator, rather than to the State Court. Nevertheless, it is self-evident that the degree of commitment required from the judge in dealing with an ordinary judgment — on the one hand — or with a simple procedure aimed at the recognition of the enforceability of the decision already made by the adjudicator — on the other hand — is qualitatively different.

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(52) For TCC claims data see R. Gaitskell, *Trends in Construction Dispute Resolution*, December 2005, on www.scl.org.uk, p. 2, Judiciary of England and Wales, *Annual Report of the Technology and Construction Court 2011-2012*, p.7 and Id., *Annual Report of the Technology and Construction Court 2013-2014*, p. 8, on https://www.judiciary.gov.uk.

Concerning adjudication referrals, see Adjudication Society, *Report no.15. Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs)*, on https://www.adjudication.org for the latest data available.

(53) There were 1778 TCC claims in 1995; 1500 in 1996; 721 in 1997; 615 in 1998; 297 in 1999.

(54) H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London, 1996.

(55) R. Gaitskell, *Trends in Construction Dispute Resolution*, cit., p. 11.

(56) The Court published a TCC Guide, whose «Purpose» (as stated by section 1.1.1) is «to provide straightforward, practical guidance on the conduct of litigation in the TCC. Whilst it is intended to be comprehensive, it naturally concentrates on the most important aspects of such litigation» and «does not and cannot add to or amend the CPR or the relevant practice directions».

Section 9 is entitled to «Adjudication business» and provides a quick «Procedure in Enforcement Proceedings» (section 9.2) and «Other Proceedings Arising Out Of Adjudication» (section 9.4). See HM Courts & Tribunals Service, *The Technology and Construction Court Guide*, 2nd Ed., 3rd revision, 2014, on https://www.gov.uk.

Finally, by comparing the number of cases brought before the TCC every year with the one of adjudication referrals in the same period, it is easy to infer a high compliance rate to the adjudicator's decisions: in 2014, for instance, there were 460 TCC claims and 1439 adjudication's referrals (and it is to be considered that the Court does not hear only cases related to adjudication ([57]) and that — most, but — not all adjudication-linked proceedings concern enforcement).

In the light of the above, adjudication proves to be an effective alternative to Emperor Kang-hsi's approach: Alternative Dispute Resolution (*rectius*: Externalized Dispute Resolution) may be successfully provided by making it something people would choose on the basis of their free will, rather than in order to escape from a nightmare (State) process.

6. *An Italian point of view: the adjudicator's decision as an «extra-judicial enforcement order».*

Given the outstanding — and, arguably, highly desirable — outcomes of adjudication, one may wonder whether and within which limits it could be implemented in civil law Countries such as Italy.

To answer to this question, it is primordial to subsume the «new» proceedings under familiar categories; and, despite the opposite opinion expressed by British Courts — although without much explanation —, it seems rational to define adjudication as *interim* arbitration: the adjudicator is asked to settle a dispute in the same way as an arbitrator is, but his/her decision, though binding and normally enforced as an award, is not final (like an *interim* award ([58])).

If this definition is accepted, the question arises as to how to deal with domestic constraints, since, in Italy, arbitrators are not allowed to grant interim relief and mandatory arbitration is forbidden.

This paper will not deal with the first prohibition, since it has already been explored (and greatly criticised) by a number of scholars, who have

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([57]) Following the Court's official webpage, it hears cases including: claims about services provided by engineers, architects, surveyors and other professionals in this Sector; claims about local authority duties relating to land and buildings; environmental claims (e.g.: pollution); claims resulting from fires; challenges to decisions of arbitrators in construction and engineering disputes.

([58]) As G.B. Born, *International Commercial Arbitration2, III, International Arbitral Awards*, Alphen aan den Rijn, 2014, pp. 3019-3020 points out, the term «interim award» is currently used in a triple sense: as a synonym of partial award; with respect to an award concerning a preliminary issue; to refer to a decision granting provisional relief. Therefore — and following Born's suggestion — it is worth specifying that the phrase is here used in this latter meaning: the adjudicator's decision may thus be equated to an «interim award of provisional relief», i.e. and award that «does not provide final resolution of part of the dispute, but resolution of all of a claim for provisional relief, subject to later revision». The only difference is that the adjudicator (unlike the arbitral tribunal), once the decision issued, is *functus officio* and, therefore, could never be asked to revise it.

widely demonstrated that the question as to whether arbitrators should be given the power to issue *interim* relief is a legislative policy one, the main argument against such power (their lack of *imperium* (59)) being inconsistent with their unquestioned power to grant *final* relief (60).

Only slightly greater attention is to be given to the second problem, since it is questionable that adjudication may be defined as a mandatory arbitration. Such a kind of arbitration — that, as well known, is held to violate article 24 Const. (61) — may briefly be defined as the one that prevents the parties from going to Court. Thus, in order to assess the legitimacy of statutory arbitration (so called *arbitrato da legge*), it is to be investigated if parties (each of them singularly) are free to back out of the arbitration clause imposed upon them by the law (62).

And, as the reader is at this point well aware, this is exactly the case for parties in a construction contract: since the adjudication clause derogates to both the arbitration clause's positive and the negative effect, parties are obliged to *provide for* adjudication, but not to *start* adjudication when a dispute arises (63). Moreover, even if *one of them* chooses to exercise

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(59) As hold by Cass. Firenze, 16 luglio 1906, in *Foro it.*, 1906, I, cc.1173 ff., and in *Giur. it.*, 1906, I, 1906, I, 1, cc.828 ff., and then retained by the following judgments and the vast majority of the docrine (starting with C. Lessona, *Dell'autorità giudiziaria a concedere il sequestro nel caso di sentenza deferita ad arbitri*, in *Foro it.*, 1906, I, cc.1301 ff.; but see also, more recently, T. Carnacini, *Arbitrato rituale*, in *Novissimo Dig.*, I, Torino, 1958, pp. 874 ff.; E.F. Ricci, *La prova nell'arbitrato rituale*, Milano, 1974, p. 60), with the exception of E. Codovilla, *Del compromesso e del giudizio arbitrale*[2], Torino, 1915, pp. 338 ff.

(60) See, for instance, F. Carpi, *L'arbitrato rituale fra autonomia e aiuto giudiziario*, in *Contr. e impr.*, 1990, 3, p. 929; F.P. Luiso, *Arbitrato e tutela cautelare nella riforma del processo civile*, in *Riv. arb.*, 1991, 2, pp. 253-253; P. Bernardini, *Arbitrato internazionale e misure cautelari*, in *Riv. arb.*, 1993, 1, p. 26.

(61) As Italian Constitutional Court has repeatedly stated since C.Cost., 14 luglio 1977, n.127 in *Foro it.*, 1977, I, c.1849; in *Giur. it.*, 1978, I, c.1809; in *Giur. Cost.*, 1977, I, pp. 1143 ff., annotated by V. Andrioli, *L'arbitrato obbligatorio e la Costituzione* (though having already touched the subject in C.Cost., 2 maggio 1958, n.35, in *Foro it.*, 1958, I, cc.665 ff.; in Giur. it., 1958, I, 1, c.884 ff.; in *Giur. cost.*, 1958, c.481 ff., annotated by C. Esposito, *Legislazione regionale sulle opere pubbliche e arbitrato obbligatorio*, and in C.Cost., 12 febbraio 1963, n.2, in *Foro it.*, 1963, I, c.397; in *Giur. cost.*, 1963, pp. 20 ff., annotated by P. Barile, *L'arbitrato e la Costituzione*; in *Mass. Giur. lav.*, 1963, pp. 95 ff., annotated by V. Andrioli, *L'arbitrato rituale e la Costituzione*).

(62) C.Cost., 8 giugno 2005, n.221, in *Giur. it.*, 2006, 7, pp. 1450 ff., annotated by I. Lombardini, *Illegittimità dell'arbitrato obbligatorio in materia di opere pubbliche.*

(63) This distinction may lead the Italian lawyer to think to a previous version of article 808, paragraph 2, c.p.c., as amended by article 4 l. 11 August 1973, n. 533, which exceptionally allowed parties to arbitrate labour disputes under two concurrent conditions:

i) that the relevant collective employment contract or agreement so provided. Actually, although the relevant articles did not mention it, arbitrability could be allowed by law too, even before the express provision added by article 20, l. 2 February 2006, n. 40, while amending — *inter alia* — article 806, paragraph 2, c.p.c.: see D. Borghesi, *Arbitrato per le controversia di lavoro*, in F. Carpi, P. Biavati (ed), *Arbitrati speciali*, Bologna, 2016, pp.11-12);

ii) that the arbitration agreement was without prejudice to the parties' right to refer the dispute to the State court. This means that, once unarbitrability got removed by collective bargaining, parties did not need to set up an individual arbitration agreement: each of them

his/her right to go to adjudication, his/her counterparty will still have the opportunity to refer *the same dispute* to litigation or arbitration (64) without waiting the end of the adjudication proceedings.

If the above considerations appear to be enough to conclude that adjudication should not be considered as mandatory arbitration, this is not the end of the story.

In fact, one could still argue that such a mechanism would end up introducing a special judge, thus infringing — this time — article 102 Const. Actually, the latter, in its prohibiting the institution of any new special judge, is deemed to go beyond its scope (65) and to be «historically dated», so that it should be modified (66); and it has already been suggested that «rather than more or less obligatory conciliatory mechanisms, which have not yet worked, one should think of compulsory forms of arbitration» (67).

But those opinions, albeit shareable, cannot exempt the interpreter from his/her duty, i.e. to take into account the law as it is, and not as it should be.

In order to deal with this matter, however, it is possible to rely on some well-known considerations. Looking at adjudication, indeed, an Italian observer cannot avoid to draw a parallel between such proceedings and the «extra-judicial enforcement order» (68) whose introduction has been invoked (since 2003) by Proto Pisani (69). Actually, the system wished-for by the learned Author is more akin to Dispute Adjudication Boards (70) than

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could start arbitration, but *was not obliged* to do so. The situation did not change with the first version of article 412-*ter* c.p.c., introduced by article 39, d.lgs. 31 March 1998, n.80: see F.P. Luiso, *L'arbitrato irrituale nelle controversie di lavoro dopo la riforma del 1998*, in *Riv. arb.*, 1999, 1, pp. 33-34.

(64) Provided that the contract does not prevent parties to seek final settlement of disputes until the end of the works; in which case it is such clause whose legality should be assessed.

(65) G. Scarselli, *La tutela dei diritti innanzi alle autorità garanti. I. Giurisdizione e amministrazione*, Milano, 2000, p. 147.

Similarly, V. Denti, *Tre interventi sul disegno di legge governativo di provvedimenti urgenti per l'accelerazione dei tempi della giustizia civile. Una difesa d'ufficio*, in *Foro it.*, 1987, V, c.172; S. Chiarloni, *Nuovi modelli processuali*, in *Riv. dir. civ.*, 1993, I, p.269; G. Verde, *Giustizia e garanzie nella giurisdizione civile*, in *Riv. dir. proc.*, 2000, 2, p. 309; R. Lombardi, *Autorità garanti e controllo del giudice*, in *Giust. civ.*, 2000, 5, II, p. 238.

(66) G. Verde, *La giustizia italiana agli albori del 2000*, in *Foro it.*, 1999, V, c. 88.

(67) *Ibid.*, c. 88.

(68) Free translation of the original expression «*titolo esecutivo di formazione stragiudiziale*».

(69) A. Proto Pisani, *Per un nuovo titolo esecutivo di formazione stragiudiziale*, in F*oro it.*, 2003, VI, cc.117 ff.

(70) Though already known by practice — especially in the US —, DBs spreading started in 1996, when the *Fédération Internationale des Ingénieurs Conseils* (FIDIC) published its *Supplement to the Fourth Edition of the Red Book.*

In 2017 edition of the FIDIC Suite of contract they are renamed Dispute Avoidance/ Adjudication Board (DAAD), in order to enhance their main purpose (i.e. the prevention of disputes), often neglected in favour of their (secondary) potential in dispute resolution.

adjudication, but his reasoning — aimed to justify the legitimacy of the proposed mechanism — fits well to the purposes of the present analysis.

In short, he suggests that, before taking legal action, parties should be subject to a conciliation attempt led by a panel of three members (two of which appointed by each party and one, the chair, by the already chosen members). Where an agreement is not reached, the same panel will issue a binding and immediately enforceable decision, which will become final unless one of the parties (normally, the aggrieved one) starts litigation within a prescribed time limit (71).

Being aware of the constitutional issue (the afore-mentioned article 102 Const.), the same Author points out that our legal system already knows several instruments through which dispute resolution is not committed to a professional judge (72).

The most remarkable example is the one of the Authorities, which — in exercising a so-called para-judicial function — have already originated the (likely justified) doubt that the legislator, through «complicated rules», has circumvented the ban to the introduction of special judges (73).

Actually, it is precisely the debate arisen over the Authorities and their legitimacy that gave rise to a teleological construction of article 102: indeed, it can be advocated that the prohibition set out therein has the limited scope of guaranteeing that the «organs that perform jurisdictional functions» are independent from other powers or, at most, that «the decisions of these authorities [...] in relation to the disputed rights are ultimately resolved and decided by the ordinary judicial authority», so that «the judicial authority continue to have the last word on the protection of rights» (74).

Summing up, if «[...] the essence of jurisdiction, which as such must always be [...] reserved to judges [...] consists in the ultimate implementation of rights», it follows that, by contrast, «it falls within the discretion

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(71) A. Proto Pisani, *Per un nuovo titolo esecutivo di formazione stragiudiziale*, cit., c.121-122. The Author, a few years later, transposed this idea in his broader proposal of a new Code of Civil Procedure: see A. Proto Pisani, *Per un nuovo codice di procedura civile*, in *Foro it.*, 2009, V, cc.1 ff., where articles 6.1 to 6.7 are placed under the title «*Del tentativo obbligatorio di conciliazione-decisione allo stato degli atti*».

(72) The reference is not only to the *giudici di pace* (justices of peace), which, indeed, by their institution (which took place with l. 21 November 1991, n.374) to date have seen their competence increase dramatically, up to the recent legislative d.lgs. 13 July 2017, n.116. In addition, there were also the *giudici onorari di tribunale* (honorary court judges) and the *vice-procuratori onorari* (honorary deputy prosecutors), whose discipline, (first) dictated by articles 42-*bis* ff. R.D. 30 January 1941, n. 12, as amended by d.lgs. 19 February 1998, n. 51, has been repealed by the aforementioned 2017 decree.

(73) G. Verde, *Giustizia e garanzie nella giurisdizione civile*, cit., p. 309; see also Id., *Autorità amministrative indipendenti e tutela giurisdizionale*, in *Dir. proc. amm.*, 1998, 4, p. 747, and R. Lombardi, *Autorità garanti e controllo del giudice*, cit., p. 225 ff.

(74) G. Scarselli, *La tutela dei diritti innanzi alle autorità garanti.*, cit., pp. 51-53. Free translation.

of the ordinary legislator [...] to attribute to subjects other than [the judicial authority] [...] the non-final implementation of the rights». In this case, «the provision of a full and unlimited control of the activities carried out by such subjects before the judicial authority: so that only the judicial authority will be able to say the last word regarding the protection of rights» ([75]) would suffice.

If so, and coming back to the «extra-judicial enforcement order», it proves to be consistent with Constitutional limits, since it does not prevent parties to have recourse to the Court.

Nor adjudication does. Indeed, adjudication is even less burdening than the proposed model, since it is not a pre-condition and since the decision cannot — unlike the «extra-judicial enforcement order» — become *res judicata.* Thus, the asserted legitimacy of the proposed model demonstrates *a fortiori* the constitutionality of adjudication.

7. *Conclusions*.

Proto Pisani claims that the introduction of his «extra-judicial enforcement order» «would operate the largest privatization ever attempted in civil justice» ([76]). The British experienced so. And it works.

Hence, once all the possible objections are discarded, the only question left unanswered is: are we ready to acknowledge a real *right to arbitration*?

([75]) A. Proto Pisani, *Per un nuovo titolo esecutivo di formazione stragiudiziale*, in *Foro it.*, 2003, VI, c.118.

([76]) *Ibid.*, cc.122-123.