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ADJUDICATION: MAY ARBITRATION BE ONLY *INTERIM* FINAL?

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Adjudication: may arbitration be only *interim* final?

VALENTINA CAPASSO

1. *Introduction*. — Statutory Adjudication (1) — firstly conceived by Sir Michael Latham, who saw it as « the key to settling disputes in the construction industry » (2), and then adopted by the UK's *Housing Grant, Construction and Regeneration Act* 1996 (3) (HGCRA (4)) — allows each party (5) to a construction contract (6) to have recourse to an independent third party in order 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 a national Court or an arbitral tribunal.

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(1) Among the vast literature on the topic, see COULSON P., *Coulson on Construction Adjudication*[2], New York, 2011; PICKAVANCE J., *A practical Guide to Construction Adjudication*, Oxford, 2016; REDMOND J., *Adjudication in Construction Contracts*, London, 2001; RICHES J. L., DANCASTER C., *Construction Adjudication*[2], Oxford, 2004.

See also, in France, SHEPPARD A., *Le règlement des litiges dans le domaine de la construction par voie d'« adjudication » au Royaume-Uni*, RDI, 2001, 129 ss.

(2) LATHAM M., *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report*, London, 1994, 70.

(3) As amended by the *Local Democracy, Economic Development and Construction Act* 2009 (LDEDCA).

(4) That will also be called « the Act » or « the Construction Act » hereinafter.

Following UK's example, many common law Countries have now adopted a Security of Payment Legislation (SOPL), which ensures contractors the right to stage payments and a quick means of dispute resolution. To date, it has been introduced in New South Wales [*Building and Construction Industry Security of Payment Act* 1999 (NSW)]; New Zealand [*Construction Contracts Act* 2002 (NZ)]; in the State of Victoria [*Building and Construction Industry Security of Payment Act* 2002 (Vic)]; Queensland [*Building and Construction Industry Payments Act* 2004 (Qld)]; Western Australia [*Construction Contracts Act* 2004 (WA)]; Northern Territory [*Construction Contracts (Security of Payments) Act 2004 (NT)*]; Isle of di Man [*Construction Contracts Act 2004 (Isle of Man*)]; Singapore [*Building and Construction Industry Security of Payment Act 2004 (Singapore)*]; South Australia [*Building and Construction Industry Security of Payment Bill 2009 (SA)*]; Tasmania [*Building and Construction Industry Security of Payment Act 2009 (Tas)*]; Malaysia [*Construction Industry Payment and Adjudication Act 2012* (Malaysia)]; Ireland [*Construction Contracts Act 2013* (Ireland)]; Ontario [*Construction Lien Amendment Act* 2017].

(5) Whether public or private: the Act applies, in fact, even with respect to public procurement.

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

Indeed, as the mere rising of a dispute during the carrying out of works is potentially fatal (especially, but not exclusively, if it relates to the cash flow), the British Legislator set up special proceedings which remind the one (then [7]) provided by Rules 25.6 to 25.9 Civil Procedure Rules (CPR) — the so called « interim payments » [8] —, while pre-evaluating the *periculum in mora* (and, essentially, the *fumus boni iuris* too [9]).

On the other hand, if the need for fast-track proceedings was felt because of the aforesaid intrinsic urgency, Parliament was also aware of the risk that such speed could result in a wrong outcome. So, it provided that the adjudicator's decision is immediately binding, but only until the dispute is finally determined by legal proceedings, by arbitration or by agreement, *if any*.

The decision, in fact, is issued under a « pay now, argue later » [10] philosophy: it is self-standing [11], but *res judicata* (i.e. the doctrine of estoppel [12]) does not apply to it [13]. It is therefore debatable whether adjudication may be defined as arbitration or not.

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(7) The CPR — which may be consulted on *https://www.justice.gov.uk* — entered into force on 1999. They have been inspired by the Lord Woolf's final report: see Woolf H., *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, London, 1996 and, for a commentary, Zuckerman A.A.S., *Lord Woolf's Access To Justice: Plus Ça Change...*, in *Modern Law Review*, 1996, 59, 773 ss. See also, among Italian scholars, Crifò C., *La riforma del processo civile in Inghilterra*, in *Riv. trim. dir. proc. civ.*, 2000, 2, 511 ss. and Passanante L., *La riforma del processo civile inglese: principi generali e fase introduttiva*, in *Riv. trim. dir. proc. civ.*, 2000, 4, 1353 ss.

(8) That may be construed, from an Italian point of view, as *interim* measures rather than summary proceedings: see Fradeani F., *I presupposti e gli effetti delle misure cautelari in Europa: l'esperienza francese ed inglese*, in Carratta A. ed., La tutela sommaria in Europa - Studi, Napoli, 2012, 243 ss.

(9) Because of the contemporary introduction of the substantial right to stage payments: see section 109 HGCRA.

(10) The expression is claimed to have been « coined [...] in early 1996 during discussions with Lord Howie of Troon in the tea room at the House of Lords » by Robert Fenwick Elliott (see Fenwick Elliott R., *Pay now, Argue Later*, on *https://feconslaw.wordpress.com/*, 15th January 2016).

Indeed, while the Parliament member envisaged a final and binding decision in order to make it « impossible to prevent the courts from placing all sorts of obstacles in the way of enforcement », the Author suggested that « if an adjudication loser was obliged to pay up, without prejudice to its right to then fight it out in the courts or arbitration to try to get it back, that would achieve the objective [they] were looking for, but minimising the risk of court interference ».

His suggestion was eventually held by the House of Lords, as well as his prediction that « this right to "argue later" would be used very much in practice [...] eventually proved good ».

(11) In the same way both Italian anticipatory *interim* relief measures (see article 669-*octies*, paragraphs 6 and 8, *codice di procedura civile*: hereinafter c.p.c.) and French referee orders (issued by the *juge des référés*: there are no express provisions in the *code de procédure civile* — hereinafter: CPC — which either state that the measure is self-standing or compel the winning party to start other legal proceedings in order to preserve its efficacy. However, the absence of such an obligation is undisputed by French Courts) are.

It is worth noting that *référé* proceedings are not always intended to provide urgent relief: see, *ex multis*, Cossa A., *L'urgence en matière de référé*, in *Gaz. Pal.*, 1955, 2, 45 ss.

(12) Upon which, see Sime S., *Res judicata and ADR*, in *Civil Justice Quarterly*, 2015, 1, 35 ss.; Quek Anderson D., *Issue Estoppel Created by Consent Judgments: Dissonance between the Principles Underlying Settlement and Court Decisions*, in *SJLS*, April 2017, 100 ss.; Barnett P. R., *Res Judicata, Estoppel and Foreign Judgments*, Oxford University Press, 2001, 134 ss.

(13) That means that parties are not estopped to bring the same dispute before a State Court or an arbitral tribunal; and, during those proceedings, the adjudicator's decision will have

In order to deal with this question, this paper will first describe the proceedings and then investigate the role of finality in arbitration.

2. *The eight compliance points*. — Adjudication's core rules are incorporated in the British primary legislation: section 108 HGCRA contains the so called « eight compliance points », that are to be included in every construction contract, any failure to comply with (even one of) them entailing the full application of the *The Scheme for Costruction Contract (England and Wales) Regulations* 1998 ([14]).

More specifically, the contract shall provide that:

i) each party may « give notice at any time of his intention to refer a dispute to adjudication »;

ii) the person chosen to act as adjudicator will be appointed and get informed about the referral within 7 days of the notice of adjudication;

iii) the adjudicator is required « 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 »;

iv) the referring party may « allow the adjudicator to extend the period of 28 days by up to 14 days »;

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no authority. A parallel can be drawn, in reference to this aspect, both with French referee orders, that cannot affect the main proceedings' decision (see article 488, paragraph 1, CPC), and Italian anticipatory relief measures, whose authority cannot be invoked in other proceedings: see article 669-*octies*, paragraph 9, c.p.c. According to some Authors — see, for instance, SALETTI A., *Sub art. 23*, in SASSANI B. ed., *La riforma delle società. Il processo*, Torino 2003, 229; ID., *Il processo cautelare, oggi*, in *Riv. dir. proc.*, 2014, 3, 549; GHIRGA M.F., *Le nuove norme sui procedimenti cautelari*, in *Riv. dir. proc.*, 2005, 3, 796 — the same is true for the main proceedings; but such conclusion is not supported by paragraph 9's wording, which literally refers to « other processes ». Indeed, an *a contrario* reading suggests the opposite solution.

Subsequent adjudicators (if asked to settle the same dispute or a dispute involving the analysis of questions already decided in a previous adjudication), instead, will be bound to the first decision, as it can be inferred from paragraph 9(2) Scheme. However, see *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC) at [53] for an analogy, albeit « imperfect », with issue estoppel.

This mechanism, in avoiding that « the claimant once disappointed by an adjudicator can seek a different determination from another, or indeed from a succession of others, until a favourable decision is reached » — *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 at [70] — evidently reminds articles 669-*decies* and 669-*terdecies* c.p.c., that would be violated if a party might ask for *interim* relief in order to neutralize the effects of another provisional measure (see MARINUCCI E., *Stabilità dei provvedimenti cautelari?*, in UBERTAZZI L.C. ed., *AIDA. Annali italiani del diritto d'autore, della cultura e dello spettacolo*, 2006, 269). Indeed, the above-mentioned articles clarify that the only « appeal » against the order is the « *reclamo* » provided by article 669-*terdecies* c.p.c. Should these means fail, the aggrieved party may only ask the Court to revoke or modify the measure if changes occur in the circumstances or if there is any previous fact that s/he has become aware after the issue of the precautionary measure (see article 669-*decies* c.p.c.).

Likewise, French referee orders explain the so called « *autorité de chose jugée au provisoire* » (for further information about the expression, see, *ex multis*, MOTULSKY H., *Rapport de synthèse*, in *Les ordonnances sur requête dans la pratique judiciaire française*, 1967, Paris, 63), and therefore can be modified or revoked only if new circumstances arise (see article 488, paragraph 2, CPC).

([14]) As amended in 2011 by the LDEDCA.

v) the adjudicator is required « to act impartially »;

vi) the adjudicator has the power « to take the initiative in ascertaining the facts and the law »;

vii) the adjudicator (as well as his/her employee or agent) « is not liable for anything done or omitted in the discharge or purported discharge of his functions [...] unless the act or omission is in bad faith »;

viii) the adjudicator's decision « 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 », but « [t]he parties may agree to accept the decision of the adjudicator » — once issued — « as finally determining the dispute ».

The circumstance that a right to adjudication will automatically arise if (but only if) there is a valid construction contract brings two consequences:

i) on the one hand, the doctrine of separability ([15]) — which recognizes the arbitration clause as constituting a separate and autonomous contract from the one to which it relates ([16]) — is not applicable to the adjudication clause ([17]). Therefore, « [w]here a contract is found to be void or it is found to be voidable and the innocent party elects, the Act will not apply because the law holds that there was never a contract in existence at all. Where the contract is [declared to be void or] rescinded, the parties are put back in the position they were before the contract was entered into, so that the contract no longer exists »;

ii) on the other hand, parties may not contract out: they can agree to draw up their own *ad hoc* adjudication clause or to refer to a standard form of contract within the limits set out by the Act. Nevertheless, the Scheme will apply if they fail to provide for the adjudication clause — at all or with reference to one or more of the eight compliance points — or if they establish a set of rules directly or indirectly inconsistent with the key provisions prescribed by section 108 HGCRA.

3. *The need for the Scheme.* — The application of the Scheme, however, is not to be regarded as a « sanction » in every case: in reality, even if the eight compliance points may suffice in order to carry out the proceedings, it is unlikely that parties would be satisfied by such a broad discipline.

([15]) As enshrined by section 8 Arbitration Act 1996, article 808, paragraph 2, c.p.c. and article 1447, paragraph 1, CPC.

([16]) Redfern A., Hunter M., *Law and Practice of International Commercial Arbitration*^{2}, London, 1991, 275.

([17]) In Italy, the same conclusion is traditionally hold by the Court of Cassation (see, for instance, Cass., Sez.I, 29 marzo 2012, n. 5105, annotated by Occhipinti E., *Ancora sull'esclusione del principio di autonomia della clausola d'arbitrato irrituale*, in this *Review*, 2012, 3, 568 ss).

For a different solution, see Vigoriti V., *L'autonomia della clausola compromissoria per arbitrato irrituale*, in this *Review*, 1996, 1, 62 ss., and Cecchella C., *Il contratto di arbitrato*, in Cecchella C. (a cura di), L'arbitrato, Torino, 2005, 77.

The Parliament itself must have been aware of this, when conferring to the Secretary of State — through sections 108(6), 114 and 146(1)(2) HGCRA — the power to draw the Scheme (secondary legislation). These Regulations, thus, not only constitute the fall-back provisions which apply in every case of non-compliance of section 108 HGCRA, but have also been a model upon which the already existent standard forms of contract has been amended (and, in the meanwhile, the first reference for parties who wished to adopt a more detailed adjudication clause).

For all the above reasons, the following description of the adjudication proceedings will refer to the Scheme's provisions.

4. *The proceedings in a nutshell.* — The party seeking adjudication (the « referring party ») has to serve a written notice (the « notice of adjudication ») setting out the nature of the dispute and the relief sought to the other party to the contract and to the adjudicator (if already designated into the contract) or, in default, to an Adjudicator Nominating Body (« ANB » ([18])), that has to appoint the adjudicator within 5 days. The nominee — whether asked to act as adjudicator directly by the referring party or by the ANB — has 2 days to decide whether he is willing to take office ([19]). The appointment, therefore, has to be secured in 7 days ([20]) and, in the same time limit, the referring party shall provide the adjudicator (and the other party) with the « referral notice » ([21]), which finally defines the *thema decidendum* ([22]).

Once the adjudicator has accepted, a 28-days time limit ([23]) starts to run for him to deal with the respondent's defence and the referring party's reply (if any ([24])), to take evidence and issue his/her decision.

Section 13 Scheme provides a non-exhaustive list of the adjudicator's powers « in ascertaining the facts and the law necessary to determine the dispute » ([25]); though more concisely expressed, they globally correspond to those conferred to arbitrators by sections 34, 37 and 38 of the *Arbitration Act* 1996.

([18]) That is « a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party »: see section 2(3) Scheme.

([19]) The appointment stage is regulated in detail by sections 2 to 6 Scheme.

([20]) As required by section 108(2)(b) HGCRA.

([21]) Section 7(1) Scheme.

([22]) But can only clarify (not extend) what the referring party has already stated in the notice of adjudication: see Construction Umbrella Bodies Adjudication Task Group (CUB), *Users' Guide to Adjudication*, on *https://www.scl.org.uk*, 2003, 12-13.

([23]) Which can only be extended -— by the referring party — up to 42 days or — if *both* parties agrees — even to a longer period: see section 108(2)(c)(d).

([24]) The response and the reply are not expressly mentioned by the Scheme, but they are normally allowed, since their need is felt to be an expression of the rules of natural justice: see Coulson P., *supra*, 450.

Sections 9, 10 and 11 CIPAA (Malaysia), by contrast, respectively provide for the « Adjudication Claim », the « Adjudication Response » and the « Adjudication Reply ».

([25]) « In particular he may —

Both the Construction Act and the Scheme, however, are silent over the question whether the adjudicator has to act in an adversarial or inquisitorial way. It has therefore been suggested that « [s]o far as procedure is concerned, the adjudicator is given a fairly free hand. [...] He is [...] permitted to take the initiative in ascertaining the facts and the law [...]. He may, therefore, conduct an entirely inquisitorial process » (26).

However, since « there are in practice a number of important restraining factors » (27) — first of all the need to comply with the rules of natural justice (28) —, the view that adjudication « tends to result in a process that is more like a speeded-up arbitration or a case in court than an inquisitorial, fact-finding exercise » (29) seems to be more realistic, even if it requires a clarification.

Indeed, given that construction disputes often involve complex technical issues, the majority of the appointed adjudicators are chosen among engineers, architects, quantity surveyors and the like (30). The decision maker is therefore strongly likely to have such an expertise degree that s/he would be able to make site visits, inspections, tests or experiments by herself/himself (31): in brief, s/he may act as an expert and as a judge in the same time (32).

(*a*) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),

(*b*) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,

(*c*) meet and question any of the parties to the contract and their representatives,

(*d*) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,

(*e*) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,

(*f*) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,

(*g*) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and

(*h*) issue other directions relating to the conduct of the adjudication ».

(26) *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC Technology 254 [at 14].

(27) Coulson P., *supra*, 110.

(28) Which can be summarized by the two Latin maxims *audi alteram partem* and *nemo judex in causa sua*: see Garner B.A., *Black's Law Dictionary*[9], St. Paul, 2009, word « *Justice* ».

(29) *Ibid*, 112.

(30) Even if the percentage of lawyers acting as adjudicators is on the rise: see the annual Reports carried out by the Glasgow Caledonian University on *https://www.gcu.ac.uk*.

(31) On the other hand, it may be the case that s/he lacks a sufficient level of knowledge in legal matters and subsequently needs to appoint a legal expert.

The same opportunity is convincingly admitted with reference to arbitration by Ghirga M.F., *Sub art.816 ter*, in Menchini S. ed., *La nuova disciplina dell'arbitrato*, Padova, 2010, 230; Verde G., *Lineamenti di diritto dell'arbitrato*[5], Torino, 2015, 159; Punzi C., *Consulenza tecnica e giudizio arbitrale*, in *Riv. dir. proc.*, 2016, 1, 1 ss.

(32) Auletta F., *Il procedimento di istruzione probatoria mediante consulente tecnico*, Padova, 2002, 349-350, underlines that parties may also agree to forbid the arbitrator to have recourse to an expert.

Hence, the question arises as to if and to what extent s/he may take evidence *ex officio*.

Needless to say that the adversarial principle, as expression of a principle of natural justice, has to be granted in any case (and not only if expressly established by the adjudication clause ([33])). This, however, does not prevent the adjudicator to use her/his own expertise in taking evidence, provided that:

(i) s/he warns the parties of her/his intention in advance and, if the outcomes of her/his investigations raise a new point, s/he discuss it with them ([34]);

(ii) the adjudicator does not do « [one party]'s job for it » ([35]).

Among the above-mentioned « restraining factors », however, stands the strict time limit at the adjudicator's disposal to release his decision. This latter, once issued, immediately binds the parties, but neither the Act nor the Scheme consider the case the losing party does not comply with it. Likewise, they do not provide a remedy against a wrong decision ([36]).

As a consequence, TCC had to deal with the need for enforcement regulations; and, in so doing, it has always adopted a robust approach, while deeming that « [t]he overall intention of Parliament is clear: [...] the decision of the adjudicator has to be complied with, pending final determination. There is no provision for a "stay of execution" (unless it is part of the decision itself), presumably since that would undermine the purpose which is finality, at least temporarily » ([37]). In short, the Court, during the years, has clarified its will to enforce the adjudicator's decision in any case, unless the losing party is able to show — during the enforcement hearing ([38]) — the adjudicator's lack of jurisdiction or her/his acting in breach of the rules of natural justice ([39]).

The first ground will be successful in cases in which the contract was not a construction contract or the dispute was not crystallized; the appointment of the adjudicator was not complying with the adjudication clause; the adjudicator failed to comply with his statutory or contractual obligations, or imposed

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([33]) Section 17 Scheme, for instance, states that « [t]he adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision ».

([34]) On the whole, s/he can make use of his/her own knowledge, if only s/he so does in accordance with the adversary principle: see Verde G., *supra*, 151.

([35]) *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC) at [35].

The same is true for our Supreme Court: see Cass., Sez. III, 6 giugno 2003, n. 9060; Cass., Sez. III, 14 febbraio 2006, n. 3191; Cass., Sez. III, 24 maggio 2013, n. 12990; Cass., Sez. II, 9 maggio 2016, n. 9318.

([36]) The absence of any form of appeal against the adjudicator's decision is not irrelevant with respect to the problem of its finality; thus, it will be recalled in the last paragraph.

([37]) *Outwing Construction Limited v. H. Randell & Son Limited* [1999] BLR 156 at [10].

([38]) A similar mechanism (which consolidates in a unique hearing the leave to enforce and the appeal against the award) is provided, in Germany, by § 1060 ZPO: see Serra M.L., *L'impugnazione per nullità del lodo rituale*, Napoli, 310-311.

([39]) An analysis of the ordinary remedies at parties' disposal against the award, both in the UK (see sections 67 to 69 AA) and in Italy (see article 829 c.p.c.), shows an overall match with the kinds of defects which render the adjudicator's decision a nullity.

a pre-condition to the release of his decision, or issued it out of time, or decided a dispute that was different from the one referred to her/him.

On the other hand, bias (whether actual or perceived) and the failure to give both party an equal chance to be heard may justify setting aside the decision on grounds of breach of rules of natural justice.

If the losing party fails to resist to enforcement, however, s/he will still be able to start litigation or arbitration, normally within « 6 years from the date on which the cause of action accrued » ([40]): in short, as anticipated, s/he has to « pay now », but s/he can « argue later ».

The adjudicator's decision, thus, reverses the burden of taking a legal action ([41]). By contrast, it is to be noted that what will be brought before the Court or the arbitral tribunal is *the same dispute* already settled in adjudication, that will be reheard afresh. Accordingly, the adjudicator's decision will not have the effect of shifting the burden of proof on the losing party ([42]).

5. *Deviations from the model*. — It emerges from the above description that adjudication diverges from a traditional arbitration in several aspects.

More specifically, (i) the adjudication clause does not require the parties' agreement; (ii) starting proceedings is not mandatory and, in any case, does not prevent parties (both of them) to go to arbitration or litigation in the meanwhile; (iii) even a simple issue of fact may be referred to adjudication; (iv) the adjudicator's decision does not prevent another (maybe contrary) judgement on the same dispute.

These deviations will be examined below.

6. Following*: consent and exclusivity*. — Notwithstanding the Statute ensures that every construction contract will contain an adjudication clause — regardless to parties' consent —, it defines adjudication as a right, and not as a pre-condition to litigation or arbitration; thus, parties will not be compelled to start it when a dispute arises. Moreover, if adjudication is eventually carried out, the same dispute can be re-litigated and finally settled by other legal proceedings.

These characteristics (lack of consent and of both the positive and negative effect of the arbitration agreement) are hard to reconcile with the features of traditional arbitration. Adjudication's arbitral nature, however, should not be denied because of the above circumstances.

([40]) As set forth by section 5 *Limitation Act* 1980 (which, instead, does not apply to adjudication, since it can be started « at any time »).

([41]) In the same way the Italian *decreto ingiuntivo* (i.e. cease and desist order: see articles 633 ss. c.p.c.) and the French *injunction de payer* (see articles 1405 ss. CPC) do.

([42]) Indeed, the cause of action of the new proceedings is a declaration of *inexistence* of the winning party's right; and, as it has already been demonstrated by Romano A.A., *L'azione di accertamento negativo*, Milano, 2006, 412 ss., the Latin maxim wants that *ei qui affirmat* — and not *ei qui agit* — *incumbit probatio*.

Indeed, a parallel can be drawn between adjudication and the so called « mandatory administrative ([43]) proceeding » provided by the Internet Corporation for Assigned Names and Numbers' Uniform Domain Name Dispute Resolution Policy (ICANN's UDRP ([44])), which constitutes a *mandatory clause* for everyone wishing to register a domain name worldwide (as specified in paragraph 1 UDRP).

If the Rules disregard parties' consent when it comes to the *provision* of the dispute resolution clause ([45]) — as HGCRA does —, paragraph 4(k) UDRP states that « [t]he mandatory administrative proceeding requirements set forth in [this paragraph] shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded ».

It is true that more than one Court has already expressed the view that mandatory administrative proceedings is not arbitration under *its national law*, whether because it is not binding on the parties ([46]) or because of its inconsistency with the restrictions on judicial review of arbitration awards ([47]); but it is equally true that « the exclusivity of arbitration is not so much an essential part of the definition than an essential part of its regime. It does not define arbitration; it protects it from court interference and is thus essential to its efficacy » ([48]).

In addition, if « [i]ts absence allows parties willing to escape the arbitration process to engage in strategic behaviour by bringing court proceed-

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([43]) The use of the word « administrative » may result to be misleading for a civilian, who is lead to think to Administrative Law, as a branch of Public Law.

By contrast, it should be read in the sense of « relating to management »: indeed, ICANN is in charge of the regulation of the proceedings (which may therefore be defined as institutional arbitration).

([44]) ICANN is a non-profit Californian corporation which administer the world Domain Name System (DNS), including « Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions »: see *http://archive.icann.org/tr/english.html*.

UDRP Rules were adopted on 24th October 1999 in order to regulate each stage of the procedure, which is administered by dispute resolution service providers accredited by ICANN.

([45]) However, a main difference has to be underlined between adjudication and mandatory administrative proceedings: in the first case, the clause is only effective between the parties involved in the construction contract, while in the second one *anyone* « wishing to challenge the registration of a domain name may initiate the proceedings against the holder of the disputed domain name, and this right is not founded in any arbitration agreement concluded between the parties, if only because the plaintiff and the defendant will most often have had no previous relationships »: see Cuniberti G., *Rethinking International Commercial Arbitration: Towards Default Arbitration*, Cheltenham, 2017, 49-50.

([46]) CA Paris, 17 June 2004, *Le Parmentier v Société Miss France*, in *Rev. Arb.*, 2006, 161.

([47]) United States District Court, E.D. Virginia, Alexandria Division, *Parisi v Netlearning Inc.* [2001] 139 F.Supp.2d 745.

([48]) Cuniberti G., *supra*, 49.

ings » ([49]) and therefore may be considered as a weakness, adjudication was precisely born in order to escape from both arbitration and litigation, whose procedures and delays were felt as inconsistent with the objective to have a « ready justice », even if « rough ».

Indeed, adjudication was conceived when arbitrators' power to grant *interim* relief was not as wide as nowadays ([50]) and the Courts were, in turn, really unlikely to grant provisional measures, especially when the contract contained an arbitration agreement ([51]).

It follows that, in order to fulfil its function — that is, to allow contractors and sub-contractors to ward their right to be paid by periodic instalments, in a contest in which the need for cash flow is *inherently* steady and urgent ([52]) —, adjudication does not need to be exclusive, nor to be final.

Instead, it has to be permanently available and quick: and HGCRA so ensures.

7. Following*: object*. — Even if adjudication's primordial objective was to grant the right to stage payments to the weaker parties in the construction chain, (both) parties may refer to adjudication « any dispute » arising under the construction contract; it follows from such a broad scope that the adjudicator may be asked to decide not only on a right, but also on a question (even of fact).

For instance, « where there is a dispute concerning the quality of the brickwork, the decision the adjudicator makes should declare whether or not the brickwork complies with the contract » ([53]).

In a case like this, it is arguable that the decision maker will act as an expert determiner rather than an arbitrator ([54]); but there are two reasons that seem to justify the conclusion that he is still to be considered as an arbitrator.

I. The first one is that, from a theoretical point of view, the nature and the

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([49]) *Ibid.* The Author further observes that « [r]emarkably, although the URDP expressly recognizes the possibility to initiate court proceedings, parties to domain name disputes have rarely used this possibility. This shows that the URDP is widely perceived as the most suitable mode of resolution of such disputes, and that its merits are so high that parties have rarely attempted to bypass it ».

Statistics show that the same is true for adjudication: see the already mentioned Glasgow Caledonian University's Reports.

([50]) Even if section 14 *Arbitration Act* 1950 provided that « [u]nless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award », the Courts, since *SL Sethia Liners Ltd v Naviagro Maritime CO (The)* [1981] 1 Lloyd's Rep 18 (Kostas Melas), were used to give it a narrow interpretation.

([51]) See, for instance, *Derek Crouch Construction Ltd v Nonhem Regional Health Authority* [1984] QB 644.

([52]) As stated in *Dawnays v Minter* [1971] 1 WLR 1205, « cash flow is the very lifeblood of the enterprise ».

([53]) Riches J. L., Dancaster C., *supra*, 265.

([54]) And the doubt is fostered by the adjudicator's double nature (as judge and expert).

function of the third party asked to act as adjudicator, whatever they are, may not change on a case-by-case basis, depending on the kind of dispute which is referred to him/her. Nor his/her actual activity changes: indeed, it goes without saying that, whether the referring party applies for an order to be paid a certain sum of money or for an extension of time or a conformity check of the works, s/he invariably asks the adjudicator to decide on a controversial matter; and, in so doing, the decision maker is always required to do a series of acts (to carry out a process ([55])) in order to « ascertain the facts and the law ».

And it is not by chance that the Italian *perizia arbitrale* has been convincingly interpreted — notwithstanding the contrary opinion expressed by the Supreme Court ([56]) — as a « partial arbitration » just because of its narrower object, the quality of the decision maker's activity being the same ([57]).

II. The second one is that the real distinction between arbitration and expert determination is muddy. A recent comparative analysis of the doctrine and jurisprudence's state of the art on valuation (called appraisal in the United States), *expertise-arbitrage* (in France), *Schiedsgutachten* (in Germany) and *bindend advies* (in the Netherlands) and expert determination (that is so widespread that it cannot be traced back to a single legal system) found out that these proceedings are usually distinct from arbitration because of « (i) the character of the issues submitted for decision (with arbitration generally involving broad "disputes", presenting legal issues and questions of liability, and expert determination and valuation involving narrower, factual or technical issues), and (ii) the nature of the procedures used (with arbitration involving neutral adjudicatory procedures affording the parties an opportunity to present their cases and expert determination and valuation not necessarily providing these procedures and permitting experts to rely more extensively on their own expertise and investigation) » ([58]).

The Author of the same study, however, underlines that « these two distinguishing features [...] are to an extent overgeneralizations » ([59]), since the broadness of the dispute, as well as the degree of required expertise and of inquisitorial role of the decision maker, may vary considerably in practice.

Considering this uncertainty throughout the world and since adjudication

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([55]) In the meaning of a series of acts aimed to issue a final order: see Fazzalari E., *Procedimento e processo (teoria generale)*, in *Enc. giur.*, XXXV, 1986, 819 ss.

([56]) Still recently: see Cass., Sez. III, 16 febbraio 2016, n. 2996, in *Resp. civ. prev.*, 2016, 3, 965.

([57]) Bove M., *La perizia arbitrale*, Torino, 2001, *passim*.

In any case, a distinction between the function of a decision maker and the regime that a specific Country provides for his/her *dictum* should be kept in mind: indeed, it is self-evident that, the latter being a choice of legislative policy, it does not affect the decision maker's actual activity.

([58]) Born G.B., *International commercial arbitration*^{2}. *Volume I: International arbitration agreements*, Zuidpoolsingel, 2014, 261.

([59]) *Ibid.*, 265 ss.

was born in the UK, it seems reasonable to refer to English jurisprudence in order to draw a distinction. In *Wilky Property v LSI* (60), it has been held that arbitration is different from expert determination because of its stricter discipline (as set out by the Arbitration Act), its easier award's enforcement system (61) and the broader variety of grounds that may be raised against the award (62).

Well, adjudication too is subject to a series of legal constraints and the adjudicator's decision is enforced by TCC as quickly as it was an award, except in those cases in which the losing party is able to prove that there has been a lack of jurisdiction or a breach of the rules of natural justice; and this two categories, as already said, virtually include all the available grounds against an arbitral award.

If the *distinguo* operated by the *Wilky Property* case is to be retained, thus, it may be concluded that adjudication is *a kind of* arbitration.

Indeed, if — for the above-mentioned reasons — it is arguable that the adjudicator holds the same nature and function of an arbitrator, it still seems that adjudication may not be defined as arbitration *tout court*, since its result may *only* consist in a decision which is not able to precluding that the same cause of action could be re-litigated.

It follows that « *interim* arbitration » might result a better definition of such proceedings, once one retains the word « *interim* » in the meaning of provisional: indeed, as Calamandrei said, « the concept of *provisionality* [...] is somewhat different [...] from that of *temporariness*. *Temporary* is [...] that which does not last forever [...] independently of the occurrence of another event » while « provisional [...] is what is intended to last until a subsequent event occurs » (and, now, *if* such an event occurs).

« In this sense, *provisional* corresponds to *interim* » (63).

And is worth noting that 13.1 Construction Lien Amendment Act, 2017 — the new SOPL enacted in Ontario, which received the royal assent on 12th December 2017 — calls the proceedings (in its French version) « *arbitrage intérimaire* » (64).

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(60) *Wilky Property v LSI* [2011] EWHC 2226 (Ch).

(61) Section 66 AA states that « [a]n award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect ».

(62) See section 68 AA, which allows the aggrieved party to challenge the award for reasons of serious irregularity.

(63) Calamandrei P., *Introduzione allo studio sistematico dei provvedimenti cautelari*, Padova, 1936, 10. Free translation.

(64) Even though it should be acknowledged that the term may have other interpretations, once read in the sense of « in the meanwhile ».

Firstly, it is arguable that, from the British Legislator's point of view, the adjudicator's decision is « *interim* » because it is (or, at least, it was supposed to be) related to payments « on account » (in respect to the whole sum agreed by the parties). Such an explanation, though not implausible, shifts the solution on a substantial, rather than procedural, level.

8. Following*: finality*. — However, since arbitration has always been conceived as a final way of dispute resolution, the aforesaid definition may be perceived as an inconsistency.

In fact, the main obstacle in recognising the arbitral very nature of the adjudicator seems to be the wrong belief of the existence of a necessary one-to-one relationship between « arbitration » and « award » (65).

That is the reason why the English Parliament itself has encountered great difficulties in drawing a dividing line between adjudication and arbitration, as shown by those proposals, arisen during debates, which aimed at configuring the adjudicator's decision as final in the absence of different agreement of the parties and, in any case, to construe the word « binding » — used in the Latham Report — in the sense that the decision should have been « the end of it unless you have a dispute that can be taken to the court » (66).

Such an interpretation evidently overshot Latham's intentions, sometimes more limited to providing a *temporary alternative* to arbitration or litigation. But, taking into account the already mentioned traditional equation according to which an arbitrator is the one who can pronounce a final award, the misunderstanding incurred by those who proposed « a speedy, fast-track arbitration which produces a binding conclusion, not open to any challenge after practical completion, but fixed and firm for all time in a wholly unrealistic time scale » (67) is understandable.

Shortly, one could imagine that the *conditores* initially thought of an adjudicator's decision that was (not only binding, but also) final, precisely because of a latent belief that, notwithstanding its name, adjudication is

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Secondly — but, this time, making use of Italian's categories — one may be tempted to equate the adjudicator's decision and the provisional order provided by article 423, paragraph 2, c.p.c. By contrast, there is a main distinction between such orders and self-standing anticipatory *interim* relief measures (as the adjudicator' decision may be considered): only the former are « *naturaliter* intended to merge into the sentence, as [they] lac[k] structural independence », since « the application for a provisional measure does not constitute an autonomous action [...], but rather introduces an internal procedure to an already proposed legal action » (see Tiscini R., *I provvedimenti decisori senza accertamento*, Torino, 2009, 54; free translation).

Indeed, the doubt about such an order eligibility to survive outside the process during which it has been issued (what is admitted by Bove M., *La decisione nel processo del lavoro*, in *Riv. dir. proc.*, 2016, 3, 736-737; Id., *Tutela sommaria e tutela a cognizione piena: criteri discretivi*, in *Il giusto proc. civ.*, 2014, 1, 78-79) only arises in the pathologic case of the extinction of the latter (see Tiscini R., *supra*, 54).

In addition to the highlighted structural difference, it is possible to underline a functional one, since only self-standing *interim* relief measures are designed to face a *periculum in mora* (Tiscini R., *supra*, 131).

(65) The same misunderstanding affects the proper construction of the *Référé pré-arbitral*, a legal action (firstly introduced by the ICC in 1990, and that may be considered as the forefather — even broader and more effective — of the Emergency Abitrator) akin to adjudication, though entirely based on parties consent: see, *si vis*, Capasso V., *Referee vs Emergency Arbitrator: chi è il vero arbitro?*, in this *Review*, 2018, 1, 21 ss.

(66) Lord Lucas, *Hansard* 28.3.96, 1911.

(67) As reported by Lord Ackner, *Hansard*, 22.4.96, 989-990, who evidently criticised the proposal.

nothing but an arbitration. It seems thus coherent that the abandonment of the idea of an « adjudicator's decision binding for all time » (68) was accompanied by some blurring.

That said, the question arises as to how finality affects the legal regime of arbitrators' decisions; or, in other words, as to what is the real meaning of « finality » for the purposes of arbitration.

Even if it is not possible to give a worldwide definition, it is to be noticed that, on the international scene, arbitral provisional or *interim* measures (which are surely not « final » in a traditional sense) are more and more equalised to (final) awards, whether expressly or by way of ensuring their enforceability as they were awards.

This is the case of the United Kingdom (69), the Netherlands (70), Israel (71), Ontario (72), the British Columbia (73), Malaysia (74), Peru (75) Singapore (76), Hong Kong (77), and, lastly, Hungary (78).

Though they remain a relatively small group, it is worth noting that the last three aforementioned Countries amended their Arbitration Acts in the last years, thus showing a trend towards the harmonisation with the UNCITRAL Model Law, whose article 17H(1) sets forth that « [a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued [...] ». And it is redundant to say that it would make very little sense if a State who recognizes and enforces foreign arbitral *interim* measures would then refuse to do the same with regard to a « non-final » decision having the same content, only because its author could not issue a final one (79).

In addition, even in the absence of an express legislative choice, it has already been noted that « the enforceability of an award generally depends on the nature of the award. It will be enforceable, regardless of whether it is interim or partial, if the award constitutes the arbitral tribunal's final decision

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(68) Coulson P., *supra*, p. 12.

(69) S. 39(1) *Arbitration Act*.

(70) Where article 1051, paragraph 3, *Dutch Code of Civil Procedure* provides for the so called *summary arbitral proceedings*, a sort of provisional proceedings *ante-causam* which ends with a decision that « shall be regarded as an arbitral award », thus enforceable.

(71) S. 1, *Arbitration Law*, 5768-1968.

(72) S. 9 *International Commercial Arbitration Act*, RSO 1990.

(73) S. 2(1) *International Commercial Arbitration Act*, RSBC 1996.

(74) S. 19(3) *Arbitration Act* 2005.

(75) S. 48(4) *Arbitration Act Legislative Decree* 1071, 2008.

(76) S. 12(6) Ch. 143A *Singapore International Arbitration Act 1994* (as amended in 2012).

(77) S. 22B(1) *Hong Kong Arbitration Ordinance* 2013.

(78) S. 27(1) 2017. *évi LX. törvény a választottbíráskodásról.*

(79) The TCC — as the national Courts ruling in the other Countries adopting a SOPL —, after all, enforces adjudicator's decisions as they were awards.

on the issues decided » ([80]). The French jurisprudence, in turn, has hold a definition of « *sentence arbitrale* » (thus « final ») which depends on whether the decision « *tranch[e] de manière définitive, en tout ou en partie, le litige qui [lui] est soumis* » ([81]), while the Supreme Court of Queensland retains the non-finality of an « arbitral tribunal's order » when it is « only provisional in that it can be varied or changed by the same body in a later decision » ([82]).

And it is undoubtful that the adjudicator's decision is final in all these senses, since its issue ends the proceedings before the adjudicator, who then becomes *functus officio* (and, therefore, cannot revise his *dictum*) ([83]), having settled *the whole* dispute which had been referred to him.

Last but not least, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) itself does not require the award to be « final », but only « binding » ([84]). Indeed, even if it is arguable that the terminological choice only lies on the intention to supersede the problem of the so-called « double-exequatur » that many national Courts had retained to be required by the Geneva Convention of 1927 ([85]), the proper construction of Article V(1)(e) shows that, for the purposes of the Convention, the award is only needed to be binding between the parties and not voided or suspended in the State of the seat ([86]). And, in this respect, the adjudicator's decision is not different from an already binding award (but) against which any means of recourse is still available.

9. *Conclusion: adjudication as an interim (but final?) arbitration*. — In the light of the previous observation, it may already be said that the adjudicator's decision is "final enough" to be an award.

([80]) Choi J., *Interpretation and Application of the New York Convention in the Republic of Korea*, in Bermann G. ed., *Recognition and Enforcement of Foreign Arbitral Awards*, Cham, 620.

A different criterion, suggested with reference to Czech Republic, is that « recognition and enforcement of interim (or partial) foreign awards is generally possible if the award in question imposes a specific enforceable obligation in the form of a concrete duty »; see Bělohlávek A.J., *Interpretation and Application of the New York Convention in Czech Republic*, in Bermann G. ed., *supra*, 265.

([81]) App. Paris, 25 ars 1994, in *Rev. arb.*, 1994, 391 ss.

([82]) *Resort Condominiums v Bolwell* (1993) 118 ALR 655, cited by Nottage L., Brown C., *Interpretation and Application of the New York Convention in Australia*, in Bermann G. ed., *supra*, 98.

([83]) Except for her/his power to correct her/his decision under the so called slip rule, set forth by section 108(3A) HGCRA (as introduced by section 140 LDEDCA).

([84]) See Article V(1)(e).

([85]) Van den Berg A.J., *The New York Convention of 1958: An Overview*, in Gaillard E., Di Pietro D. ed., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London, 2008, 61; El-Hakim J., *Should the Key Terms Award, Commercial and Binding be Defined in the New York Convention?*, in *Journal Of International Arbitration*, 1989, 6, 167.

([86]) Pettinato C., *Ancora sulla « obbligatorietà » del lodo straniero secondo la Convenzione di New York del 1958*, in this *Review*, 1998, 4, 760; see also Punzi C., *Disegno sistematico dell'arbitrato*[2], II, Padova, 2012, 807-808.

In addition, however, a strong (and, this time, peculiar) argument in favour of the adjudicator's decision finality may be drawn from the *Persero* case ([87]), even though it didn't deal with adjudication, but with an *interim* award issued in order to enforce a Dispute Adjudication Board's ([88]) decision.

The Singapore High Court had been asked to set aside such an award, on the ground that it was not final for the purposes of section 19B(1) *International Arbitration Act* 1994 (IAA), as amended in 2002 ([89]).

First of all, the Court has clarified that the aforesaid section « serves *only* to confirm that every award, to be properly called an award, must be final and binding on its subject-matter » ([90]), and hold that such subject-matter, in the case, was the « substantive, contractual right to provisional relief » ([91]) provided by the contract.

Briefly, it found the winning party having an « undisputed substantive provisional right to be paid now » and the losing party a « substantive obligation to argue only later » ([92]). Accordingly, the High Court concluded that « [n]o future [final] award will vary the [*interim*] award » ([93]) enforcing the DAB's decision.

Indeed, « [e]ven assuming that the IAA prohibits awards whose effectiveness is limited by time, [...] the [...] tribunal [asked to decide on the whole dispute] can determine the one dispute before it without varying the majority's interim award.

[...] If the [...] tribunal finds that the DAB was correct in its decision, then the tribunal need do no more than merely say so in its final award and stop there. The majority's interim award and the final award will stand together for enforcement. There is no breach of the stricture in s 19B(2).

[...] If, on the other hand, the tribunal holds that the DAB awarded [...] too little [...], then the tribunal need do no more than make that finding and order [...] to pay [...] the additional amount. Again, the majority's interim

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([87]) *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146, confirmed by the Court of Appeal: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] SGCA 30.

([88]) A form of built-in dispute resolution process firstly introduced by FIDIC in 1996. Though the mechanism is contractual in nature and principally aimed to dispute avoidance rather than dispute resolution, the Board may be asked to give a formal decision, immediately binding but not final.

Since the arbitral nature of the Board is expressly excluded by FIDIC clauses, the winning party has to start arbitration in order to enforce a DAB's decision, if not voluntarily complied with by the losing party.

([89]) « An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction ».

([90]) *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 at [135].

([91]) *Ibid*. at [128].

([92]) *Ibid*. at [137].

([93]) *Ibid*. at [149].

award and the final award will stand together for enforcement. Again, there is no breach of the stricture in s 19B(2).

[...] The only possible concern arises if the tribunal finds that the DAB awarded CRW too much. But in that situation, the tribunal need do no more than make that finding and issue a final award requiring [...] to return the excess. Once again, the majority's interim award and the final award will stand together for enforcement » ([94]).

In conclusion, whatever the end of the whole proceedings is, « the final award will undoubtedly have to accommodate or take account of the interim award. But in none of these scenarios does that necessarily involve the final award varying, amending, correcting, reviewing, adding to or revoking the interim award [...] » ([95]).

Some inferences may be drawn from the commented judgment.

The obligation to « pay now, argue later » recognized by the Court of Singapore as an implied term in FIDIC contracts is the same duty that SOPLs imposes upon the losing party *by Statute*. The solution retained in the *Persero* case may therefore be extended to the adjudicator's decision, that, unlike the DAB's decision, does not need to be transposed in an award... because *it is an award itself*.

This conclusion, on the other hand, is consistent with the already underlined circumstance that the Act does not set out any form of appeal or opposition against the adjudicator's decision ([96]). The relationship between the possible Court's judgement or arbitral award (finally) deciding on the same dispute and the adjudicator's decision, thus, will be the same as the one outlined by the Singapore High Court between the final and the *interim* award: the former will put the things right (if needed), but without affecting the latter.

It is just that the adjudicator's decision (better: the adjudicator's award), according to its provisional nature, « cannot aspire to become final itself ». Consequently, with the arrival of the final decision, if any, « the provisional effects of the precautionary measure are intended to fall undoubtedly, because, even if the main decision substantially reproduces and take the precautionary measures as its own, it will always work as an *ex novo* decision of the relationship in question, and not as a validation of the precautionary measure » ([97]).

But, since « it is said that over 95% of adjudication decision are not followed by any further argument, other than in the enforcement proceedings » ([98]), does it really matter?

([94]) *Ibid.* at [150-153].

([95]) *Ibid.* at [154].

([96]) See *supra*, paragraph 4.

([97]) Calamandrei P., *Introduzione allo studio sistematico dei provvedimenti cautelari*, Padova, 1936, 38 ss. (free translation by the Author).

([98]) Uff J., *How Final Should Dispute Resolution Be?*, August 2010, on *www.scl.org.uk*, 8.