INTERNATIONALISING ADJUDICATION: TOWARDS AN INCREMENTAL AND POLYCENTRIC HARMONISATION

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Professor Renato Nazzini KC (Hon) and Aleksander Godhe

Introduction

Commercial dispute resolution has undergone considerable harmonisation in the past years and decades. The success of international arbitration is a clear example. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') has been ratified by over 170 state parties,[1] and has been labelled one of the most successful international commercial treaties in history.[2] This trend also extends to alternative dispute resolution ('ADR') mechanisms. The Singapore Convention on Mediation ('Singapore Convention'), which establishes an enforcement mechanism for international mediated settlement agreements, has 18 ratifications and 56 signatories.[3] Moreover, several organisations propose a wide range of model dispute settlement clauses that parties can include in their contracts.[4] In many jurisdictions, ADR came to be viewed as a way of reducing court workloads and pressures on public finances.[5]

This paper focuses on internationalising adjudication, which can be defined as a fast ADR mechanism in which a third-party adjudicator renders a decision that is binding until and unless the same dispute is determined in litigation or arbitration on a full-merits basis or overturned at a higher-tier dispute resolution or court review mechanism or by party agreement.

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1 See https://www.newyorkconvention.org/contracting-states.

2 Kofi Annan, 'Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration' in Dumitru Mazilu et al (eds), Enforcing Arbitration Awards under the New York Convention (UN Publication 1999) 2: 'the Convention is one of the most successful treaties in the area of commercial law, adhered to by 117 States, including the major trading nations. It has served as a model for many subsequent international legislative texts on arbitration.'

3 See https://www.singaporeconvention.org.

4 For example, see UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ('UNCITRAL Model Law'); UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018; International Chamber of Commerce, 'Standard ICC Arbitration Clauses': https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/standard-icc-arbitration-clauses-english-version/; London Court of International Arbitration, 'Recommended Clauses': https://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx; Stockholm Chamber of Commerce, 'Dispute Resolution Clauses': https://sccarbitrationinstitute.se/en/dispute-resolution-clauses.

5 John A Jolowicz, *On Civil Procedure* (CUP 2000) 392–3.

The internationalisation of adjudication is also a timely issue in light of the work of the United Nations Commission on International Trade Law ('UNCITRAL') in the area, which has resulted in the publication of a model clause on adjudication,[6] as well as the model adjudication law drafted by the International Statutory Adjudication Forum ('ISAF Draft Model Law').[7]

Against the background of these recent developments and initiatives, this paper discusses how harmonisation can be achieved. In the authors' view, given the discrepancies that exist in relation to adjudication across jurisdictions, any harmonisation should be progressively incremental, building, over time, shared principles and standards rather than trying to impose a straitjacket on diverse legal systems. Harmonisation should also be polycentric, that is, relying on different methods and instruments, working at different levels to achieve the intended purpose. This is why this paper examines three main ways to achieve it – model clauses, a model law and an international convention.

I Statutory adjudication and its various iterations

Statutory adjudication was born in the UK specifically in the context of the construction sector and the challenges of the 1990s. At that time, the UK was in a state of economic recession, with the construction sector being disproportionately affected, resulting in widespread insolvencies.[8] The economic instability was aggravated by construction projects being by their nature prone to generate disputes.[9] This, coupled with the legal uncertainty surrounding interim payments and market volatility, meant that contractors were not paid on time, unable to complete the works and prone to the risk of insolvency.[10]

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6 See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf.

7 See https://www.39essex.com/sites/default/files/2024-01/1.%20ISAF%20Model%20Law%20on%20Statutory%20Adjudication_Working%20Draft%20-%2018%20Sept2023.pdf.

8 For an exhaustive overview of the historical context of adjudication, see Peter Coulson, *Coulson on Construction Adjudication* (OUP 2020) paras 1.04–1.36; Michael Latham, *Construction the Team: Joint Review of Procurement and Contractual Arrangement in the United Kingdom Construction Industry* (HMSO 1994) para 2.1–2.6.

9 *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 57 at 64 (Lawton LJ): 'The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible'; *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd* [2003] EWCA Civ 1750 [2] (May LJ): 'Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due'.

10 Peter Coulson, *Coulson on Construction Adjudication* (OUP 2020) para 1.02.

Adjudication under the Housing Grants, Construction and Regeneration Act 1996[11] ('UK Construction Act') was aimed at addressing these issues by ensuring timely cash flow to contractors and subcontractors. The adjudication system introduced by the UK Construction Act has proven to be highly effective in resolving disputes in the construction sector, with a high level of party compliance with the adjudication decisions.[12] The success of the UK system is reflected by the fact that it has spread across common law jurisdictions. Ireland,[13] Australian jurisdictions,[14] New Zealand,[15] Singapore,[16] Malaysia[17] and Canadian jurisdictions[18] have all adopted a version of statutory adjudication.[19] However, they differ from one another in four key aspects discussed below that will have an impact on the efforts to harmonise adjudication across the various legal systems.

(i) Types of disputes that can be adjudicated

With reference to the type of disputes that fall within the scope of statutory adjudication, jurisdictions can be divided into two groups. The first, which includes the UK,[20] allows any dispute under a construction contract to be referred to adjudication. A similar approach is taken by the Construction Contract Act 2002 in New Zealand that gives 'any party to a construction contract (…) the right to refer a dispute to adjudication'.[21] Therefore, under both these statutes, there are no limits to the types of construction disputes capable of adjudication.[22]

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11 As amended by the Local Democracy, Economic Development and Construction Act 2009.

12 Renato Nazzini and Aleksander Godhe, '2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (King's College London, 20 November 2024) <https://kclpure.kcl.ac.uk/ws/portalfiles/portal/311098514/2024_KCL_Adjudication_Report.pdf> accessed 5 December 2024.

13 Construction Contracts Act 2013 (Ireland).

14 The Building and Construction Industry Security of Payment Act 1999 (New South Wales); The Building and Construction Industry Security of Payment Act 2002 (Victoria); The Building Industry Fairness (Security of Payment) Act 2017 (Queensland); The Building and Construction Industry Security of Payment Act 2009 (South Australia); The Building and Construction Industry Security of Payment Act 2009 (Tasmania); The Building and Construction Industry Security of Payment Act 2009 (Australian Capital Territory); Construction Contracts Act 2004 (Western Australia); The Construction Contracts (Security of Payments) Act 2004 (Northern Territory).

15 Construction Contracts Act 2002, as amended in 2003 (New Zealand).

16 The Building and Construction Industry Security of Payment Act 2004, as amended in 2018 (Singapore).

17 The Construction Industry Payment and Adjudication Act 2011 (Malaysia).

18 Construction Act 1990, as amended in 2017 (Ontario); Builders' Lien Act 1997 (British Columbia); Builders' Lien Act 1987 (Manitoba).

19 Renato Nazzini, 'Impact of English construction law in the international market', in Renato Nazzini (ed), *Construction Law in the 21st Century* (Routledge 2024) 14, 37–43.

20 UK Construction Act, s108(1).

21 Construction Contracts Act 2002, as amended in 2003 (New Zealand), s25(1)(a).

22 In these legal systems, the key jurisdictional question rather relates to whether or not the construction contract falls under the legislation, since their respective scopes differ and

The second group of jurisdictions restrict the types of construction disputes that can be adjudicated. This model has been followed by the majority of legal systems that adopted statutory adjudication. These include New South Wales,[23] Singapore,[24] Malaysia[25] and Ireland,[26] where adjudication is only available for payment disputes. This policy choice may be explained by the primary objective of the legislation, which is to ensure cash flow first, by establishing a payment regime and, then, by providing for adjudication to enforce it. In fact, adjudication appears inseparable from the payment regime. Even in jurisdictions where broader types of disputes can be adjudicated, payment issues represent the majority of heads of claim that are adjudicated.[27]

(ii) Nomination of adjudicators

Another key distinction between adjudication systems concerns the procedure for the nomination of adjudicators. In the UK, secondary legislation supplementing the UK Construction Act provides that a construction contract may identify an adjudicator or that an adjudicator can be selected, following an adjudication notice, by an adjudicator nominating body ('ANB').[28] Therefore, ANBs play a pivotal role in the appointment of adjudicators. Despite their importance, there are no formal requirements for an organisation to become an ANB.[29]

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notable exceptions and exclusions can apply. Under the UK Construction Act, the subject matter of a construction contract is the carrying out, arranging for the carrying out by others, of providing labour for the carrying out of construction operations (UK Construction Act, s104(1). The UK Construction Act also contains notable exceptions and exclusions in ss105 and 106 covering, for example, construction contracts with residential occupiers or construction contracts relating to construction operations for the 'drilling for, or extraction of, oil or natural gas'; The meaning of a construction contract under the New Zealand Construction Act is slightly narrower. As per s5, a construction contract pertains to the 'carrying out of construction work'. The New Zealand Construction Act also contains carve-outs, such as construction contracts relating to construction operations related to extraction of natural resources, under s6(2). The New Zealand Construction Act, does not, however, exclude construction contracts with residential occupiers.

23 Building and Construction Industry Security of Payment Act 1999 (New South Wales), s17(1).

24 Building and Construction Industry Security of Payment Act 2004 (Singapore), s12(1).

25 Construction Industry Payment and Adjudication Act 2012 (Malaysia), s7(1).

26 Construction Contracts Act 2013 (Ireland), s6(1).

27 For example, in the UK in 2022-2023, the leading category of claim were technical payment claims. See Renato Nazzini and Aleksander Godhe, '2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (King's College London, 20 November 2024) <https://kclpure.kcl.ac.uk/ws/portalfiles/portal/311098514/2024_KCL_Adjudication_Report.pdf> accessed 5 December 2024.

28 The Scheme for Construction Contracts (England and Wales) Regulations 1998 ('the Scheme'), Sch, Reg 2(1).

29 The Scheme merely states that an ANB shall mean 'a body (not being a natural person and not being a party to the disputes) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party': the Scheme, Sch, Reg 2(3).

Other jurisdictions are keener on regulating ANBs and hence adjudicator selection. For example, in New South Wales, an ANB must seek authorisation from the Minister for Fair Trading before they can make adjudicator nominations.[30] A similar approach has been taken in Singapore[31] and Ontario.[32] By contrast, the Malaysia Construction Industry Payment and Adjudication Act 2012 provides that the adjudicator may be appointed either by the parties or the Director of the Kuala Lumpur Regional Centre for Arbitration.[33]

(iii) Enforcement mechanisms

The mode of enforcement of the adjudicator's decision also varies between jurisdictions. The UK Construction Act does not prescribe any specific procedure for enforcement. Therefore, the courts stepped in and held that enforcement applications should be coupled with an application for summary judgment,[34] that the English courts will only refuse on narrow grounds of lack of jurisdiction or breach of natural justice.[35]

By contrast, the enforcement procedure in Ireland is codified. The Construction Contracts Act 2013 (Ireland) provides that '[t]he decision of the adjudicator, if binding, shall be enforceable either by action, or by leave of the High Court, in the same manner as a judgement or order of that Court with the same effect and, where leave is given, judgement may be entered in the terms of the decision'.[36]

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30 Building and Construction Industry Security of Payment Act 1999 (New South Wales), s28(1).

31 Building and Construction Industry Security of Payment Act 2004 (Singapore), s28.

32 Construction Act 1990, as amended in 2017 (Ontario), s13.

33 Construction Industry Payment and Adjudication Act 2012 (Malaysia), s21.

34 *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] CLC 739 [14] (Dyson J): 'The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement (…) It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept'; Vivian Ramsey, 'Construction Law: The English Route to Modern Construction Law' (2022) 75 Arkansas Law Review 251, 288: '[t]he TCC (…) has developed a single section of the statute into a robust system by which it can make and enforce decisions.'

35 Jurisdictional issues in adjudication may relate, for instance, to the existence of a construction contract eg *Thomas Frederic's (Construction) Ltd v Keith Wilson* [2003] EWCA Civ 1494; existence of a dispute eg *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC); propriety of the appointment eg *IDE Contracting Ltd v RG Carter Cambridge Ltd* [2004] EWHC 36 (TCC); adjudicator's failure to answer the question referred to them eg *ABB Ltd v Bam Nuttal Ltd* [2013] EWHC 1983 (TCC); or to address the dispute properly eg *Amec Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC); or compliance with the relevant deadlines eg *Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC). On the other hand, natural justice includes, among others, questions of adjudicator's bias eg *Fileturn Ltd v Royal Garden Hotel Ltd* [2010] EWHC 1736 (TCC); adjudicator's failure to address a key issue eg *Thermal Energy Construction Ltd v AE & E Lentjes UK* [2009] EWHC 408 (TCC); or to consult the parties before reaching their decision eg *Shimizu Europe Ltd v LBJ Fabrications Ltd* [2003] EWHC 1229 (TCC).

36 Construction Contracts Act 2013 (Ireland), s6(11).

Therefore, in addition to being enforced by way of a claim, importantly, and unlike in the UK, the decision can be enforced in the same manner of a judgment or order of the court.

New South Wales also codifies the enforcement of adjudicators' decisions. However, the procedure is different than in the UK or Ireland and involves both ANBs and the courts. The process commences with an ANB issuing an adjudication certificate that can be then filed and enforced as a judgment for debt.[37] Once the judgment for debt has been filed with the competent court, the losing party may apply for that judgment to be set aside on grounds of jurisdiction or natural justice.

(iv) Judicial review

The final central point of distinction between jurisdictions relates to the very understanding of the nature of adjudication, i.e. whether it is viewed as a contractual or administrative method of dispute resolution. The UK Construction Act, for example, does not envisage adjudication as a standalone dispute resolution mechanism. Instead, it operates as a set of mandatory implied terms to the construction contract. This contributes to the characterisation of adjudication as a contractual procedure, albeit mandated by statute. For example, in *Bouygues UK Ltd v Dahl-Jensen UK Ltd*,[38] UK statutory adjudication was compared to contractual dispute resolution through an expert valuer.

This is in stark contrast with jurisdictions such as New South Wales that treat adjudication as an administrative law dispute resolution process in light of its statutory nature. In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*,[39] Brereton J held that judicial review is available as a process to challenge an adjudicator's decision since an adjudicator has 'legal authority to determine questions affecting common law or statutory rights or obligations of others'.[40] The availability of judicial review means that public law remedies, including *a certiorari*,[41] may be ordered if the adjudication decision is defective.[42]

In Ireland, following the decision in *K&J Townmore Construction Ltd v Damien Keogh*,[43] it was held that the appropriate way to challenge an adjudication decision is to defend the enforcement proceedings and not to seek judicial review. The court held that should judicial review be permitted, this would

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37 Building and Construction Industry Security of Payment Act 1999 (New South Wales), ss24–5.

38 *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] CLC 927 [12].

39 *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129.

40 ibid [44].

41 A quashing order invalidating the decision of a public body so that it has no effect: *A v HM Treasury* [2010] 2 AC 534, 690 at [4].

42 Julian Bailey, *Construction Law* (2nd edn, Routledge 2016) §24.193.

43 *K&J Townmore Construction Ltd v Damien Keogh* [2023] IEHC 509.

increase the duration and costs of the proceedings, which would hinder the overall objective of the Irish Construction Act.[44]

II Contractual adjudication

Despite differences, the above common law jurisdictions all introduce adjudication through statute. However, it is possible for parties, in the exercise of party autonomy, to agree on a similar procedure purely by contract. Such contractual adjudication predates UK statutory adjudication[45] and has been used in the UK construction sector as early as the 1970s.[46] Many standard forms of construction contracts still include such adjudication clauses.[47] While statutory adjudication is a domain of common law jurisdictions, contractual adjudication is a far more universal concept and is used in many civil law jurisdictions as well.[48] In addition, its application tends to reach well beyond the construction sector.

The most popular example of contractual adjudication – understood as a party agreement that disputes arising in relation to the contract may, or shall, be referred to a procedure that results in a binding, but not final, decision that must be complied with until and unless the dispute is finally determined in arbitration, litigation or by agreement – are dispute adjudication boards. Dispute boards are diverse and vary from ones that are standing to *ad hoc*, and from rendering interim binding decisions to non-binding recommendations.[49] Nonetheless, *ad hoc* and standing dispute adjudication boards ('DABs') that render binding but not final decisions are a form of contractual adjudication.[50] Similarly, expert determination in which the decision of the expert is binding but not final is an example of contractual adjudication.[51]

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44 ibid [80]–[81].

45 The English courts were dealing with such contractual adjudication clauses in cases predating the UK Construction Act. For example, see *Cape Durasteel Ltd v Rosser & Russel Building Services Ltd* (1995) 46 Con LR 75, 80.

46 Darryl Royce, *Adjudication in Construction Law* (2nd edn, Routledge 2022) §1.1 and §9.1.

47 Used where statutory adjudication does not apply. One of such forms is the New Engineering Contract 4 (NEC4). It includes Option W1 – a dispute resolution procedure designed for contracts that are not subject to the UK Construction Act 1996. Option W1 embeds adjudication within a multi-tiered dispute resolution clause. It outlines a process whereby disputes arising under or in connection with the contract can be referred to senior representatives. See NEC 4 Engineering and Construction Contract June 2017, Option W1, cl W1.1.

48 Renato Nazzini and Raquel Macedo Moreira, '2024 Dispute Boards International Survey' (King's College London, December 2024) <https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf> accessed 2 January 2025.

49 Popularised in particular by the FIDIC standard forms. See Volker Mahnken, 'On Construction Adjudication, the ICC Dispute Board Rules, and the Dispute Board Provisions of the 2017 FIDIC Conditions of Contracts' (2018–2019) 5 McGill J Disp Resol 60, 69.

50 Cyril Chern, *The Law of Construction Disputes* (3rd ed, Informa Law 2020) 358.

51 Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27(6) Journal of International Arbitration 551, 554–5.

The FIDIC suite of contracts is one of the most widespread and a truly international set of standard forms of construction contracting.[52] FIDIC forms are required by the World Bank in its Standard Bidding Documents Procurement of Works, an approach that other multilateral development banks and international financial institutions have followed.[53] FIDIC contracts typically include a dispute board mechanism and are widely used in common and civil law jurisdictions.[54]

Contractual adjudication is also typically how adjudication exists in civil law jurisdictions. For example, in Denmark, which has one set of national construction standard forms, contractual adjudication (called 'speedy resolution') is a common ADR mechanism.[55] In an approach that resembles some statutory adjudication systems, the Danish standard forms prescribe a specific list of claim types that may be resolved through adjudication. Adjudication of other types of disputes is only available for low-value disputes or where the parties jointly agree.[56]

Although contractual adjudication has a long history and is becoming even more popular in recent times, it faces two challenges the extent of which varies greatly between jurisdictions:

1. Recognition and enforcement of agreements to adjudicate

2. Recognition and enforcement of adjudication decisions.[57]

III Internationalisation of adjudication

Despite initial opposition, statutory adjudication has been remarkably successful.[58] Perhaps the most telling indicator of adjudication's success is its

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52 See generally, for the international character of FIDIC contracts: Donald Charrett, *FIDIC Contracts in Europe – A Practical Guide to Application* (Routledge 2023); see also Ellis Baker and others, *FIDIC Contracts Law and Practice* (Routledge 2009) 279.

53 Volker Mahnken, 'On Construction Adjudication, the ICC Dispute Board Rules, and the Dispute Board Provisions of the 2017 FIDIC Conditions of Contracts' (2018–2019) 5 McGill J Disp Resol 60, 70.

54 Katrina Mae, 'Preventing Improper Liability for Delay But Not Preventing Disputes: Re-Thinking The Implications of the Prevention Principle in Australia and Abroad' (2019) 36(1) International Construction Law Review 24, 33.

55 Sylvie Cécile Cavaleri, 'Construction Adjudication in a Comparative Perspective: the Case of the Danish Speedy Resolution' (2022) 39 ICLR 169, 170–2; referring to AB 18, clause 68; ABT 18, clause 66; ABR 18, clause 62.

56 For example, see Danish construction works and supplies contract AB 18, clause 68(1).

57 The issue is outside the scope of this paper, but see Renato Nazzini and Raquel Macedo Moreira, '2024 Dispute Boards International Survey' (King's College London, December 2024) <https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf> accessed 2 January 2025.

58 On the initial opposition see for example John Uff, *Construction contract reform: a plea for sanity: a collection of papers in opposition to the 1995–1997 reform proposals* (Construction Law Press 1997); On the success story see Matt Molloy, 'Adjudication since 1998' in Renato Nazzini (ed), *Construction Law in the 21st Century* (Routledge 2024).

wide international adoption through statute.[59] With the introduction in all Australian and some Canadian jurisdictions as well as Ireland, New Zealand, Singapore, and Malaysia,[60] and the passing, on 18 December 2024, of the Construction Industry Security of Payment Ordinance 2024 in Hong Kong, after a decade of consultations and debates,[61] statutory adjudication has spread widely in the common law world. Contractual adjudication is also becoming more popular both in national standard forms but also through FIDIC in relation to international construction projects.

This section examines three possible avenues for internationalising and harmonising adjudication. The first relies on model contract clauses, discussing in particular the recent proposals of the UNCITRAL Working Group II. The second is the introduction of a model law on adjudication. The third is the adoption of an international convention on adjudication.

Solution 1: Model contract clauses

On 28 November 2024, UNCITRAL published a model contract clause on adjudication that is intended to be used not just in the construction sector, but in relation to any long-term project.[62] The idea of promoting binding but not final adjudication through model clauses is sound. After all, contractual adjudication based on standard form contracts is a prime example of model clauses, albeit such clauses are part of a standard form contract, rather than standalone. The UK statutory adjudication system can trace its origins to the popularity of adjudication clauses in JCT and ICE standard forms.[63]

The UNCITRAL model adjudication clause builds on the existing practice of dispute boards and envisages a close connection between the adjudication mechanism and arbitration. It states that the parties shall comply with the adjudication decision and any issues of non-compliance shall be referred to arbitration subject to modified UNCITRAL Expedited Arbitration Rules ('Enforcement Arbitration'). The default time period for the Enforcement Arbitration is 30 days.[64] Further, and independently of the Enforcement

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59 Rupert Jackson, Nicholas Higgs and Hannah Fry, 'The TCC and the Housing Grants, Construction and Regeneration Act 1996' in Peter Coulson and David Sawtell (eds), *The History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules* (Hart Publishing 2023) 158.

60 See Section I *infra*.

61 The Construction Industry Security of Payment Ordinance (Cap. 652) (Hong Kong).

62 See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf; the work of UNCITRAL commenced in 2018 when UNCITRAL was tasked with 'the development of model legislative provisions or model contractual clauses facilitating the use of adjudication in the context of long-term projects, in particular construction projects': UNCITRAL Report of Working Group II (Dispute Settlement) on the work for its sixty-eighth session (New York, 5-9 February 2018) (A/CN.9/934) 21–2.

63 Darryl Royce, *Adjudication in Construction Law* (2nd edn, Routledge 2022) 9.

64 Resembling the procedure under FIDIC, eg *FIDIC Conditions of Contract for EPC Turnkey Projects* (2017 'Silver Book') Clause 21.

Arbitration procedure, the adjudication decision can be reopened on the merits through arbitration under the UNCITRAL Arbitration Rules.[65]

The clause is well-drafted overall, solving many of the issues posed by its former, multi-tiered iterations.[66] Its attractiveness is its flexibility to apply either to any dispute relating to the contract (Option I) or to specific disputes or types of disputes specified in the clause (Option II). In contrast to the statutory adjudication regimes, the clause appears to permit more than one dispute to be referred to a single adjudication while retaining the strict timelines for a decision.[67]

The Enforcement Arbitration procedure in the UNCITRAL model clause, however, raises several issues. First, the tribunal in the Enforcement Arbitration appears to be able to refuse enforcing the obligation to comply with the adjudication determination only when the adjudicator violated due process. The clause does not mention lack of jurisdiction challenges as a possible avenue for resisting enforcement. Jurisdictional challenges are a key defence to enforcement in most if not all statutory adjudication regimes and a common defence raised in relation to the enforcement of dispute board decisions before arbitral tribunals.[68]

The second difficulty around the Enforcement Arbitration is that it may be criticised as it is envisaged as a rubber-stamping process of the adjudicators' determination. It is generally accepted that arbitral tribunals must take an active role in analysing claims presented to it by the parties, rather than merely rubber stamping them.[69] Otherwise, the award may be challenged for breach of due process or public policy. This being said, it could be argued that in these proceedings the tribunal is deciding on a distinct obligation to comply with the adjudicator's determination. In that respect, the tribunal, in the Enforcement Arbitrator, does carry out a full review.

The shortcomings of the model clause can be, of course, addressed by the parties when the clause is incorporated into contracts. A different matter is its future uptake in practice. This is difficult to predict. UNCITRAL attempted to draft a

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65 See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf.

66 UNCITRAL Report of Working Group II (Dispute Settlement) on the work for its seventy-ninth session (New York, 12–16 February 2024) (A/CN.9/WG.II/WP.236) §9.

67 See England & Wales in *Fastrack Contractors Ltd v Morrison Construction Ltd & Anor* [2000] BLR 168 [20]; see New South Wales in *Rail Corporation NSW v Nebax Constructions* [2012] NSWSC 6 [45]–[46] (McDougall J); see Western Australia in *Sandvik Mining and Construction Australia Pty Ltd v Fisher [No 2]* [2020] WASC 123 [126]–[127] (Archer J).

68 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30; in relation to statutory adjudication, see *Amec Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418.

69 Nigel Blackaby KC et al, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) 475–6; *P v Q and ors* [2017] EWHC 194 (Comm).

clause that would be suitable to various sectors and disputes.[70] However, as was argued above, the original rationale for adjudication is closely linked to the specific cash flow needs of the construction sector and the overall volume of payment-related and other disputes that justify expediency. It is true that other industries now also demand expedited dispute resolution which avoids the costs of arbitration. Whether such demands will translate into a significant use of the model clause remains to be seen.

There is some evidence that multi-tiered model contract clauses, such as those drafted by arbitral institutions, are rarely used[71] and that it is difficult to have parties include model clauses into their contracts, particularly if they are new and untested.[72] The UNCITRAL model clause hence perhaps cannot be seen as the single solution for internationalising adjudication.

Solution 2: Model law

The development of possible model legislative provisions on adjudication has also formed part of UNCITRAL's agenda.[73] However, it has yet to yield in a concrete proposal, with UNCITRAL instead focusing on the development of the above model contract clause. Instead, the International Statutory Adjudication Forum is currently drafting a model law, with a first consultation draft building a compromise between the various statutory adjudication frameworks.[74]

In many respects, the UK Construction Act already served as a model law to the other common law jurisdictions adopting statutory adjudication as it was the first legal framework in its class. It is worth reiterating, however, that considerable discrepancies between jurisdictions remain, particularly in the four areas discussed above: (i) the types of disputes that may be resolved by adjudication; (ii) nomination of adjudicators; (iii) enforcement mechanisms; and (iv) availability of judicial review.[75]

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70 UNCITRAL Note by the Secretariat, Draft UNCITRAL Model Clauses on Specialised Express Dispute Resolution (SPEDR) (24 June – 12 July 2024) (A/CN.9/1181) 11: 'The Model Clause aims to facilitate the use of adjudication for long-term contracts or projects beyond those in the construction industry, such as financial or other commercial relationships, including supply chain contracts and to provide a mechanism for cross-border enforcement of determinations made by the adjudicator'.

71 James H Carter, 'Issues Arising from Integrated Dispute Resolution Clauses: Part I' in Albert van den Berg (ed), *New Horizons in International Commercial Arbitration and beyond* (Kluwer 2005) 447; Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27(6) Journal of International Arbitration 551, 568–9.

72 Martin A Frey, 'Does ADR Offer Second Class Justice?' (2001) 36(4) Tulsa Law Journal 727, 727–8.

73 UNCITRAL Working Group II, 'Report of Working Group II (Dispute Settlement) on the work of its sixty-eighth session' (19 February 2018) A/CN.9/934, §153.

74 See https://www.39essex.com/sites/default/files/2024-01/1.%20ISAF%20Model%20Law%20on%20Statutory%20Adjudication_Working%20Draft%20-%2018%20Sept2023.pdf.

75 See remarks of the Irish court in *Aakon Construction Services Limited v Pure Fitout Associated Limited* [2021] IEHC 562 [40]: 'The case law from England and Wales must, however, be approached with a degree of caution. This is because there are significant

A model law can address such differences while encouraging more jurisdictions to adopt the adjudication system through statute. For example, the UNCITRAL Model Law on International Commercial Arbitration has been described as an international success.[76] It addresses the inadequacy of and disparity between national laws by providing a model of legislative provisions that 'reflects a worldwide consensus on the principle and important issues in international arbitration practice'.[77] The UNCITRAL Model Law on Mediation[78] has also been adopted by 33 states and 46 jurisdictions[79] and is considered successful, having contributed to the subsequent adoption of the Singapore Convention on Mediation and the broader internationalisation of mediation.[80] A model law on adjudication could operate similarly and be based on the diverse experiences of different jurisdictions across the common law world and international contracting.

Nonetheless, the differences between jurisdictions in conceptualising adjudication are profound. In the first place, a model law on mandatory adjudication must be clearly linked to some other sector-specific legislation. Given the unique features of adjudication – the decision being binding but not final, speed and informality – it would be near impossible to imagine legislation that provides for adjudication in relation to all disputes in a jurisdiction.[81] It is correct that many jurisdictions provide for mandatory mediation for all civil claims,[82] but that process is an amicable attempt at dispute settlement with the parties, and, therefore, purely voluntary as to the outcome, whereas adjudication

differences between the legislative approaches adopted in the two jurisdictions. There are also significant differences in the procedure governing the enforcement of an adjudicator's decision. These distinctions are all too easy to miss in that many of the concepts underlying the UK legislation seem familiar to us.'

76 See generally Gerold Herrmann, 'Adoptions of the UNCITRAL Model Arbitration Law: A Continuing Success Story' (1997) 7 J Arb Stud 3.

77 UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006, Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, 23.

78 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

79 See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.

80 UNCITRAL Working Group II, 'Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session' (17 September 2015) A/CN.9/861 paras 15-36; Nadja Alexander et al, *The Singapore Convention on Mediation: A Commentary* (Kluwer 2022) 9.

81 Parties typically opt for a specific ADR mechanism because their circumstances favour resolving the dispute outside of litigation or arbitration. This is a case-by-case decision weighing various considerations: Jean-Francois Guillemin, 'Chapter 2: Reasons for Choosing Alternative Dispute Resolution' in Jean-Claude Goldsmith et al (eds), *ADR in Business: Practice and Issues Across Countries and Cultures* (Kluwer Law International 2006) 25–36.

82 For example, in the UK all civil claims below a value of £10,000 will be subject to mandatory mediation: see pilot scheme under Practice Direction 51ZE, 2024; see comparatively Klaus J Hopt and Felix Steffek, 'Fundamental Issues' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013) 22–33.

results in a binding and enforceable decision being imposed on the parties by a neutral adjudicator.[83]

Instead, following the approach also taken in the ISAF Draft Model Law, a model law on adjudication must be sector specific, much like existing statutory adjudication frameworks nestle adjudication firmly in the construction sector. Although it is not inconceivable to apply adjudication to other sectors and types of disputes, the statutory right to adjudicate was developed specifically to reflect the need to ensure cash flow in the construction sector with minimal disruption to the progress of the construction project despite a high volume of disputes. Therefore, adjudication should only be adopted in sectors with similar priorities: issues with cash flow, presence of SMEs, long-term projects, susceptibility to disputes and a likely high volume of claims.[84]

In light of the above, it may be argued that the utility of adjudication outside of the construction sector would be limited. Existing statutory adjudication frameworks are also closely related to the payment regimes applicable to construction contracts. As was discussed above, many jurisdictions only apply adjudication to payment disputes and, even in jurisdictions such as the UK where a broader range of disputes can be adjudicated, payment claims represent the lion's share of adjudications.[85] The connection between payment and adjudication is unequivocal in other jurisdictions. The Singapore Security of Payment Act ties the right to issue a notice of intention to adjudicate with non-payment of a claim within a prescribed period.[86]

To conclude the point, a model law on adjudication should be sector specific to the construction sector, with the possibility of extending it to other sectors. The ISAF Draft Model Law takes such a sector-specific approach. It provides for an extensive payment regime in addition to adjudication provision, but adjudication is not limited to payment disputes. However, in an effort to maximise the traction that a model law on adjudication could have internationally, this paper proposes a default 'lowest common denominator' approach instead, i.e., adjudication being used solely for payment disputes and only in relation to the construction sector, with the option of extending the field of application to other disputes and other sectors.

Further, any model law would have to account for possible exceptions and exclusions. The existing adjudication statutes are replete with such carveouts which also differ between jurisdictions as they result from specific lobbying

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83 John A Jolowicz, *On Civil Procedure* (CUP 2000) 392.

84 Resembling the issues that led Sir Michael Latham to recommend statutory adjudication in the UK in his review: Michael Latham, *Construction the Team: Joint Review of Procurement and Contractual Arrangement in the United Kingdom Construction Industry* (HMSO 1994).

85 Renato Nazzini and Aleksander Godhe, '2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (King's College London 2024) <https://www.kcl.ac.uk/construction-law/assets/kcl-dpsl-construction-adjudication-report-3.0-2024-update-digital-aw1.pdf> accessed 12 December 2024.

86 Building and Construction Industry Security of Payment Act 2004 (Singapore), s12(2).

efforts from specific industries. As a consequence, they tend to be labelled as arbitrary.[87] For instance, both the UK and Singapore have a residential occupier exception, while New Zealand does not.[88] In Ireland, contracts with a value of less than EUR 10,000 fall outside the scope of its adjudication legislation,[89] while mining/resource extraction are not excluded in Ireland nor Singapore.[90] Therefore, legislation tends to differ greatly in terms of the scope of application. Nonetheless, soft harmonisation does not require that the scope of application of the provisions is identical everywhere.

Turning to the nomination procedure, the model law could either (i) leave this area unregulated, following the UK example or (ii) regulate what organisations can become ANBs, possibly even having a single ANB similarly to Malaysia. Although the ISAF Draft Model Law takes the latter approach, requiring ANBs to be government-approved, this area can be left to implementing states. It would be difficult to choose a one-size-fits-all approach in a model law. It is clear that the unregulated model in the UK has served the industry reasonably well.[91] On the other hand, a completely unregulated marketplace for ANBs could be unpalatable to jurisdictions accustomed to tighter state regulation of dispute resolution procedures, especially if such a procedure is mandated by law and not purely voluntary.

Finally, the model law should contain specific provisions relating to enforcement. Due to its intended application in civil law jurisdictions as well, it cannot, unlike common law jurisdictions,[92] rely on the courts to clarify the process. It could, for example, state that the courts to enforce the adjudicator's decision as if a judgment debt, following the Singapore Act.[93] The model law could also set out the specific grounds for refusing enforcement, much like the ISAF Draft Model Law does, in line with the experience in the UK and other common law jurisdictions, which limit such grounds to lack of jurisdiction and breach of natural justice/due process.

To conclude the point, a model law on adjudication should have the following key features:

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87 *C Spencer Limited v MW High Tech Projects UK Limited* [2020] EWCA Civ 331 (CA), Coulson LJ [2].

88 UK Construction Act, s106; Building and Construction Industry Security of Payment Act 2004 (Singapore), s4(2)(a).

89 Construction Contracts Act 2013 (Ireland), s2(1)(a).

90 But are excluded elsewhere, see UK Construction Act, s105(2); Building and Construction Industry Security of Payment Act (New South Wales), s5(2); Construction Contracts Act 2002, as amended in 2003 (New Zealand), s6(2).

91 Whilst there are concerns about poor diversity of adjudicators on panels, there is no evidence of lack of experienced adjudicators in the UK: Renato Nazzini and Aleksander Godhe, '2024 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (King's College London, 20 November 2024) <https://kclpure.kcl.ac.uk/ws/portalfiles/portal/311098514/2024_KCL_Adjudication_Report.pdf> accessed 5 December 2024.

92 Julian Bailey, *Construction Law* (2nd edn, Routledge 2016), §24.88.

93 Building and Construction Industry Security of Payment Act 2004 (Singapore), s23(2).

- Be restricted to the construction sector and payment disputes arising under construction contracts, with the option of extending the field of application to other disputes and other sectors

- Contain a payment regime alongside adjudication provisions

- Leave the issue of regulation of ANBs to the implementing legislation

- Provide a specific enforcement regime through domestic courts.

Solution 3: International convention on the recognition and enforcement of adjudication decisions

The third method of internationalising interim binding adjudication is through an international convention.[94] Whilst difficult, it might be the most effective in reaching the intended purpose of promoting adjudication. After all, enforceability was identified as the main factor behind parties selecting one ADR mechanism over another,[95] and a leading reason for the parties refusing to include adjudication provisions in their contracts.[96] An international convention that would give the parties an enforceable title on the basis of an adjudication decision without the need for subsequent proceedings would be a strong tool for promoting adjudication internationally.[97] A recent empirical report also found support among dispute board users towards such a solution.[98]

The New York and Singapore Conventions provide examples of international treaties that successfully promoted a dispute resolution mechanism. Considering their scope, the focus of any convention on adjudication should be on recognition and enforcement of adjudication decisions and adjudication agreements.

The first question, however, is the scope of the proposed convention: should it apply to both statutory adjudication as well as contractual adjudication? This article argues that the convention should not apply to statutory adjudication regimes altogether and instead focus on purely contractual adjudication, such as

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94 Ilias Bantekas et al, *UNCITRAL Model Law on International Commercial Arbitration* (Cambridge University Press 2020) 38–49; Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013), Chapter 5.

95 Singapore International Dispute Resolution Academy, 'International Dispute Resolution Survey: 2020 Final Report' (Singapore Management University 2020) <https://sidra.smu.edu.sg/sidra-international-dispute-resolution-survey-final-report-2020> accessed 12 December 2024.

96 Renato Nazzini and Raquel Macedo Moreira, '2024 Dispute Boards International Survey' (King's College London, December 2024) <https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf> accessed 2 January 2025.

97 Djakhongir Saidov, 'An International Convention on Expert Determination and Dispute Boards' (2022) 71 International and Comparative Law Quarterly 697, 708–12.

98 Renato Nazzini and Raquel Macedo Moreira, '2024 Dispute Boards International Survey' (King's College London, December 2024) <https://www.kcl.ac.uk/law/assets/kcl-dpsl-2024-dispute-boards-international-survey-report-digital-aw.pdf> accessed 2 January 2025.

dispute boards. The main reason relates to party autonomy.[99] The significant rationale behind the New York and Singapore Conventions was to give effect to the parties' agreement to arbitrate and mediate respectively.[100] By contrast, statutory adjudication regimes represent mandatory law are imposed on the parties, even if the parties retain some flexibility to determine the adjudication procedure. This is the result of a policy decision by every given state. An international convention mandating recognition of this type of ADR would be likely to encounter significant difficulties in practice and might have little success.

If the convention were to apply to contractual adjudication only, the following issue is whether it should only apply to 'international' disputes. Such an approach to scope would reflect the Singapore Convention that only relates to international settlements,[101] whereas the New York Convention applies only to foreign arbitral awards but does not require such awards to be international.[102] Both the Singapore Convention and the New York Convention aimed not to interfere with purely domestic systems. They do so in different ways, however. The Singapore Convention relies on the idea of 'international settlements'. If there is an international element, as defined by the Convention, the Convention applies even if the mediation has taken place in the contracting state. The New York Convention relies instead on the domestic–foreign dichotomy, with the former falling outside of the Convention, as determined by the law of the place where the award was made or the law of the enforcing state.

The authors take the view that an adjudication convention should follow the Singapore Convention approach. Such a convention should apply to international adjudications, wherever they take place. Furthermore, adjudications generally do not have a seat[103] and, in international projects, the categorisation of an adjudication as 'domestic' as opposed to 'foreign' could cause difficulties. Finally, what concerns parties internationally is not that they cannot enforce an adjudication decision in states other than the state where the project is located, for example, but that they cannot enforce the adjudication decision in general. Very often, enforcement will be required precisely in the country where the project – and, therefore, most likely, the employer or main contractor – is located, rather than abroad.

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99 Christian Bühring-Uhle, Arbitration and Mediation in International Business (2nd edn, Kluwer Law International 2006) 174: 'ADR methods are premised on the right of the parties to freely dispose over their controversies through voluntary agreement.'

100 Alex Mills, *Party Autonomy in Private International Law* (OUP 2018) 12: 'There is widespread agreement among states – principally in the form of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 – that parties should be free to grant exclusive jurisdiction over their private disputes to *non-state* methods of dispute resolution, such as arbitral tribunals, to the (at least partial) exclusion of state judicial jurisdiction.' Nadja Alexander et al, *The Singapore Convention on Mediation: A Commentary* (2nd edn, Kluwer 2022) 18–19.

101 Singapore Convention on Mediation, Article 1.

102 New York Convention, Article I(1).

103 Gotz-Sebastian Hök, 'Dispute Adjudication Boards –The International or Third Dimension' (2012) 4 International Construction Law Review 420, 430–3.

The convention could hence follow the model of the Singapore Convention and define what is 'international' adjudication, likely linking it to the place of business of the parties or the place of the project that the adjudication is concerned with.[104] This approach should be preferred, even though it would effectively limit the application of the convention to a smaller number of adjudications – most likely dispute adjudication boards – that are used in the context of large international projects.

To conclude the point, much like in relation to the Singapore Convention and the work of UNCITRAL, this paper proposes that both a model law and a convention should be pursued in parallel. The model law would promote statutory adjudication in specific sectors that would benefit from the unique features of the ADR process. The convention should instead, ideally in concert with the corresponding UNCITRAL model contract clause or with clauses in standard form contracts, focus on the enforcement of contractual adjudication.

Conclusion

The article considered three possible solutions to internationalisation of adjudication. The first was to draft model contract clauses, building upon the initiatives of UNCITRAL. Although such a solution may promote adjudication as a concept, and hence contribute to internationalisation, it would fall short in harmonising the various approaches from a comparative perspective. Nonetheless, statutory adjudication was first built upon the effectiveness of contractual adjudication, so this solution might be effective in the long term in contributing to incremental, polycentric harmonisation.

The second solution is to pursue a model law on statutory adjudication. Given that such a law would give the parties a right to pursue adjudication, its scope should be limited to the construction sector specifically and hence be coupled with a payment regime. The drafting of the model law should also pay particular attention to the four differences between existing statutory regimes. Following the lowest common denominator approach, the model law should (1) be sector specific and limited to payment claims; (2) provide for a payment regime; (3) leave the process of selecting adjudicators by ANBs to implementing legislation; and (4) provide for a specific enforcement mechanism through the courts.

Thirdly, the authors argue for an international convention on the enforcement of contractual adjudication decisions. Given the vast discrepancies between jurisdictions as to the enforceability of adjudication contractual clauses, the convention should focus solely on recognition and enforcement of international adjudication decisions, following the approach of the Singapore Convention.

The three proposals above will contribute, over time, to incremental, polycentric harmonisation of adjudication globally. Given the discrepancies between jurisdictions as to their understanding of adjudication, harmonisation should be

[104] Singapore Convention on Mediation, Article 1(1).

incremental, and the proposal discussed in this paper should achieve this by being flexible and adaptable. This is clear in relation to model clauses and a model law. Whilst a convention would be a mandatory instrument, it would nevertheless relate to a very narrow, though essential, element of the process: the enforcement of the decision. This will contribute to increased awareness of, and reliance on, contractual adjudication, particularly given the problems with respect to enforceability.

Harmonisation should also be polycentric, that is, not reliant on one instrument or one method. The three solutions apply to different types of adjudication. Model clauses and a convention pertain to contractual adjudication, while the model law pertains to statutory adjudication. These methods working together have the potential, over time, to greatly enhance the use of adjudication with respect towards national legal traditions and party autonomy.

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