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INSIDE INSIGHTS

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DISPUTE RESOLUTION

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ADJUDICATION IN UGANDA: A CRITIQUE OF SELECTED RULINGS FROM CENTRE OF ARBITRATION AND DISPUTE RESOLUTION (CADER).

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Introduction

Adjudication is an Alternative Dispute Resolution (ADR) mechanism where an independent neutral third party makes a decision on a dispute between parties. The decision is temporarily binding. The adjudicator acts in an intermediate capacity on the spectrum between expert determination and arbitration. Adjudication is a common method of dispute resolution in the construction industry due to its benefits which include speed, flexibility, use of experts to resolve disputes, cost effectiveness and privacy. As such, it has also found a place in the construction industry in Uganda on public works however the uptake is still low in the private industry. This article will address the nature of adjudication in Uganda and offer a critique of selected rulings from CADER that seem to conflate adjudication and arbitration as the same ADR mechanism.

Adjudication in Uganda

There are three forms of adjudication, namely: statutory, contractual and ad hoc. On the one hand, statutory adjudication is a form of adjudication in jurisdictions like England and Wales where there is an Act that applies to a contract between parties. The Act in this case is the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 as amended by the Local Democracy, Economic Development and Construction Act (LDEDCA) 2009. When a contract falls within the description of a 'construction contract' in the Act, then a mandatory provision of dispute resolution by adjudication applies.

Contractual adjudication, on the other hand, is a form of adjudication where an Act does not apply, but the parties have agreed a mechanism in their contract where they resolve

disputes by adjudication. Ad hoc adjudication refers to a form of adjudication where the parties have agreed to submit their dispute, without reservation, to adjudication, thereby giving an adjudicator impromptu jurisdiction to decide their dispute in circumstances where an Act does not apply and where there is no pre-existing contractual agreement to adjudicate. In Uganda, the most common forms of adjudication are contractual and ad hoc adjudication. Uganda does not have a statutory adjudication regime in place for the construction industry.

Standard Form Contracts and Adjudication in Uganda

Contractual adjudication in Uganda is common due to the proliferation of the use of Standard Form Contracts which are mostly used on public projects and a few private projects. The common Standard Form Contracts in Uganda include the Public Procurement and Disposal Authority (PPDA) form of Contract, FIDIC forms of contract and the East Africa Institute of Architects form of contract which is commonly used for buildings in the private industry.

It is critical to note that there must be a dispute in order for the adjudication process to become operable. Courts have held in the case of *AMEC Civil Engineering Ltd v Secretary of State for Transport [2004]* EWHC 2339 that the word dispute should be given its normal meaning and there is no special meaning ascribed to it. A dispute crystallizes when a claim made by one party is

either accepted, modified or rejected by the other party as was held in the case of *Fastrack v Morrison [2000] 75 ConLR 33.*

The Adjudication process in the PPDA forms of Contract which are often used on public works has come under scrutiny in a number of cases at the Centre of Arbitration and Dispute Resolution (CADER) severally. CADER was established in the Arbitration and Conciliation Act 2000 in section 68 of the Act with a role of performing administrative procedures for alternative dispute resolution processes which were mainly considered to be arbitration and conciliation. It was often the institution of choice for parties in appointment of adjudicators.

Selected Cases at CADER

Reference is made to the selected cases of *Board of Governors, John Paul S.S Chelekura v Kheny Technical Services Ltd, China Jiangxi Corporation for International Economic and Technical Corporation v Cotton Development Organization, Namabale Enterprises Ltd v Busitema University and Plinth Technical Works Ltd v Hoima Municipal Local Government Council* where the parties wrote to CADER requesting for the appointment of an adjudicator. All these cases had a similar dispute resolution clause which was adopted from the clause in the PPDA form of contract. The clause is replicated here for ease of reference:

24. Disputes

24.1 If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.

The clause further reads that:

25. Procedure for Disputes

25.1 Unless otherwise specified in the SCC, the procedure for disputes shall be as specified in GCC 25.2 to 25.4.

25.2 Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision.

25.3 Any adjudicator appointed

under the contract shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Contract, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.4 Any arbitration shall be conducted in accordance with the arbitration law of Uganda, or such other formal mechanism specified in the SCC, and in the place shown in the SCC.

In this case, the SCC stands for Specific Conditions of Contract. The SCC provided for the **procedure for disputes** to be as specified in the GCC 25.2 to 25.4 and then provided for the appointing authority for the Adjudicator to be the Centre of Arbitration and Dispute Resolution.

It should also be noted that the contract defined an adjudicator as:

1.1 (b) The 'Adjudicator' is the person appointed jointly by the Employer and Contractor to resolve disputes in the **first instance.** (Emphasis added)

In the construction of this clause, the Executive Director of CADER stated that the definition of an adjudicator is synonymous with the function of the **arbitration agreement** set out in s.2(1)(e) Arbitration and Conciliation Act, Cap 4 which is replicated here for ease of reference:

"arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not."

The Executive Director further proceeded to state that "there is no provision in the ACA, which restricts the definition of an **arbitrator.**" (Emphasis added)

He then adds that "accordingly exercise the powers vested by **S.11(4) ACA** to appoint an adjudicator." (Emphasis added)

This was a consistent construction of the clauses and conclusion in decision across all of these selected cases.

A Critique of these decisions

It can be noted that there is a conflation of arbitration and adjudication which are different dispute resolution mechanisms. It is true that the parties chose the Centre of Arbitration and Dispute Resolution (CADER) to appoint the adjudicator probably basing on the fact that CADER is in place to administer this function but this does not in any way call for the use of definition of the arbitrator in the construction of a clause regarding adjudication.

It should also be noted that the parties had already defined who an adjudicator is in their contract and that the adjudicator had jurisdiction on disputes in the first instance. It can also be interpreted that there are two instances that the adjudicator would be called into action and that is when one of the parties is dissatisfied with the Project Manager's decision but also when any other dispute crystallizes between the parties as guided by the procedure for disputes in the SCC.

The arbitrator would only be called into action when one of the parties is dissatisfied with the adjudicator's decision. Therefore, the role of the arbitrator was a second instance role. Whereas the Executive Director of CADER mentioned that there is no provision in the Arbitration and Conciliation Act that restricted the definition of an arbitrator, it is also true that an arbitrator and an adjudicator serve roles which may be

different and have outcomes that have different degrees of finality as already noted above. For instance, an adjudicator's decision is temporarily binding while the arbitrator's award is final and binding.

Reference to an arbitration agreement is also faulty since in this case the parties were requesting for the appointment of an adjudicator for which they had an already pre-existing contractual mechanism to carry out that appointment and an Adjudicator Nominating Body named to do this. This contractual adjudication provision should not have been conflated with the arbitration agreement.

Conclusion

In conclusion, adjudication and arbitration are two different procedures on the ADR continuum and therefore should not be conflated to mean one and the same. Unlike jurisdictions like England and Wales where adjudication is mandatory and statutory in nature for construction contracts, in Uganda, adjudication is usually contractual or ad hoc. Additionally, in jurisdictions like England and Wales, adjudication and arbitration are governed by different statutes, that is to say the HGCRA 1996 and the Arbitration Act 1996. In Uganda, the Arbitration and Conciliation Act 2000 governs arbitration and conciliation as ADR mechanisms. It does not govern adjudication. As such, it would not be correct to appoint an adjudicator using a section in the Arbitration and Conciliation Act in a country like Uganda and more

so in a situation where there is a provision for contractual adjudication between parties. For the purposes of adjudication, CADER is simply an Adjudicator Nominating Body (ANB) whose role is to aid parties in appointing adjudicators and administering the process where need be. It is common place for Adjudicator Nominating Bodies like the Chartered Institute of Arbitrators (CIArb) to also carry other functions in other ADR mechanisms like appointing mediators and arbitrators. What stands out as good practice, is the acknowledgement of the differences between these ADR mechanisms and using the correct procedure and statute (where need be) while administering processes in the different mechanisms. This is a call for practitioners to acknowledge the difference between the two processes and avoid the conflation of the same.

CONTRACT MANAGEMENT

VARIATIONS IN CONSTRUCTION CONTRACTS

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Introduction

Variations provide the biggest headaches to the Contract Administrator, who is also referred to as the Architect, Project Manager or Engineer, on construction projects. The King's College London 2022 report on the Construction Industry pointed out one of the leading causes of disputes as changes (variations) by the client. Change is inevitable and often required on construction projects because of a number of reasons which include incomplete designs, new technology and materials plus changes in client and end user requirements. What also stands out is the fact that the Works are often unique since there is no prototype built for most construction projects. The Works being undertaken form the prototype and final product.

Why should construction contracts allow variations?

In case of a contract where the Employer is in charge of design, the Contractor may have a

case in misrepresentation against the Employer who claims that a project is fully designed when it is not as was the case in *Howard Marine v Ogden & Sons*[1]

Additionally, the common law position is that parties have to do what they contracted to do -no more and no less. As such, without a provision for change built into the contract, no change would be permitted. This can be counterproductive in terms of achieving project progress or completion where works which are part of a variation are key to progress or completion. The Contractor would not be able to do them since they lie beyond what he contracted to do. As such, a variation clause allowing unilateral change by the Contract Administrator becomes part of what the parties contracted to do.

How can change be made in construction contracts?

Change must be made by agreement which could either be by a further agreement between the parties with new consideration or by express agreement in the original contract. Express agreement in the original contract can be seen in JCT SBC/Q 16 in clause 5 supported by clauses 3.14, 2.29 and 4.22. In NEC 4, it is stipulated in clauses 14.1, 18.1,45 and 63.10-11 while in the 1999 FIDIC forms of contract, variations are primarily governed by Sub-Clauses 13.1 to 13.3.

In making a change by further agreement, the parties need to be clear whether what they are attempting to do is:

[1][1978] Q.B. 574.

[2][1966] 2 Q.B. 617.

1. Revising the terms of an existing contract which constitutes a variation
2. Agreeing to a new and additional contract which would lead to the formation of a collateral contract
3. Replacing the original contract with a new one which would constitute a rescission of the contract.

Change by further agreement cannot be brought about by undue pressure as that would lead to voiding of the new contract. This was seen in ***D&C Builders v Rees***[2]

Change made by express agreement in the original contract means that the Contract has already agreed to comply with the variations that fall within the ambit of the variation clause. As such, failure to comply with an instruction requiring a variation may amount to a breach of contract by the Contractor. This is subject to the caveat that the Contractor is not obliged to comply with any variation order which

is outside the ambit of the variation clause.

In order for a contractual variation instruction to be valid, it must:

1. Be within the ambit of the variation clause and bear some relationship to the Works. As such, the Contract Administration must hinge on the Variation clause while giving such an instruction.
2. Be additional to the original contractual obligation. With this, works that are part of the original scope cannot consist of a variation.
3. Be issued by an authorized person. Variations have to be issued by the prescribed authority who is normally named in the Contract.
4. Be issued in the prescribed manner within the Contract. As such, an instruction may be rendered null if it were issued without following the process which is set out in the Contract.

How do you determine whether an instruction amounts to a Variation?

Determination of whether work amounts to a change is a matter for construction in each contract as was the case in ***Williams v Fitzmaurice***[3] and ***Sharpe v San Paulo Railway***[4] . In order to decide whether a certain instruction amounts to a change, a benchmark is needed against which the change can be judged. This benchmark is established by reference to the original bargain or agreement between the parties. In the case of ***Chittick v Taylor***[5] , it was held that items provided for in the contract cannot be extra. It was also held that when a

Contractor provides material of a better quality that that required under the Contract without express or implied instruction from the Contract Administrator, the Contractor is not entitled to charge the additional cost. However, if the Contractor carries out work or supplies materials that are not called for under the contract basing on an instruction from the Contract Administrator, the Contractor is entitled to additional costs.

It is also important to remember that on a design and build contract where the Contractor is in charge of design, if there is a need to amend the design, the Contractor will be obliged to remedy that at no additional cost to the Employer as was the case in Davy Offshore v Emerald Field Contracting[6].

[3] [1858] 11 WLUK 131.

[4] [1873] 4 WLUK 19.

[5] [1954]

[6] [1992] 3WLUK 69.

Conclusion

Variations are one of the leading causes of disputes on construction contracts. In order for a variation to be properly executed, there is a need to follow the due process that was set out in the Contract and also to correctly identify if indeed a change has been applied in those circumstances. Valuation of the variations has to be properly done and where applicable an Extension of Time awarded in order for the Variations to be completed.

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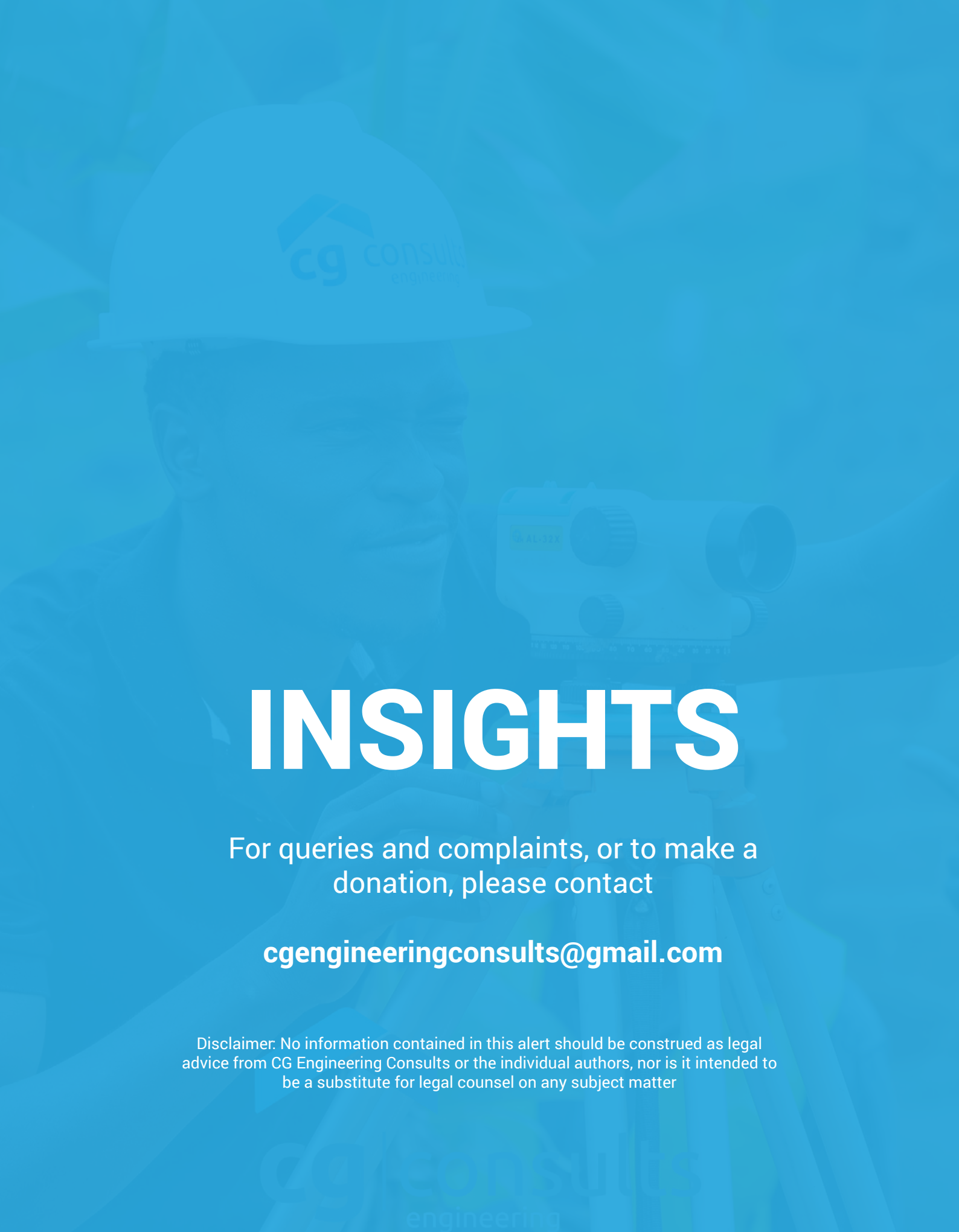

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