UK looks to new adjudication procedure for tech disputes

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Technology disputes in England and Wales are set for a revamp following the announcement that a new adjudication procedure is almost complete.

In June, educational charity the Society for Computers and Law (SCL) revealed that its work on a new adjudication procedure for technology disputes in England and Wales is nearly finished.

The news comes two months after the inaugural London International Disputes Week, which saw lawyers discuss the role of technology in dispute resolution.

It is a timely topic, as over the past year, technology companies have faced increasing scrutiny worldwide. Earlier this month, the **European Commission** sought to halt semiconductor manufacturer **Broadcom**'s exclusivity practices by formally opening its investigation into its alleged anti-competitive behaviour.

May saw App Store consumers win the right to sue **Apple** in the United States, after the Supreme Court ruled in a competition dispute concerning the technology giant's higher-than-competitive prices on its App Store.

SCL BETTER CONTRACTS INTIATIVE

In 2017, the SCL asked for market opinion on improving dispute resolution procedures in IT and technology disputes, as there was an "appetite for speedier" dispute resolution.

An alternative dispute resolution (ADR) procedure was proposed at an industry event, with a plan to incorporate it into IT and technology procedure.

Features of the new procedure include; proceedings will last three months for technology disputes, such as contracts for technology-related goods and services such as outsourcing arrangements, IT consultancy,

blockchain and cloud computing contracts.

There is no restriction on the scope or size of the disputes and the decision is provisionally binding, meaning parties can reopen the dispute in arbitration or litigation within six calendar months and parties must comply with the decision.

Additionally, there will be a pre-selected panel of adjudicators who may be lawyers or non-lawyer IT specialists from the technology industry.

Looking to bank on the increasing need for timely and cost-effective disputes, adjudicators must avoid unnecessary expense and be carried out in a time and cost-effective manner.

Parties are expressly obligated to act in good faith and co-operate throughout the procedure, while mediation is an option before, during and after the procedure.

The SCL will operate as an appointing body only, meaning that registration and application fees will be modest.

WHY NOW?

Technology, such as blockchain and cryptocurrency has exploded over the last few years, while the legal industry is also responding to new developments in technology.

Known to be costly and lengthy, technology project disputes are commonly encountered on construction projects and include poor programme management, defects, design issues, as well as delay and disruption which involve a myriad of disclosure and evidence in arbitration proceedings.

The aim of the procedure is to reduce the complexity and size of the disputes, which can often last between two to three years. There is also no statutory adjudication process for technology matters like those used in construction disputes.

By introducing a contractual adjudication process, it is hoped that technology project disputes can be resolved quickly and cheaply, avoiding lengthy legal battles.

The SCL's procedure is not mandated by statute, the parties' contract must agree to adopt the technology adjudication process by incorporating the SCL's Model Adjudication Clause.

CONSTRUCTION DISPUTES

Given the parallels between construction and technology disputes, contextual statistics provide valuable insight.

In June last year, management consulting company **Arcadis** published its report *Global Construction Disputes Report 2018: Does the construction industry learn from its mistakes?* Where it found that the average value of disputes in the United Kingdom was USD 34 million in 2017, with the cost of a dispute more on average than Europe and North America.

The most common dispute case was a failure to properly administer the contract, while adjudication was the highest ranked method of ADR.

However, it was predicted that *Grove Developments v S&T (UK) (2018)* would likely have an impact on the use of adjudication in future disputes, with party-to-party negotiation and mediation due to move up the list.

Clyde & Co's global head of projects and construction, **John Morris**, explained in a statement that it is unsurprising that "adjudication remains the preferred method of alternative dispute resolution. It offers the benefit of early cash, which is of course hugely beneficial to those operating in the industry, albeit the outcome can be a lottery given the calibre of some adjudications".

Construction disputes also remain at an all-time high in resolving the matter in a timely manner, with the average length of dispute 10 months in 2017, which is a decrease from 12 months in 2016.

TECHNOLOGY DISPUTES

June, meanwhile, saw the Technology and Construction Court (TCC) published its *Annual Report of the Technology and Construction Court 2017-2018*, finding that between October 2017 and September 2018 the London TCC had 428 new claims, which is a 13% increase on the previous year.

The wider TCC claims in the UK saw Birmingham have 52, which is consistent with 60 in 2016, while Manchester had 116, compared to 104 the previous year and Cardiff had 14, which is a decrease from 22.

A report published by Queen Mary University of London and Pinsent Masons in 2017 – *Pre-empting and resolving technology, media and telecoms disputes* – found that 48% of companies dealt with delivery and implementation issues in their IT systems disputes.

These figures suggest that companies often deal with complex technology issues, and the creation of a procedure such as the one proposed by the SCL, may well be welcomed by businesses.

INSIDE VIEW

The new procedure has seen a handful of individual contributors acting behind the scenes including **David McIlwaine**, a partner at **Pinsent Masons**, **Hausfeld** partner **Michael Bywell**, **4 Pump Court** barrister **Matthew Lavy** and **3 Verulam Buildings**' **Michael Lazarus**, who worked alongside the SCL over the past two years to deliver the procedure.

Speaking with *CDR*, Bywell, McIlwaine, Lazarus and Lavy explain the procedure enables parties within three months. Compare this with litigation or arbitration, which can typically take two or more years, "the shorter duration not only ensures lower legal costs but may also serve to mitigate or eliminate ongoing project overruns (e.g. cost and delay) and help preserve reputations and the relationship between the parties".

"Parties to technology contracts want speedy and cost-effective outcomes. The procedure provides a middle way between existing forms of ADR such as expert determination on the one hand, and fully-fledged litigation or arbitration on the other. Parties are free to mediate any time they wish," they add.

Critically, McIlwaine states that there is no disclosure process. "A party provides copies of documents that it wants to rely on, up a maximum of one lever arch file with each written submission," compared to potentially millions of emails and documents in litigation.

Based on the collective experience of the drafting committee, it is estimated that the procedure will result in cost savings – compared with litigation or arbitration – of "around 80-90% in most cases", assuming the parties accept the adjudicator's decision and the case does not proceed to litigation or arbitration.

Concluding, they say that if there is "quicker and simpler process available parties may well elect to adjudicate rather than absorb or write-off substantial expenditure because of the fear of even greater cost and risk in any

litigation or arbitration proceedings”.

Applications for the adjudicator panel will open in September, with matters being dealt with shortly thereafter.