*“Salmond (2010) has shown the wide range of challenges being used by parties to resist the enforcement of adjudicators’ decisions.
These (almost routine it would appear)
challenges to the adjudicator’s decision
raise the threshold of costs to the parties
which
may consequently render some smaller claims uneconomic to pursue. They also extend the
period of time during which the referring party has to wait for payment
, mitigating
against speedy resolution advocated by Latham (1994). (…)
Whilst the adjudication process may reach a conclusion with the decision,
that is
not the end of the dispute as far as the parties are concerned
. There is the
issue of
enforcement
and if that becomes
prohibitively expensive or protracted
this, in itself,
could impact on the attractiveness of adjudication as a means of resolving the dispute.”*
Peter Kennedy, Janey Milligan, Lisa Cattanach, Edward McCluskey
The development of Statutory Adjudication in the UK and its relationship with construction workload (2010, COBRA Conference)

*From its inception adjudication was purportedly considered as less formal and cheaper than arbitration while more binding as other unformal ADR.
While statutory adjudication in some other countries is mandatory (see Security of payments Acts in States and Territories of Australia, which stipulate that contracting out of adjudication mandated by Acts is null and void), according UK statutory provisions (The Housing Grants, Construction and Regeneration Act 1996 as amended by
Part 8 of the Local Democracy, Economic Development and Construction Act 2011) provide for mixture of voluntary and mandatory adjudication (mandatory provisions are covered by
Scheme for Construction Contracts (England and Wales) Regulations, respectively
Scheme for Construction Contracts (Scotland) Regulations.*
Limited party autonomy
*Hovewer, from viewpoint of user (contracting party) free will of parties in adjudication clauses is very limited by very point of statutory law. Section 108 of Construction Act 1996 states clearly:
Adjudication
108. – (1) A party to a construction contract
has the right to refer a dispute
arising under
the contract
for adjudication
under a*

procedure complying with this section.

For this purpose "dispute" includes any difference.
(2) The contract shall –
(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
(e) impose a duty on the adjudicator to act impartially; and
(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.
(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.
In fact parties to construction contract (e.g. principal, contractor and subcontractor) has only roam for voluntary agreements regarding adjudicator nomination, determination of adjudicating body, or amend deadlines of decisions, and provide strict clauses for costs-sharing or unilateral cost burden, but above mentioned “compliance points” are quite dissuasive.
According above mentioned paper of Caledonian University, more than 90 % of adjudicators in last decade were appointed by adjudication nomination bodies (ANB), interesting fact, concerning “free of will” to appoint adjudicator, emphasized by Elliot (2006) as distinguishing point between English and Australian adjudication. Party which disapprove nomination by adjudicator (or even ANB) in contract, may rely to the provisions of respective statutory

Schemes.

Final decision ?*The parties may agree to accept the decision as finally determining the dispute, but without such agreement decision is binding only provisionally "until the dispute is finally determined by legal proceeding, by arbitration, or by agreement. In the case of arbitration clause agreed in contract, there is not statutory requirement of preceding adjudication, that means, that parties can refer its dispute directly to arbitration and as we propose in last section of this blog this arbitration could be in fact cheaper, and streamlined more than adjudication.*
But also in the case of agreement about finality of adjudication decision, there is as Salmond says, wide range of challenges against enforcement of such decision.

U nfit for open market ?

With regard to the provisions of EU Treaty and specifically right to settlement, and right to cross-border services adjudication seems to be not fit for construction contracts with contractors or subcontractors based in other EU member states not familiar with adjudication.
Even if such a party is willing to adjudication (and for example is not insisting on direct access to the arbitration) enforcement of adjudication decisions which is subject to broad challenges in the UK enforcement proceeding may be almost unfit to enforcement proceedings in continental european countries.
Bearing in mind number of private limited companies registered with Companies House, which are only shelf companies of continental (mostly Central and Eastern European owners), this will be other problem of finality of decisions of such adjudication.

Costs of adjudication compared with arbitration*As for individual adjudicators Elliot (2006) describers medium hourly rate at 100 , whilst "experienced construction lawyer will charge much more". Costs of adjudication could be "substantial" but purportedly "still very much less of arbitration or litigation costs. This appearance is based on arbitration prices of some arbitration centres, which are really high, but also on the underestimate of adjudication nominating bodies charges. According to the Milligan, McShane (2012) "The Cost of Adjudication: How much? & When?" (based on Based on a paper submitted by Glasgow Caledonian University Adjudication Reporting Centre for the COBRA 2011 Conference) overall adjudicator costs for case the most popular band range was between 2,500 and 5,000, very closely followed by the range 15,001 to 20,000 .*
According to Report No 10 of the Adjudication Reporting Centre at GCU recent (2010) hourly rate oscilates between 151 – 175, while findings of Report No 11 and 12 evidence growth of mean hourly rate to band rate 176 – 200 and the second "popular" rate in the 2012 was over 200 (33 % of the sample, raising from 12,8 % in the previous year). In a separate sample of 240 adjudications,
70% of the total was charged at more than 175 per hour with half of those charged at over 200
.
In the Report No. 7 (published in august 2005) ARC emphasized that growth of hourly rates is also due the
lawyers acting more and more as adjudicators

(most of them charging more than 200 at hour). In the adjudications where lawyers were not adjudicators, on the other side most common experts involved were lawyers, again raising the costs of adjudication. We can (if somewhat crude) conclude that if lawyer adjudicator is not appointed this could led to appointment of lawyer as expert for adjudicator, while, if lawyer adjudicator is appointed, then charges probably will be at hourly rate over £200. Comprehensive data of ARC also reveals that adjudications taking
26-50 hours
were most common in the year 2002 (Report No 4) while in the year 2000 (Report No 2) adjudications taking up to 20 hours and taking 21-50 hours were at par (each category with 42,8 per cent of adjudications). Mean adjudicator costs
as early as in the year 2001
(Report No 3) were
3,369.
From the published relatively stable hours of performance (time budgets) of adjudications with gradual growth of hourly rates (from the year 2002 with most common range 76-100, followed by range 101-125 to the 2012 ranges 175-200 and over 200) we can in turn compute approximately mean adjudicator costs in the year 2012
as nearly twice that in the year 2001
(leaving aside slow rise of hours taken by adjudications).
In contrast to the adjudication, arbitration, especially institutional
is bound by fees tables
proposed by arbitration institutions, mainly related to subject of dispute. In adjudication we have not such scheme, but we can use data about most common sum in dispute. In the ARC Report No 12 researchers from Glasgow Caledonian University provide us with the range 10,000 - 50,000 as the most common., (consistent with previous years) and range 100,000 - 250,000 as second most common (since the year 2008). Via these data set we can propose cost comparison model, based on the computing of four model causes, with the subject of the claim with 10,000, 50,000, 100,000 and 250,000 and compare the overall fees (without review or setting aside procedures) between mean costs according ARC, and costs of arbitration facilitated by JSM PCA with place of arbitration (seat of arbitration tribunal) in the Zurich, Switzerland.

Mean adjudicator costs were calculated at hourly rate 200 (as fit for lawyer adjudicator without data about expert lawyer costs and concurrently consistent with the two main ranges from Report No 12, considering that from among these ranges one is without upper limit) for the case A with extremely low 15 hours budget, for the case B with 25 hours for C with 40 and for D case 50 hours. ANB fee is calculated as 300. Spot exchange rates of Bank of England (last three years average) was used for calculations from EUR (1,1842 EUR for one Pound sterling, and 0,8456 Pounds for one Euro). Table No 1: Case costs comparation in

Case summary

Mean adjudication costs

JSM PCA

(EUR in parenthesis)

A Claim sum

10,000

10,000 (11,842)

Fees (without expert+representatives)

3,300

809.35 (957,1)

B Claim sum

50,000

50,000 (59,200)

Fees (without expert+representatives)

5,300

2,825.14 (3,341)

C Claim sum

100,000

100,000 (118 420)

Fees (without expert+representatives)

8,300

4, 327.44 (5,117.6)

D Claim sum

250,000

250,000 (296,050)

Fees (without expert+representatives)

10,300

7,319.3(8,655.75)

As we can see from Table No 1 Arbitration facilitated by JSM PCA is cheaper not only against model calculated Mean adjudication cost based on ARC data, but also in comparison with band ranges of 2500-5000, not even mentioning probably higher appearance of range 15,001-20,000 in disputes with claim sum for D case. Considering that in arbitration facilitated by JSM PCA arbitrators are practically always lawyers, and bearing in mind, that there is some relationship between sum of claim (value of subject of adjudication/arbitration) expressed in our model by raising time budget of adjudication relative to the sum in dispute , these numbers and facts give us persuasive reasons to conclude that JSM PCA Arbitration is cheaper (in most of cases significantly cheaper) than adjudication before british adjudicators.

Timetable to the decision compared *According comprehensive sources, most adjudications are decided in compliance with Construction Act time limits or in the other words (numbers for 2012) 44 % within the 28 days 37 % in 42 days since referral, but this may be also evidence as to "consistent trend towards longer adjudications" (conclusion of ARC Report No 12).*
In arbitration time periods binding for arbitrators or arbitration centre are not very typical, but for arbitration facilitated before JSM PCA there is provision in its Rules (Section 11b Time limits for decision) which reads as follows:
(1) JSM PCA, arbitrator and secretary are bound by time limits for decisions, as follows:
a) on the procedural motions, taking the evidence, place of arbitration and rules of proceeding – within ten days from the day of delivery of the motion ,
b) on the objections and challenges, excepting the objection on lack of jurisdiction, on which the

Tribunal shall decide in the decision on the merit
within thirty days
from the day of delivery of the motion,
c) on the merit, within
sixty days
from the day of delivery of the Request for arbitration,
d) on the merit, within fifteen days from the day of delivery of the due Request for Arbitration concerning the Bill of exchange.
(2) Time limit set up in the subsection 1), point c) shall be prolonged in the case of
lack of cooperation of third persons
, no more than up to thirty days. Other time limits should not been prolonged.
Prima facie
one this limits are long, but quite short limits set up in Construction Act has been concepted for purpose (which clearly failed) to uphold adjudication in course of works (that means before completion of the construction).
Moreover, in fact most of arbitration before PCA JSM are completed in 45 days, and most of delays are delays with delivery of the award, which is ex lege
finally binding.
In situation, when most of adjudications are to be enforced, which can take time counted in months not days, (and such enforcement could be stayed by court on the basis of next-step arbitration or court proceeding) it is not so clear if time limits differing between 28-42 days for non final resolution and 60-90 days for final resolution could be reasonable dettering from "
arbitration first"
proceeding.
Arbitration first
Arbitration first is such management of arbitration clause, which open space to the parties to referral to arbitration in construction cases without precondition of adjudication. While adjudication is mandatory proceeding, if arbitration clause does not word by word states precondition of adjudication, any party have right to start arbitration. While opposing party will try for adjudication, there is good reasons to consider, that arbitration with empowered enforcement and possibility of counter-claim shall prevail. In other modelled situation, concurrently pending arbitration and adjudication shall cumulate in the arbitration if adjudicator issues decision against party who referred case to the arbitration. In case of construction contract based only on default mandatory rules on adjudication (whithout agreement on finality of the adjudicator decision) one hard can see practical reasons for opposing party to rely on nonbinding adjudication in situation when arbitration has been started in such cost effective and spead manner as JSM PCA rules offers to the parties.