

# Construction All-Day Conference

Thursday 12 October 2023 11:00 – 16:30

**Chairs Welcome:**  
11:00 to 11:05



**RICHARD  
WILMOT-SMITH KC**  
39 Essex Chambers

**Panel 1:**  
11:05 to 11:50



**DAVID SAWTELL**  
39 Essex Chambers



**KAREN GOUGH**  
39 Essex Chambers



**JONATHAN COPE**  
MCMS

- Adjudication – latest developments in “the only game in town”



# 39 ESSEX CHAMBERS CONSTRUCTION LAW CONFERENCE

Panel 1: ADJUDICATION:

THE INTERNATIONAL PERSPECTIVE



By  
**MS KAREN GOUGH,**  
39 Essex Chambers,  
London  
12 October 2023

# ADJUDICATION OF INTERNATIONAL CONSTRUCTION DISPUTES

## Types of adjudication:

- CONTRACTUAL ADJUDICATION:
  - DISPUTE BOARDS: FIDIC DAAB
  - NEC Options W1 & W3, soon W4 for Hong Kong.
  - STATUTORY ADJUDICATION:
    - All Disputes, UK, NZ, WA [before 2021]
    - SECURITY OF PAYMENT LAWS: Singapore, Malaysia, NSW, [?]HK



# ADJUDICATION UNDER THE FIDIC FORMS

## FIDIC

- DISPUTE AVOIDANCE: CI 21.3
  - FORMAL ADJUDICATION: CI. 21.4
    - NOD CI. 21.4.4
    - AMICABLE SETTLEMENT PERIOD: CI. 21.5
    - ENFORCEMENT OF DAAB DECISION: CI. 21.7
    - **The future:** Practice Note on the use of FIDIC's contractual DAAB process alongside statutory adjudication and Security of Payment regimes.

# NEC “W” OPTIONS

- NEC3 & NEC4 –dispute avoidance - part of W1, optional for W2 where statutory adjudication exists.
- DISPUTE BOARDS: Option W3
  - NON-BINDING RECOMMENDATIONS
- NEC4, W3 – condition precedent to arbitration.
- W4: New: Hong Kong SOP compliant.

# INTERNATIONAL STATUTORY ADJUDICATION FORUM (“ISAF”)

ISAF stands for International Statutory Adjudication Forum.

It was set up in July 2022.

The founding members are from each of the principal adjudication common law seats (Karen Gough and Sean Gibbs for the UK, Paul Starr and Christopher To from Hong Kong, Ian de Vaz and Yvonne Foo from Singapore, Mr. Shintaro Uno Japan/Singapore, Basil Georgiou from Australia, Dr. Naseem Ameer Ali, John and Catherine Green from New Zealand, Kevin Prakash and Wai Loon Lam for Malaysia, with Justice Dato Mary Lim (also from Malaysia)).

# INTERNATIONAL STATUTORY ADJUDICATION FORUM (“ISAF”)

ISAF’s 4 principal objectives:

1. Keep up to date with developments in statutory adjudication, identifying similarities and differences between current regimes;
2. Consider [draft] a model law on statutory adjudication;
3. Draw best practices from different statutory adjudication models, share experiences and solutions;
4. Develop standards for training and accreditation of adjudicators.

# ISAF DRAFT MODEL LAW ON STATUTORY ADJUDICATION

The chairman of ISAF is Prof. Kok Fong Chow from Singapore.

ISAF has a number of work streams. ISAF has a drafting committee which I chair.

ISAF's drafting committee has produced a draft Model Law on Statutory Adjudication for construction disputes which is out for consultation.

Please see [this link for the draft](#) (the [appendix is here](#)) of the ISAF Model Law on Adjudication which was launched at the recent SCL Singapore Annual Conference on 21 September 2023.

Email for feedback on the draft ML: [StatutoryAdjudication@gmail.com](mailto:StatutoryAdjudication@gmail.com)



# DRAFT MODEL LAW ON STATUTORY ADJUDICATION

- ISAF seeks to encourage states without statutory adjudication law to use and adapt the model law to produce their own regime; and
- To encourage those who have a statutory adjudication regime to more closely align them.
- ISAF's aim is to publish the Model Law either through buy in from SCL's internationally, or through major ADR institutions/bodies.

# UNCITRAL WORKING GROUP II

UNCITRAL is discussing the development of an additional Model Law on International Commercial Adjudication.

After discussion in early 2023 it was generally felt that work should not be limited to the construction or technology industries but rather should address the need to resolve disputes effectively in all types of industries, for example, the financial sector. It has got no further than drafting some model clauses and guidance materials.

At its fifty-sixth session (Vienna, 3-21 July 2023), the Commission requested that the Working Group continue its work on technology-related dispute resolution and adjudication. Albeit current drafting is focused on expedited arbitration provisions...

# CONCLUSION

– The rise and rise of statutory adjudication:

Lord Justice Coulson recently described it as: “...for most construction disputes, it is the only game in town.” See **John Doyle Construction Limited (in Liquidation) v Erith Contractors Ltd [2021] EWCA Civ 1452**.

- **The reach of adjudication through NEC** continues at home and abroad. Hong Kong is not alone in its adoption of NEC and thus adjudication in the form proposed by Latham.
- **FIDIC** acknowledges the role of statutory adjudication as an effective method of resolving construction disputes in numerous jurisdictions, and is keen to devise a means of utilizing its contractual DAABs alongside statutory adjudication. It is working on producing a practice note and supplements to enable parties to have the best of both!
- **ISAF** has produced a draft model law for statutory adjudication of construction disputes, released for consultation in September 2023.

# Thank you for listening

**KAREN GOUGH**

**BARRISTER, ATTORNEY AT LAW, CHARTERED  
ARBITRATOR, ADJUDICATOR, CIP [FAiADR]**

**PAST PRESIDENT OF THE CIARB.**

**Vice Chairman, SCL UK**

**Co-chair, ICP of IPBA**

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