IS ADJUDICATION WORTH THE COST?

Obstacles to recovering adjudication costs might not be the best choice for complex disputes, write Akin Akimbo and Tracey Summell.

Parties cannot recover legal costs incurred in adjudication without written agreement - after service of the adjudication notice - (which the adjudicator has costs jurisdiction. That's the general position, despite varying interpretations of section 108A of the Construction Act and recent court decisions that suggest alternative means to recover costs.

This basic principle makes adjudication potentially expensive for those embroiled in complex, high-value disputes. Such disputes are often referred to adjudication, contrary to what most envisaged when the process was introduced 20 years ago. They require intensive preparation to meet uncomforably short deadlines, and do not come cheap.

Little wonder then that parties new to adjudication are horrified to learn they are unlikely to recover these costs, even if an adjudication decision in their favour is later upheld on appeal. It is crucial to consider what dispute resolution procedure is the most appropriate as soon as the dispute arises for complex cases:

Are the regulatory and legal rules that govern businesses’ trading activities keeping up with the pace of change and the pace of growth? Changes are also needed in the legislative landscape as a result of Brexit. There is a need to deal with Brexit progress being made but slowly - and when change arrives, is it fit for purpose?

The General Data Protection Regulations (GDPR) will come into force on 25 May, replacing current data protection laws to unify data privacy laws across European Union members' states. The key aim of GDPR is to protect EU citizens from breach of privacy. It includes stricter fines of up to 4% of annual global turnover or €225m (whichever is greater). The UK government has already confirmed that it will implement GDPR following Brexit, and the Data Protection Bill has already had its first sitting in the House of Lords.

The aim of the new data protection laws is to bring them up to date with how businesses use and process our data and to ensure uninterrupted data flows between the UK and the rest of the world for trade purposes. All good - but are the new laws already outdated of GDPR? I do not, for example, consider that a cloud computing and blockchain technology in mind where the identity of the owner of the information - and indeed the location of the data owner - can be unclear.

Cyber crime is fast growing - each day brings more reports of businesses, banks, supermarkets, and telecoms companies being hit, and those ones that make headlines. The potential impact, both physical and monetary, for construction firms is severe. These companies hold valuable data about our infrastructure and building operations. The prospect of high fines under GDPR may seem more tempting to businesses to protect the data they hold, but criminal laws fall short of having the teeth required to crack down on cyber criminals.

Many of the legislation that governs this area, such as the Computer Misuse Act 1990 and the Regulation of Investigatory Powers Act 2000 were drafted well before the sophisticated technologies used by cyber criminals came into play. I foresee prosecutors struggling to make defendants fit within existing statutes. Such is the scale and potential of cyber crime that surely the time has come for specific tailored legislation and indeed more enforcement resources.

Less glamorous is the topic of payment in the construction industry. Late or delayed payment continues to be endemic, despite efforts to improve the flow of payment through supply chains. The government recognising the importance of prompt payment for businesses to thrive and grow has devised incentives to improve payment practices, including introduction of the Prompt Payment Code, creating a statutory duty on large businesses to report on payment practices and implementing strict statutory payment provisions.

While the 1996 Construction Act and the changes introduced in 2013 improved the payment landscape, there remains a number of concerns about the act's effectiveness in solving the issue of late payment. In response to industry concerns, the government launched a non statutory "post implementation review" of the 2011 changes to the Construction Act in October last year. The Construction Act consultation, which will run in parallel with a consultation on intangible assets in the construction industry, closes on 29 January. Based on the responses, the government will decide what steps are needed to improve the payment regime and the adjudication process.

We continue to see adjudication abused by insurers using it for subrogated recoveries and claims stopping and restarting adjudications. What I would like to see are more stringent rights and protections for SMEs that continue to be subjected to consecutive misconduct in an attempt to delay the flow of payment to the supply chain. I would like to see adjudication used for its initial purpose of easing the flow of cash around the system. While thinking this, but maybe protecting our SMEs and specialists in the face of the increasing consolidation in the industry is fundamental.

We need to see a faster pace of change within the legal landscape to regulate and control large construction and promote fairness of trade so that competition can thrive. The legal and justice system needs to up to speed with the new technologies that enable businesses to thrive for a good time and allow a thriving, fair and open global marketplace.

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This basic principle makes adjudication potentially expensive for those embroiled in complex, high-value disputes. Such disputes are often referred to as “adjudication, contrary to what most envisaged when the process was introduced nearly 20 years ago. They require intensive preparation to meet a deadline, and they are sometimes6 handled fraudulently, and do not come cheap.

Little wonder then that parties new to adjudication are horrified to learn they have to bear their own costs to keep the costs down. That’s why most standard forms of contract include adjudication clauses, which may allow parties to give an adjudicator jurisdiction over costs liability.

However, most agree that National Museum’s very particular facts could well make it a one-off decision. Alternatively, they might reduce the risk of rough justice and interim binding adjudication proceedings. It would still leave some questions: “Is adjudication ever the best option? In fact, our standard advice for complex claims is to avoid reliance on adjudication at all costs. Instead, it is better used in a facilitated negotiation, a better approach that more than justifies the legal costs and expenses regardless of the outcome. Such choices discouraged parties from exercising their right to adjudicate and were outlawed in 2011 by section 108A, which allows parties to give an adjudicator jurisdiction over costs liability by written agreement made after service of the adjudication notice but not section 108A’s interpretation is likely to be subject to further judicial attention in future.

Despite section 108A, legal and expert costs were successfully claimed in National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd as a separate head of cost under section 108A’s interpretation. However, most agree that National Museum’s very particular facts could well make it a one-off decision. Alternatively, they might reduce the risk of rough justice and interim binding adjudication proceedings. It would still leave some questions: “Is adjudication ever the best option? In fact, our standard advice for complex claims is to avoid reliance on adjudication at all costs. Instead, it is better used in a facilitated negotiation, a better approach that more than justifies the legal costs and expenses regardless of the outcome. Such choices discouraged parties from exercising their right to adjudicate and were outlawed in 2011 by section 108A, which allows parties to give an adjudicator jurisdiction over costs liability by written agreement made after service of the adjudication notice but not section 108A’s interpretation is likely to be subject to further judicial attention in future.

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