Adjudication: Show me the money…!

Statutory adjudication was introduced in Ireland by the Construction Contracts Act 2013, which came into force in July 2016. Since then it has been possible to refer payment disputes under a construction contract to adjudication for resolution, notwithstanding the content of a contract’s dispute resolution clause.

Purpose

The public policy backdrop to adjudication is to promote cash flow in the construction industry and, in particular, to assist cash starved parties further down the contractual chain obtaining monies properly due to them.

After slow take up in the year after its introduction, the statistics are now showing a marked increase in the use of adjudication. From July 2016 to 2017 only one adjudication was confirmed as having taken place. Nine took place the following year, and in the year just passed the figures have risen to the mid-thirties¹.

This rise is not all that unsurprising given the consistently high level of activity in the construction sector in Ireland along with parties becoming more comfortable and familiar with the process. However, the biggest driver of adjudication is its increasing attraction to parties that feel they have a strong claim and want to obtain monies owed to them, fast. It is here that adjudication finds its raison d’être.

Process

Adjudication is a compressed dispute resolution process for payment claims in construction contracts that provides an interim binding decision in 28 days from the date of referral of a dispute to the adjudicator. This time period can be extended, but only to a maximum of 42 days and only with the express agreement of the referring party. The result is that a successful party in adjudication can get paid within a matter of weeks instead of months, or even years, depending what other dispute resolution process may have been used.

The decision provided by the adjudicator is binding in the interim. This means that it must be complied with until a different decision is reached in arbitration or litigation, should either party decide to seek to obtain a more favourable result through either of those mechanisms.

International Trends

The likelihood that adjudication will continue to be used more widely in Ireland by all players in the construction sector is not without precedent – the same has happened in many other jurisdictions in which adjudication has been introduced, including Australia, New Zealand, Singapore and England and Wales.

The easiest lessons to be learnt come from our neighbouring jurisdiction of England and Wales. In that jurisdiction, the vast amount of all construction claims (and not just payment claims, which is what adjudication is limited to in Ireland) have been resolved by adjudication since the enactment of the Housing Grants, Construction and Regeneration Act 1996, which introduced adjudication there.

¹ See the first three annual reports of the Chairperson of the Ministerial Panel of Adjudicators.
The Position of the Courts

The Courts in England and Wales have taken a very robust view on adjudicators’ decisions and, on the grounds of public policy in order to promote cash-flow in the industry overall, have enforced even incorrect adjudicator’s decisions i.e. where the adjudicator may have erred in the facts or the law. The approach is one of rough justice from the perspective of the good of the industry overall and, without doubt, this approach has worked.

It is unclear what the Irish Courts position is or will be and there are some additional constitutional issues to grapple with in this jurisdiction that may complicate matters. However, from a public policy standpoint, it would be surprising (although not beyond the realms of possibility) if the Irish Courts took a differing view to that of the Courts of England and Wales. This uncertainty will ultimately be cleared up as actions seeking enforcement of adjudicators’ decisions work their way through the Irish Courts, which has not happened to date.

How to prepare?

By far the most important thing to do if you are a potential referring or responding party in adjudication is to ensure you are prepared for the process well before it kicks off.

The most fundamental issue comes down to the nuts and bolts of your operational procedures – you must ensure that all of your documentation is organised and up to date so it is easily accessible for either preparing a referral or responding to one. In addition, you will need a dedicated team to be fully engaged for the entire adjudicative process. This should be the team from the project that is the subject of the adjudication since it will have most intimate familiarity with the relevant issues. Not only will they need to engage with the detail of the dispute on a day-to-day basis, but they may also be required to provide factual evidence in witness statements. Relevant experts may also need to be engaged in appropriate matters.

Beyond this, getting the right legal advice early is vital, particularly since adjudication occurs on such a compressed timetable. As a referring party, this will allow you exert maximum pressure on your opponent and as a responding party it will assist in defending the claim most robustly. It comes down to money - obtaining the best advice as early as possible will give you the best chance of being awarded the money you are due or holding on to the money you are entitled to.

The signs are clear – adjudication is here, is growing, and you need to be prepared for it.

Killian Dorney is a specialist construction lawyer and has advised clients on many adjudications in both Ireland and England & Wales. If you would like to contact Killian in relation to adjudication or any other aspect of construction law, his contact details are below. Beale & Co. is an international construction and insurance law specialist with offices in Dublin, London, Bristol and Dubai. For more information on Beale & Co. visit www.beale-law.com

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