

The role of a construction adjudicator

While adjudication has been a contractual means of dispute resolution for many years (it was the designated dispute resolution procedure in the NEC Form of contract circa 1991, see also DOM/1 which is much older) it is, due to the introduction of statutory adjudication under the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA '96"), most commonly now associated with the resolution of disputes in the building and construction industry in the UK. The concept is to provide a simple and efficient method of settling disputes. An adjudicator assesses the evidence presented by the parties, in order to reach a decision that is legally binding unless it is then referred to arbitration or the courts, or is settled between the parties themselves. In most cases final resolution is achieved when the adjudicator has reached his decision.

Various forms of adjudication are in operation in territories outside the UK (e.g. in Australia, New Zealand, Hong Kong, Singapore; expected to arrive in Malaysia in the near future), with their own particularities and in some cases significant differences from the model found in the UK. This fact sheet looks primarily at adjudication within the UK.

There is no pre-qualification for a person to act as a construction adjudicator. An adjudicator can be named in a contract and called upon to act if a dispute arises. In some cases the contract names a professional organisation (an Adjudicator Nominating Body, 'ANB') as the body which will appoint someone from its list or panel of accredited adjudicators. Very often the contract is silent as to both the adjudicator and the method of appointment.

Notwithstanding the former it is best practice for an adjudicator to:

- Have sufficient knowledge of the statutory provisions of the HGCRA and the adjudication process in general;
- Have sufficient knowledge of the subject matter to which the dispute refers;
- Commit sufficient time to enable the decision to be made in the prescribed timescales;
- Answer the questions put to him and nothing more and not to act as an advocate to the benefit of either or both of the parties;
- Undertake the assessment of the dispute and the declaration of the decision himself without delegation to others;
- Conduct the adjudication as he thinks fit to enable the decision to be made;
- Consider the information provided to him by the parties; and
- Provide unbiased consideration of the facts of the dispute and as far as possible to ensure that all information provided to him via the parties, or obtained by his own efforts, is equally shared with all parties to the dispute.

The advantages of adjudication

Adjudication is usually regulated by a strict timetable that ensures decisions are made quickly; the statutory provision within the HGCRA states that the adjudicator shall make the decision within 28 days from his/her appointment (or such extended timescale as provided for under the HGCRA). As either party can submit a Notice of Adjudication at any time (even within the duration of the project giving rise to the dispute) the intention of such strict timescales is to allow disputes to be resolved as and when they arise, avoiding unnecessary tensions and costs. An adjudicator's decision is binding and must be complied with strictly in accordance with the provisions therein; although the decision contemporaneously binds the parties it is not necessarily final and may be revisited in another forum (e.g. arbitration or in a court of law) at a later date by application of a party. This has the advantage of allowing works to continue until the matter is resolved.

Rules governing adjudications

Since the implementation of the HGCRA on 1st May 1998 it has been a statutory requirement that all "construction contracts" as defined in the HGCRA contain a right to allow a party to refer a dispute to adjudication. The HGCRA applies to all construction contracts which are located in England, Wales, Scotland and Northern Ireland. It is the place of the works that determines the application of the HGCRA not the location of the parties to the contract.

The statutory provisions of the HGCRA provide the rules and guidelines that the parties and the adjudicator should follow.

In circumstances where

- i) the contract has no adjudication provisions; or
- ii) where one of the statutory requirements is not provided for; or
- iii) where the parties have so agreed,

then the adjudication procedure is governed by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649). There is a separate Scheme for Scotland.

The general provisions set out in the HGCRA, which are required to be incorporated into a construction contract, are:

- That a party may give notice of his/her intention to refer a dispute or difference to adjudication at any time;
- The contract must provide a timetable with the object of securing the appointment of the adjudicator and the referral of the dispute within seven days of a Notice of Adjudication;
- The adjudicator has to reach a decision on the dispute within 28 days of its referral;
- The adjudicator may extend this period to 42 days with the agreement of the referring party or for a longer period if both parties agree;

- The adjudicator must act impartially;
- The adjudicator may take the initiative in ascertaining the facts and law;
- The decision of the adjudicator is binding until the dispute is finally determined; and
- The adjudicator is not liable for anything done or omitted.

RICS guidance note

RICS has published a guidance note (England & Wales) entitled Surveyors acting as adjudicators in the construction industry*. This note sets out best practice for those acting as adjudicators and outlines in considerable detail the procedures and methods involved in the adjudication process.

* Scottish edition also available.

Further reference

Housing Grants, Construction and Regeneration Act 1996 – www.legislation.hmsso.gov.uk/acts/acts1996/1996053.htm

The Scheme for Construction Contracts (England and Wales) Regulations 1998 – www.opsi.gov.uk/si/si1998/19980649.htm

The Scheme for Construction Contracts (Scotland) Regulations 1998 – www.oqps.gov.uk/legislation/uk/si/si1998/ukxi_19980687_en_1

Users' Guide to Adjudication (by the Construction Umbrella Bodies Adjudication Task Group April 2003). Available at www.cic.org.uk/services/UsersGuide.pdf

Construction Adjudication by Christopher Dancaster & John Riches (2nd Ed., Wiley Blackwell, 2004)

Construction Adjudication by Mr Justice Coulson (OUP, 1st ed., 2007)

Hong Kong: There is no statutory right to adjudicate. A pilot scheme requiring an amendment to the standard provisions of the General Conditions of Contract of the HK Government is currently being introduced in Hong Kong. This amendment permits a party to request a dispute to be referred to adjudication as an alternative to mediation. Should the other party decline, or should either party be dissatisfied with the result of the adjudication then the dispute may proceed to be resolved by arbitration.

Adjudications under the HK General Conditions of Contract are administered by the Hong Kong International Arbitration Centre which maintains a list of qualified adjudicators, including those who are members of the RICS.

Hong Kong International Arbitration Centre:
[w www.hkiac.org/HKIAC/HKIAC_English/main.html](http://www.hkiac.org/HKIAC/HKIAC_English/main.html)

Oceania: In Australia, New South Wales, Victoria and Queensland have already introduced a statutory adjudication procedure. Adjudication in New Zealand is controlled by the Construction Contracts Act 2002, which reflects the English HGCRA '96 as well as the 1999 Act of New South Wales. Both the New Zealand and Australian Acts include a detailed adjudication scheme; in the UK the scheme is contained in a later statutory amendment.

NSW: Building and Construction Industry Security of Payment Act 1999 – www.austlii.edu.au/au/legis/nsw/consol_act/bacisopa1999606

Queensland: Building And Construction Industry Payments Act 2004 – www.austlii.edu.au/au/legis/qld/consol_act/bacipa2004493

Victoria: Building And Construction Industry Security Of Payment Act 2002 – www.austlii.edu.au/au/legis/vic/consol_act/bacisopa2002606

WA: Construction Contracts Act 2004 – www.austlii.edu.au/au/legis/wa/consol_act/cca2004284

NT: Construction Contracts (Security of Payment) Act 2004 – www.austlii.edu.au/au/legis/nt/consol_act/ccopa520

Security of Payment in the Australian Building and Construction Industry by Marcus Jacobs (Lawbook Co, 2nd ed., Australia, 2007)

New Zealand: Construction Contracts Act 2002 – www.buildingdisputestribunal.co.nz/site/building/files/legislation/Construction%20Contracts%20Act%202002.pdf

Construction Contracts Regulations 2003 (SR 2003/30) (as at 03 September 2007) – www.legislation.govt.nz/regulation/public/2003/0030/latest/DLM183471.html?search=ts_all%40act%40bill%40regulation_Construction+Contracts+Regulations+2003_resel&sr=1

Further information is also available from the NZ Building Disputes Tribunal website: www.buildingdisputestribunal.co.nz/?id=pckqpBR7&mv_pc=s

Singapore: The Building & Construction Industry Security of Payment Act 2004 came into effect 1 April 2005. The Singapore legislation has been influenced by the Australian legislation. As with the English 1996 Act, there is a statutory adjudication procedure – this supplements but does not replace any contractual right to litigate or arbitrate. Further information can be found in the publication Security of payments and construction adjudication (Lexis Nexis Butterworths 2005) – Chow Kok Fong.

The Act is available online at: www.bca.gov.sg/Publications/SecurityofPayment/sop_act.html

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The DRS offer a complete range of methods for resolving disputes including arbitration, expert determination, mediation, adjudication, enabling people to resolve property disputes quickly and effectively, without going to court. They also make appointments of Single Joint Experts. Application forms for a range of services are available via the RICS website.

RICS Scotland Dispute Resolution Service (DRS Scotland)

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w www.rics.org/site/scripts/documents_info.aspx?categoryID=253&documentID=439

The DRS Scotland offers a range of methods for resolving disputes enabling people to resolve property disputes quickly and effectively in Scotland, without going to court. Application forms for a range of services are available via the RICS website.

Republic of Ireland Appointments Service

Arbitrations Officer
Society of Chartered Surveyors
5 Wilton Place, Dublin 2, Ireland
t + 353 (0)1 676 5500
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w www.scs.ie

RICS Hong Kong

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RICS Oceania Dispute Resolution Service (DRS Oceania)

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w www.ricsdrs.com.au/index.php

The DRS Oceania offers a range of dispute resolution training and appointment services. The RICS Oceania DRS is currently an Authorised Nominating Authority in Queensland and a Prescribed Appointor in Western Australia. It is empowered to nominate adjudicators to handle construction disputes. Application forms for a range of services are available via the website. For more information, please contact the office.

RICS Books

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Stocks a wide range of titles in the dispute resolution arena.