Adjudication Introduced

In the government white paper on Creating an Environment for Reconstruction Growth and Development in the Construction Industry in 1999, it was argued that the conventional mechanisms and procedures for final dispute resolution (normally arbitration or litigation) are too costly and time consuming.

In March 2001 government published a draft code of practice, entitled "Adjudication in Engineering and Construction Contracts in South Africa", proposing a movetowards rapid and inexpensive dispute resolution mechanisms in said contracts.

The Construction Industry Development Board ("CIDB") issued a draft Practice Guide for public comment in August 2003. This practice guide, published on the back of the white paper, also advocates the use of adjudication as a cost and time efficient alternative dispute resolution mechanism to arbitration and litigation.

The World Bank also advocates that adjudication procedures be used on projects which it funds.

The Principal Building Agreement of the Joint Building Contracts Committee ("JBCC") published in March 2004, incorporated adjudication into the local construction industry even further.

ADJUDICATION - THE GENERAL PRINCIPLES

While adjudication is presently being introduced locally, many members of the construction industry remain unclear as to what adjudication is and how it is applied. Although the terms of adjudication are contract specific, adjudication can, in broad terms, be defined as being:

"... an accelerated and cost effective form of dispute resolution. The outcome is a decision by a third party intermediary which is final and binding on the parties in dispute, unless the decision is reviewed by litigation and arbitration."

The Process and Principles of Adjudication

Any dispute arising from, or in connection with the contract should be capable of being referred to adjudication provided that the necessary terms are incorporated in the contract at the appropriate time. While the procedural requirements for referral of disputes and conducting the adjudication will vary from contract to contract, one is able to distinguish certain underlying principles:

- A party referring a dispute to adjudication must do so in writing, must submit the dispute within the time period stated in the contract with all necessary information, failing which it forfeits the right to dispute the matter.
- The terms and procedures of adjudication are agreed and detailed in the contract, which results in an informed, transparent and speedy decision. If successfully referred, each party must be given a reasonable opportunity to state their case (without a hearing), to know what the case against it is and also to be placed in possession of all evidence obtained by the adjudicator.
- Adjudicated disputes must be resolved within the contract period as the contract itself forms the basis for enforcing the decision of the adjudicator. As a general rule, all disputes are to be resolved within a 42 day period of being referred to adjudication.

- The role of an adjudicator is not that of an arbitrator. The adjudicator is tasked with settlement of the dispute within the contractual rights and obligations between the parties.
- Adjudicators must base their decisions on the subject of the dispute at hand only and must avoid conducting hearings to resolve disputes. Adjudicators should avoid individual contact with either party and may not discuss matters with a party without informing the other party of the discussion and the outcome thereof.
- It is essential to successful adjudication that adjudicators achieve a balance between an inquisitorial approach and adherence to the rules of natural justice in order to treat the parties fairly. An adjudicator may not for instance prepare his own critical path analysis and draw any conclusions from it, without affording the parties an opportunity of making submissions on the accuracy thereof.
- Adjudicators must answer all questions put to them and are normally required to provide written reasons for their decisions.
- It goes without saying that adjudication can only succeed if the adjudicator is impartial and does not have (or appear to have) any relationship with any of the parties, nor have an interest in the outcome of the adjudication.
- The adjudicator should also have the right, after notifying the parties, to refer to legal and technical experts for assistance in areas where the adjudicator recognises that he may not be adequately equipped. This provision is aimed at ensuring that justice is served, despite the fact that the adjudicator may not personally possess all the skills necessary to resolve a matter.
- The decision of the adjudicator is final and binding on the parties, unless it is reviewed by either arbitration or litigation. The decision becomes enforceable immediately, whether the dispute is to be referred for final resolution or not.
- Final resolution of the dispute may, in some instances, only be referred to arbitration or litigation after a “cooling down” period has elapsed allowing the parties to make this decision after careful consideration of the merits of their case.

CAN ADJUDICATION WORK?

Can adjudication work? One can only form a view on this with due regard of other jurisdictions where adjudication had been introduced, tried and tested.

In the United Kingdom, adjudication became mandatory on all prime contracts and sub-contracts in 1998, through the introduction of the Housing Grants Construction Regeneration Act (1996). From the following statistics (based on approximately 4 850 adjudications up to September 2001) it is clear that adjudication can provide a quick summary procedure for resolving disputes:

74% of disputes referred resulted in a decision, the balance being settled or abandoned;

76% of referrals were completed in less than 40 hours;

73% of disputes concerned non-payment; other significant issues were variations, loss / expense and points of law;

81% of adjudications involved a referral by a party lower in the construction chain;

Almost 50 % of all referrals were by sub-contractors against main contractors; and

68% of decisions were in favour of the referring party.

There can thus be little doubt that adjudication has had a marked influence on the construction industry in the United Kingdom.

The high percentage of adjudications relating to "non-payment" issues does seem to indicate that where disputes are more complex, such as negligent design or construction, and are likely to affect further contracts (such as insurance policies), parties may be more reluctant to resolve matters through adjudication.

A further point of concern is the immediate enforceability of decisions. A party facing an adverse award may for instance be obliged to make payment to a party in severe financial difficulty. Should the decision of the adjudicator then be determined as incorrect by a later forum, the party at the wrong end of the adjudicator's decision then runs the risk that the recovery of monies paid may no longer be possible.

ADJUDICATION IN THE FUTURE

It is clear that adjudication can, and probably will, play a major role in the local construction industry as an additional alternative dispute resolution mechanism. A good working knowledge of processes, procedures and pitfalls under the various standard forms of construction contracts will be a pre-requisite in future negotiations of contracts.

Adhering to the procedural requirements for declaring, conducting and settlement of disputes will require some level of skill and specialisation to effectively protect a party's rights under the contract.

The procedural and specific requirements of a number of the standard construction agreements, such as FIDIC, BIFSA, JBCC and NEC will form the subject matter of a series of future publications.

The Construction and Engineering Law team at Markram Inc has the expertise to assist clients involved in disputes where adjudication is the selected dispute resolution mechanism.

Hendrik Markram
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