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AN INTRODUCTION TO ADJUDICATION

By Tom Duncan

Adjudication has been with us for some time, and for straightforward payment claims the process can offer parties an effective mechanism for resolving disputes. However, it is less suitable for more complex claims because the nature of the process means that adjudicators often take a less than rigorous approach to matters of evidence and contractual interpretation. One result is that adjudication is sometimes viewed as an opportunity to advance unmeritorious claims in the hope the adjudicator will award something. This approach is assisted by the unique advantage adjudication offers the claimant, which has time to marshal its evidence well in advance, leaving the defendant little time to respond. It is also assisted by the fact that, irrespective of the correctness of the decision, it will generally be enforced by the courts on the basis that it is an interim award pending final determination in litigation or arbitration.

One consequence of the prevailing economic conditions may be an increase in the number of unmeritorious claims referred to adjudication, leaving potential defendants in a difficult position if they want to avoid incurring the costs of having to overturn awards in court. However, steps can be taken to reduce this risk.

It is often the case that the defendant in adjudication is a party higher up the contractual

chain, which may have the stronger negotiating position. This can be used to its advantage when drafting adjudication provisions, because some flexibility does remain notwithstanding the strict requirements of the Construction Act. For example, it is possible, for the time being at least, to deter claims by providing that the claimant pays all the costs of the adjudication, including the parties' costs. The contract can also provide that any sum awarded is paid into a trust account pending final resolution of the dispute. It is also possible to extend time for service of the response beyond the standard seven days.

However, perhaps the best protection is to control who decides the dispute. The quality and approach of adjudicators varies and, unfortunately, sometimes the crucial factor in dictating the result is who is appointed, rather than the merits of the claim. Poor decisions can lead to further disputes and increased costs. Naming a respected adjudicator in the contract will ensure that this risk is limited. It also means that both parties should have fewer complaints when the decision is delivered.

Ultimately, any process in which disputes are adjudicated relies upon the quality of those adjudicating. If the nominating bodies are unable to guarantee quality appointments, the parties should take more control of their own destiny.



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