DOWNLOAD PDF ADJUDICATION IN THE BUILDING INDUSTRY

Chapter 1 : Building and Construction Industry Adjudication â€“ The UK Experience

*Adjudication in the Building Industry [Philip Davenport] on calendrierdelascience.com *FREE* shipping on qualifying offers. Many in the construction industry, and their professional advisers, remain unaware of the scheme for compulsory rapid adjudication which has now been adopted throughout Australia outside WA and NT.*

The way the legislation works is as follows: Parties to a construction contract are given a right to adjudication pursuant to a compliant procedure; The Act sets out eight features of a compliant adjudication scheme; If a construction contract does not contain a compliant procedure, then the terms of the statutory Scheme for Construction Contracts a piece of subordinate legislation cut in by way of statutory implication. The eight compliance points are as follows: There has been a proliferation of detailed adjudication rules, all incorporating the 8 essential elements, but differing in detailed procedures. Only very rarely have there been attempts to introduce markedly loaded provisions. Such claims include reverse ambushes, whereby employers who are impatient of contractors spending too long preparing claims can adjudicate on what, if anything, is due. But most claims have been for payment of sums due under the contract. But these are fairly rare. In valuation cases, these are in the nature of working meetings with the quantity surveyors. In other cases, there are mini-trial type hearings where the parties are represented by lawyers. The freedom from government regulation of appointments, and the involvement of lawyers from an early stage of the draft legislation, has led to many adjudicators, particularly in larger cases, being highly qualified lawyers or arbitrators. Adjudication appointments are regarded as rather more professionally prestigious than appears to be the case in Australia. In large or complex cases, the timetable is sometimes extended out to several weeks by agreement. The loser must write his cheque, unless he can impugn the whole adjudication process ; there is no let-out if he commences litigation or arbitration, as under the original NSW and Victorian systems. The employer loses his right to set-off if he fails to serve a set-off notice, but he still has the right to argue his valuation points in adjudication regardless of what notices or schedules he has served. Most adjudications are of medium sized disputes: At the time the legislation was being drafted, those responsible evidently felt that the task of picking their way through the minefield of consumer protection would be just too hard, particularly in light of the European legislation, which is capable of overriding UK legislation. There is thus no statutory right to adjudicate in residential construction contracts. But it is interesting to note that parties often now voluntarily include adjudication provisions in residential construction contracts, and some of the standard forms now so provide. Indeed, whilst the UK legislation prohibits contracting out of adjudication, there have been many examples of parties contracting in. This is in contrast to the position in Australia, in which the concept of contracting in remains novel it appears to be only in South Australia that any moves are being made in this respect. There are probably two reasons why contracting into adjudication has to date proved more popular in the UK than in Australia: The way the UK legislation works is to require the parties to a construction contract to include an adjudication agreement in their construction contracts. There is precious little difference between a contractual adjudication agreement that the parties have included because they want to, and one that they have included because they have to, or indeed one that is there for both reasons. The underlying neutrality of the UK adjudication process referred to above means that both parties are likely to see it as a practical answer to the problem of excessive dispute resolution costs and time, and not as weapon for a contractor to wield against his employer. The Appointment of Adjudicators Unlike the NSW system, parties in the UK have complete freedom to choose their adjudicator or, if they prefer, their nominating body. In practice, it is rare for the parties to name their chosen adjudicator in their contract. In large cases, they will often choose a construction specialist solicitor, but in smaller valuation cases, a quantity surveyor or other construction professional is much more usual. There is no substantial evidence that any parties have been obtaining any advantage by applying any unfair pressure on the other concerning the identity of the adjudicator. The freedom for the parties to agree on their adjudicator if they want to has not created any significant problems in practice, and has led to a couple of real advantages: Neither is there any requirement for adjudicators to be trained, or to adhere to any programme of continuing professional development. Perhaps surprisingly, the lack of

government regulation has had no adverse impact: All the significant appointing bodies have training and qualification criteria, and, in various forms, CPD requirements. Inquisitions and Hearings The UK compliance point that the contract must enable the adjudicator to take the initiative in ascertaining the facts and the law is in stark contrast to e. These incursions by the adjudicators outside the mere content of the submissions are very often crucial. In those larger cases where there is a mini-trial style of hearing, the techniques of effective advocacy have proved much more akin to ADR processes than to full trial. As the process has developed, however, it is clear that the Australian model is necessarily rather closer to the broad UK sweep that was envisaged: Many Australian construction contracts contain provisions for delay damages, i. Contrary to the expectation of some, it is now clear that claims to such delay damages are adjudicable. In deciding if such delay damages are payable, an Australian adjudicator may inevitably have to determine what entitlement there is to extensions of time. A sum is not payable if the other party has a defence to a claim for it. Such a defence might arise from a wide variety of legal principles. The contract might be void for mistake. The claiming party may have waived his rights, or become estopped from pursuing them. There may have been a compromise of them by way of accord and satisfaction. An Australian adjudicator will have to decide on any such matter that is raised, because he cannot otherwise determine if the amount claimed is payable. Most judges, including those now sitting in the English Court of Appeal, have been supportive of the process and slow to allow challenges based on alleged breaches of natural justice or lack of jurisdiction. Others, including some judges of the Technology and Construction Court who have seen their caseload eroded by the new process, have gone to no pains to conceal their antipathy to the process, and have allowed enforcement challenges on the slenderest of grounds. Challenges are discouraged, on the basis that if losers do not like the result they are free to then litigate or arbitrate. Summary The UK experience has been one of success. The legislation applies to contracts entered into from , and the take-up took another year or so to plateau; now there are many times more adjudications than cases taken to litigation: These shifts have of course caused profound change, both in the industry, and in the practice of construction law. A more constructive and cooperative climate has materially displaced the old dispute-centered culture in which some cynical players would sacrifice their reputations and the success of their projects in order to hang onto the cash whilst a long and drawn-out dispute is litigated, and now that the industry has got a taste for much more affordable dispute resolution, the full cost of litigation or arbitration has become all the more unpalatable. The satisfaction level with adjudication in the UK seems to be very good: The author was acting for the UK government in relation to a dispute on the Millennium Dome, and thus alongside the construction manager. As the author was leaving a meeting, he was button-holed by a main board director of that construction manager: The author had just started to sidestep when the director went on: I looked at the decision, and my people had obviously got it wrong. Morals for Australia Are there any lessons that Australian states might learn form the UK experience? There are probably a number: The governmental controls on ANAs, and in the eastern seaboard model, on party freedom to agree on their adjudicator are unlikely to be having any beneficial effect. Adjudication would prosper more if parties were permitted to agree on the identity of their adjudicator. Adjudication would be capable, without detriment, to cope with a rather wider ambit of case types than typically seen in Australia. There would probably be greater confidence in the process in Australia if adjudicators were allowed and encouraged to take a much more pro-active role in establishing which party is telling the truth and which is not where there are disputes of fact. That will probably entail some modest increase on the time available for enquiry and decision making. As time goes by, adjudication respondents are more likely to raise defences that are not contemplated in the contract, but which nevertheless may defeat the payment claim. Conversely, there are certainly some lessons that the UK could learn from the Australian experience, particularly in the area of enforcement and a much more straightforward jurisprudential basis for adjudication. What is remarkable, in both countries, is how well the process has weathered the different but undoubted shortcomings in the drafting of the legislation in both. Solicitor of the Supreme Court of England and Wales. Robert Fenwick Elliott rjfe feg. He is a Vice-President of the Technology and Construction Solicitors Association in the UK for which organisation he was the principal draftsman of the first set of statute-compliant adjudication rules in , and for which he trained, accredited and appointed many adjudicators , founding chairman of the International Construction Law

Alliance and a convenor of the Adjudication Forum of Australasia www. He has written and lectured extensively in the UK, Australia, the USA and the Middle East on construction law topics, including not only the substantive law, but also the mediation, arbitration and litigation of construction disputes. He now lives in Adelaide, where he has recently helped set up Fenwick Elliott Grace www. The Green Form for nominated subcontracts and the Blue Form for domestic contracts. The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, as the master did in this case, to the jurisdiction under Order 14â€¦There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. The high cost of litigation, and the premium on holding cash when interest rates are high, greatly increase the attractiveness to commercial plaintiffs of procedural shortcuts such as are provided by Ord. A technical knock-out in the first round is much more advantageous than a win on points after So plaintiffs are understandably tempted to seek summary judgment or interim payment in cases for which these procedures were never intended. This is a tendency which the courts have found it necessary to discourage: Home and Overseas Insurance Company Limited v. See, by way of example the debates in the Victorian Legislative Assembly on 13th June and the Legislative Council on 18th July Originally known as the Official Referees Solicitors Association, and later â€" following the change of name of the specialist court â€" as the Technology and Construction Solicitors Association. It is sometimes mistakenly thought that all an adjudicator has to do is to implement the express payment mechanism in the contract. In fact, both in the UK and in Australia, the adjudicator is charged with deciding what is due, and that potentially entails the consideration of anything provided for in the contract or not that would provide a defence in law; see below. The legislation is very slightly different in Scotland and Northern Ireland from the legislation which extends to England and Wales. It seems that the government department in question was allowed just one Bill that session, and so they lumped a collection of disparate measures into a single Bill. This statutory fiction has proved so obscure that no court has been able to implement it, and instead the courts have developed a settled route to enforcement as a matter of summary judgment. This is an obscure requirement, because an adjudicator is under a duty to act impartially regardless of any express contractual provision to that effect. The safe course for draftsmen of adjudication provisions is to spell out the duty expressly, notwithstanding that it may be arguable that it is sufficient for the duty to be imposed as a matter of implication. Prior to the Act, it was not normal for exemptions of this kind to extend to employees or agents. And so on this narrow ground, if no other, virtually none of the previous adjudication schemes satisfied the statutory requirements. Their latest report, Number 7 of August , is available on www. Such appointments are typically made by agreement, and not by nomination. Very senior solicitors and QCs tend to welcome such appointments. A few have abandoned their previous practices in order to undertake such work exclusively.

Chapter 2 : Adjudication - The Building Disputes Tribunal

NB: In , the Construction Industry Council (CIC) published a new Users' Guide to Adjudication, providing a general introduction to adjudication in the context of construction contracts, and in particular the right to adjudication in the UK and Northern Ireland.

This note explains what adjudication is, what types of construction disputes it is appropriate for and gives guidance on what to do if you receive a notice of adjudication. This is one of a series of quick guides, see Quick guides. Applies to parties to a "construction contract", who cannot contract out of it. Is a day procedure although the parties can agree to extend this period. Is often described as a "pay first, argue later" mechanism for resolving disputes in the construction industry. Is designed to protect cash-flow during construction. What is adjudication appropriate for? Adjudication is appropriate for resolving claims relating to: Delay and disruption of the works. Extensions of time for completion of the works. Defects in the works. Although not originally designed for complex claims, an adjudication can relate to: What does the Construction Act do? The Construction Act gives a party to a construction contract the right to refer a dispute to adjudication "at any time". What does the Scheme for Construction Contracts do? Interim-binding , that is, they are binding until the dispute is finally determined by legal proceedings, arbitration or by agreement. Rarely successfully challenged by the losing party. What should I consider before starting an adjudication? Before starting an adjudication, a party should: Ensure the dispute has been aired between the parties so that it has crystallised. Define the dispute in the notice. Unless the contract allows more than one, include only one dispute. What do I need to consider if I receive a notice of adjudication? If a party receives a notice of adjudication, it should consider whether: There is a construction contract. What the terms of the construction contract are and whether it is in writing or is wholly or partly oral. There is a dispute and whether it has crystallised. The dispute referred to in the notice is the same as the dispute that has crystallised. A single dispute been referred to adjudication. The dispute was the subject of a previous adjudication. The adjudicator has been validly appointed. To reserve its jurisdictional rights. What do I need to consider once the adjudicator has issued the decision? It was completed and communicated on time. There are clerical errors or mistakes that the adjudicator can correct under the slip rule. The adjudicator followed the rules of natural justice , that is, the adjudicator avoided conflicts of interest, acted fairly and without bias, and did not exceed their jurisdiction. The adjudicator answered the correct question, even if wrongly? An adjudicator can be wrong, but must answer the questions that were asked.

Chapter 3 : The adjudication process

Many in the construction industry, and their professional advisers, remain unaware of the scheme for compulsory rapid adjudication which has now been adopted throughout Australia outside WA and NT.

Dispute Resolution Adjudication The unswerving growth of the construction industry in Malaysia that has been dominantly driven by the patronage of the Economic Transformation Programme in Malaysia has given rise to several construction-related disputes. CIPAA proceedings are a summary procedure intended to reduce payment defaults by establishing a cheaper and speedier system of dispute resolution for construction contracts in respect of work done and services rendered, providing for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as the right to reduce the rate of work progress or to suspend work or the securing of direct payment from the principal. Since the inception of CIPAA, AIAC has administered over 1, adjudication cases with recording the highest number of adjudication cases with a total number of cases alone. In carrying out its duty as the adjudication authority, AIAC also regularly conducts adjudication training programmes as part of its efforts to regulate and maintain the high standards of competency expected of Malaysian adjudicators. The process starting from the dispute until the adjudication decision is as follows: Claim of Payment â€" Sec. A party who admits to the claim shall state the whole amount claimed or any amount as admitted while one who disputes the claim shall state the amount disputed and the reason for the dispute. Adjudication Notice â€" Sec. Adjudication Reply â€" Sec. The adjudication proceeding is binding unless it is set aside by the High Court, the matter is settled by both parties in writing, the dispute is finally decided by arbitration or the court, or there is a stay of adjudication decision pursuant to Sec. If either or both parties do not agree with the adjudication decision, the case can be reopened by arbitration or litigation at the conclusion or termination of the construction contract. However, the parties may agree after the appointment of the adjudicator to extend the jurisdiction of the adjudicator to decide on any other matter arising from the construction contract. In this regard, a payment dispute under a construction contract is said to have arisen when the non-paying party has, in breach of the contract, failed to make payment by the contractual due date for payment. It applies to both local and international contracts, provided the subject construction work is carried out wholly or party in Malaysia.. However, no definition or elaboration is provided in CIPAA as to what constitutes construction contract made in writing. AIAC considers that a construction contract must be wholly in writing, and that it is made in writing: Where parties agree otherwise than in writing by reference to terms which are in writing, they make a contract in writing. A contract is evidenced in writing if a contract made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the contract. However, pursuant to the Construction Industry Payment and Adjudication Exemption Order , two categories of Government construction contracts are exempted. The first category of Government construction contracts are contained in the First Schedule of the Exemption order namely a contract for any construction works that involve emergency, unforeseen circumstances and that relate to national security or security related facilities. T he second category of Government construction contracts are contained in the Second Schedule of the Exemption order namely construction contracts with the Government of the contract sum of twenty million ringgit RM20,, and below. With regards to this second category, the exemption order merely exempts these contracts from the application of subsections 6 3 , 7 2 , 10 1 , 10 2 , 11 1 and 11 2 of CIPAA , and relates to the timeline for submissions and replaced with a set of longer timelines for such submissions. It is also a temporary exemption from 15 April to 31 December for this second category. However, the exemption order does not extend to construction contracts to which the Government is not a party. CIPAA does not apply to an individual owner i.

Chapter 4 : Adjudication: a quick guide | Practical Law

REVIEWS. Reviews of previous editions: This book aims at providing a clear account of the new statutory adjudication process available to participants in the building industry this book is recommended as a sound introduction to an

important and innnovative scheme.

Chapter 5 : Statutory adjudication of construction contracts in the UK | Womble Bond Dickinson

Adjudication is a compulsory dispute resolution mechanism that applies to the UK's construction industry. This note explains what adjudication is, what types of construction disputes it is appropriate for and gives guidance on what to do if you receive a notice of adjudication.

Chapter 6 : CEDR : Find an Construction Adjudicator

Compulsory rapid adjudication (CRA), also called aaC--Eusecurity of paymentaaC--(t), is revolutionising the construction industry. It enables contractors, large and small, suppliers and consultants to recover disputed payments in weeks instead of months or years, usually at no cost to the claimant.

Chapter 7 : Construction Adjudication Services - Quigg Golden

Develop the skills and knowledge you need to successfully apply the law of adjudication to the construction industry and seek fee-earning work as an Adjudicator. The RICS Diploma in Adjudication in Construction has been designed to provide you with the necessary in-depth knowledge of the legal.

Chapter 8 : Adjudication in the Construction Industry - First4Adjudication

Statutory adjudication under the Construction Contracts Act (the Act) is the most commonly used dispute resolution process in New Zealand for resolving building and construction disputes, offering a unique, fast, and relatively straightforward statutory process for resolving disputes that arise under construction contracts.

Chapter 9 : Construction Adjudications | Singapore

Adjudication is a relatively new process introduced by the government of Victoria, Australia, to allow for the rapid determination of progress claims under building contracts or sub-contracts and contracts for the supply of goods or services in the building industry. This process was designed to ensure cash flow to businesses in the building.