



Playing the odds

Jonathan Cope and Matthew Molloy set out some practical advice for users of adjudication

Much has been written about adjudication, from the many issues surrounding adjudicators' jurisdiction to the amendments to the Housing Grants, Construction and Regeneration Act 1996. However, few articles focus on the 'nitty gritty' practicalities of how to run or defend an adjudication, and this lack of practical advice can make the prospect of adjudication daunting, even for experienced users.

Ordinarily, the referring party's objective is to obtain a result that is in their favour and which is complied with by the responding party, either by their own volition or as a result of compulsion by the courts. Similarly, the responding party's aim is to obtain a result that is in their favour. If a result goes against the responding party, this may still mean that they are not obliged to comply with the decision by virtue of it being unenforceable. These are our suggestions for increasing the chances of achieving the desired outcome.

The referring party

Assess and reassess

While it may seem obvious, the starting point for us is that the referring party should actually have a good case. We sometimes have cause to question the extent to which some referring parties have actually considered or tested their case before embarking on adjudication, and a party who does not do this is foolhardy. If you do not have the necessary expertise in-house, then advice should be sought from a suitably experienced individual or firm as to the chances of succeeding with your claim. This may result in a decision not to proceed, or a re-working of the claim. You should also continually assess your chances of success during the adjudication process and withdraw and/or settle if it becomes appropriate to do so.

Be prepared

If you have decided to proceed to adjudication, then prepare your claim, referral and notice of adjudication well. Only include relevant material, be clear on the redress you seek and keep it simple. If you know one, perhaps consider asking an experienced adjudicator to review the referral and give you their view on its strengths and weaknesses. Also adhere to any statutory timescales as the courts have now made it clear that a failure to do so can be fatal.

Choose well

Get the right adjudicator for the dispute: try and agree with a responding party if possible and, if not, then select an Adjudicator Nominating Body (ANB) which has adjudicators with the qualities that you require if the contract allows that flexibility. If using an ANB, inform them of the type of adjudicator you think will be suitable. It will be in the ANB's interest to select a suitable adjudicator as parties will reuse ANBs who appoint satisfactory adjudicators. If you don't know the appointed adjudicator, ask around and take soundings on their methods and ability. If you believe you have the wrong adjudicator, don't refer.

Deal with jurisdictional challenges

When a jurisdictional challenge comes in, first consider whether it actually has 'legs' – if it does, withdraw before the adjudicator incurs the expense of considering it. If you are unsure, consider whether you want the adjudicator to look at it and, if not, consider suspending the process to seek a declaration from the Technology and Construction Court (TCC). Another option is to start proceedings in the TCC concurrently so that the hearing date is proximate to the decision date in the adjudication.

Identify the issues

After you get the response, if possible then identify the issues for the adjudicator. This will help to point the adjudicator in the right direction and reduce the risk of issues being missed.

Try and agree the timetable

Be realistic with the timetable and agree it with the other side if possible – this will make the adjudicator's job easier. Check with the adjudicator that they have enough time. Also, if the volume of material is too large for one adjudication, then consider referring discrete parts separately.

Try and comply with directions

Comply with directions or, if you can't, apologise in advance giving a realistic indication of when you will be able to comply. The adjudicator may have specified a time for a submission for a good reason – if you are going to miss it, then say so. Do you really want to keep the adjudicator waiting around late on a Friday evening to receive a submission which he asked for by 5pm?

Step away from the phone

Don't telephone the adjudicator unless it's essential as this can create difficulties in terms of procedural fairness. The cost of putting points in writing is a small price to pay if it reduces the likelihood of having a favourable decision set aside because of a breach of natural justice.

Behave yourself

Be polite and don't bully. Adjudicators are human beings and you should put yourself in the shoes of an adjudicator receiving a letter telling you that you shouldn't have done something and questioning your competence. Having a 'pop' at the other party or their representative is equally unhelpful.

Don't waste time

When drafting correspondence, think before you send it – is it necessary for the adjudicator to see it? For example, is it really necessary for the adjudicator to be copied in on petty exchanges regarding procedural issues? Also, why copy the adjudicator in with correspondence concerning settlement negotiations?

The responding party**Consider the cost of taking part**

When you get a notice of adjudication, assess the chances of success and the costs of adjudicating. Take advice where necessary and decide whether you want to take part or not. If not, settle and/or attempt to negotiate. If you are unable to settle then consider making an offer which you may put in front of the adjudicator when they come to deal with liability for their fees.

Try and agree the adjudicator

If you want to take part, then attempt to get the right adjudicator for the dispute. Try and agree with the other side, and failing that make positive representations to the ANB as to the type of adjudicator you think the dispute requires. Don't just give a list of those adjudicators you don't want appointed.

Identify the jurisdictional strategy

If you believe a jurisdictional issue exists, consider how you wish the adjudicator to deal with it. Do you merely want to put down a marker and reserve your position so you can resist enforcement at a later

date, or do you genuinely want the adjudicator to resign? If you believe the adjudicator will not resign then why go to the added expense of having them investigate an issue? Surely it is better to reserve your position and then argue at a later date?

Jurisdiction and the timetable

Instead of using jurisdictional challenges as a delaying tactic, if you need more time then ask. Be realistic as to the amount of time required and seek to agree a timetable, in advance if possible, with the other side. If you can't achieve the timetable, then say so – there is no need for histrionics. If you use jurisdictional challenges – with the consequential cost implications – then even if you win, you may find yourself liable to pay the adjudicator's fees for dealing with an unsuccessful challenge.

Focus the response

Prepare the response and submissions well, if possible identifying the issues for the adjudicator. Keep them relevant to the issues in front of the adjudicator, as opposed to a rant about everything – whether it is relevant or not. A focused response is likely to be more persuasive and definitely more helpful for the adjudicator.

Don't bully (etc.)

The same points as above for the referring party equally apply to the responding party in relation to correspondence, bullying, telephone calls and complying with directions.

Continually review the chances of success

Review your chances of success on a continual basis. The majority of the adjudicator's fees are likely to be incurred at the end – if necessary take an early position and settle or negotiate.

What are your chances?

It is foolhardy for parties to embark on adjudication without considering what they are seeking to achieve and carefully assessing their chances of achieving it. While it is undoubtedly possible to achieve a desired outcome without forethought, this would be more by luck than judgement. A party who acts in a manner which is consistent with achieving a desired outcome will increase their chances of achieving that outcome, which is surely preferable and makes good sense commercially.

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Adjudication Awareness Seminar, 29 June 2010, Warwick University, Coventry, www.rics.org/events



The *Construction Adjudication and Payments Casebook* is available to pre-order from www.ricsbooks.com



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