Group Briefing
October 2019

Adjudication series: *A comparative perspective*

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Adjudication Article Series

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

Over the last weeks we have looked at the new regime for statutory adjudication in the construction sector in Ireland from a range of perspectives. In this final article we look at what's happening in other parts of the world in which (for the most part) similar regimes have been in place for longer.

There are common features that underpin statutory adjudication across most jurisdictions. For example, the key aim is ensuring cash-flow in the construction industry by providing prompt payment mechanisms backed up by a right to refer disputes to be adjudicated on speedily, usually during the life of a project. Another typical feature is the fact that an adjudicator's decision is binding in the interim (so payment ordered must be made) and can only be set aside by a court on fairly narrow grounds (though parties may ultimately litigate, arbitrate or reach alternative agreement if they continue to be in dispute). Pay-when-paid provisions are typically outlawed, and parties usually cannot contract out of the legislative framework.

So what's the picture in other jurisdictions and what are some of the main differences?

UK

Statutory adjudication was first introduced in the UK in 1998 pursuant to the Housing Grants, Construction and Regeneration Act 1996. The key difference in the UK is that a party to a construction contract has the right to refer for adjudication "a dispute" (not "payment disputes", as in Ireland) arsing under the contract. That there are many similarities between our systems is helpful: to date there are no Irish court judgments on adjudicators' decisions, but there are many from the UK Technology and Construction Court and these, properly interpreted, provide helpful guidance.

The regime in Northern Ireland is aligned with the UK. Given that we've just reached the twentieth anniversary of the introduction of adjudication in Northern Ireland, and its proximity to Ireland, we'll focus in this article on the story there so far.

NORTHERN IRELAND

In Northern Ireland statutory adjudication is provided under the

Construction Contracts (Northern Ireland) Order 1997 (the "Construction Order") and the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 (the "Construction Scheme"). Where a construction contract does not comply with the prompt payment and /or adjudication provisions in the Construction Order, Schedule 1 of the Construction Scheme applies.

The legislation allows a party to a construction contract to refer a dispute to adjudication under a defined procedure which requires an adjudicator to reach a decision within 28 days of referral (or longer if agreed by the parties), safeguarding the adjudication mantra of "pay now argue later".

The number of adjudications in Northern Ireland has steadily increased and there have been a number of significant enforcement judgments. The grounds upon which an adjudicator's decision may be resisted are more restricted than would normally be the case in summary judgment proceedings. An adjudicator's decision typically can only be set aside on the basis that the adjudicator lacked jurisdiction to decide the matter and / or that there was a breach of the rules of natural justice. Outside of these limited points of defence, even if the adjudicator incorrectly implemented the procedure or erred on the facts or in law, the Adjudicator's decision may still be enforced.

The courts in Northern Ireland have acted to promote the success of adjudication by ensuring that expedited processes are in place to deal with enforcement actions. The Commercial Court's new Practice Direction 01/19 and Business and Property Hub play a welcome part in this.

These are some main decisions from the High Court in Northern Ireland.

Coleraine Skip Hire Ltd v Ecomesh Ltd [2008] NIQB 141 (27 October 2008)

In this first application for summary judgement to enforce an adjudicator's decision in Northern Ireland, Ecomesh applied for summary judgment in the sum of nearly £50k. Coleraine resisted on several grounds which provide a good overview of the nature of possible challenges that may be argued. (They were that some of the works were not "construction operations"; that the adjudicator issued his decision outside the permitted statutory timeframe; and that the adjudicator's amendment of his decision did not come within the "slip rule"). The court found, on the facts, that these arguments could not succeed. However, Coleraine was successful on its fourth ground, namely that the adjudicator's decision should be stayed pending the outcome of ongoing court proceedings. The judge considered that the enforcement application related to only one part of the dispute between the parties and that the sum to be paid on foot of the adjudicator's decision should be considered in the balance of the wider proceedings. This decision prompted initial concerns that adjudication might not be as successful in meeting its objectives in Northern Ireland as hoped.

DG Williamson Ltd v Northern Ireland Prison Service & NIO [2009] NIQB 8 (27 January 2009)

In this second application to enforce an adjudicator's award the respondents again argued jurisdictional points and sought a stay of the adjudicator's decision pending conclusion of overall proceedings. Again, the court did not find in favour of various jurisdictional arguments on the facts. This time, however, the judge did not stay proceedings. He was "*satisfied that the starting point for a court dealing with a request for enforcement of the award of an Adjudicator is that it should work on the assumption that the award ought to be enforced….. The purpose of the legislation is to ensure speedy payment by dint of a summary process and, even where there is an error, to require the money to be paid and for the matter to be sorted out later when the contract disputes are settled finally by way of agreement, arbitration or litigation.*" This judgment provided a greater deal of assurance that adjudication would function effectively.

Northern Ireland Housing Executive (NIHE) v Dixons Contractors Limited [2019] NIQB 19 (22 February 2019)

This recent judgment is an unusual example of an adjudicator's decision being overturned on the basis of an error of law. In this case there was a dispute over whether Dixons were required to provide window trims as part of a contract because the contractual code of practice mentioned them but they were not in the drawings. The parties agreed that, if the adjudicator found that there was an ambiguity or inconsistency between the code and the drawings, Dixons could claim for compensation for additional work in providing the trims. The adjudicator found that there was an ambiguity – so Dixons should be paid extra. When it came before the court, there was a different conclusion. The court agreed that there was a difference between the code and drawings but that, as a matter of contractual interpretation, trims *were* required to be fitted as part of the contract. The court found that the adjudicator erred in his decision (and invited submissions on the appropriate relief to be granted). We are not aware of this leading to loss of confidence in the system of adjudication; rather, there is acceptance that mistakes can sometimes be made and that adjudicators (who may not be lawyers) may sometimes face legal questions.

AUSTRALIA

New South Wales was the first Australian State to implement a prompt payment and adjudication scheme with the introduction of the Building and Construction Industry Security of Payment Act 1999 (the "**NSW Act**"). The remaining Australian States and Territories followed suit between 2002 and 2009.

Under the NSW Act, a party entitled to a progress payment (the "claimant") must serve a payment claim on the other party (the "respondent") who can then reply by providing a payment schedule identifying the amount of the payment (if any) that the respondent proposes to make. If the respondent does not supply a payment schedule within the requisite time period, the respondent becomes liable to pay the claimed amount.

When can a claimant apply for adjudication? To commence an adjudication there must be a payment claim. The claimant can apply for adjudication if the respondent: (a) provides a payment schedule specifying an amount lower than the claimed amount; (b) provides a payment schedule but fails to pay the whole or part of the amount in the schedule; or (c) fails to provide a payment schedule and fails to pay the whole or part of the claimed amount.

Adjudication under the NSW Act therefore has to be linked to a "progress payment" (which includes final payments). This is more restrictive than in Ireland and has the effect that adjudications are nearly always initiated by contractors/sub-contractors 'upstream' for monies owed to them, again consistent with the "pay now, argue later" principle. There has tended to be a more liberal approach in Ireland to the interpretation of what constitutes a "payment dispute" and a number of adjudications here have dealt with termination costs and liquidated damages.

A notable feature of adjudication under the NSW Act is the swiftness of the process. The adjudicator must determine the application as expeditiously as possible and, in any event, within ten business days (or longer if agreed by the parties) after the adjudicator has notified the parties that he or she has accepted the appointment. The adjudicator can call a conference of the parties but it should be conducted informally. In reality, and in some degree of contrast to the trend in Ireland, conferences are rarely called and adjudications are generally decided "on the papers".

The adjudicator is required to determine the amount of the progress payment (if any) to be paid by the respondent, the date on which it is payable, and the rate of interest. Circumstances in which an adjudicator's decision will be overturned are narrow and it is worth noting how strictly this has been applied. In contrast to the Northern Ireland case described above, the NSW Court of Appeal last year set aside a Supreme Court decision and confirmed that an error in interpreting a contract or understanding a payment claim not does constitute a jurisdictional error by an adjudicator and therefore is not a basis for quashing an adjudicator's decision.[1]

The overriding factor is to ensure that any person carrying out construction work is entitled to prompt progress payments.[2] This is evident from a number of provisions of the NSW Act, including, notably, section 20, which provides that the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. If the respondent has failed to submit any reasons in its payment schedule, it will be precluded from defending the adjudication application on different grounds. This results in a more contractor-friendly scheme, with the primary aim of improving cash-flow taking precedence.

Amendments to the NSW legislative framework are coming into force in October 2019 with the aim of reducing maximum payment times from the head contractor to the subcontractor; requiring endorsement of payment claims to link them to the statutory regime; and removing the concept of reference dates, replacing it with a statutory entitlement to make a claim once per month. Notably, amendments also aim to allow courts to sever part of an adjudicator's decision in case of jurisdiction error, allowing the remainder to be enforced. This is consistent with what seems to be the approach in NSW to avoid interference with the adjudication process save for in very limited circumstances.

SINGAPORE

In Singapore, the Building and Construction Industry Security of Payment Act 2004 provides for statutory adjudication, which is popular and is perceived as a fast and cheap mode of dispute resolution. Once a payment claim is served for payment under a contract, the respondent must respond either by paying the amount claimed or by answering the payment claim. A respondent who disputes the claim but fails to provide a response setting out its reasons will be prevented from raising reasons at adjudication. Therefore the consequences for a respondent of failing to provide a payment response are quite serious, and they apply whether the respondent wishes to argue against the validity of the payment claim or the adjudicator's decision itself.[3]

Again, the timeline for adjudication is short. An adjudicator must determine the application within seven days (if the adjudication relates to a construction contract and the respondent has failed to make a payment response and to lodge an adjudication response, or has failed to pay the response amount where it has been accepted by the claimant). In any

1 Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339. See also Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4.

2 This was re-iterated by the High Court in Probuild, [2018] HCA 4, at paragraph 4.

3 Australian Timber Products Pte v A Pacific Construction & Development Pte Ltd [2013] SGHC 56.

other case, the adjudicator has 14 days (or such period as agreed by the parties).

Where an adjudicator calls a conference, each party can be represented by no more than two representatives unless the adjudicator permits otherwise. Another feature of the Singapore legislation is that, in certain circumstances, a respondent who is "aggrieved by the determination of the adjudicator" may request a review of the adjudicator's determination by a review adjudicator or panel of review adjudicators (albeit that the amount deemed payable by the adjudicator's decision has to be paid pending this review).

CANADA

Only this month - on 1 October 2019 - Ontario became the first jurisdiction in North America to introduce statutory prompt payment and adjudication by way of amendment to what is now known as the Construction Act. Many of the provincial legislatures and the federal legislature are set to follow, in what seems to be a strong recognition of the effectiveness of adjudication as a proportionate dispute resolution mechanism in the construction sector.

Under the payment system, a "proper invoice" is issued and, if it is disputed, the respondent must give a "notice of non-payment" or pay the full amount. Time periods within which this must be done vary according to contractual level (i.e. owner to contractor, contractor to sub-contractor etc). It is notable that failure to comply with the prompt payment provisions triggers remedies including, in certain circumstances, mandatory referral to adjudication. For example, if a contractor decides not to pay its subcontractor because the contractor has received a notice of non-payment from the owner, the contractor is required to refer its dispute with the owner to adjudication.

While, as in Ireland, the adjudication regime gives teeth to the prompt payment provisions, unlike Ireland, adjudication is intended to deal with disputes wider than just "payment disputes". Any party to a contract or subcontract may refer to adjudication a dispute relating to areas set out in the legislation, which lists most matters that could arise in construction projects. The adjudicator must make a determination of the dispute within 30 days of receiving documents from the parties (or such longer period as the parties agree).

MALAYSIA

Statutory mechanisms for prompt payment and adjudication came into effect in Malaysia on 15 April 2014 pursuant to the Construction Industry Payment and Adjudication Act 2012.

Though Malaysia's system also follows common principles there are some key differences. The legislation applies only to largescale commercial construction. Buildings of less than four storeys high that the contractor will occupy are carved out of the regime. The legislation also does not impose a mandatory right to interim payments. Payment requirements under the legislation are based on contractual payment dates. If a payment is not made by a due date, the unpaid party issues a claim for non-payment. The paying party has 10 working days to make payment or dispute the claim. Interestingly, in the absence of issuing a payment response, the respondent is taken to dispute the entire amount due. Once a notice of adjudication is served and the adjudicator is appointed, there is a relatively lengthy process in which periods of time are allocated for negotiation of the terms of the adjudicator's appointment and for parties' submissions, followed by a period of 45 working days for the adjudicator to reach a decision.

Use of statutory adjudication in Malaysia has grown rapidly and there has been a significant volume of caselaw addressing various issues that have arisen such as whether the legislation applies to contracts entered into before 15 April 2014, and whether a respondent can raise a defence in adjudication based on events that happened after the issue of a payment response or notice of adjudication. The limited circumstances in which an adjudicator's decision can be set aside are broadly similar to those we have seen applied by the UK courts. In Malaysia, they are specified in legislation as follows: if the decision was improperly procured through fraud or bribery; if there has been a denial of natural justice; if the adjudicator has not acted independently or impartially; or if the adjudicator has acted in excess of his jurisdiction.

SHARED EXPERIENCES

In Ireland the courts have not yet had to deal with any cases arising from statutory adjudication under the Construction Contracts Act 2013. There are, however, many decisions from courts in other jurisdictions that provide useful guidance on how similar provisions have been interpreted elsewhere.

One issue that will inevitably be shared across all jurisdictions is the authority of the court to quash a determination by an adjudicator for jurisdictional and/or non-jurisdictional error. The general trend of court decisions is to "save" the adjudicator's decision wherever possible. That said, each national court, in addition to interpreting the specific domestic legislation governing adjudication, operates within a wider context of national law. For example, in Ireland the impact of the Constitution means that principles of natural justice and fair procedure may have a greater impact on the conduct of adjudications, both in terms of whether oral hearings are required and also as regards decisions to extend timelines.

That a dispute resolution process has been introduced - and is being introduced - in so many different jurisdictions, says something about its success as a proportionate mechanic to meet the needs of the construction industry, specifically in terms of maintaining healthy cash-flow. It is not always perfect but, in many situations, it really is quite effective.

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