In the second of a series looking at the various forms of dispute resolution,
Niall Lawless explains why adjudication is a highly satisfactory process

Adjudication – pay now, argue later

Although statutory adjudication started in the UK it has been followed by other systems established in Australia, New Zealand and Singapore. Indeed the interest in both statutory and non-statutory adjudication (where parties choose the mechanism of their own free will) is on the increase and as a result of this the first ever International Adjudication Conference focusing on the developing role of adjudication in construction projects internationally is to be held in Singapore in February 2007.

The construction industry is one of the most diverse usually involving many parties each with their own interests, values, perspective and needs. Relationships can become strained because of competition for profit and there is often uncertainty due to incomplete contract documentation. In many contracts negotiation continues between the parties during the construction period. Because of these factors and others, disputes often arise. Historically the UK construction industry was renowned for lengthy payment times, due partly to the longer term nature of building contracts and the complex hierarchal matrix of contractors and sub-contractors. Late payment was a problem that often undermined the viability of many otherwise efficient and well run businesses.

On the 1st May 1998, The Housing Grants and Regeneration Act 1996 ('HGCRA') became UK law and established the statutory right for a party to a construction contract to refer a dispute to an adjudicator for a decision. The adjudicator is independent and is required to make a reasoned decision, within twenty eight days of having the dispute referred.

While adjudication was being discussed in the House of Lords, Lord Ackner clarified what it meant :-
'What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be subject matter of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of 'pay now, argue later'.

First, there must be a construction contract as defined by the Act and this includes operations such as the installation of mechanical and electrical engineering services and maintenance of such works; however work on process plant as defined by the Act is excluded. Second, there must be a dispute; that is a difference which has arisen between the parties that needs to be decided.

Once it is clear that you have a dispute, then you can start adjudication by sending a written 'notice of adjudication' to the other party, this defines what it is you want the adjudicator to decide. It should identify the parties; include a description of the dispute, how it has arisen and what remedy you want.

For adjudication to be available there is a requirement for the contract to be in writing. Engineering services contracts often provide that the adjudicator is appointed by a named Adjudicator Nominating Body (ANB) who will undertake this task for a fee; others include the name of the person the parties agree in advance will act as adjudicator. It is important that the ANB's panel is likely to possess the skills required to decide your dispute and although the Chartered Institution of Building Services Engineers is not an ANB other organisations in the sector such as the Heating and Ventilating Contractors Association and the Institution of Mechanical Engineers are. Where the parties want a building services engineer to act as adjudicator they can approach these bodies and when they receive a copy of the notice of adjudication, they will usually appoint an adjudicator within seven days.

The next procedural step is for you to send the adjudicator and the other party a referral notice; the twenty eight days starts when this has been received by the adjudicator. The referral notice should explain the dispute, provide a clear statement of your case, supporting evidence and list the decisions you require the adjudicator to make.

The adjudicator has to be impartial and avoid unnecessary expense, he should also ensure that each party has a reasonable opportunity to present its case, knows what the case to be answered is and is in possession of the evidence and information that is adduced against it. The adjudicator can take the lead in determining the facts and law to help him reach a decision and to decide what procedure is to be used.

The adjudicator must consider all of the issues referred for his decision but must also limit the decision to only the issues which were referred. As long as the adjudicator has answered the right question, even thought the decision is manifestly wrong it will be enforceable. If the adjudicator has jurisdiction and acted in accordance with natural justice, then there is very little that can be done to avoid complying with the adjudicator's decision.

The normal mechanism for the enforcement of an adjudicator's decision is usually through an application for summary judgment and the courts will enforce it without looking at whether it is correct. However, if the receiving party is insolvent the courts may refuse to enforce or ask that any sums due are paid into a stakeholder account.

Peter Kennedy Director of the Adjudication Reporting Centre at Glasgow Caledonian University says that almost 12,000 requests for the nomination of an adjudicator were reported by ANB's in the period between May 1998 and October 2005. There is a decline in the number of nominations being handled by ANB's but that this may be accounted for by the reported trend whereby the parties select their own adjudicators. Adjudication is an interim procedure and although not intended to achieve final settlement of a dispute, experience shows that of the disputes that have been referred to adjudication in the last seven years, relatively few are referred to arbitration or the courts as the majority are either accepted as final or as the basis of a negotiated settlement.

In March 2005 the DTI published a consultation document following reviews of adjudication in practice and although some of the proposals might find their way on to the statute books it is clear that adjudication in the UK will not fundamentally alter and will very much remain the pre-eminent mechanism for resolving disputes in the construction industry.

Lord Ackner had great vison when he stated that adjudication was a highly satisfactory process. I wonder if even he would be surprised as to how many parties are paying now, but not arguing later.

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