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## Settle Now, Argue Later - The Construction Adjudication Solution

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The construction industry is a leader in the application of alternative dispute resolution (ADR) techniques and processes, such as arbitration and mediation—and for good reason. No other industry is plagued by as many routine and unique claims as during the design, engineering and construction phases. In Texas alone, the claims on commercial (vertical construction, including high-rise); industrial; chemical; oil and gas; and infrastructure projects can reach billions of dollars.[1] The litigation involving such projects can take years; thus, ADR (arbitration, mediation, structured negotiations, etc.) is entrenched in the construction industry and used frequently by construction practitioners.[2] However, there is a process that is currently not being used in Texas but has been used for years in offshore jurisdictions. It has reduced the number major disputes by more than 80 percent (e.g., in the United Kingdom). That overlooked process is adjudication.

Many major construction disputes generally (and globally) result from minor issues that remain unresolved. In situations where either the contractor (from the client) or subcontractors (from the general contractor or construction manager) have not been paid, such as allegations of extra work, changed conditions, defective work and delay, such nonpayment can cause tremendous stress. Commonly, the situation deteriorates until a party terminates, slows production, walks off the job or completes the project, but with delays and financial damage to all parties.

While interim mediations (or even arbitrations) can help avoid such problems, the “battle lines” by then have been drawn, the parties have become entrenched in their positions and any surety brought in to complete the project will require time, research and/or expert defenses and exoneration. Similarly, a letter of credit drawn on a party may lead to financial distress,



bankruptcy and/or project failure. The net result is a multi-million-dollar dispute involving substantial cost, executive and productive time, and project failure or delay. There is an alternative—adjudication—where issues can be identified early and resolved quickly.

This article will describe the quick (and interim) decision that will result from a construction adjudication, provide a background of success of statutorily mandated adjudication in both the U.K. and Queensland, Australia,

and explain how construction adjudication could be a solution in Texas on mega-projects.

### **THE CONSTRUCTION ADJUDICATION PROCESS**

The adjudication process requires disputes arising during design or construction to be submitted to an adjudicator (highly skilled and knowledgeable) for a prompt interim decision that is binding until completion of the contract or project, and subject to challenge in arbitration or litigation only thereafter. Construction participants wryly refer to adjudication as the “settle now, argue later” approach to dispute resolution. However, as noted above, a very high percentage of disputes are not challenged, thus substantially reducing construction disputes in terms of both time and cost.[3]

An adjudicator with experience and knowledge in construction is selected by the parties (or appointed by an authority such as JAMS), and through an expedited process described by examples below, a decision is rendered 30 to 45 days later. Adjudication thus offers a more structured process than mediation, neutral evaluation or expert determination dispute resolution methods. The strength of adjudication is that the interim decision is binding on the parties, as described above, and can be immediately implemented while the project is in progress.

### **EXISTING MANDATORY ADJUDICATION STATUTORY SCHEMES**

While any contract provision (whether or not it is expressly contained in the construction contract, such as delay costs) can be adjudicated, the original focus of adjudication was payment under the contract. The speed with which a decision would be rendered, the briefing required (including expert reports) and the binding nature of the interim decision required the Australian and the U.K. construction industries to react much more efficiently since the implementation of adjudication procedures into law.

The original Building and Construction Industry Payments Act 2004 was recently replaced with the Building Industry Fairness (Security of Payment) Act 2017 (BIF Act).<sup>4</sup> Generally, a payment claim must be submitted in writing stating the work, goods or services to which the claim relates; the amount owed; and a request for the amount owed. Customarily, the claim is signed by the claimant as to its accuracy, but such a requirement largely comes out of contractual, not statutory, requirements. The process begins with the submission of the payment claim.

The recipient follows within 15 days, with a payment schedule identifying the specific payment claim (infra), the amount intended to pay and the reasons the amount is less if the scheduled amount is less than the claimed amount.

If the claimant disagrees with the scheduled amount, the claimant must file for

adjudication within a certain time frame, which is generally 20 to 30 days after receipt of the payment schedule or the due date for payment. Presumably, the parties will select an adjudicator to avoid having one appointed for them, but in Australia, the Queensland Building and Construction Commission appoints the adjudicator.

The document demands/delivery should be made when lodging or responding to the adjudication application, but the response is generally due after appointment of the adjudicator. The adjudicator’s decision is delivered (lodged) within 10 business days after the response was received or the date it should have been received.[4]

In contrast, adjudication in the U.K. has been authorized since passage of the Housing Grants, Construction and Regeneration Act in 1996 and has been in force since May 1998. The duties, responsibilities and requirements of parties and the adjudicator are contained in the regulatory scheme. Changes in October 2011 (England and Wales) and November 2011 (Scotland) expanded and encouraged the use of adjudication beyond the resolution of simple payment disputes. Under current law, the time frames remain generally the same (approximately 40 days from the referral Notice of Adjudication), but the dates for submissions and final decisions can be changed by the referring party with the

consent of the adjudicator or by mutual agreement by 14 days after the 28-day requirement. Thus, a decision will usually be rendered within 28 days (if no extension) or 42 days (with a full extension) from the referral notice.

For both Australia (Queensland) and the U.K., the adjudication process can be initiated and implemented upon the existence of a dispute and will result in a decision that is immediate and enforceable until the end of the project or the result is overturned by arbitration or litigation.

#### **IMPLEMENTATION OF ADJUDICATION BY CONTRACT (NOT STATUTE) IN THE U.S.**

In the United States, adjudication has been introduced on large, public-private partnership (P3) projects through surety and performance bonds, which guarantee contract completion and provide for adjudication of disputes as to whether contractors are in default. Prior to initiation of the adjudication concept in the U.S., the primary performance security on P3 projects had been demand letters of credit, which could be drawn upon without any showing of default on the underlying construction contract or subcontract. Such a draw on a letter of credit does not depend upon any neutral review. The net result is often financial distress on both the parties and the project, delay

and sometimes the demise of the project.

The focus of the adjudication process in the P3 performance bond is to obtain prompt review of, and critical interim decisions on, the issue of performance bond obligation. The issue reviewed on an expedited basis is whether the contractor or subcontractor's alleged default triggered the surety's performance under the bond. The adjudication process, as currently used in the U.S., provides the owner, contractor or subcontractor and surety some semblance of due process not offered by a demand letter of credit.

This adjudication method of prompt resolution of disputes could thus be expanded to other issues on major projects in Texas and elsewhere. The procedures in Queensland, Australia, and the U.K. could easily be adopted to provide a method of resolution on many issues, allowing for the success of projects without any impingement upon due process of any party that ultimately disagreed with the adjudication decision. Also, JAMS has developed rules for adjudication of surety bond disputes. Adjudicators under those rules can be selected by the parties from the global neutral panel of the JAMS Global Engineering and Construction Group.

#### **LOOKING FORWARD**

As contractors, owners, subcontractors, designers,

engineers and lenders, you experience and review the expedited procedures and benefits of adjudication. The process is expected to take hold in Texas and elsewhere. Parties desiring faster and much less expensive resolution of disputes, even on an interim basis, than what is offered by traditional mediation or neutral evaluation now have an expedited adjudication process available to them.

Important to the success of an adjudication scheme is that the selected adjudicator is accorded full authority to investigate disputed issues surrounding default, nonpayment or delay and can require the parties to produce documents, and that the parties generally cooperate in ferreting out relevant facts. In this fashion, the best of the existing adjudication schemes can be used, which will provide an enforceable interim decision within 45 days.

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