

INSIGHTS

Insights is a monthly newsletter from CG Engineering Consults with news in engineering, contract management and dispute resolution.

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Dispute Resolution

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Principles of Adjudication: The Ugandan Context

Introduction

Adjudication is a dispute resolution process that is commonly used in construction contracts worldwide. It involves the appointment of an independent third party, known as an adjudicator, to make a decision on a dispute between the parties to the contract. The adjudicator acts in an intermediate capacity on the spectrum between an expert and an arbitrator. This process can provide a quick and effective way to resolve disputes, allowing construction projects to continue without delay.

Advantages of adjudication

One of the key benefits of adjudication in construction contracts is its speed and efficiency. Unlike other forms of dispute resolution, such as arbitration or litigation, adjudication can provide a decision within a relatively short time frame, typically within 28 days. This allows disputes to be resolved quickly, without the need for lengthy and costly legal proceedings.

Adjudication can also be a cost-effective way to resolve disputes. The cost of an adjudication is typically shared equally between the parties to the contract, and is often much lower than the cost of arbitration or litigation. This can make adjudication an attractive option for parties who want to avoid the expense and delay of traditional forms of dispute resolution. It shares the other obvious benefits of Alternative Dispute Resolution (ADR) processes which include privacy, party choices and flexibility of choices. In its most basic form, adjudication is intended to provide a speedy, efficient and cheap resolution to



disputes concerning a variety of claims, on an interim basis. In its most complex form, it can involve the resolution of all disputes between parties to a contract on a final and binding basis.

Construction Adjudication: Global and Ugandan contexts

Adjudication has been applied across many industries worldwide but has found a particular niche in the construction industry. The main feature of construction adjudication is that it results in a decision in respect of a dispute arising under a construction contract that is temporarily binding on the parties and enforceable by the courts. The decision is said to be temporarily binding because the parties still retain the right to bring the dispute back before the court or arbitrator.

The English Parliament in 1996 passed a law requiring all construction contracts in England to have an agreement to adjudicate. This statutory form of adjudication was introduced to allow for a quick and cheap interim decision on a claim during the course of a project allowing the parties a later opportunity to argue the wider bases of the claims in another forum; arbitration or litigation. The English legislation prompted New Zealand to enact similar legislation in 2002. Legislation followed in Malaysia in 2012 and in Ireland. Legislation is now being implemented, or is

under active consideration, in Hong Kong, South Africa and Mauritius. The objective of each of these Acts is to give the claimants a statutory right to make, at the very least, progress payment claims and to receive payment even when there is no provision for adjudication in the contract.

Uganda does not have statutory adjudication and therefore most of the referrals to adjudication stem from the forms of contract that are used which include the FIDIC forms of Contract and the PPDA form of contract. Due to the absence of this “obligatory statutory adjudication”, the number of arbitrations and court cases involving construction cases in Uganda has risen.

The FIDIC forms of Contract have provided for Dispute Boards as a means of dispute avoidance and dispute resolution in construction contracts. They have been used actively since 1975 on engineering projects such as tunnels, airports, toll roads and power plants. There are different types of Dispute boards that include Dispute Avoidance Boards, Dispute Review Boards (DRB), Dispute Adjudication Board (DAB). The Dispute Board adopts an inquisitorial approach and either party can refer a dispute to the Dispute Board for a full hearing. The Dispute Board members cannot be called as witnesses in any subsequent proceedings and are absolved from any personal or professional liability arising from their

Dispute Board activities.

Most of the road projects in Uganda recently appoint Dispute Boards at the onset of the execution of the project. This is the critical point where parties are benefitting from the benefits of adjudication and dispute avoidance.

However, there are also some limitations and drawbacks to the use of adjudication in construction contracts. One of the main criticisms of this process is that it can be subject to abuse or manipulation by one or both of the parties to the contract. For example, one party may deliberately delay or obstruct the adjudication process in order to gain an advantage over the other party.

Another concern is that adjudicators may not have the necessary expertise or qualifications to make informed and fair decisions on complex construction disputes. This can lead to decisions that are based on incomplete or inaccurate information, which can be unfair to one or both of the parties.

To address these issues, there are several steps that can be taken. First and foremost, there needs to be greater transparency and accountability in the adjudication process. This could involve establishing a register of qualified adjudicators, as well as requiring adjudicators to disclose any potential conflicts of interest.

Conclusion

Overall, the use of adjudication in construction contracts can provide a quick and effective way to resolve disputes. However, there are also some limitations and challenges that need to be addressed in order to ensure that this process is fair and effective. By addressing these issues, we can improve the effectiveness and efficiency of adjudication in Uganda and other African countries

1. *Housing Grants, Construction and Regeneration Act 1996 amended by the Local Democracy, Economic Development and Construction Act 2011*
2. *Construction Contracts Act 2002 (NZ)*
3. *Construction Industry and Payment Adjudication Act 2012 (Malaysia)*



Contract Management

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Contractor's Claims: Prolongation Costs

Introduction

By definition, prolongation costs are those time related costs incurred by the Contractor as a result of critical delay to the Works (and therefore an extension of the contract period) for which the Contractor is not responsible. *Keating on Construction Contracts*¹ defines prolongation costs as: "... costs and losses incurred as a result of delays to the activity in question or the works as a whole which have led to critical delay to the contract completion date." Prolongation costs are intended to compensate the Contractor for its time-related costs which it would not have incurred but for the Employer-risk delay event. *The SCL Delay & Disruption Protocol* puts it like this: "The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred."²

Therefore, prolongation costs claimed by the Contractor must be linked to the alleged Employer delay. The Contractor must demonstrate that that overspending is the direct result of the Employer risk delay event.

Is there a link between Extension of Time (EOT) and compensation?

In fact, often time a claim for prolongation costs is presented as the financial element of a Contractor delay claim given that many Contractors assume that when an Extension of Time (EOT) is granted by the Engineer, the same amount of days is due for prolongation costs. This is incorrect as *Keating on Contracts* notes "... although prolongation costs are often seen as the financial side of a "delay claim", there is no automatic entitlement to loss and expense or damages even if a right to an extension of time is established."

The SCL Delay & Disruption Protocol put it like this "It is a common misconception in the Construction industry that if the Contractor is entitled to an EOT, then it is automatically entitled to be compensated for the additional time that it has taken to complete the contract."³

This is because where there are other non-critical Contractor delays on the project,

the scale of those delays may mean that the Employer Risk Event doesn't cause additional costs to be incurred for the full period of the extension of time awarded to the Contractor. The "excusable delay", in respect of which the Contractor is entitled to an extension of time, may be different to the "compensable delay" in respect of which the Contractor is entitled to its prolongation costs. As such, there is no absolute linkage between entitlement to an EOT and the entitlement to compensation for the additional time spent on completing the contract.

It is also important to remember that the analysis necessary to establish a contractor's entitlement to an extension of time is different to that needed to establish entitlement to prolongation costs. The differences between extension of time claims and prolongation costs claims were explained in *Costain Limited v Charles Haswell & Partners Limited*:⁴

Conclusion

Merely because the Employer contributed to the delay is no reason to compensate the Contractor if the Contractor is not able to segregate its own delays and the corresponding costs. This is largely because of the principle of Concurrent delays. Concurrent delays occur when there are two or more independent delays during the same time period. Prolongation costs therefore are calculated not merely because there was an EOT but due to the difference between Contractor delays and Employer delays.

1. *Keating on Construction Contracts, 11th Ed., para. 9-046.*
2. *Society of Construction Law Delay and Disruption Protocol, 2nd Ed (February 2017), "Core Principles", para. 20.*
3. *Society of Construction Law Delay and Disruption Protocol, 2nd Ed (February 2017), "Core Principles", para. 12.1*
4. *Costain Limited v Charles Haswell & Partners Limited [2009] EWHC 3140 (TCC).*





CG Engineering Consults is a company that deals in engineering design, claims consultancy, and dispute resolution.

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