

Using Adjudication to Settle Disputes

Problem Areas

Right to adjudicate

- Is your contract a construction contract under section 104 of the Housing Grants, Construction and Regeneration Act 1996
- If not does the contract include the right to adjudicate- Is it for a residential occupier, has the occupier had professional advice?
- Is your "Letter of Intent" really a contract
- For today, let's assume that you can seek an adjudicator's decision!

Problems with Adjudicators

- Inconsistency – often similar facts will illicit a completely different result. Process is often subjective. Don't forget they only have the two stories in front of them and it is for them to decide which they like best.
- Lack of Knowledge – try and get the right adjudicator e.g. no point asking a solicitor to decide on quantum.

The Basics

- The Contract
 - Can you find the contract documents?
 - If you can is it all the documents?
 - Are they the contract. Was it formed earlier or later than you think?
 - Are all the main heads of terms agreed?
 - Conflicting terms (2.5% discount, no discount etc etc)
 - Is receipt of the Referral the first time the contract documents come to light? Very tight timescale for Response (normally).
 - Are the terms unambiguous? Has the other side actually got a point!

The Basics

- The Adjudication
- The Adjudicator's authority is limited by the Notice of Adjudication
 - Value is different to payment. If you want paying then say so.
 - Don't limit the adjudicator. Ask for an amount / time, but allow the adjudicator to make up his own figure.
- Comply with the adjudication timescales, particularly Referral.
- Only refer 1 dispute e.g. 1 certificate

Some Pitfalls

- Has the Referring party's evidence been placed before the other party?
- Has the other party disagreed with the Referring party's evidence?
- Is there actually a dispute? Has it crystallised?
- Your using the wrong contract or contract terms
- The contract is not Act compliant. Import the Scheme e.g. Final date for payment (is your Section 111 withholding notice still valid)
- Responding party can bring into the dispute other relevant matters. Don't attempt to mislead in Referral (Pilon v Breyer)

What is the Dispute (1)

- Money
- Has the payment cycle started, if so when did it start, has it finished? – Import parts of Scheme. Has Final Date for Payment actually passed?
- Is there a payment certificate? Is there a mechanism for certification – there must be? IFC 2005 revisions 1,2,3
- Are sums actually due? Do you have a certificate?
- Is there a valid withholding notice?
- Are claims realistic? (Bear in mind fraud and ethics for professional members.)
- Do you seek decision on interim or final certificates? Tactics

What is the Dispute (2)

- Time
- Are contractual dates clear?
- Is progress/delay well recorded – evidence.
- Is there a programme, is logic shown, is there a critical path. Adjudicator will possibly want CP analysis. (Courts may apply common sense, possibly as they do not have expertise re time – but you are not in court!).
- Did you give notice. Is there a requirement for a notice? (JCT - Pre or post PC). NEC give notice. If in doubt provide notice.
- Is time claim realistic, does it include concurrency, weaknesses?
- Was PC more than 12 weeks ago? Is CA "Functus Officio"?

Conclusion

- Check you have a "dispute"
- Ensure your position is contractual and properly evidenced
- Adjudication is quick and you should expect surprises
- You need to pay your own costs and may pay a proportion or all of the adjudicator's fees, so don't adjudicate on every dispute.
