What we do for you
Construction adjudication

What is adjudication?
Adjudication is one of the fastest, quickest, most reliable methods of resolving disputes of any form of dispute resolution. From its original purpose as a means of ensuring cash flow for vulnerable contractors, adjudication has evolved hugely and now often represents a cost-effective means of resolving almost all types of dispute quickly. At Eversheds we have reacted to this by building a base of expertise we can utilise in respect of all our clients. We will guide our clients through what can be a new and complex experience.

In the UK, adjudication is available as a right for parties to a construction contract, following the enactment of the Housing Grants Construction and Regeneration Act 1996 (the “1996 Act”). Unless the timetable has been extended, within a comparatively short period of time, parties will have a decision from an adjudicator, which save for in limited circumstances the courts will enforce. The mandatory and expedited nature of the process were the principal reasons why it was catapulted to the number one method of dispute resolution in the construction industry no more than a year after the 1996 Act was passed and it is likely to retain its dominance for the foreseeable future, particularly as amendments made to the 1996 Act in 2011 widen the scope of its application.

How are we effective?
The short timescale in adjudication means that once an adjudication has commenced, there is very little time in which to learn or remind oneself about process and procedure. At Eversheds we have a team of lawyers with a high level of experience in the undertaking of adjudications, regularly acting for both Referring and Responding Parties. Our lawyers are used to working closely with in-house teams providing input and support at every stage of the adjudication process, including:

- identifying the key strengths and weaknesses of a claim to determine whether the claim or counterclaim is sufficiently strong to merit commencing or defending a dispute
- consider all dispute resolution options to identify whether adjudication is most suited to achieving the client’s goals
- working with the client, the project team, witnesses and experts to develop the case against the other party
- constantly evaluating our strategy to ensure that the right approach is being taken before and throughout the adjudication
- providing regular updates on progress and cost so that the client is always in control of the process.
Our recent experience

We have dealt with adjudication as a matter of course since the statutory regime was brought into force in 1998. We have referred and defending almost every type of dispute. Some types of disputes we find arise more often than others, including:

- payment disputes
- delay and disruption
- points of principle or contractual interpretation
- large scale disputes
- multiple adjudications in a short space of time.

Our recent experience of some of these types of disputes in adjudication is summarised below.

Adjudicating payment disputes

A common area of dispute in construction contracts relates to money. There may be a dispute arising out of the Contract Administrator’s assessment of an interim application for payment. Alternatively, there may be a dispute over the financial consequences of delay caused by the employer or the contractor. Our experience assisting with adjudications in this context includes advising:

- Acting for a multinational developer, in respect of a groundwork’s dispute. The dispute turned on the principle of how the soil which the contractor was to excavate was to be measured and therefore priced; in the loose or in the solid. This point was relevant to three contracts between the developer and the contractor. The contractor referred the dispute to adjudication and we prepared a successful response for our client resulting in a decision which prevented the contractor from bringing a further claim relating to alleged unpaid monies, as it was proven that the contractor was not entitled to further payment and had been paid using the correct method of measurement.

- Acting for a civil engineering services company in an adjudication regarding valuation under NEC term service contract. The contracted related to disputes under a 4 year planned and reactive maintenance contract. Issues arose out of valuation, ambiguities in the service information and the interaction of a bespoke annual reconciliation and final account payment mechanism. We advised on the re-negotiation of the main contract with the utility company and successfully defended a adjudication brought by a sub-contractor.

An international telecoms service provider on two inter-linked payment adjudications in respect of late and outstanding payments on our client’s employer’s bespoke contract. The first adjudication resulted in a declaration as to how the payment mechanism actually worked given the lack of clarity in our opponent’s drafting of the mechanism. The second adjudication was mainly quantum driven, with us overcoming an interpretation point on an alleged earlier waiver of our client’s financial claims under a contract amendment.
Adjudicating a point of principle

There can often be disagreement about a principle, which if decided one way or another, would impact a wide range of disputed issues to which that principle applies. In that case, it may be useful to resolve the dispute on the point of principle via adjudication.

Case study 1

We acted for a major water and sewage company in relation to the commercial close-out of a long-term framework agreement after its early termination. The framework agreement ran for a period of five years, during which our client instructed approximately 500 projects for the improvement of its water and wastewater networks and 300,000 repairs and maintenance jobs. The projects ranged in value from £50,000 to £7 million, and the jobs ranged in value from £50 to £1m.

After commercial negotiations broke down, we worked with our client’s legal and commercial teams to develop a strategy to resolve the outstanding issues swiftly and finally. The strategy was necessarily aggressive so as to convince the contractor to return to the commercial negotiations.

The strategy adopted was based upon the identification of key issues of principle affecting the account as a whole, and 15-20 key issues/claims were identified to take to adjudication, over a period of 18 months.

Our role not only involved understanding our client’s legal position in relation to each issue, but also understanding the operation of our client’s business, the relevant regulatory requirements to which our client was subject, and the technical aspects of each of the 500 or so projects that were the subject of dispute.

Six months after the implementation of our strategy the contractor returned to commercial negotiations. All issues were then resolved to our client’s satisfaction.

“Not only did we have a horrendously complicated web of payment and counter-payment issues, but the other party jumped us with an adjudication. Eversheds quickly understood the payment procedures in our contract and were able to throw resource at the job to ensure we produced a credible response in time.”

Solicitor, Public Rail Authority
Adjudicating large scale disputes

As the popularity and confidence in the adjudication process continues to grow, so it seems do the size of the disputes that are referred. A referring party will often refer disputes to adjudication that are large either in terms of the number of issues they contain, or the volume of documentation that is provided with the dispute. The classic example of this is where the referring party refers the entire final account of a project to adjudication.

Case study 2

We advised a public authority on a series of works it was undertaking on its rail network. The contract sum was valued at over £1 billion. The parties were in dispute, but neither party wanted to embark expensive and lengthy litigation or arbitration unless there was no alternative.

However, the dispute entailed several thousand compensation events and disallowed costs and was likely to take time to resolve. We suggested that the statutory adjudication framework could be amended to suit the nature of the dispute, partly because of the flexibility to amend the procedure, timetable and choose the decision maker, but also because the adjudication procedure is one of the most tried and tested forms of alternative dispute resolution.

The parties agreed in principle an extended timetable of six months between them, which was put to the adjudicator on appointment. They also agreed a bespoke set of adjudication rules that was more prescriptive as to the procedure and the timing and length of submissions. The dispute was satisfactorily resolved by adjudication, saving the parties the time and expense of litigation or arbitration.

“Although we were in discussions with the contractor, it decided that it would commence an adjudication without notice on three disputes. This really put us under a huge amount of strain in terms of our own resources. To their credit, Eversheds got up to speed very quickly, integrated with the team and were able to prepare robust responses in each adjudication.”

Solicitor, Public Rail Authority
Multiple adjudications during projects

Because adjudication is comparatively simple and quick, parties will often use it as the primary method of resolving disputes. This can lead to multiple adjudications on the same project. Our experience of assisting with adjudications in this context includes advising:

- A London public rail authority on disputes arising out of a contract for the construction of a London railway line. The contractor on the project identified what it thought were discrete issues on the project over which the parties were in dispute. There were five adjudications over a period of around six months, with a total value of around £50 million. Acting for the employer, we assisted by preparing its case in short order and responding to the claims made.

- An international contractor on a tramway refurbishment and expansion project in the North of England. The contract was based on NEC3 with elements of the ICE 6th edition contract incorporated. The project ran significantly late and suffered major cost overruns. Amongst other things, we developed a strategy for our client to maximise returns from its entitlement and advised it on the enforceability of time bar provisions. Disputes arose regarding defective works and the applicable ORR regulations and safety standards. In all, we assisted the contractor with more than 10 adjudications and one expert determination.

International adjudication

The United Kingdom was the first to legislate for adjudication in 1996 and others followed thereafter. Australia from 1997 – 2009, New Zealand in 2002, the Isle of Man in 2004, Singapore in 2005, Malaysia in 2012 and Ireland in 2013. Other countries presently seriously considering whether to introduce statutory adjudication. They include Germany, Hong Kong, China and South Africa. Furthermore, the two most utilised international standard form construction contracts, FIDIC and ICC, contain a mandatory contractual adjudication process through the use of a dispute board. The proliferation of mandatory alternative dispute resolution is a positive step in a wider, global trend of encouraging alternative and interim dispute resolution, particularly in the field of construction and engineering projects. It would seem that the use of adjudication to resolve construction disputes is gaining international acceptance and that there is an emerging trend towards its adoption as the preferred form of resolving disputes.

Eversheds’ offices in Singapore and Ireland have an in depth understanding of the adjudication process as do Eversheds’ relationship firms in Australia, New Zealand, Isle of Man and Malaysia. All our offices use FIDIC and ICC contracts regularly and are therefore often instructed on disputes that are resolved via dispute adjudication boards.

Client training

We offer our clients workshops on the topic of adjudication, which include:

- an introduction to statutory adjudication
- strategy in adjudication
- understanding jurisdiction and natural justice
- ways to enforce an adjudicator’s decision
- drafting adjudication provisions
- case law updates on adjudication.

We can tailor the training to suit the client’s needs, as appropriate.

Key contacts

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Keep in touch

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