

## Adjudication Lifecycle

### Pre-Action

#### Referring Party

- Is there a construction contract?
- Is it subject to the Housing Grants Construction and regeneration Act 1996 (the "Act")?
- Is the dispute ready to be referred to adjudication?
- What rules will apply to the adjudication?



- Serve Notice of Adjudication.
- Appoint Adjudicator.
- Prepare Referral Notice.
- Assess Response.
- Deal with Adjudicator requests.
- Consider Decision.



- Dealing with challenges.
- Enforcing the Decision.
- Enforcement Proceedings.
- Final Resolution.

### Adjudication Procedure

#### Responding Party

- Identify and manage issues.
- Consider payment notices.
- Resolve the dispute without recourse to adjudication.
- Consider contract's adjudication terms.



- Receive Notice of Adjudication.
- Assess whether the Adjudicator has jurisdiction.
- Assess Referral Notice.
- Prepare Response.
- Deal with Adjudicator Requests.
- Consider Decision.



- Challenging the Decision.
- Basis of challenge.
- Cost consequences.
- Final Resolution.

### Challenges / Enforcement

#### DAC Beachcroft Expertise

- Advice on:
  - Operation of contract;
  - Whether you should adjudicate;
  - What your chances of success may be.
- Provide you with national coverage.



- Advice on:
  - Technical legal issues;
  - Procedural issues;
  - Pleading your case.
- Reduce disruption to your business.
- Support throughout the entire process.



- Advice on:
  - Possibility of challenges;
  - Resisting enforcement;
  - Costs;
  - Commercial settlement.

## Adjudication Lifecycle



### Referring Party

#### Do I have a construction contract?

- Is the Contract for Construction Operations?
- Was the contract entered into before 1 October 2011?
  - Contract must be in writing or evidenced in writing.
- Was the contract entered into on or after 1 October 2011?
  - Contract can be oral.

Yes ▶

#### Is the contract subject to the Act?

- Are the operations excluded?
  - Expressly?
  - By Order of the Secretary of State?
- Is the contract with a residential occupier?
- Was the contract made before 1 May 1998?

Yes ▶

#### Is the dispute ready to be referred?

- Has a dispute crystallised?
- Has the dispute been defined?
- Is it possible to resolve the dispute without recourse to adjudication?
- Can you support your claim?
  - Have you included all relevant supporting documents?

Yes ▶

#### What rules will apply to the adjudication?

- The Scheme for Construction Contracts 1998 (“Scheme”)?
  - For contracts entered into before 1 October 2011.
- The Scheme as amended?
  - For contracts entered into on or after 1 October 2011.
- Bespoke procedure contained within the contract?
- Other industry standard rules?

### How DAC Beachcroft can help

#### Adjudication Notice

As you are the person who knows your project best, we will work closely with you at all stages of the adjudication process, but especially at the beginning when the dispute must be defined and the Adjudication Notice drafted. We can help by:

- Drafting and reviewing the Notice with you to ensure you maximise your chances of a successful recovery;
- Defining the dispute appropriately to ensure the Adjudicator is provided with the necessary jurisdiction to decide the dispute;
- Providing you with what an Adjudicator’s view of the dispute will be.

Gather information and identify dispute (no defined time constraint)

### Responding Party

#### Identify management issues

- Resolve payment issues.
- Manage and maintain relationships.
- Identify causes of delay.
- Identify project critical events / dates.
- Address issues as they arise.

▶

#### Consider Payment Notices

- Ensure payment notice provisions have been complied with.
- What procedure applies?
  - The Scheme (contracts entered into before 1 October 2011);
  - The Scheme as amended (contracts entered into on or after 1 October 2011);
  - Bespoke procedure – is the procedure compliant with the Act?

▶

#### Attempt to resolve the matter without recourse to adjudication

- Identify problems.
- Is there a practical resolution?
- Is a change of personnel required?
- Is there potential for a commercial meeting?
- Could a mediator help?

▶

#### Receiving a Notice of Adjudication

- Consider obtaining specialist legal advice.
- Consider the dispute – is there actually a dispute? – Has it crystallised?
- Should payment be considered?
- Has the dispute been defined?
- Is there one or multiple disputes?
  - Only one dispute should have been referred.

### How DAC Beachcroft can help

#### Pre-Action

Issues on site can often escalate rapidly and result in a dispute. If commercial negotiations do not work, usually, the first formal step to resolve a dispute will be to commence an adjudication. Should a dispute arise, DAC Beachcroft can help by:

- Providing advice on operation of the contract to assist in avoiding a dispute from the outset;
- Providing advice on whether or not adjudication is the best remedy for any dispute that has arisen;
- Providing a national coverage so we are always on-hand to assist where and when we are needed.

## Adjudication Lifecycle



### Referring Party

#### Serve the Notice of Adjudication ▶

- You can serve a Notice of Adjudication ("Notice") at any time.
- Ensure you:
  - Consider the dispute to be referred;
  - Define the dispute;
  - Request the right relief.
- Does the relief requested cover the dispute you want resolved?
- Note: You have no second chance to amend the Notice after it is served.

#### Appoint the Adjudicator ▶

- Is the Adjudicator identified in the contract?
- Is the Adjudicator to be selected by an industry nominating body (e.g RICS / RIBA / CI Arb / TeCSA or TECBAR)?
- Does the Adjudicator require a specific specialisation?
  - If so, inform the nominating body of which specialisation is required.
- Has the nominating body appointed the Adjudicator within the required time? (If not, the procedure may have to be recommended).

#### Prepare the Referral Notice ▶

- Set out the factual and legal basis for your claim.
- Particularise the dispute and the redress sought.
- Ensure the dispute and redress sought is the same as that contained within the Notice.
- Ask the Adjudicator for reasons for his decision.
- Enclose supporting documents (contract, invoices etc).
- Serve the Referral within the prescribed time (usually within 7 days of service of the Notice).

#### Assess the Response ▶

- Has it been received within time?
- Does it answer the dispute or raise a different dispute?
- Is a Reply to the Response required?
- Has a cross-claim been raised?
  - An extension to the adjudication timetable may be required for you to respond.
- Should you request a meeting?
- Should you consider settlement?

#### What further steps might the Adjudicator request? ▶

- Has the Adjudicator requested a Reply?
  - If not, and you think that a Reply is necessary, inform the Adjudicator and provide him with reasons as to why a Reply is required.
- Extension of time for service of further documents by both parties (Rejoinder, Surrejoinder etc.).
- Visit to site.
- Oral hearing.

#### Consider the Decision

- Has the Adjudicator addressed all the issues raised?
- Is there an error in the Decision?
  - Can the error be amended?
    - Is it clerical? – It can be corrected (the 'slip' rule).
    - Is it procedural / other error? – The Decision may be unenforceable.
- Has it been provided within the required time?
- Have reasons been provided, if requested?

Comply with procedural time limits (decision can be issued within 28 days)

### Responding Party

#### Has the Notice been served properly? ▶

- A Notice can be served at any time.
- Has it been sent to the right party?
- Has the Scheme / bespoke contract procedure been followed correctly?
- Is all necessary information and are all supporting documents included?
- What relief has been requested?

#### Does the Adjudicator have jurisdiction? ▶

- Should you challenge the Adjudicator's jurisdiction?
- Possible basis of challenge:
  - There is no contract;
  - The contract is not a construction contract;
  - Bias / possible bias of the Adjudicator;
  - There is no dispute;
  - Dispute referred is different to the dispute that has crystallised.
- If you have raised a jurisdictional challenge all further correspondence should be marked 'Without Prejudice' to that challenge.

#### Prepare your Response ▶

- Is specialist legal advice required?
- Reply to the factual and legal basis of Referring Party's case
- Support your assertions by documentary evidence.
- Comply with the Adjudication Procedure e.g. time limits etc.
- Is an extension of time required?
- Refer to contractual provisions.
- Respond to redress sought.

#### Comply with requests from the Adjudicator / prepare further documents

- Has the Adjudicator allowed further submissions from the Referring party? (Reply)
- Do you need to prepare a Rejoinder? If so,
  - Answer specific points;
  - Do not just re-state the Response.
- Adjudicator may request:
  - A hearing;
  - A visit to site;
  - Extension of time for additional submissions.

## How DAC Beachcroft can help

### Adjudication Proceedings

Although adjudication is considered to be a speedy process and is far simpler than arbitration or protracted legal proceedings, complicated issues of law inevitably arise, which need to be properly applied to the facts in question. DAC Beachcroft can help by:

- Advising on technical issues, such as jurisdictional challenges and arguments as to Adjudicator bias that may arise;
- Providing support through the entire process from cradle to grave, with a dedicated person on our team always on hand to speak with you about any issues you wish to discuss;
- Ensuring that the adjudication process causes as little disruption to you and your business as possible, allowing you to concentrate on what is most important.

## Adjudication Lifecycle



### Referring Party

#### Challenges to the Decision

- The Decision is binding until finally determined by litigation, arbitration or agreement.
- A party may, however, choose not to comply with the Decision and to challenge it in the Enforcement proceedings.
- Challenges rarely succeed and there are only limited circumstances where challenging is appropriate.

#### Enforcing the Decision

- A court will usually enforce the Decision unless:
  - The Adjudicator did not have the authority to make his Decision (it was outside his jurisdiction as defined by the Notice);
  - There has been a breach of natural justice;
  - The successful party is insolvent;
  - The Decision is obtained by fraud.

#### Enforcement Proceedings

- Fast-track process in the Technology and Construction Court to enforce Decisions.
- Apply for summary judgment.
- Costs can be recovered.

#### Final resolution of the dispute

- Depends on the contract, but might be:
  - Arbitration;
  - Litigation;
  - By agreement.

### How DAC Beachcroft can help

#### Enforcement of the Adjudication Decision

In the minority of circumstances an Adjudication Decision may need to be enforced through the courts. There are few grounds to resist the Decision of an Adjudicator. In such cases we can help by:

- Enforcing or resisting the Decision as necessary;
- Advising on whether you should progress the dispute through to arbitration or legal proceedings, considering that the Adjudication Decision is only temporarily binding;
- Using our experience to advise upon what is a commercially acceptable outcome notwithstanding the Decision of the Adjudicator.

Undefined Time Period

### Responding Party

#### Challenge the Decision?

- Challenges rarely succeed.
- There is no right to appeal.
- Decisions are binding in the interim.
- Could choose not to comply and hope challenge will be successful.
- Court approach is to enforce an Adjudication Decision even if there is an error in fact or law.

#### Challenge on what basis?

- The Adjudicator acted outside his jurisdiction:
  - The contract was not a construction contract?
  - The Decision did not relate to the dispute that had crystallised?
  - The Adjudicator was not properly appointed?
  - The Adjudicator decided more than one dispute?
- There has been a breach of natural justice.

#### Resisting Enforcement Proceedings?

- Insolvency of successful party.
- Consider appealing enforcement proceedings?
  - Leave of court required.

#### Final Resolution of the dispute

- Depends on the contract, but might be:
  - Arbitration;
  - Litigation;
  - By Agreement.

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