

MARCH 15, 2018

CCA Annual Conference

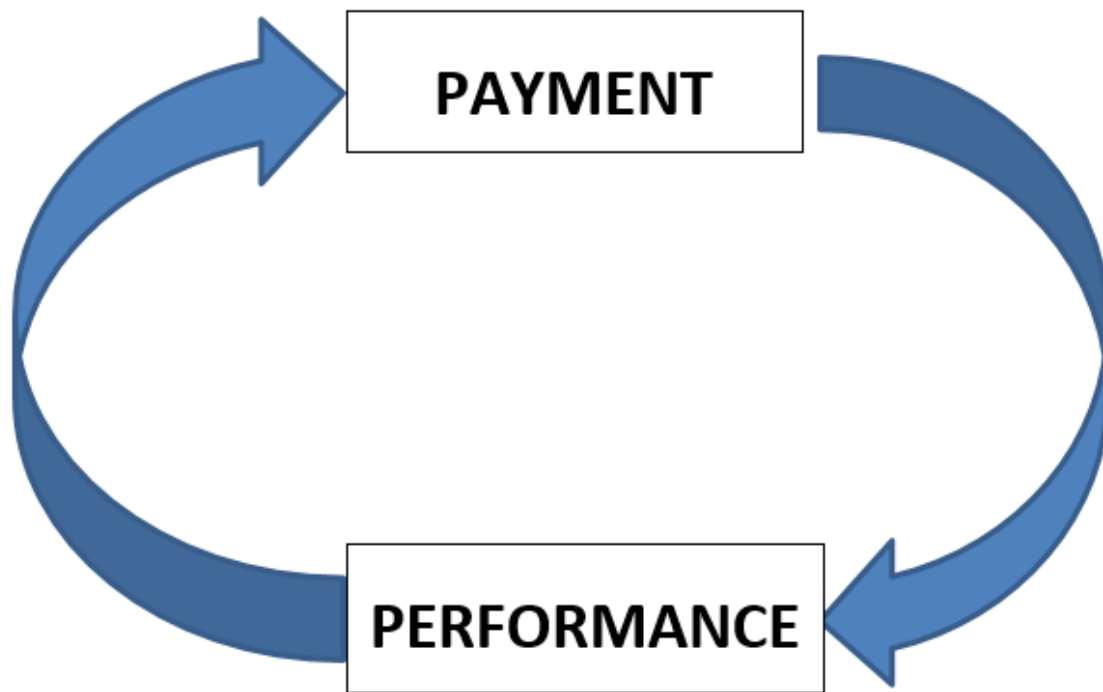
The How and Who of Adjudication

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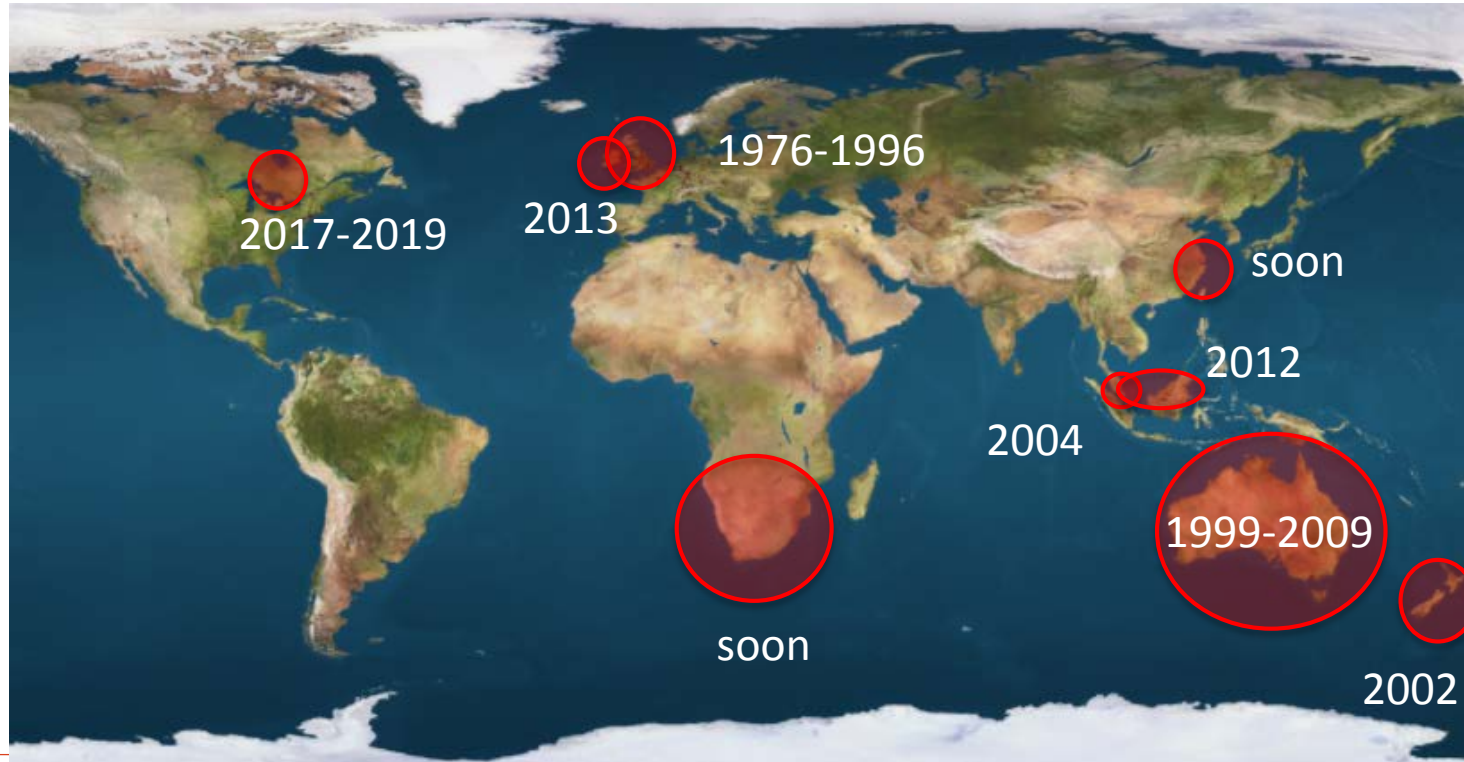








The International Experience of Adjudication



The International Experience of Adjudication

- **1976:** Adjudication first appears in U.K. “Green Form” and “Blue Form” subcontracts
- **1980:** General revision of U.K. standard forms include rudimentary adjudication principles
- **1982:** U.K. Association of Consulting Architects (ACA) adopts adjudication principles
- **1988:** Joint Contracts Tribunal (JCT) standard forms include adjudication for certain disputes

The International Experience of Adjudication

- **1993:** Institution of Civil Engineers makes adjudication front line dispute resolution technique.
- **1993:** Sir Michael Latham releases *Trust & Money*
- **1994:** Sir Michael Latham releases *Constructing the Team*

The International Experience of Adjudication

- Early 1990s: overheated economies, overbuilt markets, overextended developers
- Decline in construction volume
- Canary Wharf and Channel projects exemplified poor state of construction industry
- Complete absence of trust in the industry
- Cash flow severely impeded

The International Experience of Adjudication

- Frequency of construction disputes excessive
- Resolution of construction disputes inept
- Favoured tool to date, arbitration, causes excessive delay and impedes cash flow
- Adjudication process recommended

The International Experience of Adjudication

- **1996:** *Housing Grants, Construction and Regeneration Act 1996*

Eight fundamental components:

1. The right to refer a dispute at “any time”: A party to a construction contract does not need to wait until the project is finished in order to have a dispute determined by an adjudicator.
2. Notice requirements: A party to a construction contract must have the right to give a notice at any time of his intention to refer a particular dispute to the adjudicator.

The International Experience of Adjudication

3. Seven days to brief an adjudicator: A method of securing the appointment of an adjudicator and furnishing him with details of the dispute within seven days of the notice is mandatory.
4. Twenty eight days to an adjudicator's decision: The adjudicator is then required to reach a decision within 28 days of this referral. It will not be possible to agree in advance of any dispute that additional time may be taken for the adjudication. There are only two exceptions to this rule. First the adjudicator may extend the period of 28 days by a further 14 days if the party refereeing the dispute consents. Second, a longer period can be agreed by consent of all the parties. Such agreement can only be reached after the dispute has been referred.

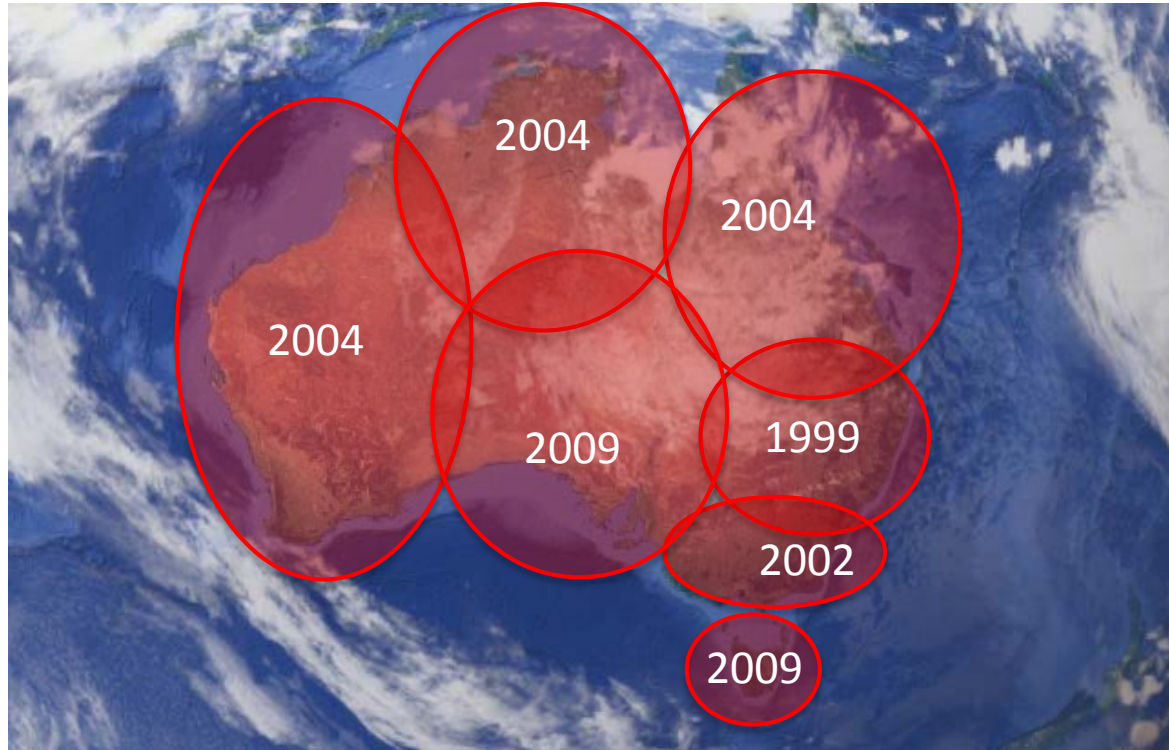
The International Experience of Adjudication

5. Elementary due process: The adjudicator is required to act impartially.
6. Inquisitorial jurisdiction of the adjudicator: The [*U.K. Construction Act*] requires that the adjudicator “takes the initiative in ascertaining facts and the law.” This gives the adjudicator power to investigate the issue in whatever manner he or she deems appropriate in light of the short time scale available.

The International Experience of Adjudication

7. Interim binding decisions, enforceable in court if necessary: The decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement [...] The [*U.K. Construction Act*] does, however, go on to say that the parties may agree to accept the decision of the adjudicator as finally determining the dispute.
8. Adjudicator immunity: The adjudicator cannot be held liable for anything done or omitted in the discharge of his function as an adjudicator unless acting in bad faith. This protection is extended to any employee or agent of the adjudicator.

The International Experience of Adjudication



The International Experience of Adjudication

Each jurisdiction adapts the UK model to its unique needs.

- Australian East Coast model (New South Wales, Queensland, Victoria, ACT, South Australia, Tasmania)
 - Emphasis of the legislation is on default
 - Any party missing very tight procedural timelines will lose by default
 - High proportion of adjudication decisions are for the whole of the sum claimed
 - No evaluation of whether that sum is actually due
 - Parties cannot choose the adjudicator

The International Experience of Adjudication

- Australian West Coast model (Western Australia, Northern Territory)
 - More aligned with UK model
 - Emphasis on a realistic evaluation of what is due to the claimant
 - Less stress on default provisions.
 - Parties pick adjudicator

The International Experience of Adjudication

- Society of Construction Law (Australia), *Report on Security of Payment and Adjudication in the Australian Construction Industry*, 2014
 - Positive evaluation of the West Coast Model
 - Under the East Coast model, 80% of determinations that were challenged in court were quashed
 - East Coast model frequently gives rise to cases of bias and breaches of natural justice (always in favour of the claimant)
 - Current lack of national uniformity in legislation results in a range of unnecessary costs that outweigh any commensurate benefits.
 - SoCLA research suggests that there is broad support for a single national system.

The International Experience of Adjudication

Who can request adjudication?

- Australia (West Coast), New Zealand, Ireland, Malaysia and Hong Kong: any party
- Australia (East Coast) and Singapore: only a payee (i.e. an unpaid supplier of work, services or materials)

What disputes can be adjudicated?

- UK: any difference arising under a construction contract, with a few exclusions:
 - drilling or extraction of oil/natural gas, extraction of minerals, manufacture
 - delivery of certain products (e.g. building components or materials)
 - assembly, installation or demolition of plant or machinery
 - Agreements with Residential Occupiers
 - certain construction contracts excluded by order of the Secretary of State

The International Experience of Adjudication

What disputes can be adjudicated?

- New Zealand: similar to UK, but residential exclusion was repealed in 2015
- Ireland: disputes under construction contracts that are created for the purpose of carrying out, arranging or providing labour for construction operations; no disputes under €10,000, no PPP
- Singapore and Australia (East and West): Only payment matters
- Malaysia: any ‘dispute arising from a payment claim’ under “every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government; residential exclusion
- Hong Kong (proposed): almost all relevant construction disputes

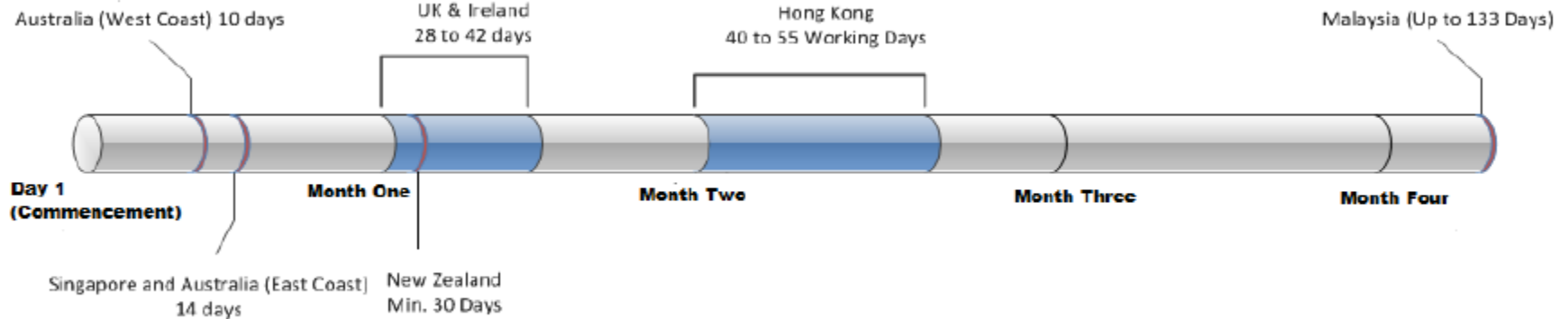
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What is the process?

- UK: adjudicator has broad inquisitorial powers and can develop a process to gain an understanding of the relevant facts
- New Zealand, Australia (East and West Coast), Malaysia and Singapore: more prescriptive; proceedings are prescribed in the legislation

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Timing



The International Experience of Adjudication

How are determinations enforced?

- In all jurisdictions, adjudicator's decisions are binding on an interim basis and as such are enforceable through court processes as interim binding decisions
- UK: adjudicator's decision gives rise to a cause of action in favour of the parties to the adjudication; claimant typically brings an action and then moves for summary judgment in that action
- Ireland: determination is binding on the parties for all purposes and may be relied upon by any party "by way of defence, set-off, or otherwise, in any legal proceedings"
- Australia and Singapore: award can only be stayed (i.e. enforcement refused) if the conditions precedent for the adjudicator's jurisdiction have not been met and/or there has been a material breach of natural justice

The International Experience of Adjudication

Adjudication and lien legislation

- U.K., Ireland, Hong Kong, Singapore and Malaysia: no lien legislation
- New Zealand: lien legislation repealed leading up to introduction of adjudication and prompt payment
- Australia: most states have a form of lien; however these liens are in relation to unpaid progress payments or in relation to amounts due pursuant to an adjudication award and are not directly comparable to a construction lien
- Other states repealed lien legislation before adjudication and prompt payment were adopted
- South Australia has lien legislation comparable to construction lien. Contractors there can choose between lien or adjudication procedure

Adjudication in Ontario?



- Adjudication is a swift and flexible mechanism of dispute resolution
- Significant international experience
- It is a proven and pragmatic solution for projects gridlocked by disputes

Ontario Specific Solution

- Adjudication as an interim remedy integrated with existing construction lien regime
- Backstop to new prompt payment provisions
- Available province-wide
- Bill 142 – December 12, 2017
- Regulations



Ontario's Nominating Authority

- A single official Authorized Nominating Authority (The Authority) will be created
- The Authority is to be selected by the Ministry of the Attorney General following a detailed application process
- The Authority will train and certify adjudicators, set default fees, make appointments, resolve fee disputes, establish a public registry of adjudicators
- Regulations describe the further powers of the Authority



Who is the adjudicator?

- Parties may agree on an adjudicator, but if no agreement in 4 days, the Authority will appoint one within 7 days upon request
- The adjudicator may not be named in the contract or subcontract in advance
- Adjudicators:
 - no conflict of interest
 - At least 7 years of relevant working experience in the construction industry as determined by the Authority
 - qualified under standardized training program with certificate
 - Currently on the Authority's registry
- Adjudicator has immunity and cannot be compelled to testify
- Certificate is subject to suspension or cancellation, in certain circumstances

Code of Conduct

- Adjudicators will abide by a code of conduct established by the Authority and approved by the Minister
- Code is expected to address:
 - Conflicts of interest
 - Proportionality / excess expense
 - Civility, fairness, competence, integrity of the adjudication
 - Confidentiality
 - Accuracy and completeness of information

What can we adjudicate?

- Adjudication applies to a specified subset of issues focused on resolving payment disputes including:
 - valuation of services or materials
 - payment under the contract/change orders
 - disputes of notices of non-payment
 - set-offs
 - holdback payments
 - non-payment of holdback
 - issues that the parties may agree to be part of an adjudication



What makes it work?

- Parties are free to agree on adjudicator fees or fees will be decided by the ANA
- Each party bears its own costs / fees
- Adjudicator can award costs in certain circumstances (i.e. frivolous, vexatious conduct)
- Decisions are binding on an **interim** basis
- Adjudications are enforced in a manner similar to an arbitration award
- Parties free to arbitrate or litigate the dispute at the end of a Project

Timelines

- Appointment of the adjudicator can take up to 11 days
- Five days after appointment of the adjudicator, the referring party is to provide the adjudicator with the notice of adjudication and certain documents
- 30 days after receiving documents, the adjudicator is to make a determination (can be extended on consent)
- Subject to extension by agreement, the entire process is concluded in 46 days



Consolidated Adjudications

- When the same or related matters in respect of an improvement are to be adjudicated, the parties can agree to bring the issues together before one adjudicator
- The contractor can require a consolidated adjudication in the event the parties do not agree



Application to Surety Bonds

- Expected that claimants under Labour & Material Payment Bonds will have the ability to refer to adjudication disputes with surety
- Performance Bond claims are not a proper subject of adjudication

Questions?