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by **Jamie Ritchie**

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"Adjudication can quickly and irrevocably upend the ADR landscape and status quo, and unfortunately this has contributed to many 'thought leaders' rejecting or being unwilling to promote adjudication as an effective dispute resolution mechanism. This is doing a great disservice to clients, contractors and sub-contractors." Niall Lawless

Jamie Ritchie, Associate Solicitor (Projects, Construction and Energy) at LK Shields is a lawyer with experience of acting on behalf of claimants (referring parties) and defendants (responding parties) in construction adjudication. In order to help promote awareness of this form of dispute resolution within the Irish construction industry, Jamie recently interviewed Niall Lawless (Irish Construction Adjudicator and co-author of the CIC Users' Guide to Adjudication) in order to get his take on the future of this currently underutilised process. Below is a transcript of that interview.

Jamie: Niall, thank you for taking the time to talk to us. In your own words, how would you define adjudication?

Niall: In Ireland adjudication provides the parties to a construction contract with a process whereby an independent third party makes a quick decision when the parties are in disagreement over payment. The adjudicator's decision is binding until determined by arbitration or litigation and the parties may agree that the adjudicator's decision is final and binding.

Jamie: You have many years' experience of adjudication across multiple jurisdictions. Tell us a bit about your experience and your background?

Niall: My early ADR experience was as a Chartered Building Services Engineer and Mechanical Engineer acting as expert witness at all pleading stages and giving evidence under examination in arbitration and the Technology and Construction Court in London numerous times. That led me to Fellowship of the Chartered Institute of Arbitrators in 2001, and becoming a Chartered Arbitrator in 2004. With the rapid and widespread adoption of adjudication in the UK effectively displacing construction industry arbitration and litigation, it was natural to want to apply the practice and procedure, knowledge, process and skills learned through arbitration to make adjudication decisions.

I have just started a second three year term as Chair of the Construction Industry Council (UK) Adjudicator Nominating Body Management Board. I am a Centre for Effective Dispute Resolution (CEDR) and a Chartered Institute of Arbitrator's (CIArb) accredited mediator, experienced acting as mediator in multi-million Euro construction and engineering disputes.

Jamie: What would you say are the main differences between adjudication in the UK and Ireland?

Niall: In arbitration it is widely recognised that allowing the parties to bifurcate their dispute into liability and quantum can be the most cost effective and efficient way to proceed. Over the last year I have been

involved with two substantial disputes referred to adjudication where the parties did not want a decision on an amount of money, rather just a decision on principle. In one dispute the parties asked the adjudicator to decide what the conditions of contract were, and in another dispute the parties asked the adjudicator to decide the method of measurement which ought properly to be applied to thermal insulation work undertaken. The adjudicator's decision on these matters would allow the parties to move forward together.

For me the dominant and regrettable difference is that in the UK parties can refer any dispute, whereas in Ireland the referral is limited to a payment dispute. This limits party autonomy, it constrains adjudication and reduces its efficacy, and can undermine the objective of the dispute being processed in the shortest time and at the lowest cost.

Jamie: Given that the Construction Contracts Act (2013) provides that a party to a construction contract can only refer a payment dispute to adjudication. In your own words, how would you define a payment dispute?

Niall: In adjudication, the words 'payment dispute' do not have a specialised meaning. In the ordinary use of the English language, there is a dispute over payment if a party has refused to pay a sum claimed, or has denied that the sum claimed is owed.

Adjudicators regularly face a jurisdictional challenge on the grounds 'No dispute has crystallised'. To avoid incurring cost and time, referring parties should make sure that a dispute has crystallised and is suitable for adjudication. For a dispute to crystallise there must have been an opportunity for each of the parties to consider the position adopted by the other and to formulate reasoned arguments. If a claim is ignored a dispute can also crystallise. There does not have to be an express rejection of a claim, a dispute can arise through a period of silence. The period of silence before inferring there is a dispute depends heavily upon the specific circumstances. Adjudicators should not adopt an overly legalistic analysis of what the dispute between the parties is.

Jamie: The Act has facilitated the establishment of a panel of adjudicators. What is the typical professional background of an adjudicator and what do they typically charge?

Niall: Following a rigorous assessment process the Public Appointments Service recommended suitably qualified persons for selection to the Department of Jobs, Enterprise and Innovation's Panel of Adjudicators. The Panel comprises construction and legal professionals meeting the requirements set out in section 8 of the Construction Contracts Act.

Becoming a construction adjudicator requires a significant investment in education and training, which is expensive and time consuming. Skilled adjudicators continue such investments so that they are always kept abreast with developments and updates in the industry. The parties in adjudication should expect to pay an hourly rate commensurate with employing someone qualified to a senior level in their primary profession, and who has additional expertise and skills. Whereas there is some consistency as to the hourly charge of lawyer adjudicators, there is a wide diversity in the hourly charge rate of construction profession adjudicators. Some of whom take the view that as they operate at the same level and perform the same work as lawyer adjudicators, plus they utilise their sector-specific knowledge and expertise, the hourly charges should be similar or higher. Other construction profession adjudicators charge an hourly rate consistent with the lower rates for providing architectural, engineering or quantity surveying services.

Jamie: What are the most common grounds which you have come across for challenging an adjudicator's decision?

Niall: Jurisdiction is an adjudicator's authority to make a decision. The Notice of Intention confines the limits of the adjudicator's jurisdiction. If the adjudicator does not have jurisdiction, or acts in a way to lose jurisdiction, then a competent court will not enforce any purported adjudicator's decision.

In adjudication, it is common for the responding party to raise jurisdictional challenges, these will fall into two categories. The first are threshold jurisdictional challenges: for example a dispute has not crystallised, the adjudicator has not been properly appointed, or there has been a document or procedural misstep. The second are breach of natural justice jurisdictional challenges: for example the adjudicator has given one party unfair advantage, was biased, or used their own expert knowledge without allowing the parties to

make submissions.

To help maintain confidence and good order in the adjudication system, the adjudicator should investigate any challenge to their jurisdiction and arrive at a non-binding conclusion. To avoid incurring unnecessary expense, the best time to do that is as soon as possible. It is a regrettable feature of adjudication that the adjudicator and the parties spend a great deal of time and money dealing with jurisdiction.

Jamie: Under what circumstances would you hold an oral hearing in adjudication?

Niall: The adjudicator is empowered to decide the adjudication procedure. For example, the adjudicator can take the initiative in ascertaining the facts and the law necessary to reach a decision, make use of their own specialist knowledge, and decide whether it is necessary or helpful in their decision-making to meet jointly with the parties and their representatives.

Although most adjudication is on a documents only basis, there are times when the adjudicator or the parties want to have a meeting. Whereas the Construction Contracts Act uses the term 'oral hearing', in adjudication, I normally use the term 'meeting' rather than 'hearing'. In legal terminology, a 'hearing' is a legal proceeding where a disputed fact or issue of law is tried and evidence is presented to help determine an issue. The term 'meeting' connotes a less formal, less adversarial proceeding, with more relaxed standards of evidence and process.

Any meeting should have a specific purpose. A meeting can be helpful where the quality of submissions is inadequate; there is conflicting evidence from experts or witnesses of fact, to inspect site based physical evidence, or for other reasons. If both parties want to have a meeting, I will accommodate their request, even if the meeting costs will be large compared to the amount in dispute. If only one party wants to have a meeting, I will accommodate its request, only if the meeting will assist me in making my decision.

Jamie: In your experience, what is the single biggest mistake a referring party and a responding party can make in adjudication?

Niall: Before referring your dispute to adjudication, you must decide that it is the best course of action for you. Have you really reached the 'end of the road' with negotiation, early neutral evaluation and mediation? Have you learned anything during those alternative dispute resolution procedures that helps inform your decision whether to use adjudication, or what is the best time to do that? For example, when you commence adjudication, will the other party have a valid response that you owe them money, or will your referral to adjudication trigger the other party to commence adjudication against you? In addition, it makes little sense to invest energy and resources to prevail in adjudication, and then a court judgment to enforce the adjudicator's decision, if the other party will not have the money to pay you.

Before commencing adjudication, you should audit your adjudication risk. Risk audit is a process, which helps you make sensible commercial decisions. It highlights risks, their nature and scope, and allows you to determine how to prevent or reduce the risks. The biggest mistake that a referring party can make is not to undertake a formal audit of risk.

The response is the responding party's opportunity to refute all of the allegations that the referring party has made. It should rebut the factual and legal claims advanced; it should explain the basis for the rebuttal by clarifying what the facts are, and referring their effect to the contract and the law; it should set out full details of any cross-claims. However, in adjudication the responding party will usually only have seven to fourteen days to prepare its response to convince the adjudicator that there is a more plausible alternative story.

With good practice of construction management, much of the information required to prepare a response should be readily available. The information required will be the same information that you have relied upon to reject the referring party's claims, and therefore should be on file. The biggest mistake a responding party can make is not to contemporaneously document in detail with supporting evidence why it has not paid money claimed.

Jamie: In your experience, what are the biggest challenges that adjudicators face?

Niall: Acting as adjudicator is not for the faint hearted. It can be a brutal process with many snares and traps set along the way. It is in the nature of some claims consultants, lawyers and parties to bully and

routinely use intimidatory tactics in adjudication. Parties will use tactics such as making spurious challenges as to jurisdiction, deliberately seeking to confuse the adjudicator by the use of technical or esoteric legal arguments; threatening to take legal action against the adjudicator or to report him to his professional institution. They seek extensions of time alleging that the timetable is unfair and a breach of natural justice. They use bellicose language. They unreasonably refuse to pay the adjudicator's fees and expenses.

Jamie: How do you think contractual adjudication in Ireland will interact with statutory adjudication over time? Do you think that statutory adjudication will make the use of contractual adjudication (and independent nominating bodies) more common?

Niall: Adjudication provisions are becoming widespread in contracts and situations where there is no statutory entitlement. As an engineer I have acted as adjudicator in several non-statutory adjudications, for example, in a multi-million pound engineering and technology transfer dispute, and also in process engineering disputes.

For a more detailed discussion on the appointment of adjudicators by independent nominating bodies I would refer the reader to the CIC Users' Guide to Adjudication: Ireland published on 26 July 2017. The Users' Guide to Adjudication: Ireland is available for free download from CIC's website here.

Jamie: What are the main advantages and disadvantages of adjudication?

Niall: Arbitration and litigation are more expensive and time consuming than adjudication. Where adjudication enjoys the full backing of the courts, it expedites and facilitates the flow of money through the contractual chain. Adjudication is short lived and contemporary; if it takes place during the construction contract, it allows the parties to modify their conduct or performance early. Adjudication prevents small disputes becoming big disputes. Adjudication can be informal, and allows for self-representation. Experience shows that an adjudicator's decision is often the final solution, or that it provides the parties with the basis to negotiate an alternative final solution acceptable to them.

Jamie: There appears to be a reluctance amongst the construction industry in Ireland to embrace adjudication in the same way it has done in the UK. Why do you think that is?

Niall: In Ireland under the Construction Contracts Act, absent agreement between the parties, the adjudicator appointment will be made by the Chairperson of the Panel appointed by the Minister responsible. Based on anticipated adjudication referrals during the first five years the Minister's Panel was initially limited in size to some thirty members.

In Malaysia the Kuala Lumpur Regional Centre for Arbitration (KLRCA) is the default adjudicator appointment body. By way of contrast, the total number of adjudicators empanelled by the KLRCA has increased from 363 as at 15 April 2016 to 446 as at 15 of April 2017.

Ireland has a wealth of construction and engineering ADR talent, and I believe that there is a sense of disenfranchisement and exclusion from the opportunity to act as adjudicator. Adjudication can quickly and irrevocably upend the ADR landscape and status quo, and unfortunately this has contributed to many 'thought leaders' rejecting or being unwilling to promote adjudication as an effective dispute resolution mechanism. This is doing a great disservice to clients, contractors and sub-contractors. The irony of this rejection of promoting adjudication is that with few adjudication referrals in Ireland, there is little incentive for the size of the Minister's Panel of Adjudicators to increase.

Jamie: Do you think that adjudication has the potential to become the main method of resolving construction payment disputes in Ireland?

Niall: In 2012, when I went to Malaysia to undertake the training to be considered for the KLRCA panel of adjudicators provided for under the Construction Industry Payment and Adjudication Act (CIPAA), there was cynicism as to whether adjudication would be successful. Malaysian people said that culturally, adjudication was not acceptable, we prefer to mediate; adjudication will cause a loss of face, which is offensive and not tolerable; employers are vexatious, if I adjudicate it will be the last time I work for that organisation; adjudication is not suitable for complex disputes, because of tight timescale; adjudication is unsuitable for final account disputes; adjudication is uncertain and does not give a final resolution of the dispute; there will be problems with enforcement, even if I win, the other party will not pay.

Notwithstanding the above concerns (and although Malaysia is considerably bigger than Ireland) it is worthwhile noting that the CIPAA became law on 18 June 2012, and came into force on 15 April 2014. To 31 December 2014 – there were 29 adjudicator appointments; to 31 December 2015 – there were 199 adjudicator appointments; to 31 December 2016 – there were 461 adjudicator appointments; to 31 December 2017 – the KLRCA is forecasting 700 adjudicator appointments.

There is no cultural or structural impediment to the adoption of adjudication in the Republic of Ireland. Adjudication is widely used in Northern Ireland, albeit more aggressively than in Great Britain.

If you are interested in learning more about adjudication please do not hesitate to contact Jamie Ritchie at jritchie@lkshields.ie in the Projects and Construction team at LK Shields.

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