

A solution to rising adjudication costs

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When the Construction Act came into effect in the late 1990s, it introduced fast-track dispute resolution in the form of the statutory adjudication regime. Adjudication was intended as a quick, cheap way of resolving construction disputes and easing cashflow. The aim was to significantly reduce the reliance on lengthy and costly litigation or arbitration.

However, over the past two decades, adjudication has evolved to become potentially both time-consuming and costly for all concerned. The issue was highlighted by a recent Department for Business, Energy and Industrial Strategy investigation into the escalating costs of adjudication, which has developed into a formal process with parties typically serving several rounds of detailed submissions, witness statements and expert reports, often to extended timetables.

The report, *Post Implementation Review of the 2011 changes to the Housing Grants, Construction and Regeneration Act 1996*, came at a time when constructors – and smaller firms in particular – could ill-afford the additional costs: according to Office for National Statistics data, the UK construction industry lost more businesses to insolvency than any other industry last year.

Minimising the risk

As a result, companies are looking for ways to reduce the risks involved with adjudication. “Where cashflow and profit are ever-more dependent on the success of claims, construction businesses are seeking respite from the cost of conducting adjudications,” says Christopher Paterson, investment manager at Augusta Ventures.



“Third-party funding is one solution.”

The way it works is that funders, such as Augusta Ventures, pay for the costs associated with conducting an adjudication in return for a share of the proceeds if the adjudication is successful. “Crucially, the funding is non-recourse, so if the adjudication is unsuccessful, the funder is not repaid,” says Andrew Roberts, one of Mr Paterson’s fellow investment managers at Augusta. “This enables referring parties to shift the legal cost and risk of commencing an adjudication onto the funder, while retaining the financial benefits if successful.”

For larger construction companies with dedicated legal budgets, it is an option that mitigates risk and frees up capital for investment, according to Mr Paterson. Meanwhile, for smaller contractors and subcontractors that may not routinely set aside capital for formal disputes, third-party funding allows them to pursue adjudications that might not otherwise be feasible.

Of course, funders will not back every claim. Rather, they will take a view on the likelihood of success and only support claims in which they believe the claimant is in the right and is likely to win. Accordingly, says Mr Roberts, third-party funding provides

referring parties with an independent perspective on their claim.

This process can have the added advantage that a claimant in receipt of third-party funding may be taken more seriously by their opponent – quite simply, it is more likely that an opponent will settle, Mr Roberts adds. “A responding party’s knowledge that a leading funder is backing you adds credibility to your claim, and shows you are well-equipped and motivated to pursue the dispute through to a formal decision. These factors can help facilitate early settlement,” he says.

Portfolio funding

Third-party funding can also help when companies are having difficulties budgeting for multiple adjudications with uncertain outcomes, either on one project or across multiple schemes. According to Mr Paterson, the cost of adjudications can be especially prohibitive when they need to be pursued in quick succession, usually on the same project.

“In such circumstances, ‘portfolio’ funding can provide welcome financial relief and risk mitigation by bundling multiple adjudications into one facility,” he says. “This gives the business confidence that its

COMPANY PROFILE

Resolving disputes can be a burdensome process, but third-party funding offers a way to reduce the risk

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adjudications will be pursued, while eliminating the cost risk associated with them. A funder will typically accept a lower share of proceeds per claim when spread across a portfolio, making it a more attractive proposition for companies with several claims.”

In terms of costs, Mr Roberts says Augusta charges either a multiple of the amount invested or a percentage of the amount recovered from the other side, which is assessed on a case-by-case basis. He adds that Augusta has no lower or upper limit for funding, as long as the ratio between costs and damages is at least 1:6.

“For example, if the expected cost of conducting the adjudication is £100k, the expected quantum should be no less than £600k,” he says.

Mr Roberts also points out that the company understands that adjudications are often time-sensitive and acknowledges that approving funds does require thorough due diligence. “However, we have an experienced in-house team of construction lawyers who have acted on numerous adjudications,” he adds.

“As such, we can make decisions quickly if the necessary materials are provided.”

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