

International Construction Contract Law

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Lack of fairness during the adjudication process may be grounds for setting aside the adjudicator's decision by a court.

11.5.3 Some procedural aspects of statutory adjudication

Under the Scheme, adjudication may be initiated by serving a written notice of adjudication to the other party. The notice specifies the matters which the party seeks the adjudicator to decide. An adjudicator must be appointed within seven (7) days of the submission of the notice. The adjudicator may be named in the construction contract in question, the contract may specify a panel of adjudicators or an Adjudicator Nominating Body or, if the contract is silent on this issue, any Adjudicator Nominating Body may be approached. After an adjudicator has been appointed, a referral notice with information that the adjudicator ought to consider is sent to him or her and to the other party. Generally, a decision must be rendered within 28 days of the receipt of the referral notice by the adjudicator.

A party may challenge the adjudicator's jurisdiction, for instance, on the grounds of an alleged conflict of interest or that the underlying contract is not a construction contract within the meaning of the Act. While adjudicators generally (unless given such authority by the parties) lack the power to decide upon such jurisdictional challenges (i.e. they are left to the court), the adjudicators are advised to conduct an investigation into their jurisdiction and also in order to comply with their obligation to be, and appear, impartial.

In their decisions, adjudicators may issue an order to a party to pay money or may decide a fact or a matter of a technical nature that the parties failed to agree upon. The Scheme requires that reasons for the decision be provided to the parties if and where requested.

The adjudicator also decides which party pays the adjudicator's costs. However, under existing law, each party is responsible for bearing their own costs and the adjudicator lacks the power to award costs orders.

The party against whom the adjudicator's decision was given will either comply with the decision or the decision may be enforced in court (which, in most cases, will uphold it in a matter of days), unless a party succeeds with a jurisdictional challenge or attacks the adjudicator's decision on natural justice grounds, i.e., where the adjudicator had failed to act impartially or had not provided both parties with an opportunity to present their case. A party cannot appeal the adjudicator's decision but the matter may be heard as a new case, either in court or in arbitration proceedings.

Settling construction disputes in Hungary by Tamás Balázs (Hungary)

Two special Hungarian dispute resolution bodies need to be mentioned concerning the settlement of disputes in connection with construction contracts entered into on the basis of FIDIC terms and conditions of contracts. The power and procedures of these bodies to decide legal issues overshadow the triple hierarchy of FIDIC dispute resolution (Dispute Adjudication

Board – Amicable Settlement – Arbitration) in Hungary. Legislation enacted into force on 1 July 2013 (Act XXXIV of 2013 on the Expert Body for Performance Certification, hereinafter: the 'Act') set up the Expert Body for Performance Certification (EBPC) and regulated its functions and powers. The reason for enacting new legislation and establishing this body was in reaction to legal disputes having increased greatly in connection with the performance of construction contracts in recent years. Disputes were mainly between the employer and contractor and, to a lesser extent, between the contractor and their sub-contractors. Generally, these legal disputes took years to decide before a binding judgment was eventually handed down by the courts. The scope of the legislation covers all construction projects in Hungary. The Act states that contractual clauses that exclude or restrict the powers or procedures of the EBPC or which attach any negative, legal consequence to initiating EBPC procedures are null and void. Therefore, if the construction project is implemented in the territory of Hungary, we are faced with a mandatory provision of Hungarian law that cannot be bypassed even if choosing the law of another country. However, the EBPC does not have jurisdiction over all legal disputes in the construction sector. Its jurisdiction only applies:

- (a) to those cases in connection with the performance of construction contracts when no performance certificate is issued;
- (b) where the issuance of a performance certificate is disputed;
- (c) payment is not made despite being due; as well as
- (d) to those cases when the ancillary obligations to guarantee the contract (bank guarantee, lien, surety) and their enforcement are disputed by the parties.

It is to be emphasized that the *ex officio* procedure of the EBPC is not mandatory and can be initiated upon request of one of the parties. The Act grants priority and summary procedure to the parties involved in court litigation where they have attempted to use the EBPC. Presumably, this will motivate the parties concerned to avail themselves of the possibility granted by the new Act instead of opting for the much longer 'normal' court procedure. The EBPC comprises of independent court experts and must deliver its expert opinion in 30 days from the date of receipt of the application. The party that disagrees with the expert opinion can enter into litigation within 60 days from the date of its receipt and the court is obliged to handle all such cases with priority in a summary procedure. The amended *Code of Civil Procedure* provides a number of guarantee provisions and preferential treatment to the party which sustained injury according to the expert opinion (e.g. judicial protective measures and prior enforceability).

This procedure is particularly advantageous to the contractor if the employer disputes performance or certain aspects of performance stated in the contract. Provided that an EBPC review is allowed, the contractor will probably decide against using arbitration. The other special bodies created to decide legal disputes are the conciliation boards attached to the regional Chambers of Industry and Trade. This institution enforces consumer protection regulation in Hungary and its functions are accessible to the consumer. The definition of 'consumer' was broadened considerably as a consequence of an amendment to the *Consumer Protection Act* (2013) which came into effect in July 2013. The new definition covers not only natural persons acting to promote objectives outside the scope of their independent professions and activities but, among other things, micro, small and medium-sized enterprises in the European sense. The conciliation board can give a binding decision with regard to the enterprise which is subject to the

complaint but *only* if it made a statement of submission before the adoption of the decision. It is further possible – even in this case – for the entity subject to the complaint to start litigation (i.e. appeal) against the conciliation body's decision within 15 days of the decision. Where the terms and conditions of the FIDIC contract are used in Hungary, the contract must contain the rules for deciding legal disputes in accordance with the relevant contract templates. Failing that – and if the competent court and the applicable law are not specified – the registered office of the Hungarian company subject to litigation in Hungary or the site of the construction project in Hungary may lay the foundation for determining the jurisdiction of the Hungarian court (see also Chapter 20 of the 1999 FIDIC Red and Yellow Books). The functions of the EBPC overlap those of a Dispute Adjudication Board (DAB) under FIDIC if initiated by a party. Given the advantages of the EPBC mentioned above, the parties are likely to choose it over the DAB. The EPBC still remains somewhat of an 'unknown' in Hungary because Act XXXIV of 2013 providing for the rules of EBPC procedure only came into effect on 1 July 2013. It is important to note that Act XXXIV of 2013 states that contractual clauses that exclude or restrict the applicability of the procedure of EPBC are null and void.

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Statutory adjudication in Australia by Donald Charrett and Andrew Downie (Australia)

Cash flow is the lifeblood of the construction industry. The Australian construction industry includes many small organizations that rely on the cash flow from regular progress payments in order to pay their employees and creditors. Such companies are financially vulnerable to their employers withholding payment for any reason, whether valid or not.

The final report of the Cole Royal Commission into the Australian building and construction industry in 2003 (The Hon. T. R. H. Cole QC, *Final Report of the Royal Commission into the Building and Construction Industry*: Vol. 8 (2003), Appendix 1) made recommendations on 'one of the most significant and controversial issues impacting the success or failure of any party working in the construction industry'. The report highlighted the rationale for security of payment as follows:

Commission investigators were repeatedly told of the suffering and hardship caused to subcontractors by builders who are unable or unwilling to pay for work from which they have benefited. The subcontractors who experience payment problems are often small companies or partnerships. Frequently they do not have the expertise or resources to enforce their legal rights, because enforcement would require protracted litigation against much better resourced and more sophisticated companies.