

The Adjudicator

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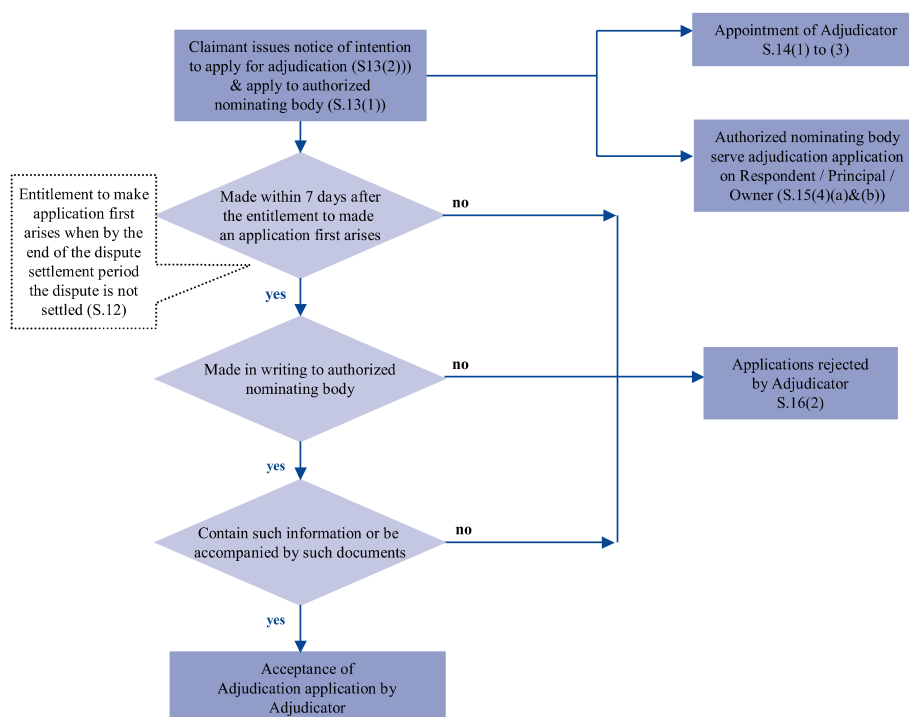
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SECURITY OF PAYMENT ACT: CRITICAL MEASURES IN ADJUDICATION

A lot have been written about the Security of Payment Act in recent months. Accordingly, the broad structures of the legislation should be reasonably well known. However, there are issues that can arise from the way the details are being structured. This will be the first of a series dealing with such issues. This newsletter focuses on the initial stage of the adjudication process that comes with the Act. There are a number of important measures that must be taken failing which some rights may be affected.

Basically, adjudication is a dispute resolution process by which a neutral person decides a claim made for payment under the Act. It is a creature of the Act and therefore operates only within the ambit of the Act. Other processes that most people are already familiar with are, of course, litigation and arbitration which still continue to exist. In fact, s. 34 of the Act specifically provides that nothing in the Act is to affect any right that a party may have to submit any dispute that he may have under his contract to "a court or tribunal or any other dispute resolution proceedings." The application for adjudication is made to an Authorised Nominating Body (ANB). The initial procedures that follow are set out in the chart below.



ADJUDICATION APPLICATION DEADLINE

As the above chart shows, there is a requirement in s. 13 that the adjudication application must be made within 7 days after the entitlement of the claimant to make such an application first arises under s. 12. Looking at s. 12, the claimant is so entitled if “by the end of the dispute resolution period, the dispute is not settled or the respondent does not provide the payment response.”

What if the claimant missed the deadline of 7 days specified under s. 13(3)(a)? By s. 16(2)(a), the adjudicator must reject any adjudication application that does not comply with s. 13(3)(a) and the deadline is clearly one of the requirements spelt out in s. 13(3)(a). Thus, it seems reasonably clear that an application lodged after the deadline will be met with rejection. Can the claim be included in the next Payment Claim and then re-submitted again in a subsequent adjudication application notwithstanding its earlier rejection because it was out of time? An argument can be made, relying on s. 10(4) that this can indeed be done. This section allows the claimant to include in a payment claim “an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid” as long as it is “served within 6 years after the construction work to which the amount in the other payment claim relates was last carried out.” The only prohibition against re-submission appears therefore to be (a) the claim amount must be unpaid and (b) it must not be barred by the limitation period of 6 years.

ADJUDICATION APPLICATION REQUIREMENTS

The other mandatory requirements are also spelt out in s. 13(3) as follows:

- (a) The application shall be made in writing and addressed to the ANB
- (b) The application shall identify the adjudication application to which it relates
- (c) The application shall contain such information or be accompanied by such documents as may be prescribed
- (d) The application shall be accompanied by the appropriate application fee determined by the ANB

What is not mandatory but useful would be for the application to contain or be accompanied by such other information or documents (including expert reports, photographs, correspondences and submissions): see s. 13(2)(e).

The adjudicator, by s. 16(2)(a) is obliged to reject any adjudication application that does not comply with s. 13 (a), (b) or (c). In other words, (a) to (c) above must be complied with. What is not clear is (d). Presumably, in practice something like that is not likely to happen as the fee would probably be collected upon lodgement.

ADJUDICATION NOTICE

Before the claimant makes his adjudication claim, s.13(2) requires him to give notice in writing of his intention to apply for adjudication of the payment claim dispute. Curiously, the s. 13(2) is not one of the provisions listed in s. 16(2)(a). Assuming that no notice was given, can the adjudicator reject the application? Although s. 13(2) expresses the requirement for a notice in mandatory terms, the adjudicator does not appear to be empowered to reject the application.

Readers with any questions or comments on the contents of this issue are welcome to write to us at

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