ARCANA
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Adjudicator Nominating Authority

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ARCANA User information regarding:

- **Applicability of the ARCANA Fees Schedule and Notes**
- **The raising of jurisdictional issues by the adjudicator of their own volition**

Applicability of the ARCANA Fees Schedule and Notes

The Alberta Prompt Payment and Adjudication Regulation 13(2) provides that:

> **Fee schedule for adjudication**
>
> **13(1)** A Nominating Authority shall set out and maintain a schedule of fees publicly available on its website, listing the fees, costs or other charges related to adjudication according to the policies and procedures established by the Nominating Authority.
> **(2)** The relevant parties shall pay the adjudicator who hears a dispute regarding an adjudication matter under section 19 a fee in accordance with the schedule of fees set out under subsection (1) unless the parties and the adjudicator agree to pay a different fee.

The question arises whether an adjudicator may enter into terms of engagement with a party or the parties which differ from the fee schedule specified by ARCANA, either in terms of the hourly rate, fee cap, or by charging as an expense to the parties the commission payable out of their fee by the adjudicator to ARCANA and/or to another Nominating Authority.

The ARCANA Fees Table provides that, in larger cases, the fees charged will be as agreed by the parties and the adjudicator, so in those cases this is uncontroversial.

The Notes to the Fees Table provide that, in all cases, the commission due to ARCANA by the adjudicator is taken as a commission <u>from</u> the adjudicator's fees. No provision is made under any circumstances for this to be levied as an additional charge to the parties.

No provision is made for any fee/commission due to another Nominating Authority to be charged.

The wording of Regulation 13(2) is clear - the adjudicator is obliged to proceed with the adjudication on the basis of the fees published by the Nominating Authority unless the parties agree to pay a different fee. To the extent that the commission is covered in the fees table and the Nominating Authority's policies referenced in subsection (1), any on-charging of this (or any other) commission to the parties would similarly need to be agreed to by the parties and the adjudicator under subsection (2).

The question is what amounts to agreement, and more specifically, either as a matter of law or as a matter of policy by the Nominating Authority, whether such agreement requires informed consent on the part of both parties.

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This question comes into focus at the point that an adjudicator presents the parties with a set of terms of engagement which differ from the fee schedule and policies of the Nominating Authority.

Subsection (2) makes it clear that parties are under no obligation to agree to any fee structure other than that set out by the Nominating Authority, and that, in the absence of agreement, the adjudicator is obliged to continue to deal with the adjudication and charge only what is allowed by the Nominating Authority's fee schedule.

What then is the situation when one or both of the parties simply accept the adjudicator's terms of engagement without challenge, but without realising that they were, by law, perfectly entitled not to accept them and to insist that the adjudicator continue in accordance with the fee schedule laid down by the Nominating Authority?

It would seem that, under these circumstances, the party/ies would have consented to proceed on that basis under the mistaken belief that they did not have the rights provided by the Regulation. In these circumstances, the contract would appear to be voidable by mistake.

If, of course, the adjudicator in any way suggested or implied to the party/ies that they were obliged to accept the terms of engagement, or that the adjudicator's dealing with the matter required them to, then this would amount to misrepresentation.

ARCANA is a statutory Nominating Authority with an obligation to operate in the public interest. It follows that where it has a choice between setting a policy which facilitates openness and transparency and one which does not, it will choose the former.

ARCANA's stated policy is that an adjudicator is entitled to propose terms of engagement to the parties which differ from the published fee schedule and policies of the Nominating Authority, but that their becoming operative will require the explicit and informed consent of both parties, in the sense that they understand their entitlements provided by Regulation 13 and have both agreed to deviate from them.

Adjudicators' terms of engagement must make it clear that parties are not required to agree to fees, cost or policies different to those published by the Nominating Authority, and that their acceptance of the terms of engagement is not a precondition for the adjudicator to continue with the adjudication process.

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The raising of jurisdictional issues by the adjudicator of their own volition

A second issue is whether an adjudicator can of their own volition deliver a decision relating to their jurisdiction without having taken submissions on at this point from the parties.

Circumstances may arise where one or both parties may make submissions on the merits of the dispute without realising that the time period for submitting the Notice of Adjudication had expired, or even that such time periods existed. Would it be appropriate, without raising this point with the parties and inviting them to make submissions on it, an adjudicator were to proceed to write and charge for writing a decision concluding that they do not have jurisdiction to deal with the matter? Under such circumstances parties may argue that had they been told this, they would never have proceeded with the adjudication and incurred costs.

The Alberta Prompt Payment and Construction Lien Act provides that:

> **Adjudication of dispute**
> **33.4**
> **…**
> **(2)** An adjudication may not be commenced if the notice of adjudication is given more than 30 days after the date of final payment under the contract or subcontract, unless the parties to the adjudication agree otherwise.

This is mirrored in the Regulation:

> **Adjudication matters**
> 19 A party to a contract or subcontract may refer to adjudication a dispute with the other party to the contract or subcontract, as the case may be, respecting any of the following matters:
> …
> (e) any other matter in relation to the contract or subcontract, as the case may be, that the parties in dispute agree to, regardless of whether or not a proper invoice was issued or the claim is lienable.

ARCANA understands these provisions to mean that the parties can agree to have the merits of the dispute determined by adjudication even if the notice is out of time. If they do not agree, the matter is non-adjudicable, and the parties need to go to court/arbitration.

But the critical distinction is that what the legislature intended here was to provide the parties with a mechanism to have the merits of their dispute dealt with by the cheaper avenue of adjudication, even though the notices were out of time, rather than being forced to the expense of a court case. What they are <u>not</u> agreeing to is a situation in which the merits of the case are never going to be considered by the adjudicator at all, because the adjudicator subsequently delivers a decision, without alerting the parties to the possibility, which says they do not have jurisdiction to deal with them.

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Adjudicators are perfectly entitled to charge for the time that they have reasonably spent in dealing with a matter, and in these cases, for the time taken in looking at the papers submitted to conclude that the notice is out of time and that the matter is therefore non-adjudicable. But the adjudicator should not proceed further without having invited the parties to make submissions to them on this point. If on receiving that invitation, the parties realise that moving forward is pointless without the other party's agreement, then they must be entitled to withdraw without incurring the additional expense of a written decision which does not advance the resolution of the matter any further.

ARCANA's policy on this issue is set out below.

This section also raises a second point: whether where parties have remained silent on the question of jurisdiction, and the adjudicator is aware of circumstances, such as the late filing of the notice, which would mean that the matter is not adjudicable, can the adjudicator rely on their silence to then proceed to give a decision on the merits without alerting the parties to the possibility that no jurisdiction exists.

English authorities are reasonably clear:

Coulson on Construction Adjudication Peter Coulson, Oxford: Oxford University Press, 3rd Edition at 446:

> "Should the adjudicator consider, of his own volition, and regardless of the points that may or may not been made by the parties, whether or not he has the necessary jurisdiction? It is thought that he should. If the adjudicator does not have the necessary jurisdiction, then, prima facie, his decision is a nullity, regardless of the lack of an objection at the time…. It is much wiser for the adjudicator to address himself to the question of jurisdiction at the outset of the adjudication…".

In *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC), the alleged absence of jurisdiction arose from whether there was already a binding decision on the point by another adjudicator. The TCC held per Ramsey J at paragraph 38 (3) that:

> As a matter of practice, an adjudicator should consider (based either on an objection raised by one of the parties or on his own volition) whether he is being asked to decide a matter on which there is already a binding decision by another Adjudicator. If so he should decline to decide that matter or, if that is the only matter which he is asked to decide, he should resign.

This principle is also reflected in the RICS & CIArb Professional Guidance for adjudicators as follows:

- Paragraph 3.1.5.3 of the RICS Professional Statement, *Surveyors Acting as Adjudicators*, states

  > …In the main, it is for the parties to raise jurisdictional issues. However, if the adjudicator identifies an obvious issue which goes to threshold jurisdiction, it is recommended that they ask the parties for their views about the issue and how they wish to proceed…

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- The CIArb/Adjudication Society Guidance Note on Jurisdiction states at paragraph 2.1:

  …The very first question an adjudicator should ask himself, when deciding whether to accept an appointment, is "Do I have jurisdiction?" In other words, can the adjudication process be set in train at all? Whilst, an in-depth analysis is not necessarily required at this stage, an initial and proportional review to flag any issues should be undertaken…

It is also interesting to note that in their leading textbook, Adjudicating Construction and Engineering Disputes, 2024 LPP, Matthew Malloy and Jonathan Cope conclude at page 63 that in the United Kingdom it is clear that the courts consider that the adjudicator is under an obligation to satisfy themselves that they have jurisdiction, either as a result of a challenge or of their own volition. They conclude that it would be appropriate for the adjudicator to ask the parties to confirm why, and or whether, they are content that the adjudication should proceed. The basis for their reasoning is that if the adjudicator had a genuine concern about the validity of their appointment such that they did not feel they could proceed with a clear conscience, they should invite comment to avoid any criticism at a later date.

There is also the issue, of what exact wording the adjudicator should use. The logical pushback is that if both parties are entirely unaware of there being a time difficulty, simply asking them whether they are content with the adjudication proceeding on the merits invites the answer: "Yes, we have already told you – get on with it."

ARCANA's view is that where the parties are required to agree under section 33.4(2), that agreement needs to be underpinned by informed consent, and this consent can only be informed if the parties genuinely understand what they are agreeing to do viz., to proceed on the merits even though the matter is in fact not adjudicable because of the absence of jurisdiction.

The English Court of Appeal has, in *Steve Ward Services (UK) Ltd v Davies & Davies Associates Limited* EWCA Civ [2022] 153, in addition, approached this from a different angle, viz., given that an adjudicator's function is to provide an enforceable decision, where they knowingly produce a decision which is not enforceable, they are not entitled to be paid for doing so.

In giving judgement, Coulson LJ relied on the leading case of *PC Harrington Contractors Ltd v Systech International Ltd* [2012] EWCA Civ 1371; [2013] BUSLR 970; [2013] BLR 1. On the facts of that case, the adjudicator awarded sums to the claimant, but he failed to deal with the principal element of the respondent's defence, which was that they had already overpaid the claimant on their final account. As a result of this breach of natural justice, the adjudicator's decision was not enforced. His claim for fees was disputed.

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In paragraph 73 The Court of Appeal cited the decision of Dyson LJ (as he then was) to the effect that:

> 33. … If the adjudicator's appointment is revoked due to his default or misconduct, he is not entitled to any fees. It can hardly be disputed that the making of a decision which is unenforceable by reason of a breach of the rules of natural justice is a "default" or "misconduct" on the part of the adjudicator. It is a serious failure to conduct the adjudication in a lawful manner. If during the course of an adjudication, the adjudicator indicates that he intends to act in breach of natural justice (for example, by making it clear that he intends to make a decision without considering an important defence), the parties can agree to revoke his appointment. In that event, the adjudicator is not entitled to any remuneration.

This decision is argument by analogy that where without clear consent from the parties that they should do so, the adjudicator elects not to consider the defence that the entire matter is non-adjudicable, and thus proceeds to deliver what is an unenforceable decision because of their lack of jurisdiction, they would not be entitled to payment.

It is possible that this decision could be distinguished from the present circumstances, and that the Canadian courts might take a different line on this point, but the decision does nonetheless hold a cautionary tale for roster adjudicators who elect to proceed with a great deal of work, running up considerable fees, where it is not clear that the parties have in fact consented knowingly to the matter being decided on the merits .

There are also some ethical and practical points that concern ARCANA.

If the adjudicator ignores their concerns about notice periods, says nothing to parties who have not appreciated the problem, and continues to deal with the matter on the merits, is this ethical? Stated differently, if the adjudicator, in the absence of the parties making a conscious decision to agree to have the dispute determined by adjudication even if strictly non-adjudicable, continues to consider a matter which they suspect is by law non-adjudicable, are they acting honestly? It raises the question whether they should put the parties to the costs of what may be an invalid procedure without having alerted them to the fact and given them an opportunity to address the adjudicator on it, and then to agree or not agree to proceed nonetheless.

And what is the situation when the losing party engages counsel and raises the absence of jurisdiction in judicial review proceedings? Will a court not ask what the adjudicator thought they were doing proceeding with a matter when they harboured doubts as to whether the law allowed them to do so … without alerting the parties or giving them an opportunity to address the adjudicator on it, or to make an informed agreement under section 33.4(2)?

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ARCANA also raised with the authors that they express the view on page 69 of their book that where the parties are silent about whether the adjudicator should proceed to dealing with the matter on the merits, then the adjudicator's decision to proceed should depend on the experience or status of the parties and or their representatives - so that where the parties are large firms represented by lawyers, it would be reasonable for the adjudicator to assume that the lawyers are aware of the lack of jurisdiction and for the adjudicator to proceed anyway. Jonathan Cope replied that whilst this may be arguable as a point of law, given the authorities above; as matter of chosen policy by ARCANA, he would "probably err on the side of caution and not draw a distinction between parties who are represented and those who aren't when it comes to raising jurisdictional issues."

Which brings us back to our starting point: ARCANA believes that in the interests of transparency and openness, a Nominating Authority, should be cautious not to lay itself open to criticism. Adjudication is an inquisitorial mechanism where an adjudicator is free to raise issues with parties so long as *audi alteram partem* is applied. The matter is either adjudicable or it isn't. We are unable to see good cause why either party would be disadvantaged by having this cleared up at the outset. They can always agree to have the matter dealt with by adjudication notwithstanding the non-compliance with the notice periods. And if they don't, the parties are no worse off than they would have been otherwise, as the matter is non-adjudicable anyway.

ARCANA's stated policy on these matters is that in all cases, whether the parties are represented or not, before proceeding to deal with either their jurisdiction, or with the merits where they are concerned that they may not have jurisdiction, the adjudicator should invite the parties to make submissions to them on the point; or to consent to proceed on the merits notwithstanding the lack of jurisdiction; or to withdraw.