

# What is adjudication? Is adjudication cost always irrecoverable? Under what circumstances can it be recovered? A recent Court case: *The Board of Trustee of National Museums and Galleries on Merseyside v AEW Architects and Designers, Ltd. and PIHL Galliford Try JV [2013] EWHC 2403 TCC*



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## 摘要

甚麼是“裁決”（“判決”）(Adjudication)？裁決的費用又可否拿回？若是可以，在甚麼情況下可拿回？筆者會和大家分享以上問題和一個近期的有關案例。

## What is adjudication?

Adjudication, pursuant to "*Arbitration in Hong Kong – A Practical Guide, 2011*," involves an independent and impartial third party (an "adjudicator") making a binding decision on a disputed matter for the disputing parties. This is an inquisitorial, but not adversarial, process that saves time. Usually, the adjudicator has relevant experience in the matter being disputed and is selected jointly by the parties as an expert, but not necessarily as an arbitrator. Costs are usually shared equally by both parties. The adjudicator's decision is usually compulsory, binding, and implemented immediately after it occurs, though it is subject to review by an arbitrator or the courts.

According to "Wikipedia", adjudication is a legal process in which an arbiter or judge reviews evidence and arguments, including legal reasoning, set forth by the opposing parties or litigants to come to a decision that determines the rights and obligations of each party. In the UK, adjudication has become a common practice in recent decades and has replaced arbitration in some cases. The relevant legislation in the UK is the 1996 Housing, Construction and Regeneration Act (1996, Chapter 53). In Hong Kong, adjudication is a hot topic and many leading practitioners have discussed it recently. All agree that legislation is an important step for adjudication to gain in popularity here.



## Adjudication costs

As for the relevant costs and expenses of adjudication, this is generally and equally shared by the parties, but it is not mandatory. The relevant Conditions of Contract may make it clear who is liable for such costs. For instance, in *Bridgeway Construction, Ltd. v Tolent Construction, Ltd. [2000] TCC*, the subcontract between Bridgeway and Tolent incorporated the CIC Model Adjudication Procedure, but with amendments. Two amendments were relevant to the issue of costs. A new Clause 28 stated:

*The party serving the Notice to Adjudicate shall bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and expert fees.*

A new Clause 29 stated:

*The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses.*

As a result, it is clearly stipulated under the relevant contract that the party that serves the adjudication notice shall be liable for those related costs and expenses in adjudication, including, but not limited to, the adjudicator's fees.

If the contract keeps silent on the matter of each party's costs and the adjudicator's fees., the Housing Grants Construction and Regeneration Act has also been silent on such subject matter. The Act, however, states that the adjudicator is entitled to receive reasonable fees. The Act also makes each party jointly and individually liable for the adjudicator's fees and the wording used implies that payments may be made before the issues are determined.

Paragraph I.25 of the Act states:

*The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.*

However, there is seldom a contract or statute that dictates that one must have guidance before deciding if the cost of adjudication is recoverable. The following case provides a clue to this question.

### The case

***The Board of Trustee of National Museums and Galleries on Merseyside v AEW Architects and Designers, Ltd. and PIHL Galliford Try JV [2013] EWHC 2403 TCC***

### Facts

1. The AEW Architects and Designers, Ltd. ("AEW") was the designer of the Museum of Liverpool for the client – the Board of Trustees of National Museum and Galleries on Merseyside ("Client").
2. PIHL Galliford Try JV ("Contractor") was the main contractor for the development.
3. The case concerned allegations of professional negligence relating to AEW on design.
4. A series of design changes were encountered followed by significant remedial works.
5. AEW joined the Contractor in the proceedings, mindful that the Contractor had committed contributory negligence (pursuant to the 1978 Liability [Contribution] Act) for failing in certain aspects of its design, materials, and workmanship, which all overlapped with AEW's duties.

6. AEW made a very late admission of liability right before the trial.
7. The Client, AEW, and the Contractor all called factual witnesses to support their respective cases, but AEW decided during the trial to not call its factual witness anymore and withdrew its statements.

### Held

1. AEW was ruled in breach of contract and negligent in failing to properly design the project works, as well as violating its coordination and inspection obligations.
2. The Contractor was required to bear 25% of the common damages.
3. The Claimant (the Client) was entitled to recover its adjudication costs against the Contractor, which had already paid them.

### Comments

In this case, Mr Justice Akenhead gave a landmark ruling on recovering adjudication costs based on a decision that:

*"Adjudication is a fact of life now in construction contracts (note: in UK)... it was within the bounds of reasonable foreseeability that there could be adjudication in circumstances such as arose here. There was a sufficient causative link between the defaults of AEW and this adjudication."*

That is to say, in case a sufficient causative link can be found between the party's default and negligence and any subsequent adjudication, all the related costs and expenses in adjudication could be recovered by the other party.

Another key point was drawn from this case – it is vital and important for an expert to understand and analyse the case and the issues behind it. The judge found that AEW's expert was not instructed to consider the most obvious question and the expert declared that he would defend the indefensible (AEW's default) under cross-examination. Finally, the judge concluded that AEW's expert was the one whom he never found to be aware of his duties, given his statement. As a result, the judge disregarded all of the testimony by AEW's expert, calling it "wholly unconvincing" on all the aspects of liability. ■