

ICE Legal Notes Series

- Guidance for Users of Adjudication

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Acknowledgments

Author: Alan Wilson

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Guidance for Users of Adjudication

1 Introduction

- 1.0 Please note that the Guidance is not intended to be comprehensive and should not be treated as a substitute for professional advice. It is not intended as a complete statement of the law which depends on the particular circumstances and it should not be relied upon as legal advice.
- 1.1 The Housing Grants, Construction and Regeneration Act 1996 (the 'Act') as amended from time to time entitles a party to a 'Construction Contract' as defined in the Act to have a dispute resolved by adjudication.
- 1.2 This Guide specifically relates to adjudications conducted under the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended from time to time ('Scheme'), although the general principles will apply to all adjudications.
- 1.3 Parties may use adjudication with or without legal or other representation. This Guidance is intended to provide an overview of some of the issues to be considered by users and explain the role of the Institution of Civil Engineers ('ICE').
- 1.4 The ICE maintains a List of Adjudicators available to undertake adjudication. All are experienced construction professionals who are qualified by training and experience to gain entry to the List of Adjudicators. They are required to undertake continuing professional development and are regularly monitored to ensure they conform to the standards set by the ICE.

2 The Act and Scheme

- 2.0 The Act provides that a Construction Contract must include certain minimum provisions for adjudication. If it does not comply with all of the eight compliance requirements, the contract is read to include the adjudication provisions set out in the Scheme.
- 2.1 Most standard form contracts are written to comply with the Act, although they may have provisions that are different from the Scheme. Many bespoke contracts do not comply in one way or another and so the Scheme applies. It is important to read the contract carefully to establish what adjudication provisions apply.

3 Construction Contract

- 3.0 A Construction Contract is a contract to provide almost any service required for construction activities, including labour only contracts and contracts with architects, designers, engineers and surveyors. The main exclusions are

3.0.1 *Supply only contracts*

3.0.2 *Work on process plant* on a site where the primary activity is nuclear processing, power generation, water treatment, handling chemicals, pharmaceuticals, oil, gas, steel or food and drink.

3.0.3 *Extracting natural gas, oil and minerals*

3.0.4 *Purely artistic work*

4 Dispute

4.0 The Act confines disputes to matters arising 'under the contract'. It cannot deal with matters such as negligence or nuisance that is not also a breach of contract.

4.1 A dispute is not defined in the Act but case law establishes a common sense approach

4.1.1 A dispute should be given its normal meaning with no rigid legal rules

4.1.2 A claim is not a dispute until it brought to the attention of the other party and it rejects it, or does not admit it and a sufficient time has elapsed; and

4.1.3 Time has to be allowed for a third party such as an Engineer or Architect to issue a certificate, if the contract provides for one.

4.2 The Act allows for an adjudication to deal only with one dispute. What comprises one dispute is explained in case law in fairly broad terms. It might, for instance, include the valuation of an entire Interim Certificate or the time and monetary consequences of a particular disruptive event. It cannot include a series of unconnected matters.

5 Procedure

5.0 The Procedure depends on the particular procedural rules in the contract ("Procedural Rules") or the Scheme if that applies. After the Adjudicator is appointed, he has a duty and necessary powers to direct the procedure that best suits the fair, economical and timely resolution of the dispute.

5.1 The main steps are similar under most Procedural Rules and are briefly as follows.

6 Notice of Adjudication

6.0 The Notice of Adjudication is a key document as it determines the scope of the adjudication. It usually comprises a letter from the claiming party to the other including

6.0.1 Details of the parties including their proper (usually company) names, addresses and contact details

6.0.2 Details of the contract ideally stating the title of the works, date and terms, such as NEC3 Engineering and Construction Contract Option B: Priced contract with bill of quantities (June 2005) or 'Anyco Standard Subcontract Conditions'

6.0.3 A brief description of the dispute

6.0.4 A statement of the redress claimed whether a sum of money or a declaration as to the extension of time.

7 Appointment of the Adjudicator

7.0 There are several ways to appoint an adjudicator. In each case, the object is to make an appointment and 'Refer' the dispute within 7 days of the Notice of Adjudication.

7.0.1 The parties can agree an adjudicator chosen from a list. For this reason the ICE publishes its list online with a selection facility to identify an adjudicator with the right specialism and location, if that is thought desirable.

7.0.2 Some contracts include a named adjudicator or several from which a choice must be made.

7.0.3 If there is no named adjudicator or if the parties cannot agree, the claiming party must apply to an Adjudicator Nominating Body ('ANB') for a nomination. Some contracts specify the ANB, in which case that ANB must be used. If not, the claiming party can apply to any ANB. There is usually an application form to accompany a copy of the Notice of Adjudication and the appointment fee.

7.1 The adjudicator will usually provide his terms when accepting an appointment. He is entitled to reasonable fees and expenses. The terms of appointment vary but parties should be alert to any which place greater obligations upon them than that provided by the Procedural Rules. The ICE publishes online standard terms of appointment intended to provide a fair balance between the parties and the adjudicator.

7.2 Once the ANB has appointed an adjudicator, the ANB has no responsibility for the conduct of the adjudication. The ICE has an independent complaints procedure and will investigate any failure of its appointed adjudicators. However, no ANB can challenge the decision which will always be a matter for the courts.

8 Referral

8.0 The claiming party must refer ('Referral') the dispute to the appointed adjudicator. This must be completed within 7 days of the Notice of Adjudication.

- 8.1 The Referral comprises a statement of the case by the claiming party together with copies of the documents upon which it relies. The statement should include such information as
- 8.1.1 Details of the contract
 - 8.1.2 A narrative of the events leading up to the dispute
 - 8.1.3 A list of the matters in dispute
 - 8.1.4 An explanation of the claim, the facts, contractual terms, evidence and law upon which it relies
 - 8.1.5 The calculation of any monetary claim and a list of the redress sought.
- 8.2 It is helpful to the adjudicator and may save costs if the claiming party briefly explains the position taken by the other party and reasons why the claiming party says it is wrong.
- 8.3 The Referral and all other correspondence to the adjudicator must be sent at the same time and by the same means to the other party.

9 Timetable

- 9.0 The adjudicator will provide directions to the parties during the adjudication. He will probably issue his first directions when he receives the Referral and can assess what is required.
- 9.1 It is important that the directions are followed as the adjudicator may proceed without a submission that is not made when requested, may draw inferences from that failure and may make a Decision using only the information provided.
- 9.2 The Act requires the adjudicator to issue his decision within 28 days of the Referral. He may extend this time by 14 days with the agreement of the claiming party only or longer by agreement of both parties.
- 9.3 The first directions will require the party not making the claim to provide a response ('Response') usually within a period of 7 to 14 days after the Referral.
- 9.4 After receiving the Response, the adjudicator may agree to the parties each making a further submission. However, the time available is limited as the adjudicator will probably require 7 to 14 days to make his decision. He may, therefore, limit the time for these further submissions to a few days. He may also restrict the content of the submissions to answering new material provided by the other party; and may limit the number of pages that may be submitted.

10 Meeting

- 10.0 If the adjudicator considers it appropriate, he may call a meeting. It is not essential and adjudications are often successfully completed on documents only. However, it may help the adjudicator to understand the parties' cases and give him the opportunity to speak to any witnesses.

- 10.1 The meeting is usually at a location agreed by the parties to make transport as convenient as possible. The venue is usually organised by the claiming party but the cost may be taken as part of the adjudicator's expenses.
- 10.2 The parties may be represented in the meeting by any person they wish. The adjudicator may restrict how many people attend the meeting which should be limited to those who have a contribution to make. He will usually provide an agenda and state how long the meeting should last.

11 External Advice

- 11.0 Most Procedural Rules permit the adjudicator to take external legal or technical advice, usually with the agreement of or having given notice to the parties. In most cases, with an experienced adjudicator, this should be unnecessary. The adjudicator will have in mind his duty to decide the dispute in an economical manner.
- 11.1 The adjudicator must provide the external advice to the parties to comment upon.

12 Jurisdiction

- 12.0 Occasionally parties challenge the jurisdiction of the adjudicator either in whole or part. This may be genuine or can be seen as a tactic to unfairly stop an adjudication or unsettle the adjudicator. The arguments are usually based on the considerable case law that has built up on the subject and are outside the scope of these notes.
- 12.1 Unless the Procedural Rules provide, the adjudicator does not have jurisdiction to decide whether he has jurisdiction to continue. He is under a duty to continue unless he reaches the conclusion that he does not have jurisdiction.
- 12.2 Most adjudicators will ask both parties of their views and provide brief reasons why he should or should not continue. If he continues and it is later found that he does not have jurisdiction, the party asking him to continue, usually the claiming party, will be responsible for paying his fees and expenses.

13 Decision

- 13.0 The decision must be issued within the time allowed by the Procedural Rules; usually 28 days as may be extended by agreement.
- 13.1 The decision usually includes reasons. If the Procedural Rules do not provide for reasons the parties may ask for them before the decision is written. Adjudicators are unlikely to refuse to provide reasons. Some say reasons increase the cost but they enable the parties to understand the decision; and the adjudicator will have to provide his own draft reasons to arrive at the decision, so most of the work has been done, in any event.

14 Costs, Fees and Expenses

14.0 Costs are the costs incurred by the parties; for instance legal representation, experts, travel and copying. These are borne by the party incurring the cost unless the parties have agreed otherwise. Terms in contracts providing such an agreement are now considered to be unenforceable.

14.1 Fees and expenses are the remuneration of and costs incurred by the adjudicator. As noted above, this may include such things as room hire or the cost of external advice. The decision will state the amount of the fees and expenses and who is liable to pay. This usually means that the losing party will pay. Sometime, the fees and expenses are apportioned if the adjudicator considers this is just. If the decision does not say otherwise, the parties are liable in equal shares.

14.2 Whichever party is held to be liable by the decision, the parties remain subject to joint and several liability. This means that if the party held liable fails to pay, the adjudicator can oblige the other party to pay him. It will then have to recover the sum from the party held liable.

15 Enforcement

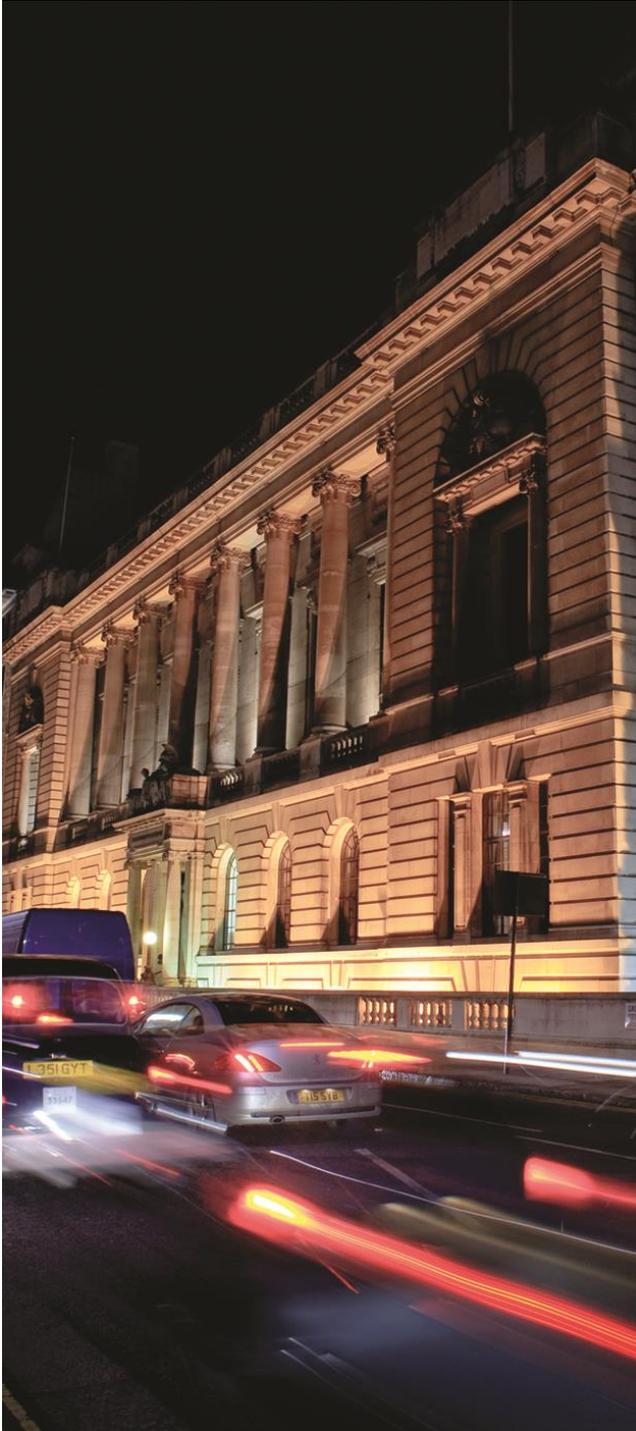
15.0 The decision will say what is to be done by the parties and when. If a party does not comply, the courts have special procedures in place to enforce an adjudicator's decision without unnecessary cost. Specialist advice should be sought if this becomes necessary.

References

For further information on adjudication, visit the ICE website at www.ice.org.uk or contact

Dispute Resolution Service
The Institution of Civil Engineers
One Great George Street
London SW1P 3AA
Tel: 020 7222 7722

Online selection of Adjudicators	www.ice.org.uk/disputeresolution
Application for the Nomination of an Adjudicator	www.ice.org.uk/disputeresolution
ICE Adjudication Procedure	www.ice.org.uk/disputeresolution
ICE Adjudicator's Agreement	www.ice.org.uk/disputeresolution



Institution of Civil Engineers
One Great George Street
Westminster
London SW1P 3AA
t +44 (0)20 7222 7722
f +44 (0)20 7222 7500
ice.org.uk

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