

Adjudication



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A guide for the referring party:

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Introduction

Adjudication is a mandatory procedure for determining disputes, which was introduced in the construction industry by the Housing Grants, Construction & Regeneration Act 1996 (the "Construction Act"). As the Adjudicator should reach his decision within 28 days of the Referral to him, it is a very speedy process, and one that, today, is used in the vast majority of construction disputes.

Can I Adjudicate?

You have a right to adjudicate if you have a dispute arising under a "construction contract", whether in writing, partially in writing or oral. A construction contract is not limited to the building contract. It includes any contract which provides or arranges for the carrying out of most construction related operations. Examples include not only the construction of, but also the maintenance and repair of buildings, including architectural, engineering, design or surveying work and professional advice. It also includes demolition activities.

Where does the right come from?

Primarily, it is a right provided to you by statute. However, it is acknowledged that parties are free to agree and provide for their own adjudication procedure and so your contract may contain an express provision entitling you to adjudicate. If it does not, and you are a party to a construction contract, your right will be implied into the contract, as a result of the statute.

Are there any exceptions?

Unless the contract otherwise provides, the statute will not give you an implied right to adjudicate if the construction contract is with a residential occupier and relates to a property which that person will occupy as his home.

Anything else?

Again, unless the contract otherwise provides, you will not be able to adjudicate if the contract is really a development agreement. A development agreement provides for the grant or disposal of an interest in land as well as the carrying out of construction operations on that land. The same applies to certain contracts entered into under the private finance initiative.

There are also a number of other specific exclusions, including the assembly, installation or demolition of plant or machinery where the principal activity on the site is power generation or the production of chemicals or

pharmaceuticals; and drilling for oil and gas and extraction of minerals. The manufacture and delivery to site of engineering components is included only if the contract also provides for their installation.

Can the other party refuse?

No, not if all the relevant pre-conditions are met. It is your right.

How do I start the process?

To begin with, you need a "dispute". That is not always as easy as it sounds. The dispute must have crystallised: the process of discussion or negotiation must have ended without a solution being found and, most likely, monies claimed not being paid. A dispute is not the same thing as having a claim. Merely notifying the other party of a claim does not instantly mean there is a dispute. In those circumstances, the dispute will not emerge until it is apparent that the claim is not admitted. Whether there is a dispute will depend on the facts in your particular case.

OK, I have my dispute. What do I do next?

You must look at the contract to see whether the adjudication process is expressly set out or whether any particular set of rules are stated to apply. If there are no specific rules, or the process does not comply with the basic requirements laid out in the Construction Act, then the adjudication procedure in the Scheme for Construction Contracts Regulations will apply.

How do I start the Adjudication?

Given the speed of the process, tactics are clearly important in the adjudication procedure. The referring party has time to prepare his case and should only kick the process off once he is ready. While, for the reasons set out below, the referring party should not seek to ambush his opponent, he will be fully aware that the responding



party will only have a limited time in which to respond.

As the referring party, you need to prepare a Notice of Intention. This Notice can be given "at any time", including after the contract works have been completed, and even if the contract has been determined. It is important that the Notice sets out a brief description of all the relevant matters which you want the Adjudicator to decide. It is this document which gives the Adjudicator jurisdiction and defines the scope of the adjudication. You will not be able to include anything later in the adjudication which is not referred to in this document.

How do I appoint an Adjudicator?

The contract may actually name the individual to be appointed as the Adjudicator. Alternatively, the contract may state that one of a number of so called appointing bodies shall appoint the Adjudicator. Alternatively, you may be able to agree the identity of the Adjudicator with the other party. While this means you know what (or who) you are getting, it also gives the other party advance notice of the adjudication.

The Referral

Within 7 days of giving the Notice of Intention, you should have the Adjudicator appointed and have referred the dispute to him. To do this, you will need to serve your Referral. There are no rules which govern the form or content of this document. However, it will need to contain all your evidence in respect of the dispute. In addition to a full Statement of Case, depending on the nature of the case, it may also contain a copy of the contract, contemporaneous correspondence and other documents, witness statements and expert reports (if necessary).

The Procedure

After the Adjudicator has been appointed and you have served your Referral, you are pretty much in the hands of the Adjudicator. There is no prescribed

procedure: the Adjudicator will decide the relevant procedure and give directions accordingly. Whether the adjudication is under the contract or the Scheme, it must enable the Adjudicator to take the initiative in ascertaining the facts and the law. In practice the parties adopt a fairly standard procedure. The Adjudicator will inevitably want to see what the other party, the Responding Party, has to say in response to your claim and it will set this out in a document aptly named the "Response". You may or may not be able to persuade the Adjudicator to accept a Reply. Even if he does not, you may wish to send him one in any event. He may still have to take it into account when reaching his decision.

The Adjudicator may or may not want to hold a meeting to ask the witnesses or experts questions. It is very much up to him. Any hearing is likely to be far more informal than giving evidence in Court.

Are there any rules which the Adjudicator must observe?

Yes. In addition to any specific rules governing the adjudication, the Adjudicator must observe certain rules relating to natural justice. This basically allows you an opportunity to state your case and comment on anything the other side says, and vice versa. However, while the rules of natural justice must be adhered to, time is short and the adjudication must be conducted in the time available. Accordingly, the cloth must be cut to suit.

The Adjudicator must also act impartially and, as a matter of good practice, ought not to have dealings with one party in the absence of or without the knowledge of the other.

When must the Adjudicator reach a Decision?

The basic rule is that the Adjudicator must reach his Decision within 28 days of the date of the Referral. The Referring Party, can agree to extend this by 14 days. After that, both parties must agree to any

further extension.

Depending on the nature of the Adjudication, you may want to give some thought to allowing the Adjudicator more time to reach his Decision. 28 days passes very quickly indeed.

The Decision

While the Decision must be in writing, there is no prescribed form that it should take and the Adjudicator may not have to provide reasons for his Decision. It is often advisable to ask the Adjudicator to provide reasons. It will help you and the other party understand how the Decision was reached.

What is the effect of the Decision?

The Decision is binding on the parties and must be complied with.

What happens if the Decision is not complied with?

You can enforce the Decision by court proceedings. The courts take a robust approach and generally enforce any decision made by an Adjudicator. Although a hearing will be required, you should be able to obtain summary judgment. There should not be much delay in doing this.

Can the Decision be set aside?

While the Decision is binding, the paying party (who believes that the Decision is wrong), can begin fresh proceedings (whether it be in court or arbitration), and ask for the dispute to be heard afresh. The court or arbitral tribunal is able to come to a different decision from the Adjudicator.

You mean I have to go all the way to trial to get the decision overturned, even if it is obviously wrong?

Yes I am afraid so. Adjudication can be rough justice. However, in limited circumstances, it may be possible to fast track this provided that there are no disputed issues of fact. The only other way to overturn the Adjudicator's Decision is to

prove to the court at the summary judgment stage that one (or more) of a number of grounds entitling the paying party to resist enforcement apply. These include:

- ▶ No construction contract;
- ▶ No dispute capable of being referred to adjudication at the date of the referral;
- ▶ The Adjudicator strayed outside of his jurisdiction; and
- ▶ A breach of the rules of natural justice by the Adjudicator in his conduct of the adjudication.

If so, the Decision can be set aside as a nullity.

What about a really small error, say the Adjudicator added up the damages wrongly?

Well, in those limited circumstance, the Adjudicator has the power to amend his Decision under the slip rule, but the scope of the rule is narrow and the time in which to do so is limited, usually 5 days.

What about my costs?

As a general rule, you will not be able to recover your costs, even if successful, unless that is, both parties give the Adjudicator express jurisdiction to decide whether one party should bear the other's costs in whole or in part. However, the Adjudicator can, in any event, decide which party should pay his fees and expenses. The Adjudicator usually decides that these should be borne by the "losing party".

Practical Tips

- ▶ Is your dispute suitable for adjudication? Not all are. If it is not, do not adjudicate.
- ▶ Are you sure you have a dispute? While ambush sounds a good idea, it may rebound on you. Make sure your dispute has crystallised.
- ▶ Does your Notice of Intention cover all of the issues? It must. Although it is a short document, it is very important.
- ▶ Is your house in order and the Referral completely ready? If it is not, do not serve your Notice of Intention. Only start when you are ready. When the clock starts, it ticks fast.
- ▶ Are all the relevant people from your team going to be around for the next month or so? They need to be. They will need to comment on the Response and be available to help prepare a Reply and the Adjudicator may want to meet them if they are witnesses.
- ▶ Consider extending the timetable if necessary. At some point during the process, you may also want a day or two extra to be able to respond. Remember 28 days passes very quickly.
- ▶ Have you asked the Adjudicator for reasons? You should do so, otherwise you may get a one word answer.

For more information please contact:



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