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# USERS' GUIDE TO ADJUDICATION >

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## A guide for participants in adjudications conducted under Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009

CIC 2017  
USERS' GUIDE TO ADJUDICATION

Every effort has been made to ensure that this Guide is correct at the time of going to print.

All parties must rely exclusively upon their own skill and judgment when making use of this document. This Guide is intended merely to outline the procedures in adjudications under the Construction Act and not to be comprehensive, nor to provide legal advice. Neither the CIC nor any other contributor assumes any liability to anyone for any loss of damage caused by any error or omission whether such error or omission is the result of negligence or any other cause. Any and all such liability is disclaimed.

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Cover photograph of Kings Cross Station Redevelopment taken by Yeshen Venema

## ▶ CONTENTS

<b>1. INTRODUCTION</b>	<b>6</b>
<b>2. WHAT IS ADJUDICATION?</b>	<b>6</b>
What are the requirements?	
What if the contract does not include an adjudication procedure?	
<b>3. ESTABLISHING A RIGHT TO ADJUDICATE</b>	<b>8</b>
How do I know whether I can go to adjudication or not?	
Is my contract a 'construction contract' as defined by the Act?	
Is there anything that is excluded from the definition?	
Are there any other exclusions from the Act?	
So does it mean I can never refer a dispute to adjudication if I do not fit these criteria?	
Do I have a 'dispute'?	
Does the dispute arise 'under the contract'?	
<b>4. DO I NEED PROFESSIONAL HELP?</b>	<b>11</b>
<b>5. STARTING ADJUDICATION</b>	<b>12</b>
I have a dispute under a 'construction contract': how do I start adjudication?	
What is my first step in starting adjudication?	
What is the next step?	
And then?	
How long does the process take?	

<b>6. REPLYING TO A NOTICE OF ADJUDICATION</b>	<b>16</b>
Being on the receiving end	
How should I respond if I receive a notice of adjudication against me?	
Counterclaiming	
Challenging the adjudicator's appointment	
What should I do if the adjudicator refuses to agree with me over jurisdiction?	
<b>7. WHAT HAPPENS NEXT?</b>	<b>19</b>
What does the adjudicator do next?	
What will actually happen?	
Will there be a formal hearing?	
The adjudicator has asked me for more documents, or set a deadline that is too soon for me: do I have to comply?	
<b>8. THE ADJUDICATOR'S DECISION</b>	<b>20</b>
What can I expect from an adjudicator's decision?	
Will the adjudicator provide written reasons?	
<b>9. THE COST AND WHO PAYS</b>	<b>21</b>
Who pays the adjudicator's costs?	
The adjudicator obtained expert advice – do I have to pay for this too?	
What will the adjudicator charge?	
Does the adjudicator have a written agreement or terms of appointment?	
I have spent a lot of money on legal advice: can I ask the adjudicator to award me my costs?	

<b>10. WHAT DO I DO NOW?</b>	<b>23</b>
I have an adjudication decision in my favour, but the other party is refusing to comply: what should I do now?	
The adjudication decision has an error in it: what should I do?	
The adjudicator has refused to amend the error: what should I do?	
I do not agree with the adjudicator’s decision: what should I do?	
The decision is plainly wrong: is there nothing I can do at all?	
The decision has gone against me: is that it?	
Can I sue the adjudicator for negligence?	
<b>11. WHERE DO I GO TO FOR FURTHER INFORMATION OR ASSISTANCE?</b>	<b>25</b>
<b>APPENDIX A</b>	<b>26</b>
CONSOLIDATED LEGISLATION	
Part II of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) incorporating amendments in the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA Act 2009).	
<b>APPENDIX B</b>	<b>38</b>
List of Adjudicator Nominating Bodies.	



## ▶ 1. INTRODUCTION

This Guide provides a general introduction to adjudication in the context of construction contracts, and in particular the right to adjudication provided by the Housing Grants, Construction and Regeneration Act 1996 (of which section 108 is the most significant part) , as amended by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). Together, these are referred to as 'the Act' for the purposes of this guide. The Act applies to construction contracts in England and Wales and Scotland. Largely similar legislation exists in Northern Ireland.

Whether you wish to take a dispute to adjudication, or have received a notice of adjudication, it is hoped that this Guide will assist you. Please note however that the Guide is not intended to be comprehensive and should not be treated as a substitute for professional advice.

## ▶ 2. WHAT IS ADJUDICATION?

Adjudication is a way of resolving disputes in construction contracts. The Act provides parties to construction contracts with a right to refer disputes arising under the contract to adjudication. It sets out certain minimum procedural requirements which enable either party to a dispute to refer the matter to an independent party (the adjudicator) who is then required to make a decision within 28 days of the matter being referred.

If a construction contract does not comply with these requirements, a statutory default scheme, called the Scheme for Construction Contracts (referred to in this document as the 'Scheme') will apply. This Guide specifically relates to adjudications conducted under the Scheme, although the general principles will apply to all adjudications. Sometimes it has been necessary to specify whether a section relates only to the Scheme or to all adjudications.

Adjudication does not necessarily achieve final settlement of a dispute because either of the parties has the right to have the same dispute heard afresh in court (or where the contract specifies arbitration, in arbitration proceedings). Nevertheless, experience shows that the majority of adjudication decisions are accepted by the parties as the final result.

The legislation provides that adjudication can be used at any time. For example, provided the parties have a contractual relationship it can be used to decide contractual disputes with designers before construction begins; it can be used to resolve contractual disputes with and between designers, contractors and subcontractors during construction; and with or between them after completion. see section 3.

Once a dispute has arisen between the parties either party may seek adjudication. The adjudicator is selected within a week and must decide the dispute within a further four weeks (subject to any agreed extension). Once the adjudicator has made their decision, the other party must comply with it: if they do not, a court hearing to compel compliance can usually be obtained in a few weeks. See section 10.

Adjudication is therefore designed to be quick in comparison to other methods of dispute resolution such as arbitration or litigation, and it can also be used during the currency of the contract and afterwards. While adjudication is meant to be a straightforward process without the need to involve lawyers, you may wish to consider taking professional advice on your own particular circumstances.

Generally, adjudication is more cost effective than arbitration or litigation but inevitably complex cases will attract higher costs.

## **What are the requirements?**

Section 108 of the Act see appendix A requires all 'construction contracts', as defined by the Act, to include minimum procedural requirements which enable the parties to a contract to give notice at any time of an intention to refer a dispute to an adjudicator. The contract must provide a timetable so that the adjudicator can be appointed – and the dispute referred – within seven days of the notice. The adjudicator is required to reach a decision within 28 days of the referral, plus any agreed extension, and must act impartially. In reaching a decision an adjudicator has wide powers to take the initiative to ascertain the facts and law related to the dispute.

## **What if the contract does not include an adjudication procedure?**

Where a contract does not include an adjudication procedure (either in the contract itself or by reference to another document), the Act provides a fall-back procedure in the form of the Scheme. If your contract contains adjudication provisions, but they do not comply with the requirements of Section 108, even in one respect, then again the Scheme will apply.

## ► 3. ESTABLISHING A RIGHT TO ADJUDICATE

### How do I know whether I can go to adjudication or not?

The Act provides that a party to a construction contract has the right at any time to refer to adjudication a dispute arising under the contract.

If the contract does not contain any adjudication procedure, or it does but the procedure does not comply fully with Section 108 of the Act, then before you can refer a dispute to adjudication you need to make sure that:

- you have a dispute;
- the dispute arises out of the contract;
- the contract contains an adjudication procedure or, if not;
- the contract is a 'construction contract' as defined by the Act.

### Is my contract a 'construction contract' as defined by the Act?

A **construction contract** is defined in sections 104 and 105 of the Act as an agreement to undertake the following operations (see Appendix A):

- construction, alteration, repair, maintenance, extension and demolition or dismantling of structures forming part of the land and works forming part of the land, whether they are permanent or not;
- the installation of mechanical, electrical and heating works and maintenance of such works;
- cleaning carried out in the course of construction, alteration, repair, extension, painting and decorating and preparatory works.

Contracts with architects, designers, engineers and surveyors are also included, as is the giving of advice on building, engineering, decoration and landscaping.

### Is there anything that is excluded from the definition?

Yes, the following are excluded:

- **Work on process plant** and on its supporting or access steelwork on sites where the primary activity is nuclear processing, power generation, water or effluent treatment, handling of chemicals, pharmaceuticals, oil, gas, steel or food and drink (but not warehousing). This exclusion is somewhat vague and a number of cases have gone to court in an endeavour to clarify it. The outcome of these cases suggests that, as a rough rule, in deciding whether a particular contract is excluded from the Act you should look at the purpose of the contract works: that is, whether the contract works are integral to the process (for instance, pipework joining turbines, which would be excluded from the definition) or whether they are not part of the process (for instance, scaffolding, which would not be excluded).



- **Supply-only contracts**, that is contracts for the manufacture or delivery to site of goods where the contract does not provide for their installation.
- **Extracting natural gas**, oil and minerals (and the workings for them).
- **Purely artistic work**.

## Are there any other exclusions from the Act?

There are some other important exclusions and these are:

- **Contracts with residential occupiers**  
The Act does not apply to contracts made with residential occupiers. This means that where work is carried out on a dwelling (house or flat) which one of the parties occupies or intends to occupy as their residence, then adjudication is excluded from the contract, unless there is an adjudication clause incorporated in the contract. It must be one of the parties to the contract that occupies the dwelling. The exclusion only applies to a contract with a residential occupier, so a contract between a contractor and subcontractor or consultant in connection with a dwelling will be covered by the Act, even if the contract between the contractor and the occupier is not.
- **PFI contracts etc**  
Head agreements in PFI projects, contracts for the financing of works (including insurance policies and bonds), development agreements and agreements made under certain specified statutory provisions are all excluded.

## So does it mean I can never refer a dispute to adjudication if I do not fit these criteria?

If your contract does not fit the criteria for a construction contract, it is not covered by the Act. You may find, however, that your contract gives you equivalent or similar rights – this is particularly so if it is a standard form of contract such as one produced by an industry contract writing body. In that case, the right to go to adjudication arises under the contract, not under the Act.

The advice in this Guide will also be relevant to such contracts but you are advised to check the terms of your contract carefully to establish the precise provisions of the adjudication procedure. Additionally, parties can agree to use adjudication to resolve their dispute on a one off basis; again, this Guide may apply by analogy. In neither of these cases will the parties be bound by the adjudication provisions of the Act but they will be bound by any adjudication provisions incorporated in the contract.

## Do I have a 'dispute'?

Only disputes between contracting parties, arising under the contract, can be referred to adjudication. The Act refers to differences as well as disputes. However, in this context, the law makes no distinction between a dispute and a difference and so one can ignore differences and simply think about disputes. If there is no dispute then an adjudicator has no jurisdiction (that is, authority) to consider the matter. When you seek to refer an issue to adjudication you must therefore be sure that the dispute you want to refer actually exists.

The creation of a dispute starts with the making of a claim. A claim need not be a claim for the payment of money. It may involve simply an assertion of a right by one party. However, making a claim under your contract is not in itself enough. A dispute only arises when it emerges that the claim is not admitted by its recipient. By 'not admitted' we mean there are sufficient grounds to infer from the facts that one party does not agree with the other parties' claim. There does not have to be an express rejection of a claim by the recipient. It is enough if it can be inferred from all the facts that the claim is not admitted (for example, from discussions between the parties). There may be an express rejection of the claim but a period of silence is enough if, in the particular circumstances, it is seen as sufficiently long. The length of time you allow the recipient to consider your claim should be realistic and will depend on its size and complexity. It is advisable to put a response date in any claim document you submit to the other party which will help you establish that the claim has indeed been ignored.

The recipient who tries to argue that there is no dispute because the claim was not sufficiently particularised or explained, or because supporting documentation was missing, is very unlikely to succeed. Even if an insufficiently particularised claim is made and it is not admitted, a dispute exists and the adjudicator has authority to consider the matter.

Under the Scheme, an adjudicator only has jurisdiction to consider one dispute at a time under the same contract unless there is agreement between the disputing parties that the adjudicator may do otherwise. By referring more than one dispute at the same time to the same adjudicator you could run the risk of wasting their time, incurring additional fees and leaving it open to the other party to challenge the adjudicator's jurisdiction to consider both disputes. see section 5.

## Does the dispute arise 'under the contract'?

Since the dispute must arise 'under the contract', you cannot seek adjudication upon matters arising before the contract came into existence or in the course of negotiating the contract (such as misrepresentation), or upon matters that arise outside of the contract (such as nuisance).

## ► 4. DO I NEED PROFESSIONAL HELP?

Adjudication is designed to be a straightforward process to enable disputes to be resolved quickly and inexpensively. In some cases it may be unnecessary for you to incur the cost of obtaining professional assistance from lawyers, claims consultants, or other specialists. You may be able to seek assistance from your trade association or professional body or deal with it on your own.

Adjudication is also a serious process and mistakes can be very costly. For instance, the adjudicator's ability to decide you are entitled to what you want will depend largely on the wording of the notice of adjudication right at the beginning. It is therefore crucial to get that document right. The proper preparation and presentation of your written case with supporting evidence to the adjudicator will invariably be a major factor in determining the success or failure of your arguments. Don't forget that the adjudicator only has a short time in which to consider the arguments put forward by both parties before reaching a decision.

Where the facts of a dispute are completely straightforward and the referring party wishes the adjudicator to make a decision about how much should be paid, and to whom, then preparation of the case may be possible without professional assistance. However, if you are starting the adjudication and it matters to you, it would be prudent to at least have the draft adjudication notice and referral reviewed by an experienced professional and to have one available to assist if required.

Certainly, where the case involves complicated technical or legal issues, you would be well-advised to seek professional help and, if this is the case, you are recommended to seek it at the earliest opportunity, preferably before you start the adjudication process.

It is also important that respondents give prompt consideration to the possible need for professional help. Quite apart from the speed with which a response will need to be prepared, there may well be important legal and tactical issues to consider eg the desirability of introducing cross-claims into the proceedings. See section 6.

Who pays the costs of this professional help depends upon the terms of the Scheme or adjudication procedure, whichever applies. It is very likely that the adjudicator will have no power to award party costs, and you will therefore have to bear your own costs, even if you win. See section 9.

## ► 5. STARTING ADJUDICATION

### **I have a dispute under a 'construction contract': how do I start adjudication?**

This brief description of how you start adjudication applies to adjudications conducted under the Scheme only. In the case of adjudications conducted under an industry standard or specially written procedure, some of the general advice set out below is likely to be helpful but the procedure in your contract needs to be looked at carefully before you take any steps in the adjudication.

In any case, it is recommended that before doing anything else, you read your contract and in particular the adjudication procedure, or the Scheme if applicable.

The steps below are simple, but it is absolutely vital to get them right. Chronologically, they are:

- notice of adjudication;
- appointment of adjudicator; and
- referral notice.

### **What is my first step in starting adjudication?**

#### ***Notice of adjudication***

Once you are satisfied that you have a dispute arising under a 'construction contract' see section 3, you can start the adjudication process by sending a written notice of adjudication to the other party. The notice must be given to the other party (or where the contract is between more than two parties to every party to the contract). There is no requirement for it to be copied to those who are not parties to your contract. The notice must contain the following details:

- brief description of the dispute and the parties involved;
- when and where the dispute arose;
- what remedies are being sought;
- names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

The notice of adjudication is a very important document – it defines what matters the adjudicator has to decide. The adjudicator has no jurisdiction (that is, authority) to decide any matter not covered by the notice. It is vital, therefore, that your notice of adjudication is comprehensive and covers every aspect of your dispute and allows the adjudicator to decide all of the matters you want them to. For instance:

- have you included a request for interest on any money you consider being overdue?
- do you want to ask that the other party should pay the fees and expenses of the adjudicator?
- will you want an order that the other party pays any money awarded within a specified time?
- do you want the adjudicator to give reasons for their decision?

In addition, it may be used to inform the Adjudicator Nominating Body what experience and expertise the adjudicator should have.

Your notice of adjudication should contain the following elements:

- **A description of the dispute** – an imprecise description could result in a challenge to any decision an adjudicator makes. If, for example, in the notice of adjudication you simply refer to a claim for an extension of time, the adjudicator will not have the jurisdiction also to order the repayment of delay damages unless the notice covers that as well. When claiming money, it is advisable to claim for the particular amount wanted and, in the alternative, what the adjudicator thinks is due. In addition, care should be taken as the Scheme says that an adjudicator can only decide one dispute at any one time. If, for example, there are disputes about the valuation of variations and the ascertainment of loss and expense it would be prudent to frame the notice of adjudication in terms of a dispute in relation to payment of monies due rather than refer to the two single elements, as you would then be less likely to run the risk of a challenge to the adjudicator's jurisdiction.
- **Details of how the dispute has arisen** – this will be required mainly to show that you actually have a 'dispute' to refer to adjudication.
- **The decision that you want the adjudicator to make and the remedy or remedies sought** – you will need to be clear about the remedies that you want – these will either be a declaration of principle (for example, that a particular event does amount to a variation or that you do have a particular right under the contract) and/or an order for the payment of money. If you want the adjudicator to make an order that you should be paid money, your notice must clearly ask them to do so. Remember that the adjudicator's decision may be only partially (and not entirely) in your favour. For this reason, you need to state that the adjudicator may make such other decision as they see fit.
- **The names and addresses of the parties involved in the dispute** – these are required so that the Adjudicator Nominating Body knows who to contact.

Remember to make sure that everything you want is covered in the notice. In addition, later in this document you will see that it is better not to issue the notice until you are ready with your referral notice.

## What is the next step?

### ***Appointment of adjudicator***

All adjudicators must be impartial: that is, the adjudicator should not unfairly regard with favour or disfavour one of the parties or their case, nor should there be any appearance that the adjudicator might do so.

Your contract may name an adjudicator, a panel of adjudicators or an Adjudicator Nominating Body. If it does, then you must use the named person or body. If it does not, or if the person named declines to act and the contract does not provide for a substitute, then you may approach an Adjudicator Nominating Body of your choice to select a person to act. Names of Adjudicator Nominating Bodies can be found in appendix B.

Any request for an adjudicator must be accompanied by a copy of the notice of adjudication, and the appointment of the adjudicator should take place within seven days of the submission of the notice of adjudication to the other party.

Alternatively, it may be possible to agree with the other party the name of an individual who should act as adjudicator. However, sometimes parties are unwilling to agree anything once they are in dispute, and you may wish to balance how long you are likely to spend trying to reach agreement with how likely it is that agreement will be reached.

Any person requested to act as adjudicator, by whichever method, must indicate to you within two days whether or not they are willing to act.

### ***Adjudicator Nominating Bodies***

As the name suggests, Adjudicator Nominating Bodies are organisations that have set themselves up to nominate adjudicators. There is nothing to prevent any organisation doing this and there are no external controls. A number of professional bodies and trade associations have set up Adjudicator Nominating Bodies, and those in England and Wales are listed in appendix B.

If you have a choice as to which Adjudicator Nominating Body to use, it is recommended that your choice should be based on the skills you envisage the adjudicator should possess to decide your dispute.

Your chosen Adjudicator Nominating Body will normally require a fee to make the appointment. You may want to establish the likely cost by contacting the Adjudicator Nominating Body before you serve your notice of adjudication on the other party.

### **And then?** ***Referral notice***

The next step is for you to send a referral notice to both the adjudicator and the other party (all documents must be copied to the other party as well as to the adjudicator). The 28 day period for the decision starts on the date when the adjudicator receives your referral notice.

The referral notice is the document which contains all the information that you wish the adjudicator to consider. It should:

- be consistent with the notice of adjudication;
- explain the nature of the dispute and how it arose;
- detail the facts that you rely upon;
- provide the documentary evidence to support those facts;
- provide sufficient details of the contract to show that you have a contractual right to the remedy which you seek;
- list the decisions that you require the adjudicator to make.



It is not necessary to obtain expert advice on the drafting of your referral notice, but it may be advisable to do so if the matters in dispute are both complex and involve a lot of money.

When you begin to draw up your referral notice you should remember that the adjudicator knows nothing about either the contract or your dispute. The notice should therefore be a clear statement of your case. It is unwise to rely solely on providing the adjudicator with correspondence about your dispute, since, for example, site or other correspondence will normally assume many of the facts relating to the dispute because they are well known to both writer and receiver, while the facts will be unknown to the adjudicator.

The referral notice is therefore usually written as a narrative, detailing in chronological order the events as they occurred starting with the formation of the contract, the parties, its aim and how it came into being. This should be followed by a description of the events leading up to the dispute, cross-referenced to documentary evidence attached in appropriate appendices.

The differences and arguments between you and the other party should be explained, again in chronological order, and you should endeavour to address the arguments of your opponent and explain why you consider that they are wrong. You may not have another opportunity to do so: under the Scheme there is no automatic right of reply to the other party's response.

It is best to keep it simple so that the adjudicator can quickly grasp the essential points of your arguments. This is vital because of the short time scale of adjudication. Many adjudicators will start to consider the documents once the written statements of the cases and any other relevant documents that they have called for have been presented. You may therefore have little opportunity to persuade the adjudicator to accept your arguments after this stage. Again, adjudicators can – and some do – limit the amount of paperwork that they will consider. To assist adjudicators in making the best use of their limited time, it is suggested that you submit a neat and short summary of your points in argument cross referenced to the referral notice and accompanying documents, together with any back up information to support your arguments. It is also recommended that you offer to support your argument with further documents should the adjudicator require them.

You will need evidence to support your case. Generally, any assertions by the referring party which are not evidenced, and are challenged by the responding party, are unlikely to be successful. You have to prove that on the balance of probabilities, what you assert is correct. Evidence generally consists of documents or otherwise (e.g. samples, telephone recordings). The comments or opinions of others are of little value unless they are acting as professional expert although witness statements, setting out the facts, can be helpful.

Once you have told the story, and explained what you want the adjudicator to decide, you might need to check that you have included one or two incidental matters, such as for example:

- have you included a request for interest on any money you consider being overdue?
- do you want to ask that the other party should pay the fees and expenses of the adjudicator?
- will you want an order that the other party pays any money awarded within a specified time?
- do you want the adjudicator to give reasons for their decision?

While it is important to send all relevant information to the adjudicator, you should not send anything that you do not refer to in the referral notice. This may add unnecessarily to costs that you might eventually have to pay.

The referral notice and all the attachments should be sent to both the adjudicator and the other party simultaneously and by the quickest means. You will not help your case if the adjudicator gets a copy in advance of the other party.

## How long does the process take?

You have to refer your dispute to the adjudicator within seven days of your notice of adjudication; the adjudicator then has 28 days from the date of your referral notice to make his decision. The adjudicator can extend this by up to 14 days with your consent. If the parties both agree, however, they can extend the period for as long as they wish, provided the agreement is made after the date of the referral notice. Sometimes a party may be tempted to refuse an adjudicator's request for more time but this can affect the quality of the decision the adjudicator is able to make.

## ► 6. REPLYING TO A NOTICE OF ADJUDICATION

### Being on the receiving end

You may of course be on the receiving end of the adjudication process. For example, if you are in dispute with the other party to your contract, you may suddenly find that you receive a notice of adjudication. Given the quick timetable, you will need to make a number of rapid decisions about what you should do.

### How should I respond if I receive a notice of adjudication against me?

When you receive a notice of adjudication you should consider the following:

- do I have a dispute?;
- does the dispute arise under the contract?;

- has the referring party provided me with a sufficient opportunity to consider its claim before sending the notice? If not you should argue that no dispute had arisen prior to the notice of adjudication and make the adjudicator aware of this as soon as they are appointed. See section 3;
- does the contract contain an adjudication procedure and, if not;
- is the contract a 'construction contract' as defined by the Act?

If your contract is a 'construction contract', and you do not agree with the case being made against you, then you should take the following steps:

- consider whether the adjudicator has jurisdiction to be appointed and if in doubt, seek professional advice; and
- decide whether you require the assistance of professional advisers anyway (if you do decide to instruct professional advisers, now is the time to do so, to give them as much time as possible to assist in the preparation of your response); and
- consider what staff you have and who are best able to assist you; and
- begin preparing your response to the notice of adjudication as soon as possible (identify documents referred to in the notice of adjudication such as contracts, correspondence or certificates, and any other documents you think will help the adjudicator decide the dispute).

The referring party is likely to seek the immediate appointment of an adjudicator to coincide with sending the notice of adjudication. Once the adjudicator has been appointed, the referring party must formally refer the dispute to the adjudicator by a referral notice. The adjudicator will then ask you to respond in writing to the points raised in the referral notice, usually within 14 days from the date of the referral notice, although sometimes they may give you less time than this.

It is important to take care in writing your response. For example, you should ensure that you deal with each of the points raised by the other party or deny that they are correct; if you do not, you may find that the adjudicator will decide against you on the apparently undisputed points.

Adjudicators will vary in their approach to adjudication and they have a wide discretion regarding the conduct of the process. See section 7.

However, as explained above, because of the short time scale, most adjudicators will start to consider the documents once the written statements of the cases and any other relevant documents that they have called for have been presented. You may therefore have little opportunity to persuade the adjudicator to accept your arguments after this stage. Again, adjudicators can – and some do – limit the amount of paperwork that they will consider. To assist adjudicators in making the best use of their limited time, it is suggested that you submit a neat and short summary of your points in argument, cross referenced to the referral notice and accompanying documents, together with any back up to support your arguments. It is also recommended that you offer to support your argument with further documents should the adjudicator require them.

## Cross-claims

Generally speaking, you will be able to rely, as part of your defence, on any claim that you may have arising under the same contract. Clearly, that will almost certainly include any claim relating to the same project but it might extend to other projects where they fall under the same contract or are very closely connected. This is called a “cross-claim” and is the type of claim that a respondent can introduce into adjudication proceedings as a defence to set off against the claims brought against him.

Importantly, where cross-claims are introduced in this way, the adjudicator will only have jurisdiction to determine them up to the amount of the claims brought by the claimant and not beyond. If the responding party is seeking a positive award, meaning for these purposes an award in excess of the claims advanced by the referring party, it is necessary to issue separate proceedings.

If you consider you may have possible cross-claims you should obtain professional advice about whether you may be able to rely upon them as defences to claims brought against you and/or whether you need to start a separate adjudication against the referring party dealing with the cross-claim.

The word “counterclaim” is often used instead of cross-claim. It is a misleading description because the word “counterclaim” is actually a technical concept unique to Court proceedings. The expression “cross-claim” is both more appropriate and accurate in adjudications.

## Challenging the adjudicator’s appointment

There may be circumstances when you feel that the adjudicator has no jurisdiction (authority) because, for example, the referring party has sought to appoint an adjudicator in contravention of the procedure set out in your contract; you do not think that the contract is a construction contract within the meaning of the Act, or you do not think that there is a dispute. See section 3.

If you are in any doubt about the adjudicator’s authority to act, it is suggested that professional advice be sought. Again, this should be done at an early stage, before taking any other steps.

After taking advice, if you feel it is appropriate, you should write to the adjudicator, with a copy to the other party, setting out clearly your reasons for saying that the adjudicator does not have jurisdiction in relation to the dispute. It is possible that the adjudicator will agree with you.

## What should you do if the adjudicator refuses to agree with you over jurisdiction?

It is usually fruitless to continue to bombard the adjudicator with objections to the appointment. If you do believe that the adjudicator has no authority to act then you have three possible courses of action:

- refuse to take part in the adjudication process itself;
- take part but reserve your position on jurisdiction; or
- agree to waive the adjudicator's lack of jurisdiction and consent to the adjudicator proceeding.

Additionally, you can go to court and ask for the adjudication to be stopped by seeking a stay of proceedings.

If you decide to contest the dispute you will have to act quickly to ensure that you have gathered together all relevant documents.

Even where you contest jurisdiction it is open to the adjudicator to proceed and to reach a decision on the matters that have been referred to them. This means, in the case of the first option, that the adjudicator may proceed without your involvement at all, and you run the risk that the adjudication decision goes against you. For this reason, the first option should only be considered after taking professional advice. The safest option is the second: you may succeed in the adjudication and in any case you will be able to contest jurisdiction at a later stage through enforcement proceedings.

## ► 7. WHAT HAPPENS NEXT?

### What does the adjudicator do next?

The adjudicator has to carry out their duties in accordance with the terms of the contract and make a decision in accordance with the law applicable to the contract. The adjudicator has to act impartially see section 5 and avoid incurring unnecessary expense see section 9 but subject to these things and the provisions of the adjudication procedure, has a very free hand as to how the adjudication is run.

### What will actually happen?

The Act requires the contract to enable the adjudicator to take the initiative in ascertaining the facts and the law necessary to reach a decision, and it is up to the adjudicator to decide on the procedure to be followed. In particular, the Scheme allows the adjudicator to:

- request any party to the contract to supply any documents the adjudicator reasonably requires, including further written statements;
- decide what language should be used, including whether translations are needed;

- decide whether to meet parties and their representatives;
- decide whether to make site visits and inspections (although it is acknowledged that the adjudicator may need the consent of people outside the adjudication before they can do this);
- impose deadlines or limits to the length of documents or oral representations;
- issue other directions for the conduct of the adjudication.

## **Will there be a formal meeting?**

It is up to the adjudicator to decide whether to hold a meeting or not (this will depend on what the adjudicator feels is necessary in your case). If there is a meeting, the adjudicator will also decide how formal it is to be: most will be relatively informal but it will be up to you to decide whether you want legal representation or not.

## **The adjudicator has asked me for more documents, or set a deadline that is too soon for me: do I have to comply?**

Yes. Even if you think it is unreasonable or unfair, the Scheme expressly requires the parties to comply with any request or direction of the adjudicator. The adjudicator only has a limited amount of time to make a decision and the time given to the parties is linked to that. If a party does not comply and cannot show sufficient cause (that is, a good reason) why not, then the adjudicator may continue with the adjudication in the absence of the documents or party, draw such inferences from the failure as may be justified and make a decision on the basis of the information before them. If a document or statement is submitted after a deadline, the adjudicator may legitimately decide to ignore it or to attach less importance to it than otherwise. Similar provisions may apply in the case of industry standard or specially written adjudication procedures.

## **► 8. THE ADJUDICATOR'S DECISION**

### **What can I expect from an adjudicator's decision?**

The adjudicator's decision may be an order for the payment of money from one party to another or it may relate to a disputed fact or technical matter (for example, whether the workmanship is to the right standard or what the specification means). An adjudicator has wide powers to open up, revise and review any decision taken or any certificate given by any person referred to in your contract (unless the contract provides that the decision or certificate is final and conclusive). The adjudicator may also decide that any of the parties to the dispute is liable to make a payment under the contract and decide when that payment is due and the final date for payment. If provided for in the contract the adjudicator also has power to award interest (either simple or compound) on outstanding payments.



Adjudicators have power to consider any type of dispute or difference arising under the contract, but they are not allowed to decide issues that have not been referred (that is, adjudicators are restricted to the dispute referred to in the notice of adjudication) and may only make the decision sought in the referral notice. For instance, if the referral notice only asks the adjudicator to decide what a party's entitlement under the contract is, the adjudicator cannot order payment of money. The adjudicator can only do this if the referral notice specifically asks for an order for payment of the money to which the referring party is entitled.

## **Will the adjudicator provide written reasons?**

Whether the adjudicator has to provide written reasons or not depends on the terms of the adjudication procedure: under the Scheme reasons are not required unless one or both of the parties asks for them. If you want the adjudicator to provide reasons therefore, you should request them at the earliest opportunity. Reasons help the parties to understand the decision and may assist in determining a future course of action.

## **► 9. THE COST AND WHO PAYS**

Although adjudication is generally inexpensive in comparison with arbitration or litigation, the process is not free and there are inevitably some costs that have to be paid. There are two elements to these costs: the fees of the adjudicator (together with those for any advice and assistance obtained by them) and the costs that you and the other party, as participants in the process, spend on your own legal, expert or commercial advice.

### **Who pays the adjudicator's costs?**

Who pays the adjudicator's costs is one of those matters that depends upon the terms of the adjudication procedure. The Act requires that the adjudicator is entitled to decide who should pay the adjudicator's costs, as part of the decision, unless the parties have agreed otherwise after the notice of adjudication has been given. Often, the adjudicator will decide that the party 'losing' overall must pay their costs. However, this is not always the case and the adjudicator may take into account matters such as how each party has behaved, and whether each party has won on some issues. On the other hand, whatever the outcome of the decision, the adjudicator may simply apportion the fees equally between you and the other party.

However, this is not the end of the matter since both parties are jointly and severally responsible to the adjudicator for their fees. This means that if the other party does not pay, you will have to: if one of you defaults on payment, or becomes insolvent, the adjudicator can legally demand those fees from the other, leaving that other party to recover from the defaulter.

It is also worth remembering that the adjudicator is under a duty to avoid incurring unnecessary expense.

## **The adjudicator obtained expert advice – do I have to pay for this too?**

Provided that they have notified the parties first, the adjudicator is entitled to appoint experts, assessors or legal advisers as required. Within the general requirement to avoid incurring unnecessary expense, the costs of any such external advice will form part of the adjudicator's costs. Similarly, the adjudicator may require tests or experiments to be carried out and the costs of these will also form part of the adjudicator's charges.

## **What will the adjudicator charge?**

There is no set rate for an adjudicator; a range of hourly rates are charged. The total amount will depend upon the complexity of the issues and the length of time the adjudication takes. If the adjudicator was named in the contract or agreed by the parties, then the hourly rate should be agreed at that time. However, if the adjudicator is nominated by an Adjudicator Nominating Body there is no opportunity for the parties to agree an hourly rate and the adjudicator must set a reasonable rate. It is up to the adjudicator to record and determine how many hours have been spent on the adjudication.

Most adjudicators will notify you at the outset what their hourly rate is, and offer you terms for acting.

## **Does the adjudicator have a written agreement or terms of appointment?**

This is not required under the Act or the Scheme, but some contracts and adjudication procedures do include standard terms, and some adjudicators will send their own terms to the parties. To avoid difficulties over the adjudicator's appointment, if the adjudicator has not already provided them, it is advisable for the parties to seek written terms of appointment.

## **I have spent a lot of money on legal advice: can I ask the adjudicator to award me my costs?**

Whether the adjudicator has the power to award the parties' costs (as opposed to the adjudicator's own costs) depends upon the terms of the adjudication procedure. Under the Scheme the adjudicator does not have this power, and many, but not all, specially written procedures specifically provide that each party pays its own costs.

Sometimes the parties make a one off agreement to allow the adjudicator to deal with the parties' costs; if for instance, each party in its submission asks the adjudicator to allocate party costs, this will be construed as such an agreement, so be careful to agree to the adjudicator having the power to deal with the parties' costs if that is what you want.

## ► 10. WHAT DO I DO NOW?

### **I have an adjudication decision in my favour, but the other party is refusing to comply: what should I do now?**

If a party does not comply with an adjudicator's decision, the other party can enforce that decision by going to court. Proceedings are usually started in the Technology and Construction Court (TCC), and normally you would apply for 'summary judgment'. You will generally need to obtain legal advice and representation to do this.

You can usually get the proceedings heard by the court very quickly; the TCC will usually be prepared to shorten its own time limits for adjudication enforcement applications, to ensure that there is as little delay as possible.

### **The adjudication decision has an error in it: what should I do?**

You should check the adjudication procedure to see if there is a specific provision regarding errors. Subject to that, if there is an error or omission in the decision that appears to be a clerical or mathematical mistake, you should contact the adjudicator immediately. At the same time you should also notify the other party. You must do this as soon as you receive the decision. If the adjudicator agrees that there is an accidental error or omission, they are entitled to amend the decision (but they do not have to). What the adjudicator may not do is to change their mind on the substantive issues. The adjudicator may ask for submissions from both parties before considering making any amendment.

### **The adjudicator has refused to amend the error: what should I do?**

It is up to the adjudicator to decide whether an error has been made or not. If the adjudicator concludes that there is no error, then there is little that you can do with regard to the adjudication decision itself, although you can take the dispute to arbitration or litigation.

### **I do not agree with the adjudicator's decision: what should I do?**

There is very clear law indicating that, generally, the courts will enforce adjudication decisions without enquiring as to their correctness.

The exceptions are as follows:

- **Jurisdiction:** That is, where the adjudicator has acted without having the authority to act or to make the decision that has been made. Examples are where the adjudicator decides something that they were not asked to decide, or has not done what was asked of them; where the contract is not one for construction operations; where the adjudicator has been appointed wrongly; and where there was no dispute in the first place.
- **Natural justice:** That is, where the adjudicator has not acted in accordance with procedural fairness in the conduct of the adjudication. There are two parts to natural justice: the adjudicator must be impartial and must allow each party the opportunity to make its case.

You should seek professional advice if you wish to challenge the decision on either of these grounds.

## **The decision is plainly wrong: is there nothing I can do at all? The decision has gone against me: is that it?**

Adjudication decisions are binding temporarily, that is, unless and until the dispute is decided by litigation or arbitration (which will depend on your contract) or by agreement. Even if the adjudicator's decision is enforced in court, it is always possible to take your dispute to court or to arbitration, whichever applies under your contract; this is not an appeal from the adjudicator's decision, but a completely new hearing starting afresh.

As previously indicated see section 2 the majority of adjudication decisions are accepted as the final resolution of the dispute. This may be as a result of an agreement between the parties at the time of the adjudication or by default, because the dispute is simply not re-opened and the decision is complied with. There may also be a term in the contract that provides for adjudication decisions to become final if they are not challenged within a certain period of time.

## **Can I sue the adjudicator for negligence?**

Not unless the adjudicator has made an act or omission in bad faith. This exemption from liability extends to employees and agents of the adjudicator.

## ► 11. WHERE DO I GO FOR FURTHER INFORMATION OR ASSISTANCE?

If you belong to a trade association or professional institute they may well have published information. Specialist contract advisers and specialist law firms will also be able to advise you. There are also a number of specialist websites where information can be freely found. The legislation, in the form of Part II of the Housing Grants, Construction and Regeneration Act 1996, the Local Democracy, Economic Development and Construction Act 2009 and the Scheme for Construction Contracts may be found on the following websites:

- [Housing Grants, Construction and Regeneration Act 1996](#)
- [The Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(Amendment\) \(England\) Regulations 2011](#)
- [The Scheme for Construction Contracts \(England and Wales\) Regulations 1998 \(Amendment\) \(Wales\) Regulations 2011](#)
- [Rheoliadau Rheoliadau Cynllun Contractau Adeiladu \(Cymru a Lloegr\) 1998 \(Diwygio\) \(Cymru\) 2011](#)
- [The Scheme for Construction Contracts in Northern Ireland \(Amendment\) Regulations \(Northern Ireland\) 2012](#)
- [The Scheme for Construction Contracts \(Scotland\) Amendment Regulations 2011](#)
- [Local Democracy, Economic Development and Construction Act 2009](#)

## ► APPENDIX A

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### CONSOLIDATED LEGISLATION

Part II of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) incorporating amendments in the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA Act 2009).

#### Introductory provisions

##### 104 Construction contracts

- (1) In this Part a "construction contract" means an agreement with a person for any of the following-
  - (a) the carrying out of construction operations;
  - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
  - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement-
  - (a) to do architectural, design, or surveying work; or
  - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- (3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).
- (4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

- (5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations. An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).



- (6) This Part applies only to construction contracts which
  - (a) are entered into after the commencement of this Part, and
  - (b) relate to the carrying out of construction operations in England, Wales or Scotland.
- (7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

### **105 Meaning of "construction operations"**

- (1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions-
  - (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
  - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
  - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
  - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
  - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
  - (f) painting or decorating the internal or external surfaces of any building or structure.
- (2) The following operations are not construction operations within the meaning of this Part-
  - (a) drilling for, or extraction of, oil or natural gas;
  - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
  - (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -
    - (i) nuclear processing, power generation, or water or effluent treatment, or
    - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

- (d) manufacture or delivery to site of-
  - (i) building or engineering components or equipment,
  - (ii) materials, plant or machinery, or
  - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;
- (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

#### **106 Provisions not applicable to contract with residential occupier**

(1) This Part does not apply-

(a) to a construction contract with a residential occupier (see below).

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence. In this subsection "dwelling" means a dwelling-house or a flat; and for this purpose-"dwelling-house" does not include a building containing a flat; and "flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

(3) The Secretary of State may by order amend subsection (2).

(4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

#### **106A Power to disapply provisions of this Part**

(1) The Secretary of State may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations (not being operations in Wales) which is specified in the order.

(2) The Welsh Ministers may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations in Wales which is specified in the order.

(3) The Scottish Ministers may by order provide that any or all of the provisions of this Part, so far as extending to Scotland, shall not apply to any description of construction contract which is specified in the order.

- (4) An order under this section shall not be made unless a draft of it has been laid before and approved by resolution of-
- (a) in the case of an order under subsection (1), each House of Parliament;
  - (b) in the case of an order under subsection (2), the National Assembly for Wales;
  - (c) in the case of an order under subsection (3), the Scottish Parliament.

**[107 repealed]**

## **Adjudication**

### **108 Right to refer disputes to adjudication**

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.
- (2) The contract shall include provision in writing so as to-
- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
  - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
  - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
  - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
  - (e) impose a duty on the adjudicator to act impartially; and
  - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
- (3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- (4) The contract shall also provide in writing that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
- (5) If the contract does not comply with the requirements of subsections 1 to 4, the adjudication provisions of the Scheme for Construction Contracts apply.

- (6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate. For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision.

### **108A Adjudication costs: effectiveness of provision**

- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
- (2) The contractual provision referred to in subsection (1) is ineffective unless-
- (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
  - (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.

## **Payment**

### **109 Entitlement to stage payments**

- (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless-
- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
  - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
- (4) References in the following sections to a payment provided for by the contract include a payment by virtue of this section.

### **110 Dates for payment**

- (1) Every construction contract shall-
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
  - (b) provide for a final date for payment in relation to any sum which becomes due. The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

- (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on-
- (a) the performance of obligations under another contract, or
  - (b) a decision by any person as to whether obligations under another contract have been performed.
- (1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).
- (1C) Subsection (1A) does not apply where
- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
  - (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.
- (1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.
- (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

#### **110A Payment notices: contractual requirements**

- (1) A construction contract shall, in relation to every payment provided for by the contract-
- (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
  - (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
- (2) A notice complies with this subsection if it specifies-
- (a) in a case where the notice is given by the payer-
    - (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated;
  - (b) in a case where the notice is given by a specified person-
    - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies-
- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
  - (b) the basis on which that sum is calculated.

- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (6) In this and the following sections, in relation to any payment provided for by a construction contract-
  - “payee” means the person to whom the payment is due;
  - “payer” means the person from whom the payment is due;
  - “payment due date” means the date provided for by the contract as the date on which the payment is due;
  - “specified person” means a person specified in or determined in accordance with the provisions of the contract.

**110B Payment notices: payee’s notice in default of payer’s notice**

- (1) This section applies in a case where, in relation to any payment provided for by a construction contract-
  - (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
  - (b) notice is not given as so required.
- (2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
- (3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
- (4) If-
  - (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of-
    - (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated, and
  - (b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

**111 Requirement to pay notified sum**

- (1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.



- (2) For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means-
  - (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
- (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.
- (4) A notice under subsection (3) must specify-
  - (a) the sum that the payer considers to be due on the date the notice is served, and
  - (b) the basis on which that sum is calculated. It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
- (5) A notice under subsection (3)-
  - (a) must be given not later than the prescribed period before the final date for payment, and
  - (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
- (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
- (7) In subsection (5), “prescribed period” means-
  - (a) such period as the parties may agree, or
  - (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts.
- (8) Subsection (9) applies where in respect of a payment-
  - (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
  - (b) a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
- (9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than-
  - (a) seven days from the date of the decision, or
  - (b) the date which apart from the notice would have been the final date for payment, whichever is the later.

- (10) Subsection (1) does not apply in relation to a payment provided for by a construction contract where-
- (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
  - (b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
- (11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.

### **112 Right to suspend performance for non-payment**

- (1) Where the requirement in section 111(1) applies in relation to any sum but is not complied with, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of any or all of his obligations under the contract to the party by whom payment ought to have been made ("the party in default").
- (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of the sum referred to in subsection (1).
- (3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.
- (4) Any period during which performance is suspended in pursuance of, or in consequence of the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right. Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

### **113 Prohibition of conditional payment provisions**

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- (2) For the purposes of this section a company becomes insolvent-
- (a) when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986,
  - (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,

- (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
  - (d) on the making of a winding-up order under Part IV or V of that Act.
- (3) For the purposes of this section a partnership becomes insolvent-
- (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or
  - (b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.
- (4) For the purposes of this section an individual becomes insolvent-
- (a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act
  - (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.
- (5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection 2, 3 or 4 under the law of Northern Ireland or of a country outside the United Kingdom.
- (6) Where a provision is rendered ineffective by subsection 1, the parties are free to agree other terms for payment. In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

## Supplementary provisions

### 114 The Scheme for Construction Contracts

- (1) The Minister shall by regulations make a scheme ("the Scheme for Construction Contracts") containing provision about the matters referred to in the preceding provisions of this Part.
- (2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.
- (3) In this section "the Minister" means-
- (a) for England and Wales, the Secretary of State, and
  - (b) for Scotland, the Lord Advocate.
- (4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.
- (5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

### **115 Service of notices, &c**

- (1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.
- (2) If or to the extent that there is no such agreement the following provisions apply.
- (3) A notice or other document may be served on a person by any effective means.
- (4) If a notice or other document is addressed, pre-paid and delivered by post-
  - (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
  - (b) where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as effectively served.
- (5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.
- (6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

### **116 Reckoning periods of time**

- (1) For the purposes of this Part periods of time shall be reckoned as follows.
- (2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
- (3) Where the period would include Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded.

### **117 Crown application**

- (1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity.
- (2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.
- (3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.
- (4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.

...

#### **146 Orders, regulations and directions**

...

(2) Orders and regulations under this Act may contain such incidental, supplementary or transitional provisions and savings as the authority making them considers appropriate.

(3) ...

(a) orders and regulation subject to affirmative resolution procedure (see sections 104(4), 105(4), 106(4), 106A and 114(5), ...

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## ► APPENDIX B

### List of Adjudicator Nominating Bodies

Association for Consultancy and Engineering  
Association of Independent Construction Adjudicators  
Centre for Effective Dispute Resolution  
Chartered Institute of Arbitrators  
The Chartered Institute of Arbitrators (Scottish Branch)  
Chartered Institute of Building  
Construction Industry Council  
Construction Plant-hire Association  
Construction Adjudicators.com  
Institution of Chemical Engineers  
Institute of Civil Engineers  
Institution of Electrical Engineers  
Institution of Mechanical Engineers  
The Law Society of Scotland  
Nationwide Academy of Dispute Resolution  
The Royal Incorporation of Architects in Scotland  
Royal Institute of British Architects  
Royal Institution of Chartered Surveyors  
Royal Institution of Chartered Surveyors in Scotland  
Royal Society of Ulster Architects  
Technology & Construction Bar Association  
Technology & Construction Solicitors Association

This list may not be exhaustive and was correct at date of publication.

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