



USERS' GUIDE TO ADJUDICATION >

— **CONSTRUCTION UMBRELLA BODIES ADJUDICATION TASK GROUP APRIL 2003** —

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A guide for participants in adjudications
conducted under Part II of the Housing Grants,
Construction and Regeneration Act 1996

**CONSTRUCTION UMBRELLA BODIES ADJUDICATION TASK GROUP
APRIL 2003**

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▶ 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 section 108 of the Housing Grants, Construction and Regeneration Act 1996 (referred to as the 'Act' in this document, although you may also hear it called the 'Construction Act'). See *appendix A*. This applies to all construction contracts (as defined in the Act) in England and Wales, and Scotland, coming into effect on or after 1 May 1998. Legislation in the same terms was introduced into Northern Ireland by the Construction Contracts (Northern Ireland) Order 1997 for contracts coming into effect on or after 1 June 1999.

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. Section 108 of 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 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, recent 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 his decision, the other party must comply with it: if he does not, a court hearing to compel compliance can usually be obtained in a matter of days. *See section 10.*

Adjudication is thus very quick in comparison with other methods of dispute resolution such as arbitration or litigation and it can also be used during the currency of a contract. Adjudication can be a simple procedure, so in many cases there is no need to involve lawyers or other advisers. It is usually more cost effective than arbitration or litigation.

What are the requirements?

Section 108 of the Act 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. See *Appendix A*. 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 fallback procedure in the form of the Scheme. If your contract contains adjudication provisions, but they do not comply with the Act's requirements, 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 with the Act, then before you can refer a dispute to adjudication you need to make sure that:

- the contract is a 'construction contract' as defined by the Act;
- there is a 'dispute'; and
- the dispute arises 'under the contract'.

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:

- 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 not 'in writing'*
The Act does not apply unless the contract is 'in writing'. The definition of in writing is very wide. If you have a contract and you are not certain whether it comes within the definition of in writing or not, you may wish to take legal advice. Broadly, in writing does not mean that the contract has to be in a document entitled 'contract' and signed by both parties. All of the following will be regarded as in writing:
 - agreements made in writing, whether or not signed;
 - agreements made by exchange of communications in writing;
 - agreements evidenced in writing;
 - agreements not formally in writing but where there are other references to written terms; and
 - agreements made otherwise than in writing recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

Where an agreement is made informally, for instance, by an exchange of correspondence, it does not seem to be enough if the written evidence only shows that a written agreement existed; it also needs to show the terms that supported the agreement.

- *Contracts with residential occupiers*
The Act does not apply to contracts made with residential occupiers. This means a contract where work is carried out on a dwelling (house or flat) which one of the parties occupies or intends to occupy as his residence. 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.

Do I have a 'dispute'?

The Act provides that only *disputes* or *differences* between contracting parties can be referred to adjudication. If there is no dispute or difference 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 you are actually in dispute.

For example, a dispute is not the same as making a claim under your contract. For there to be a dispute it must be clear that a point has emerged from the process of discussion or negotiation that needs to be decided. In other words, there needs to be some matter of disagreement between you which can be decided by the adjudicator. Often, this will mean simply that your claim must either have been rejected or ignored by the other side and 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 length of time you allow should be realistic and will depend on the size and complexity of the claim.

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 he may do otherwise. By referring more than one dispute at the same time to an adjudicator you could run the risk of wasting his 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 simple process to enable disputes to be resolved inexpensively and quickly. In many cases it will not be necessary 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.

However, proper preparation and presentation of your written case to the adjudicator may be a critical factor in the success or failure of your arguments. The adjudicator only has a short time in which to consider the arguments put forward by both parties before reaching his decision. In reality, this is often only two or three weeks. Where the facts of a dispute are 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 can probably be done without professional assistance.

Where the case involves complicated technical or legal issues, however, you may wish 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.

Who pays the costs 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 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 initiate adjudication by submitting 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:

- nature and brief description of the dispute and the parties involved;
- when and where the dispute arose;
- nature of the redress being sought;
- names and addresses of the parties to the contract.

The notice of adjudication is an important document – it defines what matters the adjudicator has to decide. It may be used to inform the Adjudicator

Nominating Body (*see below*) what experience and expertise the adjudicator should have. It is vital, therefore, that your notice of adjudication is comprehensive and covers every aspect of your dispute. It should contain the following elements:

- *A description of the dispute* – as explained, care should be taken as the Scheme says that an adjudicator can only decide one dispute at any one time. An imprecise description could result in a challenge to any decision an adjudicator makes. 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 him to make and the remedy or remedies sought* – you will need to be specific about the remedies that you want – these will either be a declaration of principle 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 him 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 specify that the adjudicator may make such other decision as he sees 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. Later in this document you will see that it is better not to issue the notice until you are ready with your referral notice. *See below.*

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 the case of one of the parties, 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;
- not include evidence (for example, an expert's report or test results) that the other side has not seen before; this could be challenged and possibly stop the adjudicator's decision being enforced;
- 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 best 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. 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 many 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.

As the referring party you must prove your case to the adjudicator. It is likely that where there is a direct clash of assertions, with you alleging one thing, and the other party saying the opposite, then in the absence of any other evidence you will lose, not because the adjudicator considers that you are untruthful but because you have not adequately demonstrated your case. Vagueness and comments about what you have been told by others are of little value as evidence. Evidence is, generally, the information you can provide, documentary or otherwise (for instance, samples), which backs up your case.

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?

While it is important to send all relevant information to the adjudicator, do not waste the adjudicator's time by sending documents that you do not refer to in the referral notice; this may add unnecessarily to the adjudicator's 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 his 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.

► 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 in the post 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 you respond if you receive a notice of adjudication against you?

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

- is your contract a 'construction contract' and covered by the Construction Act?
- is there a 'dispute'?
- does the dispute arise 'under the contract'? See *section 3*.

You should also check to make sure that the referring party has provided you with an opportunity to consider the dispute before sending the notice. If not, when you come to make your submission to the adjudicator, you should argue that no dispute had arisen prior to the notice of adjudication.

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:

- decide whether you require the assistance of professional advisers (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
- 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
- consider whether the adjudicator has jurisdiction to be appointed (*see below*) and if in doubt, seek professional advice.

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 he may give you less time than this.

It is recommended that you take care in writing your response. For example, you should ensure that you deal with each of the points raised by the other party; 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 many 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.

Counterclaiming

You should not include your own counterclaims against the referring party in any response you submit, unless they are directly related to matters referred to in the referral notice. In any other situation, counterclaims are treated as separate disputes and must be separately adjudicated. If you have a counterclaim that you suspect is not directly related to the adjudication you should obtain professional advice as to whether you need to start a separate adjudication against the referring party dealing with the counterclaim.

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 legal 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 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 him. 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 legal 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 his 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 he 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 hearing?

It is up to the adjudicator to decide whether to hold a hearing or not (this will depend on what the adjudicator feels is necessary in your case). If there is a hearing, 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?

The Scheme expressly requires the parties to comply with any request or direction of the adjudicator. If they do not comply and cannot show sufficient cause (that is, a good reason) why they have not complied, 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 him. If a document or statement is submitted beyond a deadline, the adjudicator may attach such weight to it as he thinks fit. 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. 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 may not 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 relatively 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 he obtains) 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 depend upon the terms of the adjudication procedure. Under the Scheme and many other procedures, it is for the adjudicator to decide who should pay his costs, as part of the decision. Often, the adjudicator will decide that the party 'losing' overall must pay his costs. However, this is not always the case and he 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 his 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 he has 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 his 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. Remember, however, that adjudication is likely to be much cheaper than arbitration or litigation.

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 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 deal with its costs, this will be construed as such an agreement.

Some forms of contract and some adjudication procedures (but not the Scheme) provide that the party which starts an adjudication has to pay all the costs of the parties and the adjudicator, whatever the outcome. At the moment, this is enforceable, so it is suggested that you be on your guard when tendering for a contract and try to avoid the inclusion of such a provision.

► 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 has even indicated that it is prepared to shorten its own time limits, 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 accidental, you should contact the adjudicator immediately and tell him. 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, he may agree to amend the decision. What he may not do is to change his 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 he 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. See *below*.

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 he was not asked to decide, or has not done what was asked of him; where the Act does not apply because the contract was made before it came into force (this is becoming less likely as time goes on); 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?

The Act requires the contract to provide that the adjudicator is not liable for anything done or omitted unless the act or omission is 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?

Following the introduction of the statutory right of adjudication in 1998, there are many sources of information now available on adjudication. 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 and the Scheme for Construction Contracts may be found on the following websites:

- Housing Grants, Construction and Regeneration Act 1996: www.legislation.hmso.gov.uk/acts/acts1996/1996053.htm;
- The Scheme for Construction Contracts (England and Wales) Regulations 1998: www.legislation.hmso.gov.uk/si/si1998/19980649.htm.

► APPENDIX A

Housing Grants, Construction and Regeneration Act 1996, section 108

Adjudication

108. – (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 –
 - (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 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.
- (4) The contract shall also provide 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.

► APPENDIX B

List of Adjudicator Nominating Bodies

Association of Independent Construction Adjudicators

Construction House, 56-64 Leonard Street, London EC2A 4JX
020 7608 5221 www.aica-adjudication.co.uk

Centre for Effective Dispute Resolution

Exchange Tower, 1 Harbour Exchange Square, London E14 9GB
020 7536 6000 www.cedr.co.uk

Chartered Institute of Arbitrators

12 Bloomsbury Square, London WC1A 2LP
020 7421 7444 www.arbitrators.org

Chartered Institute of Building

Englemere, Kings Ride, Ascot, Berkshire SL5 7TB
01344 630700 www.ciob.org.uk

Confederation of Construction Specialists

1 Walpole House, 2 Pickford Street, Aldershot, Hampshire GU11 1TZ
01252 312122

Construction Confederation

Construction House, 56-64 Leonard Street, London EC2A 4JX
020 7608 5000 www.theCC.org.uk

Construction Industry Council

26 Store Street, London WC1E 7BT
020 7637 8692 www.cic.org.uk

Institute of Chemical Engineers

Davis Building, 165-189 Railway Terrace, Rugby CV21 3HQ
01788 578214 www.icheme.org

Institute of Electrical Engineers

Michael Farraday House, Six Hills Way, Stevenage SG1 2AY
01438 767380 www.iee.org

Institution of Civil Engineers

1 Great George Street, London SW1P 3AA
020 7665 2214 www.ice.org.uk

Institution of Mechanical Engineers

1 Birdcage Walk, London SW1H 9JJ
020 7222 7899 www.imeche.org.uk

Royal Institute of British Architects

66 Portland Place, London W1B 1AD
020 7307 3649 www.architecture.com

Royal Institution of Chartered Surveyors

Surveyor Court, Westwood Way, Coventry CV4 8JE
020 7334 3805 www.rics.org.uk

Technology and Construction Court Bar Association

c/o Paul Letman, 3 Hare Court, Temple, London EC4Y 7BJ
020 7415 7800

Technology and Construction Solicitors' Association

c/o Julia Court, 7 Devonshire Square, Cutlers Garden, London EC2M 4YH
020 7655 1000 www.tecsa.org.uk



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