

CONSTRUCTION CONTRACT ADJUDICATION

Long awaited changes to the Construction Act came into force on 1 October 2011. This briefing highlights the main changes to the adjudication provisions.

Background

On May 1 1998 Part II of the Housing Grants Construction and Regeneration Act 1996 (known as the Construction Act) (“the 1996 Act”) came into force. The 1996 Act arose from the recommendations of Sir Michael Latham’s report in 1994 “Constructing the Team” and in addition to introducing procedures regulating the flow of information and payments also introduced adjudication as an additional dispute resolution mechanism.

Prior to the Act neither litigation nor arbitration provided the speedy resolution of disputes which are often required in the construction industry. Typically, standard contracts would provide that litigation or arbitration could not be commenced until practical completion and so disputes could be left unresolved for the duration of the contract works. Adjudication is now available for the parties to resolve any dispute arising under the contract at any time with a decision being given within 28 days of appointment. The decision is binding until the dispute is subsequently resolved by litigation, arbitration, or the parties’ agreement.

The Act

Contracts for most types of building work are covered by the Act, but it excludes (amongst others) contracts: with residential owner occupiers; for mining; for oil or gas drilling; for artistic works; of employment; for supply only and those not in writing. Further exclusions are made by Order under the 1996 Act, particularly excluding some types of PFI and finance agreements.

The 1996 Act came into force on 1 May 1998 and applies to contracts entered into after that date. The 1996 Act requires the inclusion of an adjudication provision within the contract which complies with the requirements of the Act. Standard forms of contract tend to have their own bespoke provisions. If the contract does not comply with the requirements of the 1996 Act, then the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649) will apply (“the Scheme”).

The Scheme

The Scheme allows disputes arising under the contract to go to adjudication and gives the adjudicator the power to open up review and revise any decision or certificate under the contract unless the contract says such decision or certificate is to be final. The adjudicator can also order the payment of money by one party to the other.

Adjudication is intended to be a speedy mechanism for settling disputes on a provisional, interim, basis and enabling the decisions of the adjudicators to be enforced pending final determination of the dispute either by arbitration or litigation.

Commencing adjudication under the Scheme

The adjudication is triggered by notice to the other party that there is a dispute that it wishes to be referred to adjudication. The appointment of an adjudicator is sought within 7 days. The adjudicator will either be named in the contract, subsequently agreed by the parties, or selected by a nominating body on the application of the referring party.

Adjudication procedure under the Scheme

- Notice of a party's wish to refer any dispute for adjudication can be given at any time.
- Appointment of an adjudicator should take place within 7 days of notice being given.
- The adjudicator must reach a decision within 28 days of referral (or 42 days with the consent of the referring party or such longer period as the parties may agree).
- The adjudicator is able to take the initiative to ascertain the facts and the law.
- The decision of the adjudicator is binding on the parties until the dispute is decided either by litigation, arbitration or by agreement.
- The precise procedural steps shall be decided by the Adjudicator.

The parties are jointly and severally liable for the Adjudicator's fees. The Adjudicator may award interest on such amount as he decides is due to be paid but has no power under the Scheme to award costs. However, the parties might agree to grant that power to the adjudicator.

The adjudicator's obligations under the Scheme

The adjudicator is required to:

- reach a decision in accordance with the relevant terms of the contract
- decide on procedure
- act impartially
- consider any relevant information submitted by the parties to the dispute

- make available to the parties any information to be taken into account in reaching the decision
- deliver a copy of the decision to the parties as soon as possible after making it
- give reasons for the decision if requested

Changes under the 2009 Act

Contracts covered

The scope of contracts covered by the Act is extended to include oral contracts. The requirement under the 1996 Act that only contracts made or evidenced in writing are caught is gone. This requirement had in effect excluded many contracts which were recorded partially in writing and so far more contracts will now be subject to the payment requirements and Scheme. Many more professional appointments are now caught than was previously the case and smaller projects where the paperwork has not been put in place are now subject to the 2009 Act.

Adjudication provisions in writing

Even though oral contracts are now subject to the provisions of the Act, the 2009 Act requires that the adjudication provisions should be in writing. If not, then the Scheme will apply.

Allocation of costs

The 2009 Act introduced a new statutory provision that renders ineffective any contractual provision that requires one party to pay the others costs of any adjudication. Such clauses (known as “Tolent” clauses) were upheld in the Tolent case but in more recent cases have been held to be unenforceable in England and Wales.

Slip rule

The 2009 Act also introduced a statutory provision allowing an adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission. Under the Scheme any correction will have to be within 5 days of the decision to be corrected.

What is happening in practice?

After a slow take up following the implementation of the Act, adjudication is now widely used and is probably the most common form of dispute resolution in construction disputes.

The threat of the adjudication process appears by itself to have had some effect in encouraging disputes to be resolved and at an early stage. Adjudication is particularly well suited to straightforward disputes about the amount due on interim payments.

The advantage of adjudication, its speed, is also a disadvantage. It may simply not be possible for one party to respond fully in the limited time available to the other party's case.

As a result of the speed with which the adjudication process takes place, the decision of the adjudicator can be fairly rough-and-ready. The courts, however, take a robust attitude and will enforce the adjudicator's decision, even though a party which has been ordered to pay money feels (perhaps with some justification) that the adjudication process did not allow them a fair hearing, or where the adjudicator has patently got his decision wrong. The courts will enforce the awards, despite the apparent injustice and enforce the "pay now argue later" philosophy which underlies the Act. The courts will refuse to enforce an adjudicator's decision when the adjudicator's jurisdiction has been exceeded. However, the party which objects to the jurisdiction must clearly reserve its rights at the outset and maintain the objection throughout the adjudication process.

The changes introduced by the 2009 Act, particularly bringing oral contracts within the scope of the Act, have meant greater numbers of disputes being referred to adjudication.

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This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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