

WHAT IS ADJUDICATION?

Court proceedings and arbitration can be time consuming and expensive methods of resolving disputes. Complex cases can take years to resolve and it may not be cost effective to litigate smaller disputes.

Adjudication is an interim fast track method of resolving disputes arising under construction contracts. It has been described as a “pay first, argue later” mechanism, designed to protect cash-flow in the construction industry pending ultimate determination of the dispute by a court or an arbitrator. In fact, the majority of adjudication decisions are accepted by parties as the final result and are never taken any further.

MAIN FEATURE OF ADJUDICATION

The main features of adjudication are:

- the dispute is referred to an independent and impartial adjudicator, who is required to make a decision within 28 days of referral (or such longer period as the parties may agree);
- the adjudicator’s decision is binding until the dispute is finally determined by litigation or arbitration; and
- in the meantime, the adjudicator’s decision will be enforced by a court (save in exceptional circumstances).

A PARTY’S STATUTORY RIGHT TO ADJUDICATE

You have a statutory right to refer a dispute for adjudication under The Housing Grants, Construction and Regeneration Act 1996 if the dispute has arisen under a construction contract made or evidenced in writing (Since 1st October 2011 oral contracts may be referred to adjudication – see page 5). ‘Construction Contracts’ include contracts for architectural, design or surveying works as well as interior/exterior decoration and landscaping advice.

A brief guide to Adjudication

Certain types of contract are excluded, including:

- DOMESTIC contracts with residential occupiers
- ENERGY contracts primarily concerned with oil, gas, minerals, chemicals, pharmaceuticals, food and drink, nuclear processing, power generation, and water or effluent treatment;
- CONTRACTS OF SALE - supply only contracts;
- PROPERTY - development agreements
- private finance initiative (PFI) contracts.

ADJUDICATION PROCEDURE

It is important to check your contract to establish the specific details of the contractual procedure that will apply to your dispute. The parties are free to agree the adjudication procedure provided it complies with certain minimum procedural requirements. If it does not, or if the contract does not contain any adjudication provisions, then the statutory Scheme for Construction Contracts will apply:

STAGE	DESCRIPTION
Dispute	The right to adjudicate arises where a 'dispute' has crystallised under a construction contract.
Notice of Adjudication	The referring party can then initiate adjudication by submitting a written Notice of Adjudication to the other party to the dispute, setting out details of the dispute and the nature of the redress sought.
Appointment of Adjudicator	An adjudicator should be appointed within 7 days of the Notice of Adjudication. Your contract may name an adjudicator, panel of adjudicators or nominating body to choose an adjudicator.
Referral Notice	The referring party sends a Referral Notice to both the adjudicator and the responding party, attaching all documents relied on in support of its claim.
Response to the Referral Notice	The responding party will usually be asked by the adjudicator to submit a Response to the Referral Notice.
Reply to the Response	The referring party may wish to submit a Reply to the Response, if permitted by the adjudicator. The parties often wish to continue making further submissions, although the adjudicator may impose a limit of deadline on submissions given the timescales involved.

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STAGE	DESCRIPTION
Decision	The adjudicator must provide his decision within 28 days of the Referral Notice. The adjudicator can extend this period by up to 14 days with the referring party's consent and for any further period as the parties may both agree.
Enforcement of Decision	If the other party does not comply with an adjudicator's decision in your favour, you can enforce that decision in court. Usually you would make an application for summary judgment in the Technology and Construction Court.

SHOULD I ADJUDICATE?

Despite the undeniable success and many advantages of adjudication it does have drawbacks and is not necessarily the most appropriate means of resolving your construction dispute. It is nearly always preferable to attempt a negotiated settlement. Mediation can often help apparently polarised parties to find some middle ground as in Adjudication there is usually a winner or loser which may ruin your relationship with that Client. Even if submitting the dispute for independent determination is unavoidable, there are circumstances in which it may be advisable to head straight for litigation or arbitration rather than adjudication, especially if the dispute is complex.

ADVANTAGES OF ADJUDICATION	LIMITATION OF ADJUDICATION
The 28 day process is much faster than litigation or arbitration, allowing disputes to be resolved while works are still in progress and on-site relationships to be salvaged.	The tight timetable means that it is not possible to prepare and argue the disputed points as thoroughly as would be the case in litigation or arbitration. The adjudicator has to deliver a quick decision. Consequently, the losing party will almost certainly feel that it has suffered 'rough justice'.
Adjudication is usually cost effective and limits the extent to which a party with deep pockets can avoid payment by threatening to tie the would-be claimant up in lengthy and expensive litigation.	The fast track nature of adjudication means that it may be unsuitable for complex disputes involving multiple parties, allegations of professional negligence or large and complicated final account disputes (although it may be possible to break down a complex dispute into smaller issues).

A brief guide to Adjudication

ADVANTAGES OF ADJUDICATION	LIMITATION OF ADJUDICATION
Unlike court proceedings, adjudication is private (unless subsequently enforced in court).	Unless the parties agree otherwise, the adjudicator will have no power to award costs to the winning party (other than payment of the adjudicator's own fees). The parties' legal costs can be considerable if the dispute is complex.
The courts have proven willing to robustly enforce adjudicators' decisions unless there is a clear error of jurisdiction or serious breach of natural justice.	Adjudication is only interim and provisional in nature, While experience suggests that the majority of adjudicators' decisions are accepted by the parties, the likelihood of subsequent proceedings may depend on the amount of money at stake.
You can ask the Nominating Body to choose an adjudicator with particular expertise in the subject matter of the dispute. For example scaffolding or delay analysis.	You are in the hands of the Nomination Body. The vast majority of Adjudicators are professional and experienced. They are nonetheless human and may make mistakes. The Decision will be binding upon the parties until and if the dispute is referred to litigation or arbitration.

PRACTICAL TIPS

- 1 Ensure that the dispute has actually arisen before the adjudication is commenced, otherwise the respondent may argue that the adjudicator lacks jurisdiction. In particular:
 - prior to issuing the Notice of Adjudication, make your claim in a letter to the other party and allow them a reasonable time to respond; and
 - avoid including any evidence that the other side has not seen before with the Referral Notice.

- 2 Use the Notice of Adjudication to define the scope of the adjudication in terms favourable to you e.g. by excluding the possibility of cross-claims from the responding party.

- 3 Prepare the Referral Notice prior to serving the Notice of Adjudication, as the documents should be consistent and the Referral Notice must generally be served within seven days of the Notice of Adjudication. The dispute is defined by the Notice - make sure the Referral does not conflict with the Notice.
- 4 Note any contractual time limits and service provisions.
- 5 Notify the Adjudicator at the outset that you will require him to give reasons for his decision – he is not automatically required to do so by the Scheme for Construction Contracts.
- 6 If you wish to make a jurisdictional challenge as responding party, write to the adjudicator immediately on his appointment. If the adjudicator does not resign you would generally be well advised to participate in the ensuing adjudication, but expressly reserve your right to raise the jurisdictional issues during any enforcement proceedings. You must continually reserve your position, if necessary in every communication to the adjudicator.

ADJUDICATION: THE FUTURE

The Local Democracy, Economic Development and Construction Act 2009 is applicable to all contracts entered into since 1 October 2011. The “New Construction Act” (as it is referred to by commentators) will make three key changes to the law relating to adjudication:

- the right to statutory adjudication will be extended to oral contracts;
- contractual adjudication clauses whereby the Referring Party is obliged to pay the entire costs of the adjudication (including the Responding Party’s legal fees), regardless of the outcome of the adjudication, will be prohibited; and
- the existing common law right of adjudicators to make corrections to their decisions (known as the “slip rule” will be expressly enshrined in statute.

Please feel free to request initial advice by e-mail or by telephone.