

Adjudication

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In July 1994 Sir Michael Latham published his report *Constructing the Team*. In the report were recommendations concerning adjudication. Following these recommendations, provisions for a statutory adjudication process were introduced in the Housing Grants, Construction and Regeneration Act 1996, (“the Act”). This Act was amended by the Local Democracy, Economic Development and Construction Act 2009, which came into effect in England and Wales on 1 October 2011 (1 November 2011 in Scotland). Similar amendments were introduced for Northern Ireland on 14 November 2012. Adjudication provisions were introduced for the first time in the Republic of Ireland by way of the Construction Contracts’ Act 2013 which came into effect on 25 July 2016.

This Information Sheet intends to raise awareness on the general nature and stages of an adjudication and is not a substitute for professional advice. Members finding themselves either at the receiving end of a Notice of Adjudication or wishing to serve one should seek professional advice.

What is Adjudication?

Adjudication is a simple and quick procedure for resolving disputes. An Adjudicator weighs up evidence presented by the parties involved and gives his/her decision on that dispute, usually within 28 days.

Provisions for adjudication in the UK can be set out in a construction contract, providing the adjudication provisions comply with the Act. If the adjudication provisions in a construction contract do not comply with the Act (and some adjudication provisions in construction contracts still do not comply) then the Act has provision for an adjudication to be conducted under the Scheme for Construction Contracts (England & Wales) Regulations “the Scheme”. Similar schemes exist in Scotland and Northern Ireland but not in the Republic Of Ireland. The Scheme was first published in 1998 and amended in 2011. If there is no formal construction contract then the adjudication is conducted (in the UK) under the provisions contained within the Scheme current at the time the construction contract was formed.

What sort of disputes can be settled with Adjudication?

Any party to a construction contract in the UK has the right to refer a dispute arising under the contract for adjudication (Section 108 (1) of the Act). In the Republic of Ireland the right to adjudicate under a construction contract is limited to any dispute relating to payment.

The UK Act defines what a construction contract is; in simple terms it applies to all building work except for drilling for oil, gas or mineral extraction (there are also other exceptions). Up to 1 October 2011, the construction contract had to be in writing and this could be an exchange of letters or a standard form of contract. The Act was amended on 1 October 2011 by Section 8 of the Local Democracy, Economic Development and Construction Act 2009. This new Act now includes not only written construction contracts, but also oral and partly oral agreements. Importantly, the adjudication provisions do not extend to a residential occupier (unless the parties agree otherwise). The Construction Contracts’ Act in the Republic of Ireland has a similar definition.

Disputes in the UK which can successfully be referred to adjudication are those involving sub-contractor vs. main contractor; main contractor vs. employer; employer vs. designer and vice versa. Most commonly the disputes involve non-payment of money but can involve defective work, contractual claims, and professional services (and many others too numerous to mention). As already stated, in the Republic of Ireland, only payment disputes can be referred to adjudication. Architectural, design and surveying work all fall within the Act (in the UK and Republic of Ireland) and can be referred to adjudication (providing in the Republic of Ireland the dispute involves payment).

Any party to a construction contract (except a construction contract with a residential occupier, and a limited number of other exclusions, unless otherwise agreed) may refer a dispute to adjudication at any time.

How are adjudicators appointed?

An Adjudicator can be named in a construction contract and called upon to act if a dispute arises. In some cases the contract names an organisation as the body which will appoint someone from its list of approved adjudicators. If the construction contract does not specify the name of an adjudicator, or does not specify a particular Nominating Body, then the Referring Party can agree the name of the adjudicator with the other party or is free to choose any Nominating Body (some of the more widely used nominating bodies include RIBA, RICS, CI Arb, AICA and CIC). An application can be made to the Nominating Body for the appointment of a suitably qualified adjudicator.

The appointment of an adjudicator in the Republic of Ireland is different. The parties may agree on an adjudicator, or failing agreement, the adjudicator is appointed by the Chair of the

panel (which is a panel of 30 adjudicators held on what is known as the Minister's Panel). Unlike the UK there are no nominating bodies.

What are the benefits of adjudication?

Speed

Adjudication is usually regulated by a strict timetable, which ensures decisions are made within a reasonable period typically within 28 days from the appointment of the adjudicator. This timetable can be extended if the parties agree.

Timelines

Adjudication allows construction disputes to be resolved as and when they arise. Differences are not allowed to continue on and cause increased tension between the parties, which could lead to unnecessary additional time and costs to resolve the dispute.

Clear conclusion

An adjudicator's decision is binding and must be complied with immediately, or on a date set by the Adjudicator. If either party does not accept the adjudicator's decision, the dispute can be referred to legal proceedings or arbitration. However, this is not normally necessary.

How much does adjudication cost?

A nominal administration fee is usually charged by the Nominating Body for each application in the UK. Following the appointment, the adjudicator will contact the parties to advise them of the general procedure for dealing with the dispute and, at that stage, will set out the fees to be charged. There are no guidelines on the level of adjudicators' fees in the UK. In the Republic of Ireland, however, the adjudicator is required under the Code of Practice to charge fees which are "reasonable and commensurate with the value of the matter to be determined" and where the dispute is for less than €50,000 and on the basis of papers without legal or experts' opinion, the maximum fee is set by the Chair of the Panel. In more complex disputes the adjudicator is to provide an estimate of his fees in advance of any adjudication hearing.

Adjudicators in the UK normally charge an hourly rate based on the nature and complexity of the dispute. Adjudication can be relatively inexpensive because the time and effort expended by the adjudicator in dealing with a dispute is normally far less than going to court or arbitration.

In most cases, the adjudicator will decide which party is to be responsible for payment of their fees. The Adjudicator may decide that both parties pay equal amounts or, if there is an outright winner in the dispute, the loser may be required to pay all the adjudicator's fees. Each party will normally bear their own costs in preparing the necessary papers or acquiring professional help, unless a construction contract states otherwise.

Usual stages of adjudication in UK

Stage 1

The Referring Party (ie the party making the claim) must serve a notice of adjudication on the other party to the construction contract.

It can be done by way of a letter or a more formal document. To be valid it must contain the information required under a

construction contract or, if there is no formal construction contract, the information required by the Scheme.

The Scheme requires that the notice shall set out briefly:

- (a) the nature and a brief description of the dispute and of the parties involved;
- (b) details of where and when the dispute has arisen;
- (c) the nature of the redress which is sought; and
- (d) the names and addresses of the parties to a construction contract (including, where appropriate, the addresses, which the parties have specified for the giving of notices).

Stage 2

Having served Notice, the Referring Party can then refer the dispute to the adjudicator named in a construction contract, or, if there is no named adjudicator, apply to the Nominating Body named in the contract or alternatively agree the name of the adjudicator with the other party. If there is nothing mentioned in the contract or there is no formal contract or agreement on the name of an adjudicator then the Referring Party is free to apply to a Nominating Body of their choice.

If the parties can agree on the name of an adjudicator, or any particular skills required by the adjudicator then this is always preferable. If there is a need for the adjudicator to have any particular skills then the parties need to ensure that the adjudicator has these skills before naming them in a construction contract. Alternatively, ensure that the Nominating body is made aware of the need for these skills when applying to the Nominating Body for an adjudicator.

Stage 3

If applying to a Nominating Body, they will advise of the person they have nominated to be adjudicator (usually within two or three days).

It is usual for the Adjudicator to contact the parties once he/she has been nominated (the Nominating Body advise the Adjudicator of the nomination at the same time as the parties are notified).

Stage 4

Once the claimant is aware of who the Adjudicator is, they should be sent the "Referral". This is the claimant's claim and must contain copies of, or relevant extracts from the construction contract and such other documents as the Referring Party intends to rely upon. The Referral must be copied to the Responding Party (ie defendant). Any timescale set out in the relevant contract between the parties to the dispute must be complied with. The Scheme requires the Referral to be submitted within 7 days of the date of the Notice of Adjudication. Ensure that the dispute set out in the "Referral" is the same as that set out in the Notice of Adjudication, otherwise there may be difficulty in enforcing any decision the Adjudicator makes.

Stage 5

The Adjudicator will allow the Responding Party to submit a Defence, often referred to as a "Response". The Adjudicator will usually set out the timescale for this unless the contract stipulates the timescale.

The Adjudicator is usually allowed to make such enquiries as they consider necessary to establish the facts and the law. This

may involve inspecting the site. The Adjudicator should make further contact with the parties if he/she has acquired further information which the parties are not aware of.

The Adjudicator should allow the parties to comment on this information before he/she considers this as part of the case.

Stage 6

The Adjudicator will issue their decision within 28 days of the Referral. The Referring Party can extend that period by up to 14 days without having to discuss this with the Responding Party. Any further extension beyond 14 days has to be agreed by both parties.

How do I start adjudication in the Republic of Ireland?

Starting an adjudication in respect of payment disputes in the Republic of Ireland is broadly similar to that in the UK. A Notice of Adjudication has to be given. The parties may agree to appoint an adjudicator of their own choice or from the panel appointed by the Minister. Failing agreement the adjudicator is selected by the Chair of the panel. The referral has to be served within 7 days of the adjudicator being appointed and a copy sent at the same time to the other party. Stages 5 and 6 (from the UK) will equally apply in the Republic of Ireland.

UK Nominating Bodies

Royal Institute of British Architects (RIBA)
66 Portland Place, London, W1B 1AD
architecture.com

Royal Institution of Chartered Surveyors (RICS)
12 Great George Street, Parliament Square, London, SW1P 3AD
T: 020 7222 7000
rics.org.uk

Centre for Effective Dispute Resolution Ltd (CEDR)
70 Fleet Street, London EC4Y 1EU
cedr.com

Construction Industry Council (CIC)
26 Store Street, London, WC1E 7BT
T: 020 7399 7400
cic.org.uk

Further reading

Members in the UK may also be interested in the CIC Model Adjudication Procedure 5th edition, which can be purchased from Construction Industry Council (CIC), cic.org.uk

Members in the Republic of Ireland may also be interested in the *Users' Guide to Adjudication: Ireland*, and this can be downloaded from the following link:
<http://cic.org.uk/download.php?f=adjudicationuserguide2017-irelandupdated-code-of-practice.pdf>

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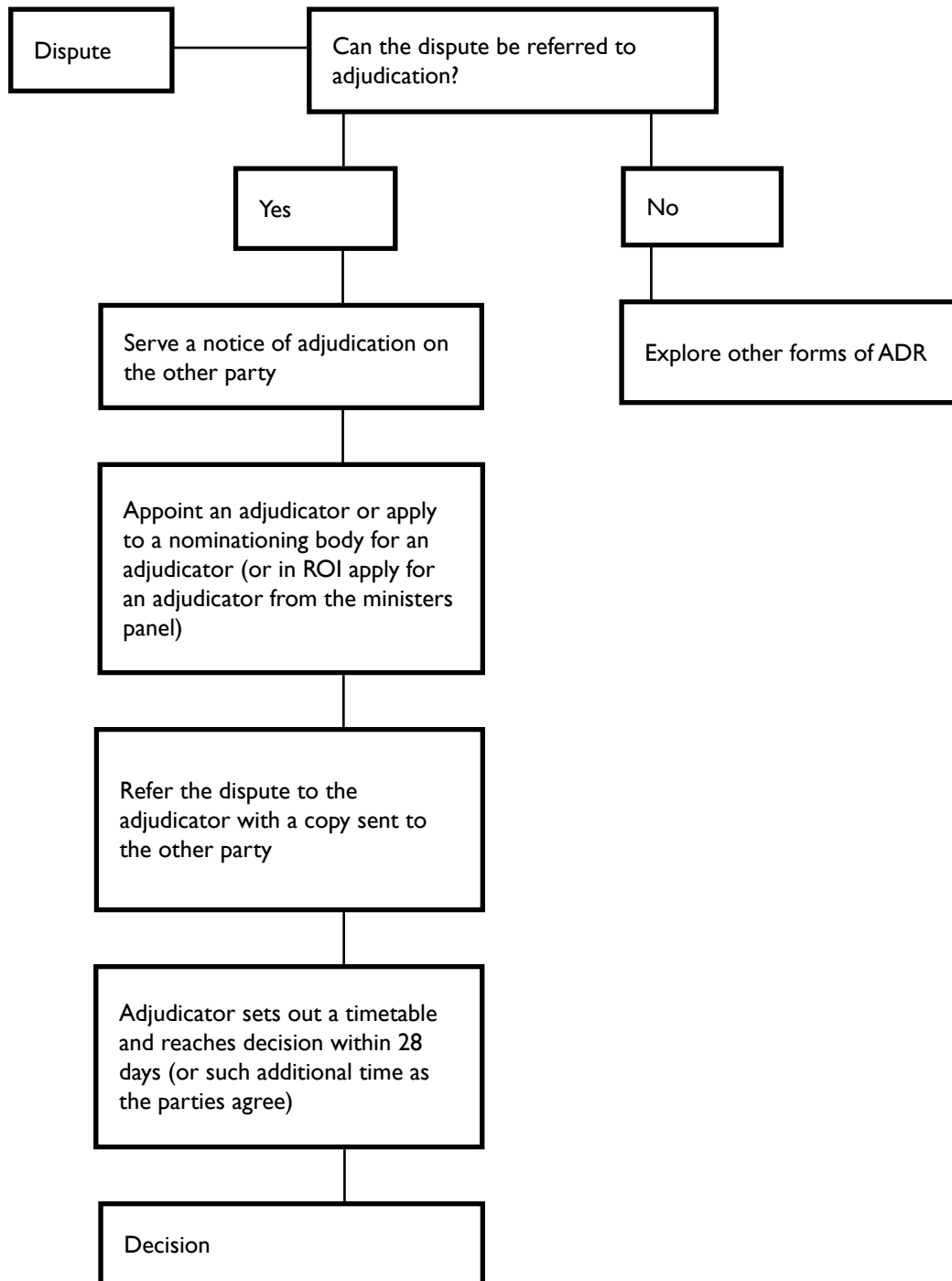
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The adjudication process



How does adjudication fit into the dispute landscape

