

“ Plain speaking legal advice ”

Adjudication

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What is it?

It is a form of dispute resolution that is uniquely only available for Construction Disputes. It was created by the Housing Grants Construction and Regeneration Act and provides a fast track means of resolving construction disputes usually only between two commercial parties. From the referral of the dispute to a decision being provided can be as little as 28 days. The decision is temporally binding on the parties until either agreement or a subsequent decision of a court or arbitrator. It is a rough and ready, albeit very popular form of dispute resolution that can be used during the course of a construction project to resolve issues and aid cash flow.

What is required?

There has to be a written Construction Contract (although this requirement is proposed to be removed during the current parliament). The dispute has to concern a construction operation and not be one of the operations excluded by the Act – for example oil exploration. In most cases residential occupiers are also excluded unless Adjudication is specifically provided for in their construction contract and the residential occupier has been specifically advised as to what Adjudication involves before entering into the contract.

A party can bring adjudication at any time provided there is a 'dispute' that has formed.

The Process

Provided that adjudication is suitable, the party wishing to refer the dispute to adjudication needs to appoint an adjudicator. Ideally this will be an individual named in the construction contract, if there is not one and the parties can not agree to an individual then the contract will generally provide that a 'nominating body' such as the Royal Institute of Chartered Surveyors are to appoint a suitable qualified individual. In most cases the adjudicator is not a lawyer or anyone with legal training but instead someone with practical experience that would assist in deciding the issue in dispute.

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The referring party commences the adjudication by preparing and sending to the other side a “Notice of Adjudication” which is essentially a brief document setting out the important contract terms, confirming the dispute and the remedies required. After only seven days the referring party then sends a more detailed document (“the Referral Document”) together with supporting evidence. The Adjudicator will then usually allow the responding party the opportunity to respond to the Referral Document but this will usually be within only seven days of the Referral Document. Unless there is agreement to an extension the Adjudicator is bound to provide his decision within 28 days.

The parties own legal costs of the proceedings are not recoverable but the adjudicator generally has authority to decide who pays his fee or who pays what proportion.

The Decision

The Adjudicator’s decision is binding on the parties until either the parties agree it or until enforced by the courts or arbitration.

The Courts in most cases will enforce the decision without question. There are only very limited grounds and circumstances where a decision will not be enforced. To resist enforcement it needs to be shown that the Adjudicator:

- Acted outside his jurisdiction – for example he answered a different question or decided a different dispute to the one referred.
- Breached the rules of natural justice or
- Demonstrated bias.

The Courts will therefore enforce a decision even if it is wrong providing the Adjudicator has answered the right question albeit wrongly.

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Given these very limited grounds for resisting a decision many adjudications are now undertaken with professional help – to ensure so far as is possible that the dispute is presented or defended in the best possible light.

The Pressures / Tactics of the Process

The tactical upper hand in Adjudication is very often with the party bringing the claim. They can in most cases decide when to commence Adjudication and therefore should have prepared both the Notice and Referral in advance. They must however ensure that there is a dispute. Where for example the other side could be said to still be considering an application for payment there is unlikely to be a dispute and therefore any Adjudicator would not have jurisdiction to act and should in those circumstances resign.

The Responding Party is very much on the back foot. From the date of the Notice they have only 14 days to provide a comprehensive reply. This puts that party under extreme time pressure which may be increased if for example key personnel are not available to assist during that period.

Unlike a Court action a responding party cannot counterclaim in Adjudication and the Adjudicator can not order monies are paid by the referring party. In such circumstances it is sometimes advisable for a responding party to, upon receipt of an Adjudication Notice, to immediately commence their own Adjudication using the same Adjudicator and asking the two actions be joined together.

As soon as an Adjudication Notice is received it is advisable to ensure that as many of the key personnel are available and immediately seek professional help with what can be a complex and highly pressurised process.

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