

A users' guide to
Adjudication under
the Scheme for
Construction Contracts
INCLUDING PAYMENT PROVISIONS

2nd edition

G U Y C O T T A M

Adjudication under the Scheme for Construction Contracts

INCLUDING PAYMENT PROVISIONS

Second edition

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Adjudication under the Scheme for Construction Contracts

Preface

The first edition of this book proved to be very popular and was even referred to in court. However, since it was written we have now had three years of experience with this new form of statutory adjudication and the legal position of adjudication has become clearer.

Adjudication has been an outstanding success. Paying parties have realised that they now have to deal with a payee's claims quickly and efficiently and payees have learnt that they have to present their claims in a matter which reflects their contractual rights and not opportunistic whims. It has made all parties more aware of their obligations to each other.

There have now been around 200 court judgements, mostly on enforcement proceedings. There have been four decisions of the Court of Appeal. It is clear that the courts have been supportive of adjudication and are clearly of the opinion that adjudicators' decisions should be enforced summarily even if they contain mistakes unless it can be shown that the payee would be unable to repay a monetary award should the adjudicator's decision be reversed. The safeguard is that the dispute may subsequently be referred to arbitration or litigation.

The effects of these judgements have been reflected in the text.

Experience has shown that it is not necessary to have to take advice before embarking upon an adjudication. All those who are capable of negotiating their own contracts are quite capable of preparing their case for the adjudicator. It is even possible to seek enforcement of the decision through the courts without legal representation.

I have included in this edition additional guidance on how to present your information to the adjudicator, what to expect from the other side and how to enforce a decision if the other party does not implement it. I have not tried to turn the book into a legal

treatise although there is comment on some of the more important cases at the end.

Experience has shown that probably the most important feature of the Housing Grants Construction & Regeneration Act 1996 has been the payment provisions. The section on the payment provisions has been expanded to take account of our better understanding of their effects. The dangers of paying parties failing to give the appropriate notices has become apparent.

Experience has also shown that parties are reluctant to pursue a dispute through the courts or arbitration if they disagree with the adjudicator's decision. This is probably due to the costs involved for what will probably be only a marginal advantage. There is little reason, generally, to be confident that a judge or arbitrator will come to a more favourable decision than the adjudicator did. It is therefore important to ensure that the best possible case is presented to the adjudicator and it is presented in a manner that will assist the adjudicator in reaching the Decision. I have tried to indicate what the adjudicator requires.

Guy Cottam

Preface to the first edition

The aim of this book is to provide a simple guide to the effects of the Housing Grants, Construction and Regeneration Act 1996, and the Scheme for Construction Contracts which is a Regulation produced under the Act.

Although the text follows in detail the Scheme for England and Wales, the Schemes for Scotland and Northern Ireland are similar with one major and a number of minor alterations. The main difference concerns the enforcement of an adjudicator's decision which in England and Wales relies on the Arbitration Act 1996, but in Scotland permits registration of the decision in the Books of Council and Session. Otherwise the Scottish version merely tidies up some of the more blatant meandering draughtsmanship of the English version, with minimal consequences. Users in Scotland should check the text of the paragraphs in the Scottish version to identify the differences, which are highlighted in Appendix C.

The Scheme implements the purposes of the Act if the parties to the construction contract fail to include its requirements in their contract. The Scheme has been drafted in parliamentary language, and is not particularly user-friendly.

The most important requirement of the Act is the right to adjudication for all disputes. Adjudication not only covers all disputes that may arise on a construction contract but is also the principal means by which the other requirements will be enforced. This is why most of the book is devoted to adjudication.

There is no reason why a party wishing to go to adjudication should employ outside help. For most disputes the parties will be able to produce all the notices and other documents required by the adjudicator themselves. The main problem will be time, particularly for the party who has not initiated the adjudication, for he will have only about three weeks to respond, whereas the initiating party may

spend a considerable amount of time preparing his case before starting the adjudication process.

This book does not go through the Scheme clause by clause, but explains the actions required by the Scheme stage by stage. It is not intended to be a legal treatise but a simple guide to help those who have a dispute which is referred to adjudication, or those who have difficulty with the payment terms.

It explains to those people their new rights under the Act, and how to go about securing them. It does not cover disputes which may arise later concerning the conduct of the adjudication or interpretation of the Act itself. These types of dispute will inevitably be referred to either arbitration or litigation and further specialist advice will be needed for them.

At every stage the requirements of the Scheme are printed in italics, and the various chapters include all the words contained in the Scheme. Alternative actions are discussed at each stage, and appropriate tactics highlighted.

The Scheme applies to a wide range of construction contracts, not just to contracts between client and a contractor. The scheme also covers consultants' contracts with their clients, main contracts, subcontracts, subsubcontracts and so on down the chain. It is therefore difficult to define the names of the parties to the relevant construction contracts. Accordingly, I have referred to the party for whom the service is provided and who will be paying for the service as the employer. This term will therefore refer to the contractor in the context of a subcontract dispute.

The Act covers a wide range of contracts so it is impossible to describe every potential party to a dispute by the name that he would normally ascribe to himself. Throughout this book I have referred to the person who starts the adjudication as the Referring Party and the person who receives the notice as the Receiving Party. There is, unfortunately, not yet any universally accepted terminology, and some commentators refer to the responding party or the defending party. What we must avoid is using the terms used in litigation or arbitration. I have also used the term 'employer' for the

party under the contract who is paying for the service and this will include a contractor in the case of a subcontract and a consulting engineer or architect when he engages others to do work for him.

Although this book is written using the masculine gender for simplicity of reading, it should be read as including the feminine throughout.

Guy Cottam

Contents

Preface	vii
Preface to the first edition	ix
1 Introduction: the Act and its implications	1
2 Pre-contract considerations	21
3 Adjudication—getting started: the Notice of Adjudication	29
4 The Referring Party: the appointment of the adjudicator and referral of the dispute	33
5 The Responding Party: receipt of the Referral Notice	53
6 The procedure—determination by the adjudicator	63
7 General obligations of the parties	77
8 Settlement and resignation of the adjudicator	83
9 The Decision	91
10 The effects of the Decision	105
11 Payment of the adjudicator	111
12 The payment provisions	119
13 The Act	137
14 The evolving legal position	169
Appendix A Part II: Housing Grants, Construction and Regeneration Act 1996	185
Appendix B Statutory Instrument 1998 No. 649	199

Appendix C	Differences between the versions of the Scheme for England and Wales and the Scheme for Scotland	215
Appendix D	A Case Study	233
Appendix E	Construction Industry Council's Guidance Notes for Adjudicators	263
Appendix F	The ICE Adjudication Procedure (1997)	277
Appendix G	Published Adjudication Procedures and Adjudicator Nominating Bodies	293
Appendix H	Index to Paragraphs in the Scheme	297
	Index	301

Introduction: the Act and its implications

In July 1994, Sir Michael Latham published the results of his investigation into the construction industry in a report titled **Constructing the Team**.¹ In his report, Sir Michael made a number of proposals for fairer contracts.

He recommended that the industry should be encouraged to use certain standard contracts and that these should be unamended. He said that the Bill should state that when any of the standard forms are used the following actions should be unfair or invalid:²

- (1) any attempt to amend or delete the sections relating to times and conditions of payment, including the right of interest on late payment;
- (2) to seek to deny or frustrate the right of immediate adjudication to any party to the contract or subcontract, where it has been requested by that party;
- (3) to refuse to implement the decision of the adjudicator;
- (4) to seek to exercise any right of set-off or contracharge without:
 - (a) giving notice in advance;
 - (b) specifying the exact reason for deducting the set-off; and
 - (c) being prepared to submit immediately to adjudication and accepting the result subject to (3) above.

1 Final report published by HMSO ISBN 0 11 7552994.

2 Paragraph 8.9 & Recommendation 25: Unfair Conditions.

- (5) to seek to set-off in respect of any contract other than the one in progress.

And in bespoke contracts these points should be declared unfair or invalid and in addition any attempt by contractors to introduce 'pay when paid' conditions should be explicitly declared unfair and invalid.³

He said that in order to aid confidence, these central provisions should be underpinned by legislation.

This prompted the Conservative Government of the day to pass **The Housing Grants, Construction and Regeneration Act 1996**⁴ (The Act) which imposes some of these principles upon the construction industry.

The Government decided not to introduce these principles into legislation in a form similar to the Unfair Contract Terms Act 1977, which rendered certain terms in contract unfair, but as rights which one party is free to exercise if he so wishes.

The Act addresses three important issues in construction contracts:

- (a) Interim settlement of disputes by adjudication;
- (b) payment by instalments for contracts lasting longer than 45 days;
- (c) the ability to suspend performance if not paid within a specified period; and
- (d) the outlawing of 'pay when paid' clauses.

The Act states the basic principles which are to apply for each of these matters. It imposes them by permitting the parties to a construction contract to include them voluntarily in their contracts with such additions as they may wish, provided that those additions do not offend against the basic principles themselves.

3 Paragraph 8.10 & Recommendation 25.

4 See Appendix A.

When a construction contract does not comply with these requirements the Act provides that the **Scheme for Construction Contracts**, which is referred to in this book simply as the Scheme, applies.⁵ When the Scheme applies its requirements have the effect of implied terms under the contract.⁶

To whom does the Act apply?

The Act applies to all 'construction contracts'. The Act defines what is a construction contract and the definition comes from the Income and Corporation Taxes Act 1988. It is by no means ideal and has a number of significant omissions. The Secretary of State is given power, by order, *to add to, amend or repeal any of the provisions ... as to ... which are construction contracts*.⁷ This is done by laying a draft order before both Houses of Parliament.

A construction contract is an agreement with another party for any of the following:⁸

- (a) *the carrying out of construction operations;*
- (b) *arranging for the carrying out of construction operations by others, whether under a subcontract to him or otherwise;*
- (c) *providing his own labour, or labour of others, for the carrying out of construction operations.*

These definitions clearly cover contracts for construction work but the Act also includes consultancy contracts in connection with construction work. Construction contracts also include an agreement:⁹

- (a) *to do architectural, design or surveying work, or*

5 The Act ss108(5), 109(3), 110(3), 111(3), 113(6), 114(4).

6 s114(4).

7 s104(4).

8 s104(1).

9 s104(2).

- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.

A wide definition is provided for construction operations.¹⁰ These include construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, structures forming or to form, part of the land including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage coast protection or defence.¹¹

The definition goes on to include the incidental operations involved in constructing these works. There are, however, a number of important exclusions.

First, the construction contract must be in writing. If it is not then the Act does not apply to it. However, the definition of a contract in writing is again wide. It is said to be in writing if it is made in writing. This is the normal written agreement. However, the Act includes agreements which are evidenced in writing:¹² An agreement is evidenced in writing if the agreement is recorded by one of the parties or a third party with the authority of the parties to the agreement.¹³ This means that if someone at a meeting for instance is asked to produce minutes of the meeting and the minutes record the agreement then it is an agreement in writing and the contract, if a construction contract, is covered by the Act. However, the court of appeal has said that the relevant terms must be in writing even if the contract itself is not in writing.¹⁵

The Act does not apply to a construction contract with a residential occupier.¹⁴ This exemption will include houses and flats which are

10 s105.

11 s105(b).

12 s107(2)(c).

13 s107(4).

14 s106(1)(a).

15 *RJT Consulting Engineering Ltd v. DM Engineering (Northern Ireland) Ltd* CA (8 March 2002).

either occupied by, or are intended to be occupied by one of the parties to the contract. It does not exclude housing developments by either property companies or housing associations.

Also exempt are material and component supply contracts, mineral extraction contracts and process engineering contracts.¹⁶

Even when the primary operation is exempt, such as a process plant, the subsidiary operations such as site preparation, roadworks and office buildings will not be exempt. This means that those with exempt contracts will have to consider whether or not it is in their own interest to include the requirements of the Act into their contracts so as to be 'back to back' with subcontracts that they may subsequently enter into and which will be covered by the Act.

It follows that the Act will apply to most contracts in the industry: client/consultant; client/main contractor; main contractor/subcontractor; and subcontractor/subsubcontractor. It was even queried whether legal advice from a solicitor in relation to construction operations would be caught!

Before either entering into a contract or before trying to impose the requirements of the Act it would be wise to check whether or not the contract will be affected by the Act. If in doubt, it would be best to assume that it is.

Adjudication

The first of the requirements of the Act to be considered is the requirement of adjudication. This was the major recommendation of Sir Michael Latham.

The Act says that *a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with*¹⁷ *this section [of the Act] ... at any time.*¹⁸

Adjudication is a procedure whereby an impartial person is asked to give a quick temporary solution to a perceived wrong.

16 s105(2).

17 s108(1).

18 s108(2)(a).

The adjudicator's decision 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.*¹⁹

The adjudicator therefore gives a decision which the parties to the contract are bound to implement but if either party is dissatisfied with the decision he can refer the dispute for a final decision by the traditional legal processes, but implementation may not be suspended pending the outcome of those proceedings.

The aim of adjudication is to resolve disputes on a temporary basis so that the work may proceed unimpeded. Certain events which commonly arise can cause a serious problem for one of the parties, and if not resolved could be disastrous.

Such events may be:

- (a) failure to pay a sum of money;
- (b) disagreement about a certificate, an instruction; or the quality of the design or workmanship;
- (c) disagreement as to whether an instruction should be given;
- (d) disagreement as to whether the work is physically or legally impossible to perform.

The adjudicator makes a decision which settles the dispute temporarily so that the work may proceed with less likelihood of serious injustice being caused. If either party disagrees with the adjudicator's decision he may refer the dispute for final determination by either an arbitrator, if arbitration has either been agreed in the contract or is subsequently agreed to by the parties, or otherwise by a court.

The parties are obliged to implement the adjudicator's decision even if the decision is not accepted by one of the parties. It is a quick process, generally completed within 28 days; although the time may be increased by agreement.

¹⁹ s108(3).