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# **Adjudication Society & Chartered Institute of Arbitrators**

## **GUIDANCE NOTE: CONSTRUCTION CONTRACTS AND CONSTRUCTION OPERATIONS**

1<sup>st</sup> Edition (04/2013)

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## **GUIDANCE NOTES FOR ADJUDICATION**

The Adjudication Society and Chartered Institute of Arbitrators established a joint working group in April 2010 in order to produce a series of Guidance Notes dealing with Adjudication. The purpose was to deal with Adjudication in England, Wales and Scotland. Nicholas Gould, Partner, Fenwick Elliott LLP chaired the joint working group, which was established under the policy sub-committee of the Chartered Institute of Arbitrators and the executive committee of the Adjudication Society.

The Guidance Notes are to assist not just adjudicators, but also parties and party representatives in respect of the key issues that they and adjudicators might encounter when dealing with adjudication under the Housing Grant, Construction and Regeneration 1996, and the subsequent Local Democracy Economic Development and Construction Act 2009. The Guidance will take into account the Scheme, amendments to it and also pertinent case law.

The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered. Instead, the Guidance tries to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish best practice, so that guidance notes will be provided from time to time.

The first Guidance Note dealt with jurisdiction, and was published on the 25<sup>th</sup> May 2011.

Guidance Notes can be obtained from the website of The Adjudication Society ([www.adjudication.org](http://www.adjudication.org)) or the Chartered Institute of Arbitrators ([www.ciarb.org](http://www.ciarb.org)).

### **Nicholas Gould**

*Chairman, Guidance Note Joint Working Group, Comprising Guidance Note Sub-Committee, Adjudication Society and Guidance Note Sub-Committee, Chartered Institute of Arbitrators.*

## **1. CONSTRUCTION CONTRACTS**

- 1.1. Part II of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”) only applies to “construction contracts”.
- 1.2. These are defined in two ways in section 104 of the Act. The first definition can be found in section 104(1). This definition covers contracts for the carrying out of building work and defines “constructions contracts” to include agreements for:
  - 1.2.1. The carrying out of construction operations.
  - 1.2.2. Arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise.
  - 1.2.3. Providing labour for the carrying out of construction operations.
- 1.3. The second definition, which works alongside the first definition, can be found in section 104(2) of the Act and covers contracts with construction professionals. It provides that the following are also “construction contracts”:
  - 1.3.1. Agreements to do architectural design or surveying work; and
  - 1.3.2. Agreements to provide advice on building, engineering interior or exterior decoration or on the laying-out of landscape.
- 1.4. There are two central aspects to all these definitions:
  - 1.4.1. Firstly there must be a contract. This is a very broad topic outside the scope of this guidance note.
  - 1.4.2. Secondly, save for s.104(2)(a) of the Act, all the definitions refer to “construction operations”, a phrase which is considered further below.

## **2. EXPRESS ADJUDICATION CLAUSE**

- 2.1. The issue of whether a contract concerns construction operations only arises if the contract does not contain an express adjudication clause such that a clause has to be implied.<sup>1</sup> If the parties have expressly agreed that their contract is governed by adjudication, they are bound by this agreement and it is irrelevant that the Act may not otherwise have rendered adjudicatory mandatory.

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<sup>1</sup> *Treasure & Son Ltd v Dawes* [2007] EWHC 2420 (TCC); *Ledwood Mechanical Engineering Ltd v Whesoe Oil and Gas Ltd* [2007] EWHC 2743 (TCC).

### **3. GEOGRAPHICAL SCOPE**

3.1. The adjudication provisions of the Act only apply to constructions contracts which relate to the carrying out of construction operations in England, Wales and Scotland. It is the geographical location of the construction operations that determines whether the contract is caught by the Act, not the location of the contracting parties or where the particular work is carried out if these are different.

3.1.1. For example, a contract between an English developer and an English architect entered into in London will not attract the adjudication provisions of the HGCRA if the building being designed is to be located in France.

3.1.2. By contrast, a contract between a French developer and a French architect entered into in Paris would theoretically attract the adjudication provisions of the HGCRA if the building being designed is to be built in England, although there may be other legal and practical hurdles to adjudication.

### **4. CONSTRUCTION OPERATIONS – INCLUDED AND EXCLUDED ACTIVITIES**

4.1. The Act defines “construction operations” in two ways. Firstly by reference to generally included activities and second by reference to specific excluded activities. The specific exclusions take precedence such that if they apply the operations are not construction operations even if they fall within the general included activities.

4.2. The following activities are defined as construction operations by section 105(1) of the Act:

(a) *construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);*

(b) *construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) 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;*

- (c) *installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;*
- (d) *external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;*
- (e) *operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;*
- (f) *painting or decorating the internal or external surfaces of any building or structure.*

4.3. There is only limited judicial guidance on the meaning of these words in borderline cases:

4.3.1. The references to “land” in sub-sections (a), (b) and (c) means that those parts do not apply to offshore installations.<sup>2</sup>

4.3.2. The installation of materials which are not structures or fittings which will upon completion form part of the land to which they are attached is also not covered by the Act.<sup>3</sup>

4.4. The following is a list of excluded activities by virtue of section 105(2) of the Act:

- (a) *drilling for, or extraction of, oil or natural gas;*
- (b) *extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;*
- (c) *assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—*
  - (i) *nuclear processing, power generation, or water or effluent treatment, or*
  - (ii) *the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;*
- (d) *manufacture or delivery to site of—*
  - (i) *building or engineering components or equipment,*

<sup>2</sup> *Staveley Industries Plc v Odebrecht Oil and Gas Services Ltd* [2001] 98 (10) LSG 46. Much work on offshore installations would in any event be caught by the exclusions in s.105(2) of the Act.

<sup>3</sup> *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd* [2001] BLR 407

- (ii) *materials, plant or machinery, or*
- (iii) *components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;*
- (e) *the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature*

4.5. Again, there is only limited judicial guidance on the meaning of these words in borderline cases:

- 4.5.1. Pipework connecting plant or machinery is generally considered part of that plant or machinery.<sup>4</sup>
- 4.5.2. By contrast, preparatory work for the construction of plant such as the construction of temporary roads and demolition of pre-existing buildings does not fall within the exceptions.<sup>5</sup>
- 4.5.3. Similarly, although various on-site steelwork activities are caught by subsection (c), preparatory activities such as the production of fabrication drawings, off-site fabrication and delivery to site are not caught.<sup>6</sup>

## **5. OTHER EXCLUDED MATTERS**

5.1. Although outside the scope of this guidance note, it should be remembered that the following contracts are also excluded from the Act even though they relate to construction operations:

- 5.1.1. Contracts with a residential occupier.<sup>7</sup>
- 5.1.2. Development Agreements as defined in the Construction Contracts (England and Wales) Exclusion Order 1998 (Statutory Instrument 1998 648).

## **6. ASSESSMENT BASED ON SPECIFIC CONTRACT WORKS**

6.1. Each contract should be assessed by reference to work covered by that particular contract rather than the purpose of the project as a whole.<sup>8</sup>

6.2. As a result, it is possible to have a single project where:

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<sup>4</sup> *Homer Burgess Ltd v Chirex (Annan) Ltd* [2000] BLR 124

<sup>5</sup> *North Midland Construction Plc v A&E Lentjes UK Ltd* [2009] EWHC 1371 (TCC)

<sup>6</sup> *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC).

<sup>7</sup> Section 106 of the Act.

<sup>8</sup> *North Midland Construction Plc v A&E Lentjes UK Ltd* [2009] EWHC 1371 (TCC)



- 6.2.1. The main contract relates partly to construction operations and partly to excluded or other matters.
- 6.2.2. Some sub-contracts relate solely to construction operations.
- 6.2.3. Some sub-contracts relate solely to excluded or other matters.

## **7. CONTRACTS ONLY PARTLY RELATING TO CONSTRUCTION OPERATIONS**

- 7.1. Where a contract relates partly to construction operations and partly to excluded or other matters, the Act applies in so far as it relates to construction operations.<sup>9</sup> This means that adjudication is available provided it is limited to resolving disputes about the construction operations and does not cover excluded matters. If the referred dispute relates partly to matters which are not construction operations and there is no express adjudication clause, the adjudicator does not have jurisdiction and should refuse to act.<sup>10</sup> The referring party will be entitled to refer again, drafting its referral in such a manner that it is strictly limited to construction operations.

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<sup>9</sup> Section 104(5) of the Act.

<sup>10</sup> *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC).