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# Adjudication Society & Chartered Institute of Arbitrators

## GUIDANCE NOTE: THE SCHEME FOR CONSTRUCTION CONTRACTS

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. THE SCHEME FOR CONSTRUCTION CONTRACTS**

- 1.1. The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) (and the equivalent Scheme for Construction Contracts (Scotland) Regulations 1998 (SI1998/687)) supplements Part II of the Housing Grants, Construction and Regeneration Act 1996 (“the Construction Act”) and applies to construction contracts in England, Wales and Scotland entered into from 1<sup>st</sup> May 1998 up to the date (“the effective date”) when the Construction Act was amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009. The effective date for England and Wales is 1<sup>st</sup> October 2011 and for Scotland is 1<sup>st</sup> November 2011.
  
- 1.2. The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) (and the equivalent Scheme for Construction Contracts (Scotland) Regulations 1998 (SI1998/687)) has now been amended by the following statutory instruments:-
  - 1.2.1. The Scheme for Construction Contracts (England) Regulations 2011;
  - 1.2.2. The Scheme for Construction Contracts (Wales) Regulations 2011;
  - 1.2.3. The Scheme for Construction Contracts (Scotland) Regulations 2011;
  
- 1.3. This Guidance Note collectively refers to the various original Schemes as enacted and as amended as “the Scheme”.
  
- 1.4. The Scheme provides a fall-back position where a construction contract does not include all the adjudication provisions in Section 108 of the Construction Act 1996. Where that is the case, the adjudication provisions set out in the Scheme take effect as implied terms and replace completely any such provisions in the contract <sup>1</sup>

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<sup>1</sup> S.114(4) of the Construction Act 1996

## **2. THE SCOPE OF THIS GUIDANCE NOTE**

- 2.1. This Guidance Note only considers the adjudication provisions of Part 1 of the Scheme.
- 2.2. This Guidance Note does not deal with the following issues which are covered by separate Guidance Notes:-
  - 2.2.1. The meaning of “Construction contracts” and “construction operations”;
  - 2.2.2. The meaning of “Contracts in writing”;
  - 2.2.3. The question of whether a dispute has arisen;
  - 2.2.4. Matters of timing associated with service of the Referral and reaching/delivery of the Decision;
  - 2.2.5. An adjudicator’s lien;
  - 2.2.6. The slip rule;
  - 2.2.7. Costs;
  - 2.2.8. Interest;
  - 2.2.9. Simultaneous proceedings;
  - 2.2.10. Adjudicating the same issue.
- 2.3. Sections 3 to 10 inclusive deal with the Scheme as it relates to contracts entered into prior to the effective date. Section 11 deals with the Scheme as it relates to contracts entered into after the effective date in England. Section 12 deals with the Scheme as it relates to contracts entered into after the effective date in Wales. Section 13 deals with the Scheme as it relates to contracts entered into after the effective date in Scotland.

## **3. THE APPOINTMENT OF THE ADJUDICATOR**

- 3.1. Paragraphs 2 to 6 of the Scheme contain detailed provisions for the appointment of the adjudicator.

- 3.2. The Referring Party should appoint the adjudicator *after* it has given notice of adjudication (paragraph 2(1)). It may do this by either (i) agreeing with the Responding Party who shall act (paragraph 2(1)), (ii) requesting the person named in the contract (if any) (paragraph 2(1) (a)), (iii) approaching the adjudicator nominating body (“ANB”) specified in the contract<sup>2</sup> or (iv) approaching an ANB to select an adjudicator (if the contract does not specify a particular ANB).
- 3.3. The Referring Party should include a copy of the notice of adjudication with the request for the appointment of an adjudicator (paragraph 3).
- 3.4. The potential adjudicator should (i) indicate whether he is willing and able to act within 2 days from receiving the request to do so (paragraph 2(3) and also paragraph 5(3) and paragraph 6(2)), (ii) be a natural person acting in his personal capacity (paragraph 4), (iii) not be an employee of any of the parties to the dispute (paragraph 4) and (iv) declare any interest, financial or otherwise, in any matter relating to the dispute (paragraph 4).
- 3.5. If the person named in the contract indicates he is unwilling or unable to act, or fails to respond to the Referring Party’s request with 2 days, the Referring party may request another named adjudicator (if any) to act, or approach an ANB for an appointment (paragraph 6(1)).
- 3.6. If an adjudicator is appointed following the resignation of an adjudicator, the adjudicator can request copies of all documents that were made available to the previous adjudicator (paragraph 9 (3)).
- 3.7. Although a Responding Party may object to the adjudicator’s appointment, this will not invalidate the appointment or any decision reached (paragraph 10).

#### **4. THE REFERRAL**

- 4.1. The Referring Party is required to refer the dispute in writing to the adjudicator not later than 7 days from the date of the notice of adjudication (paragraph 7 (1)).

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<sup>2</sup> This only applies if no person is specified in the contract or if the person named is unwilling or unable to act (paragraph 2(1) (b)).

## **5. MULTIPLE DISPUTES**

- 5.1. The adjudicator may deal with more than one dispute in an adjudication provided all the parties consent to him doing so. The disputes may arise under the same contract (paragraph 8(1)) or be related disputes under different contracts (paragraph 8(2)).

## **6. RESIGNATION AND REVOCATION**

- 6.1. The adjudicator may resign at any time by giving the parties written notice (paragraph 9(1)). The adjudicator is obliged to resign if the dispute referred is the same or substantially the same as one that has been previously referred to adjudication and a decision is made (paragraph 9(2)). In the event the adjudicator considers that he will be unable to decide the dispute fairly within the statutory (or amended) timetable he should resign. Similarly, the adjudicator should resign if he considers that he does not have jurisdiction unless both parties agree that he should proceed.
- 6.2. The parties may agree at any time to revoke the adjudicator's appointment (paragraph 11(1)). In such circumstances, the adjudicator is entitled to payment of his reasonable fees and expenses unless the revocation was attributable to his default or misconduct (paragraph 11(2)).

## **7. THE ADJUDICATOR'S POWERS**

- 7.1. Paragraphs 12 to 17 of the Scheme deal with some of the adjudicator's powers.
- 7.2. Whilst paragraph 12 of the Scheme requires the adjudicator to act impartially, there is no express requirement to act fairly. However, the courts have made it clear that adjudicator's are obliged to comply with the requirements of natural justice<sup>3</sup>.
- 7.3. The adjudicator has the power to take the initiative in ascertaining the law and the facts (paragraph 13). The scope of that initiative extends to:-
- 7.3.1. Requesting documents or written statements;
- 7.3.2. Holding a meeting to question parties or their representatives;

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<sup>3</sup> See separate Guidance Note.



- 7.3.3. Making site visits and inspections, accompanied or not;
  - 7.3.4. Carrying out tests and experiments;
  - 7.3.5. Obtaining and considering representations and submissions;
  - 7.3.6. Appointing experts, assessors or legal advisors (subject to notifying the parties);
  - 7.3.7. Giving directions as to timetable for the adjudication, any deadlines, or limits on the length of written documents or oral representations;
  - 7.3.8. Issuing any other direction relating to the conduct of the adjudication.
- 7.4. The adjudicator is required to avoid incurring unnecessary expense (paragraph 12(b)).
- 7.5. The adjudicator is required to consider any relevant information submitted, although he is entitled to disregard unsolicited submissions beyond a Reply that have no new grounds and which are delivered too close to the date for the Decision<sup>4</sup>. If an adjudicator requests a document and a party declines to provide it, he is entitled to draw an adverse inference against that party for failing to provide it, although the adjudicator should warn the party that he might draw such an inference<sup>5</sup>. Similarly, an adjudicator is entitled to continue with an adjudication in the absence of documents or statements which he has requested (paragraph 15).
- 7.6. Unless they otherwise agree, the parties are free to be legally represented (paragraph 16(1)), and the adjudicator has the power to allow more than one representative to appear (paragraph 16(2)).
- 7.7. Paragraph 18 contains a limited duty of confidentiality in respect of documents or information which is expressly indicated to be confidential. The duty of confidentiality does not extend to the fact that the adjudication has taken place or to the conduct of the adjudication.

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<sup>4</sup> GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd [2010] EWHC 283 (TCC)

<sup>5</sup> Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd [2009] EWHC 2218 (TCC)

**8. THE MATTERS IN DISPUTE**

8.1. The adjudicator is required to decide the matters in dispute (paragraph 20) including (i) matters the parties have agreed are within the scope of the adjudication, (ii) matters under the contract which the adjudicator considers are necessarily connected with the dispute.

8.2. The adjudicator is able to open up, review and revise any decision or certificate unless the contract states that the decision or certificate is final and conclusive (paragraph 20(a)).

**9. REASONS**

9.1. The adjudicator is not required to give reasons, although a party may request reasons (paragraph). It is considered to be good practice to provide reasons if requested, provided the request is made sufficiently in advance of the decision date to enable them to be prepared.

**10. LIABILITY OF THE ADJUDICATOR**

10.1. The adjudicator is not liable for any acts or omissions while carrying out his function as an adjudicator, unless the act or omission was in bad faith. The exclusion of liability also covers employees and agents (paragraph 26).

**11. CONTRACTS ENTERED INTO ON OR AFTER THE EFFECTIVE DATE: ENGLAND**

11.1. The differences to the adjudication procedure dealt with above as it relates to contracts entered into on or after the effective date in England are set out below:-

11.1.1. The adjudicator is required to advise the parties of the date of the referral notice is received (paragraph 7 (4) of the Scheme);

11.1.2. Paragraph 20 (b) of the Scheme is amended such that if the adjudicator decides one party is liable to make a payment to the other, that payment will be due by the later of (i) seven days from the date of the decision or (ii) the final date for payment;

11.1.3. Paragraphs 23 (1) and 24 of the Scheme are deleted to remove the adjudicator's power to make peremptory orders which has proved to be an unnecessary power;

11.1.4. Paragraph 22A of the Scheme is introduced and sets out a statutory slip rule to enable the adjudicator to remove a clerical or typographical error arising by accident or omission, either on his own initiative or at the request of one of the parties. Such correction must be made within 5 days of the date the decision was delivered to the parties and must be delivered as soon as possible;

11.1.5. Paragraph 25 of the Scheme is now subject to Section 108A(2) of the Construction Act 1998 as introduced by Part 8 of the Local Democracy, Economic Development and Construction Act 2009. The effect is that parties may no longer agree who will be responsible for the costs and expenses of the adjudication unless such agreement is made after the notice of adjudication has been served or that the agreement permits the adjudicator to apportion liability for his fees;

## **12. CONTRACTS ENTERED INTO ON OR AFTER THE EFFECTIVE DATE: WALES**

12.1. The only notable difference between Wales and England in relation to contracts entered into after the effective date is the wording of paragraph 22A The Welsh Scheme refers to "the adjudicator's" own initiative whereas the English Scheme refers to "his" own initiative. It is not thought this will affect adjudications in practice.

## **13. CONTRACTS ENTERED INTO ON OR AFTER THE EFFECTIVE DATE: SCOTLAND**

13.1. There are as many amendments' to the Scottish Scheme as there are to the English and Welsh Schemes. Unlike in England and Wales, no amendments have been made to paragraphs 1 to 19 and 21 of Part 1 of the Scheme. An equivalent amendment has been made to paragraph 20(b) (as set out in paragraph 11.1.2 above). Similarly, a slip rule is introduced at paragraph 22A, although there is no reference to the adjudicator delivering the corrected decision to the parties as soon as possible.

13.2. Paragraph 24 of the Scheme has not been deleted, although it refers to the registration of a decision with the “Books of Council and Session” rather than Section 42 of the Arbitration Act 1996 as in England and Wales.

13.3. Paragraph 25 has also been amended in line with the English and Welsh Schemes.