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Guidance Note: The Scheme for Construction Contracts



Second edition (12/2019)

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Guidance Notes for Adjudication

The Adjudication Society and Chartered Institute of Arbitrators have worked jointly since 2010 to produce a series of Guidance Notes dealing with Adjudication in England, Wales and Scotland.

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.

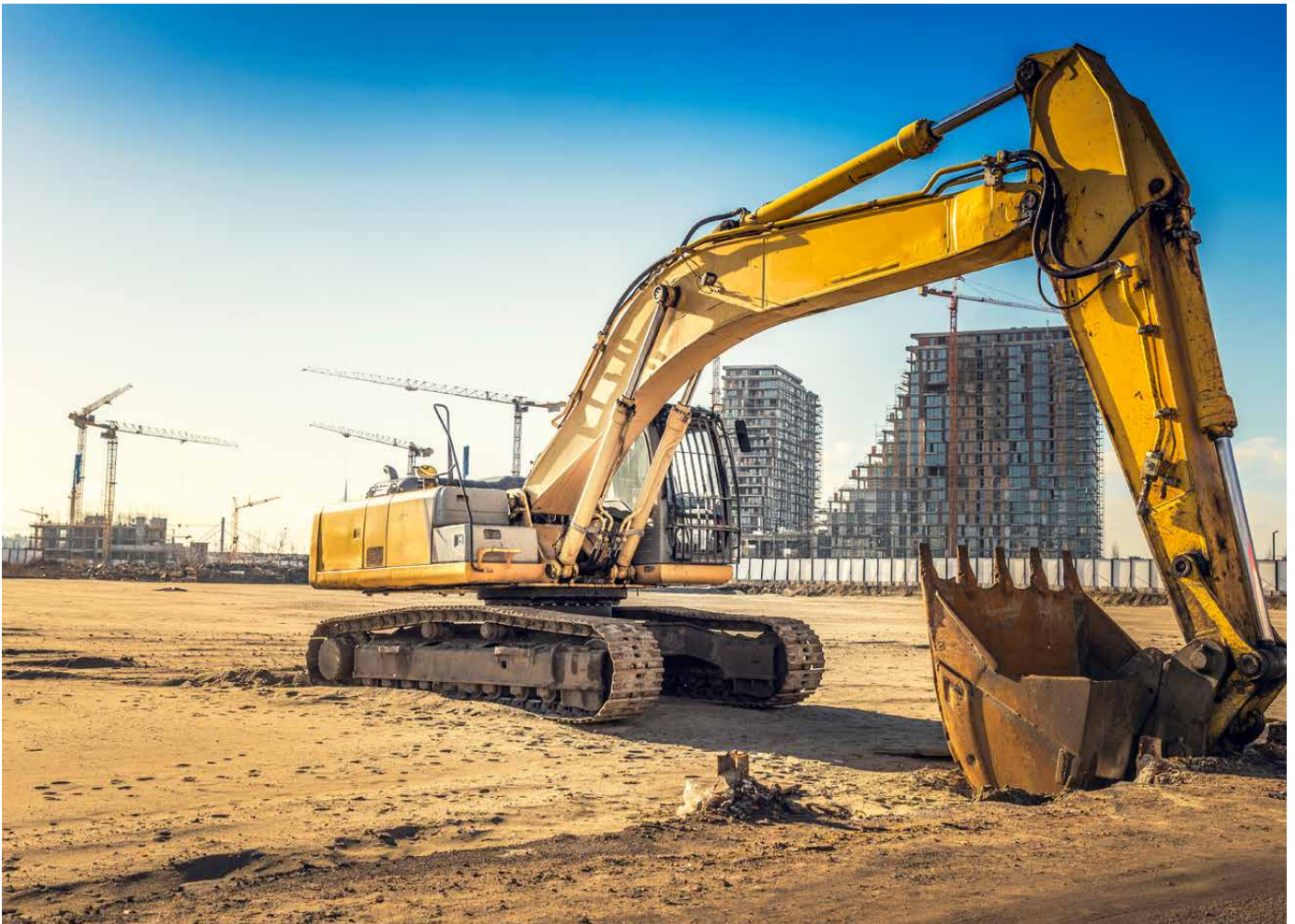
The Guidance Notes do not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered.

Instead, the Guidance Notes try to identify a sensible or practical approach to some of the everyday problems encountered in adjudication. It is an attempt to establish current best practice and, to that end, updated guidance notes will be provided from time to time.

The first edition of this Guidance was published on the websites of The Adjudication Society (www.adjudication.org) and the Chartered Institute of Arbitrators (www.ciarb.org) in April 2013. This current edition results from a review by a Working Group set up by the Practice and Standards Committee (PSC) of the Chartered Institute of Arbitrators with assistance from the Adjudication Society.

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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 (SI 1998/687)) supplements Part II of the Housing Grants, Construction and Regeneration Act 1996 and applies to construction contracts in England, Wales and Scotland entered into from 1st 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 Construction Act”). The effective date for both England and Wales was 1st October 2011 and for Scotland was 1st 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 (SI 1998/687)) 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”. In each Part of the Scheme which follows it is the Scheme in England that is described, followed by a summary of the significant differences between it, the Scheme for Wales, and the Scheme for Scotland.

1.4. Part I of 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. 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.¹

1.5. Part II of the Scheme provides particular implied terms regarding payment practice that supplement or replace those in construction contracts that fail to comply with Sections 109, 110, 110A, 110B, 111, 112, and 113 of the Construction Act. Where contractual payment practices fail to comply either individually, wholly, or as a group, with these sections of the Construction Act then only the failing contractual provisions are supplemented or replaced by the relevant provisions of Part II of the Scheme.

1.6. The intention of the Construction Act is to make mandatory the use of fair payment practices in certain construction contracts. Adjudication is part of the process that goes to ensure that such practices occur but is also available to deal with any dispute arising under such contracts at any time.

2. The Scope of this Guidance Note

2.1. This Guidance Note only considers the adjudication provisions of the Scheme.

¹ S.114(4) of the Construction Act

2.2. This Guidance Note does not deal with the following issues which are or will be covered by separate Guidance Notes:

2.2.1. The meaning of “construction contracts” and “construction operations”;

2.2.2. Contractual Provisions in writing in relation to adjudication;

2.2.3. The question of whether a dispute has arisen;

2.2.4. An Adjudicator’s lien;

2.2.5 The effects of a Decision

2.2.6 Costs;

2.2.7 Interest;

2.2.8 Simultaneous proceedings;

2.2.9 Adjudicating the same issue.

2.3 Section 106 of the Construction Act dis-applies it from construction contracts where one of the parties’ principal aim is to alter or construct a dwelling which it occupies or intends to occupy as its residence.

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Where the Scheme or its paragraphs are mentioned under this head it is to Part I that they refer.

3. The Appointment of the Adjudicator

3.1. Any party to a construction contract may give written notice (the notice of adjudication) at any time of its intention to refer any dispute arising under the contract to adjudication. It must do so in accordance with and providing the details required under paragraph 1.

3.2. Paragraphs 2 to 6 contain detailed provisions for the appointment of the Adjudicator.

3.3. 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 contract² or (iv) approaching an ANB to select an Adjudicator (if the contract does not specify a particular ANB).

² 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)).

3.4. The Referring Party should include a copy of the notice of adjudication with the request for the appointment of an Adjudicator (paragraph 3).

3.5. The potential Adjudicator should (i) indicate whether willing and able to act as Adjudicator 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 a 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).

3.6. If the person named in the contract is unwilling or unable to act, or fails to respond to the Referring Party's request within 2 days, the Referring party may request another named Adjudicator (if any) to act, or approach an ANB for an appointment (paragraph 6(1)).

3.7. 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)).

3.8. Although a Responding Party may object to the Adjudicator's appointment, this will not invalidate the appointment or any decision reached (paragraph 10).

3.9. Paragraph 25 of the Scheme is now subject to Section 108A(2) of the Construction Act. 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 the Adjudicator's fees.

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)).

4.2. The Adjudicator is required to advise the parties of the date that the Referral notice is received (paragraph 7 (4)).

5. Multiple Disputes

5.1. The Adjudicator may deal with more than one dispute in an adjudication provided all the parties consent to the Adjudicator 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 feels unable to decide the dispute fairly within the statutory (or amended) timetable, the Adjudicator should resign. Similarly, the Adjudicator should resign if the Adjudicator considers there is a lack of jurisdiction unless

both parties agree that the Adjudicator should proceed. In such circumstances the Adjudicator's fees are dealt with under paragraph 9(4).

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 reasonable fees and expenses unless the revocation was attributable to default or misconduct on the part of the Adjudicator (paragraph 11(2)).

7. The Adjudicator's Powers

7.1. Paragraphs 12 to 19 of the Scheme deal with the principal 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.³

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;

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 the Adjudicator 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.⁴ If an Adjudicator requests a document and a party declines to provide it, the Adjudicator is entitled to draw an adverse inference against that party for failing to provide it, although the Adjudicator should warn the party that such an inference might be drawn.⁵

³ See separate Guidance Note

⁴ *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC)

⁵ *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC)

Similarly, an Adjudicator is entitled to continue with an adjudication in the absence of documents or statements which the Adjudicator 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 17 deals with some aspects of 'natural justice' for which see the separate guidance note.

7.8. 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.

7.9. The periods in certain situations in which the Adjudicator must make and publish the Decision and the consequences of failure to do so are set out in paragraph 19. Absent consent otherwise the period is 28 days after receipt of the Referral.

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)). The Adjudicator may decide that one party is liable to make a payment to the other and, subject to Section 111(9) of the Construction Act, when that payment will be due and its final date for payment (paragraph 20(b)); and deal with interest subject to any provisions for it in the contract.

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

9. Reasons

9.1. The Adjudicator is not required to give reasons, although a party may request reasons (paragraph 22). 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. The New Slip Rule

11.1 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 the Adjudicator's 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;

11.2 A Slip Rule correction should extend to all the consequential corrections as well.⁶

12. Differences in Adjudication Procedure in England, Wales, and Scotland

12.1. In Wales, the only notable difference with the Scheme in England in relation to contracts entered into after the effective date is the wording of the new Slip Rule. Paragraph 22A of the Welsh Scheme refers to "the Adjudicator's" own initiative whereas the English Scheme refers to "their" own initiative. It is not thought this will affect adjudications in practice and paragraph 11.1 above has been written on that assumption.

12.2. In Scotland, 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 new 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.

12.2.1 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.

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



⁶ For this and a useful guide to the Statutory Slip Rule see: *Axis M&E UK Ltd./Axis Plumbing NSW Ltd. v Multiplex Construction Ltd.* [2019] EWHC 169 (TCC)



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