



Welcome to the February edition of **Insight**, Fenwick Elliott's latest newsletter, which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out some practical tips on adjudication

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Adjudication - some practical tips for the referring party

Much has been written about forum shopping recently (whereby parties try to influence which adjudicator will be appointed to decide the dispute), but what other practical points do parties need to bear in mind prior to commencing an adjudication and in the early stages of such proceedings?

In part one of this two part series, we consider the steps that should be taken by the referring party at the outset of adjudication proceedings to ensure (i) that the adjudication proceeds without a hitch and (ii) the award is capable of enforcement. Part two looks at adjudication from the responding party's perspective.

Before you start

The key to starting a successful adjudication, and to keeping costs to a minimum, is preparation. Without this, adjudication can quickly end up being a false economy. But first you must ask yourself - can you adjudicate?

Crystallised dispute

Prior to taking any steps whatsoever in any intended adjudication proceedings, you must first establish that a dispute exists (or has in legal terms, "crystallised"). If a dispute does not exist then the adjudicator will not have jurisdiction to make a decision. This means that you need to plan how you will create the dispute and the timescale for doing this.

In the case of complex disputes, you need to be sure that all the issues have been put on the table since it is possible for a claim to be rejected either overtly or by silence. You should also ask yourself whether there is one dispute or multiple disputes and, if the latter, check whether your contract allows you to refer multiple disputes to the adjudicator or whether you are required to adjudicate each dispute separately. The default position is that only one dispute can be referred to an adjudicator at any one time.

Under a 'construction contract'

In addition to the dispute having crystallised, it should relate to a 'construction contract' as defined by the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Act"). The contract must not fall foul of any of the exclusions, the most noteworthy of which are the power and residential occupier exclusions at sections 105(2)(c)(i) and 106 respectively. The former section excludes the 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 (amongst other things) power generation.

If the dispute is not a 'construction contract' within the terms of the Act,

you will only be able to adjudicate if the contract contains a clause entitling the parties to adjudicate and any contractual rules which relate to the conduct of any adjudication should be adhered to.

Now that oral contracts are caught by the adjudication legislation, there may be an increase in responding parties seeking to question whether the parties have entered into a contract at all. This may raise a jurisdictional issue as to whether there is a 'construction contract' for the purposes of the Act. You should therefore ensure the existence of the contract and its terms is set out with clarity and is supported by as much contemporaneous documentary evidence as possible.

Check which adjudication rules apply

If you can adjudicate, then ask yourself – on what terms? The contract will sometimes prescribe specific adjudication rules where applicable (for example, TeCSA) but, as a minimum, a 'construction contract' must contain an adjudication procedure that complies with the requirements of section 108 of the Act. If the contract is not compliant, then the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 will apply.

Check all the contract provisions to see whether they can be used to your advantage. The parties might, for example, have agreed a particular timetable for the adjudication and / or a particular adjudicator or adjudication panel.

Is it worth it?

Finally, when you have a money claim, always remember to consider whether the other side has the money to pay you if you are successful.

Drafting the notice

Once the entitlement to adjudication has been established and you know which rules apply, the first procedural step is to prepare the Notice of Adjudication ("the Notice").



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The Notice informs the responding party that you wish to refer the dispute to adjudication and contains a summary of the claim. It is very important that you prepare the Notice with care, since it will determine the scope of the matters and issues that the adjudicator will consider and which s/he will have jurisdiction to decide. The relief that you ask for in your Notice and in your Referral should mirror each other.

If you think a dispute is in prospect, it may be tactically beneficial to take the initiative and prepare and serve the Notice before the other party has the opportunity. The referring party can often have the upper hand in adjudication proceedings, and provided you are well prepared and have your case well evidenced and fully in order, you may be able to force a weaker, lesser prepared responding party to adjudicate under a strict timetable. This may place the responding party at a disadvantage.

Appointing an adjudicator

Briefly, (in light of how much has been written on forum shopping and appointing an adjudicator of late) an adjudicator must be appointed and the dispute referred to him within seven days of service of the Notice. If you fail to achieve this deadline, then there will be a real risk of a successful challenge to any subsequent award on enforcement on the basis that the adjudicator did not have jurisdiction.

If the contract does not name the adjudicator, then the likelihood is that it will provide for the parties to agree an adjudicator or, in the absence of agreement, for an adjudicator to be appointed by a nominating body. So who do you want your adjudicator to be? If you have a valuation dispute, then it is likely that it will be better for you to have a QS than a lawyer. If you have a dispute on a point of law then

the opposite may be true. Trying to agree the identity of the adjudicator gives both parties some control. Remember though if you are trying to agree someone, the clock will still be running and the RICS, for example, needs at least five days to appoint the adjudicator. If you do not give them enough time then you run the risk of not having an adjudicator appointed in time. You will then have to start again.

Drafting the referral

The purpose of the Referral is for you to provide detailed submissions on your case. The Referral may be the only opportunity you have to set out your claim and it should therefore be drafted with upmost care and be accompanied by fully supporting contemporaneous documentation, if possible.

A properly prepared Notice and Referral is a powerful tool. In all disputes, you should also consider preparing the following documents to give to the adjudicator as part of the Referral:

- a full copy of the contract conditions together with any Contract Documents and drawings that are relevant;
- witness statements relating to matters of fact that may be in dispute between the parties;
- copies of relevant correspondence between the parties;
- copies of certificates where relevant, for example previous interim certificates, the practical completion certificate (if it has been issued) and certificates showing that an extension of time has been granted;
- copies of any relevant case law or extracts from legal texts that you may wish to rely upon.

The time for service of the Referral varies depending on which adjudication rules apply: often it has

to be served immediately upon the identity of the adjudicator becoming known and at the latest within seven days of service of the Notice. As a matter of good practice, you should give serious consideration to drafting the Referral and putting together the bulk of the supporting documentation at the same time as preparing the Notice itself to avoid any last minute hitches.

New information issued by the referring party as part of its Referral cannot form part of an existing dispute. If you are re-packaging what the parties already know, for example, through witness statements and commentaries, then you should be fine. But if you are producing an expert's report which the other party is unaware of you may run into problems on enforcement as the adjudicator may not have jurisdiction to consider the new material.

Conclusion

The key to success in adjudication is in the preparation: nothing can be beat a well prepared Notice and Referral, which should be clear and to the point.

The Referral and supporting documents should be ready for service before the Notice is served and advance consideration should be given to any expected defence or counterclaim as a response may need to be provided at short notice.

If the dispute is complex, then witness statements should be prepared by both parties in advance and in all cases any key personnel should be available for the duration of the adjudication.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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