



## A Guide to the Adjudication Process (Article 75)

Date: 01 July 2022

### Introduction

Prior to 1996, the most common form of Dispute Resolution within construction was Arbitration, however, that all changed upon the introduction of the Housing Grants, Construction and Regeneration Act 1996 (*“the Construction Act”*).

The Construction Act introduced a requirement for mandatory interim payment mechanisms along with the right of any Party to refer *“at any time”*, *“any dispute”* to Adjudication. Whilst slightly amended by the Local Democracy, Economic Development and Construction Act 2009 (revising the original Act so that contracts do not have to be solely in writing being the most important amendment, in Ramskill Martin’s (*“RM”*) opinion), the right to Adjudication remains intact.

Previous mailings issued by RM have explained that not all sectors of construction fall under the Act, although the vast majority of works are governed by the Act and the Scheme where such contracts are deficient/not in accordance with the Act.

At the dawn of this new era, the Construction Industry was gripped by a hope for *“quick and dirty”* decisions which were cost-effective, did not get too caught up in the technical legalities of other processes and freed up the lifeblood of the industry (cash). However, those hopes were soon dashed, and Adjudication quickly became the process that it is today. Currently Adjudication, whilst certainly quicker than other processes, can be a relatively expensive venture and is fraught with legal technicalities which, if not followed and/or understood, can have a serious impact on your ability to recover your entitlement let alone achieve the *“quick and dirty”* decision that was hoped for.

### Timeline

A key feature of Adjudication is that the Adjudicator must reach a decision within 28 days. The primary reason for this timescale is to provide the Parties with a fast, cost-effective dispute resolution process. Adjudication is far quicker than most other forms of dispute resolution processes and is ideally suited to resolve disputes causing cashflow challenges.

However, Adjudication can be used for disputes of any nature and has often been utilised to resolve significant and complex disputes with a varied amount of success.

Once the Parties are clearly at the point that they are in dispute, commonly known as the “*crystallisation of the dispute*”, the Referring Party (the Claimant) is able to submit its Notice of Intention to Refer a Dispute (“*Notice of Adjudication*”) to the Responding Party (the Defendant). This Notice of Intention to Refer sets out a number of key points – the Parties in dispute, the nature of the dispute, the Contract Terms and Conditions (in summary), the Adjudication Rules under which the matter is referred (this will be the Scheme for Construction Contracts/the Act where there are no clear terms, or the Contract will contain its own Adjudication provisions) and the recourse sought (what decisions are required of the Adjudicator).

Following the Notice of Adjudication, the Referring Party then has 7 days to appoint an Adjudicator via an Application to the Adjudicator Nominating Body (“*ANB*”).

Once an Adjudicator is appointed, the Referring Party submits the details of its case. This is referred to as the “*Referral Notice*”. This will amplify all the details contained in the Notice of Intention to Refer and close attention must be paid to ensuring that the Notice of Intention to Refer and the Referral Notice are consistent in content, arguments and especially the recourse (the decisions required of the Adjudicator) sought.

The Referral Notice should be issued within 7 days of the Notice of Adjudication. This will be Day 1 of the process. The Notice can only be issued after the Adjudicator is appointed and should be issued to the Responding Party at the same time as it is issued to the Adjudicator. From here, the 28-day period to decide commences.

The Responding Party is then, usually, allowed 7 days to submit its Response. It is quite normal for the Responding Party to request that this period is extended to 14 days and, in RM’s experience, these requests are usually granted. The Response is the other side’s opportunity to put forward its case. This could be a rejection of the Referring Party’s case; it could be an explanation of the true position or, depending on the wording and content of the Referral, could be a Counterclaim.

The right to serve a Reply (a response to the Response) is then likely to be requested and granted with normal periods of service being between 3 and 5 days. There is not an automatic right to such Reply, and the Referring Party should usually establish that it intends to only respond to anything new contained in the Response. The Reply should not be used to merely repeat the contentions raised in the Referral.

The Referring Party can agree to extend the Adjudication duration by a further 14 days. After that, it requires both Parties to agree to any further extension. With the exception of anything but the most straightforward of disputes (smash and grab Adjudications for example) it is fairly normal for the duration of the Adjudication to be extended to 42 days to allow both Parties a reasonable period to serve both the Response and Reply and to allow the Adjudicator adequate time to reach a decision.

The Adjudicator can allow further submissions, often referred to as the Rejoinder and Surrejoinder, but only where necessary and only if appropriate extension to the period to decide can be agreed between the Parties.

### **Service of the Notice of Adjudication**

One of the most common mistakes leading to the Adjudicator being required to step down is due to the inadvertent appointment of an Adjudicator prior to the correct service of the Notice of Adjudication.

The Notice of Adjudication must be served in accordance with the Contract to the address identified within the Contract. Sending the Notice of Adjudication via recorded/special delivery does not mean that it has been served correctly. Our recommendation is that the Notice of Adjudication is sent via 1st Class post and proof of postage obtained. The Referring Party should then allow 2 clear working days, after which the Notice is deemed served.

You may be asking why serving in this manner is better than serving a document via recorded/ special delivery. The reason is that, if the Responding Party is aware that you intend to serve a Notice of Adjudication and fails to sign for it or refuses to receive the package, all you are left with is proof of non-delivery and thus non-service.

### **Adjudicator Nominating Body (“ANB”)**

The ANB will generally be specified in the Contract Particulars/Data and will usually be a body such as the Royal Institute of Chartered Surveyors (“RICS”). If there is no ANB specified in the Contract, ideally the Parties should agree an ANB or, failing that, any recognised ANB can be utilised.

Failure to apply to the correct ANB would be a ground for the Adjudicator to step down.

### **Payment of the Adjudicator’s Fees**

The general rule surrounding payment of the Adjudicator’s fees is that the unsuccessful side will pay the Adjudicator’s fees (the legal principle of the costs following the event), however, this is not always the case. Both Parties are jointly and severally liable for the Adjudicator’s fees. The Adjudicator is allowed to apportion his fees as he sees fit.

As the Parties are jointly and severally liable if the unsuccessful Party refuses to pay the Adjudicator’s fees, the Adjudicator can direct the successful Party to pay them.

## Low Value Adjudication

The Construction Industry Council (“*CIC*”) and the RICS have developed a Low-Value Dispute Model Adjudication Procedure (“*LVD MAP*”). The aim of the LVD MAP is to further reduce and streamline the Adjudication process.

The LVD MAP focusses on disputes which are under £50,000.00 and relatively straightforward in nature. The Adjudicator’s fees are capped at a maximum of £6,000.00 under the RICS Rules.

## Conclusions

Within Construction, Adjudication remains the main form of dispute resolution and there is no indication that this is likely to change. The Adjudication process can be complex to those who are not familiar with it.

Whilst the Adjudication process is at times not generating the “*quick and dirty*” fixes hoped for originally, it is still by far the quickest and most cost effective method to resolve disputes. The level of evidence required in an Adjudication can sometimes come as a surprise to the uninitiated and is one of the reasons we recommend taking expert advice before embarking on a path to Adjudication.

RM has developed a number of Products which can assist a Party considering the referral of a dispute to Adjudication.

If you find yourself faced with a Referral, or wishing to refer a matter to Adjudication, RM’s experienced team of Consultants can assist you throughout the process.