DATE: April 9, 2015

TO: OGCA Friends

FROM: Clive Thurston

SUBJECT: Construction Adjudication process in England.

1. **Overview**

* Binding decision within 49 days;
* Decision can be litigated or arbitrated after Adjudication (no time specified).

1. **Introduction**

The construction adjudicating process (“CAP”) is a “formal, private and binding process where construction related disputes are resolved by a decision made by an adjudicator.”[[1]](#footnote-1) The primary purpose of the CAP is to provide an interim solution to a dispute in order to maintain cash flow through the supply chain. Although the parties can escalate the dispute to litigation, most often the parties will accept the decision of the adjudicator as final.[[2]](#footnote-2)

The CAP was established through Statutes[[3]](#footnote-3) which require every construction contract to contain certain provisions regarding Adjudication. If a contract fails to provide these provisions or provides contrary provisions, the Statutes mandate that those contrary provisions are void and replaced, in their entirety, by the provisions prescribed. The prescribed provisions (or model terms) are outlined in secondary legislation called The Scheme for Construction Contracts.[[4]](#footnote-4)

1. **The Procedure and Timing**

The Statutes and Scheme outline the procedure that all parties must follow. The process starts once a dispute arises. When this occurs, either party can submit a notice to the other party of its intention to refer the dispute to Adjudication. The notice must identify the dispute and set out the remedy. Within 7 days of the issuing the notice, the referring party (party commencing the proceedings) must submit to the other party its Referral (i.e. its statement of the case). If the Referral is not submitted within that time, the Adjudication will likely be void. Additionally, within that 7 day period, the referring party must secure the appointment of an Adjudicator. Following appointment, the Adjudicator must make his/her decision within 28 days of the Referral. That time period can be extended to 42 days (of the Referral) with the permission of the referring party or further with the agreement of both parties.[[5]](#footnote-5) Therefore, parties should expect the overall time to resolve a dispute under the CAP to be anywhere from 1-7 weeks. Below is a visual timeline of the process:

Serve Referral & secure appointment of Adjudicator

Issue notice

Final decision

Dispute arises

**Any time during Contract**

**35 - 49**

**7**

**0**

1. **Enforceability and Appeal**

The Adjudicator’s decision will be binding on the parties and enforceable in court. There is no appeal process, but the parties are able to take the same dispute to litigation (or arbitration if the contract contains an arbitration agreement) if the parties have not agreed in the construction contract to accept the decision of the Adjudicator as final.[[6]](#footnote-6)

1. **How Legalistic is the Process?**

The process seems to be a hybrid of trial and arbitration. As mentioned above, to commence an adjudication you must first submit a Notice of Adjudication to the other party. This Notice contains:

* + a description of the dispute;
  + details of how the dispute arose;
  + the decision you want the Adjudicator to make and remedies you desire; and
  + the names and addresses of the parties involved.[[7]](#footnote-7)

Once submitted, the parties must then appointment an Adjudicator. Parties can contract how/who to appoint as Adjudicator. After appointment, the next step is to send a Referral Notice to the Adjudicator and the other party. The Referral Notice should:

* + be consistent with the Notice of Adjudication;
  + explain the nature of the dispute and how it arose;
  + detail the facts that you rely upon;
  + provide the documentary evidence to support those facts;
  + provide sufficient details of the contract to show that you have a contractual right to the remedy which you seek;
  + not include evidence (for example, an expert’s report or test results) that the other side has not seen before; and
  + list the decisions that you require the adjudicator to make.[[8]](#footnote-8)

There is no prescribed form or method of providing the Referral Notice (essentially the evidence) to the Adjudicator and it is up to the Adjudicator to decide if any oral hearings are required. The formality of any such hearings again will be decided by the Adjudicator. Additionally, the other party can submit counterclaims but these claims are limited to the specific dispute being adjudicated. Any other counterclaim must be treated as a separate dispute for which a separate adjudication must be commenced.

1. Chartered Institute of Arbitrators, “*What is construction adjudication”*, 2014 (available at: <https://www.ciarb.org/training-and-development/construction-adjudication>). [↑](#footnote-ref-1)
2. Steven Evans, “*Construction Adjudication in the UK – a Practical Guide*”, 2015 (available at: <http://www.stevencevans.com/a-practical-guide-to-construction-adjudication/>). [↑](#footnote-ref-2)
3. There are two Statutes: Housing Grants, Construction and Regeneration Act 1996 (now called the old Act) and the Local Democracy, Economic Development and Construction Act 2009 (now called the new Act). [↑](#footnote-ref-3)
4. *Supra* note 2. [↑](#footnote-ref-4)
5. Id. [↑](#footnote-ref-5)
6. Housing Grants, Construction and Regeneration Act 1996, c.53 Part II, s.108 (3) (available at: <http://www.legislation.gov.uk/ukpga/1996/53/part/II>). [↑](#footnote-ref-6)
7. Construction Umbrella Bodies Adjudication Task Group, “*User’s Guide to Adjudication*”, April 2003 pg. 11 (available at: <http://www.architecture.com/Files/RIBAProfessionalServices/ProfessionalConduct/DisputeResolution/Ajudication/UsersGuide.pdf>). [↑](#footnote-ref-7)
8. Id. at pgs. 12-13. [↑](#footnote-ref-8)