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## Appendix 8

# Construction Confederation Contract DOM/1

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### 38 Settlement of disputes

#### 38A Adjudication

##### *Application of clause 38A*

- .1 Clause 38A applies, where pursuant to Article 3, either Party refers any dispute or difference arising under this Sub-Contract to adjudication.

##### *Identity of Adjudicator*

- .2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either party, an individual to be nominated as the Adjudicator by the person named in the Appendix part 8 ("the Nominator") provided that:-
  - .1 no Adjudicator shall be agreed or nominated under clause 38.A.2.2 or clause 38A.3 who will not execute the Standard Agreement with the Parties and
  - .2 where either Party has given notice of his intention to refer a dispute to adjudication then
    - any agreement by the Parties on the appointment of an Adjudicator must be reached with the object of securing the appointment and of the referral of the dispute or difference to the Adjudicator within 7 days of the date of the notice of intention to refer, (see clause 38A.4.1);
    - any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer:
  - .3 upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by the Parties from the nominator of the name of the nominated Adjudicator the Parties shall thereupon execute with the Adjudicator the JCT Adjudication Agreement.

##### *Death of Adjudicator - inability to adjudicate*

- .3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree upon a person to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the agreed or nominated Adjudicator.

*Dispute or difference – notice of intention to Adjudication – referral*

- 4 .1 When pursuant to Article 3 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. Within 7 days from the date of such notice or the execution of the JCT Adjudication Agreement by the Adjudicator if later the Party giving the notice of intention shall refer the dispute or difference to the Adjudicator for his decision (“the referral”); and shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.
- 2 The referral by a Party with its accompanying documentation to the Adjudicator and the copies thereof to be provided to the other Party shall be given by actual delivery or by FAX or by registered post or recorded delivery. If given by FAX then, for record purposes, the referral and its accompanying documentation must forthwith be sent by first class post or given by actual delivery. If sent by registered post or recorded delivery the referral and its accompanying documentation shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting subject to the exclusion of Sundays and any Public Holiday.

*Conduct of the Adjudicator*

- 38A .5 .1 The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm that receipt to the Parties.
- 2 The Party not making the referral may, by the same means stated in clause 38A.4.2, send to the Adjudicator within 7 days of the date of the referral with a copy to the other Party, a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.
  - 3 The Adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation under clause 38A.4.1 and acting as an Adjudicator for the purposes of s.108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; and that by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision.
  - 4 The Adjudicator shall not be obliged to give reasons for his decision.
  - 5 In reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:
    - .1 using his own knowledge and/or experience;
    - .2 opening up, reviewing and revising any certificate, direction, opinion, decision, requirement or notice issued given or made under the Sub-Contract as if no such certificate, direction, opinion, decision, requirement or notice had been given or made;
    - .3 requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement pro-

- vided by the Parties including the results of any tests that have been made or of any opening up;
- .4 requiring the Parties to carry out tests or additional tests or to open up work or further open up work;
  - .5 visiting the site of the Works or any workshop where work is being or has been prepared for this Sub-Contract;
  - .6 obtaining such information as he considers necessary from any employee or representative of the Parties provided that before obtaining information from an employee of a Party he has given prior notice to that Party;
  - .7 obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved;
  - .8 having regard to any term of the Sub-Contract relating to the payment of interest deciding the circumstances in which or the period for which a simple rate of interest shall be paid.
- .6 Any failure by either Party to enter into the JCT Adjudication Agreement or to comply with any requirement of the Adjudicator under clause 38A.5.5. or with any provision in or requirement under clause 38A shall not invalidate the decision of the Adjudicator.
  - .7 The Parties shall meet their own costs of the Adjudication except that the Adjudicator may direct as to who should pay the cost of any test or opening up if required pursuant to clause 38A.5.5.4.

*Adjudicator's fee and reasonable expenses – payment*

- .6 .1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportions.
- .2 The Parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses incurred by the Adjudicator pursuant to the Adjudication.

*Effect of Adjudicator's decision*

- .7 .1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given. [ff]
- .2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; and the Contractor and the Sub-Contractor shall ensure that the decisions of the Adjudicator are given effect.
- .3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled, to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to Clause 38A.7.1.

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[ff] The arbitration or legal proceedings are *not* an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by an Adjudicator.

*Immunity*

- .8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator.