

# **Construction Adjudication**

# **Construction Adjudication**

**Second Edition**

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and

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# Contents

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<i>Preface</i>	xiv
<i>Acknowledgements</i>	xvi
<b>1 What is adjudication?</b>	<b>1</b>
General Introduction	1
Terminology	1
Before 1 May 1998	2
After 1 May 1998 New adjudication – ‘Sea Change’ or ‘Hurricane’?	3
Review and consultation	4
Training and quality of adjudicators	5
Advice	6
The rest of the world	6
Public or private law?	6
Adjudication defined	7
Is adjudication a judicial process?	13
Comparison of adjudication with other forms of dispute resolution	14
Mediation and conciliation	15
Expert determination	15
Arbitration	15
Litigation	16
The obligations placed upon the adjudicator	17
The powers of the adjudicator	17
Possible liabilities of the adjudicator	18
What personal qualities should the adjudicator have?	18
Summary	19
<b>2 The Act: The Overarching Provisions</b>	<b>20</b>
Section 104: Construction contracts	20
Section 104(1)	20
Section 104(2)	21
Section 104(3)	22
Section 104(4)	22
Section 104(5)	23
Section 104(6)(a)	24
Section 104(6)(b) and (7)	24
Section 105: Meaning of ‘construction operations’	25
Section 105(1)(a)	25
Section 105(1)(b)	26
Section 105(1)(c)	26
Section 105(1)(d)	27
Section 105(1)(e)	27

Section 105(1)(f)	28
Section 105 (2)(a)	28
Section 105(2)(b)	28
Section 105(2)(c)	28
Section 105(2)(d)	30
Section 105(2)(e)	31
Section 105(3) and (4)	31
Section 106: Provisions not applicable to contract with residential occupier	31
Section 106(1)	31
Section 106(2)	32
Section 106(3) and (4)	33
Section 107: Provisions applicable only to agreements in writing	33
Section 107(1)	33
Section 107(2)	34
Section 107(3)	37
Section 107(4)	38
Section 107(5)	39
Section 107(6)	40
The supplementary provisions	40
Section 114: The Scheme for Construction Contracts	40
Section 114(1)	40
Section 114(2)	40
Section 114(3) and (4)	41
Section 114(5)	41
Section 115; Service of notices, &c.	41
Section 115(1)	41
Section 115(2)-(4)	41
Section 115(5)	42
Section 115(6)	42
Section 116: Reckoning periods of time	42
Section 116(1-3)	42
Section 117: Crown application	42
Section 117(1-4)	42
Part V of the Act	43
Section 146: Orders, regulations and directions	43
Section 148: Extent	43
Section 149: Corresponding provision for Northern Ireland	44
Section 150: Commencement	44
Section 151: Short title	44
<b>3 The Act: The Adjudication Provisions</b>	<b>46</b>
Section 1: Right to refer disputes to adjudication	46
Section 108(1)	46
Section 108(2)(a)	50
Section 108(2)(b)	52
Section 108(2)(c)	53
Section 108(2)(d)	53
Section 108(2)(e)	54
Section 108(2)(f)	54

Section 108(3)	55
Section 108(4)	56
Section 108(5)	56
Section 108(6)	57
<b>4 The Act: The Payment Provisions</b>	<b>58</b>
Section 109: Entitlement to stage payments	58
Section 109(1)	58
Section 109(2)	59
Section 110: Dates for payment	60
Section 110(1)	60
Section 110(2)	60
Section 110(3)	64
Section 111: Notice of intention to withhold payment	65
Section 111(1)	65
Section 111(2)	71
Section 111(3)	71
Section 111(4)	71
Section 112: Right to suspend performance for non-payment	72
Section 112(1)	72
Section 112(2)	73
Section 112(3)	73
Section 112(4)	74
Section 113: Prohibition of conditional payment provisions	74
Section 113(1)	74
Section 113(2)-(5)	75
Section 113(6)	75
<b>5 The Secondary Legislation</b>	<b>77</b>
The Scheme for Construction Contracts (England and Wales) Regulations 1998	77
Part I - Adjudication	78
Notice of intention to seek adjudication	78
Paragraph 1	78
Paragraph 2	79
Paragraph 3	81
Paragraph 4	81
Paragraph 5	82
Paragraph 6	83
Paragraph 7	83
Paragraph 8	84
Paragraph 9	86
Paragraph 10	90
Paragraph 11	90
Powers of the adjudicator	91
Paragraph 12	91
Paragraph 13	92
Paragraph 14	93
Paragraph 15	93
Paragraph 16	94

Paragraph 17	94
Paragraph 18	94
Paragraph 19	95
Adjudicator's decision	96
Paragraph 20	96
Paragraph 21	99
Paragraph 22	99
Effects of the decision	100
Paragraph 23	100
Paragraph 24	100
Paragraph 25	102
Paragraph 26	102
Part II – Payment	103
Entitlement to and amount of stage payments	103
Paragraph 1	103
Paragraph 2	103
Dates for payment	105
Paragraph 3	105
Paragraph 4	105
Paragraph 5	105
Paragraph 6	106
Paragraph 7	106
Final date for payment	106
Paragraph 8	106
Notice specifying amount of payment	107
Paragraph 9	107
Notice of intention to withhold payment	108
Paragraph 10	108
Prohibition of conditional payment provisions	108
Paragraph 11	108
Interpretation	108
Paragraph 12	108
The Construction Contracts (England and Wales) Exclusion Order 1998	109
Citation, commencement and extent	109
Paragraph 1	109
Interpretation	109
Paragraph 2	109
Agreements under statute	110
Paragraph 3	110
Private finance initiative	110
Paragraph 4	110
Finance agreements	111
Paragraph 5	111
Development agreements	111
Paragraph 6	111
<b>6 Adjudication Clauses, Rules and Procedures</b>	<b>113</b>
Adjudication clauses	113
Joint Contracts Tribunal	113

Construction Confederation	116
Institution of Civil Engineers Conditions 6th Edition	116
Institution of Civil Engineers – NEC Engineering and Construction Contract	117
The Government Contracts	118
Association of Consulting Engineers	122
Institution of Chemical Engineers Form of Contract 2001	122
Adjudication rules and procedures	123
Comparison of the provisions	125
The notice of adjudication	125
The nomination of the adjudicator	125
The referral notice	126
The date of referral	127
Adjudicator’s agreement	127
Adjudicator’s fees	128
Adjudicator’s jurisdiction	129
The parties’ costs	130
Adjudicator’s ability to resign	131
Termination by parties	131
Joinder provisions	132
Procedure and timetable	132
Power of adjudicator to open up, review and revise	133
Expert assistance	134
Matters for decision	135
Method of decision	136
Reasons	136
Status of decision if not reached within 28 days or any extended period	137
Adjudicator’s lien	138
Correction of decision	139
Destruction of documents	140
<b>7 The Appointment</b>	<b>141</b>
Selecting the adjudicator	144
The time for the appointment of the adjudicator	144
Who are adjudicators?	144
Training of adjudicators	146
How can an adjudicator be appointed?	146
Agreement on an adjudicator	147
Naming an adjudicator by prior agreement	147
Appointment when the dispute occurs	150
What are Adjudicator Nominating Bodies?	150
The adjudicator and appointment	152
The adjudicator’s terms and conditions	154
The standard forms of contract and appointment	155
Joint Contracts Tribunal main contracts	156
Joint Contracts Tribunal sub-contracts	159
Construction Confederation sub-contracts	159
Institution of Civil Engineers’ main contracts	160
Institution of Civil Engineers’ Adjudication Procedure	161
Civil Engineering Contractors’ Association sub-contracts	162



Government contracts	164
NEC Engineering and Construction Contract	165
Institution of Chemical Engineers Form of Contract 2001	166
The Association of Consulting Engineers	167
The Construction Industry Council Model Adjudication Procedure	168
Centre for Effective Dispute Resolution	168
The Technology and Construction Solicitors' Association	169
Final comments	169
<b>8 Adjudicators' Agreements</b>	<b>170</b>
General introduction	170
The terms of an adjudicator's agreement	171
The agreement between the adjudicator and the parties	172
Terms where the Scheme applies	175
Published adjudicators' agreements	176
The Joint Contracts Tribunal adjudication agreement	176
The Construction Industry Council adjudicator's agreement	178
The Institution of Civil Engineers' adjudication agreement	180
The Adjudicator's Contract for the NEC Engineering and Construction Contract	180
GC/Works/1 Model Form 8 Adjudicator's Appointment (Condition 59)	182
The Institution of Chemical Engineers' adjudicator's agreement	183
Centre for Effective Dispute Resolution	186
Technology and Construction Solicitors' Association	186
Conclusion	186
<b>9 Jurisdiction, Powers and Duties</b>	<b>187</b>
Jurisdiction	187
Can the adjudicator determine his own jurisdiction?	188
Independence	191
Impartiality, natural justice, fairness and bias	191
The Act	193
Subsidiary questions	197
The Scheme	198
The Standard Forms of Contract	200
Joint Contracts Tribunal Main Contract Form	200
Joint Contracts Tribunal Sub-Contract forms	205
Construction Confederation	205
Institution of Civil Engineers' Main Contract	205
Civil Engineering Contractors' Association sub-contracts	210
Government contracts	212
NEC Engineering and Construction Contracts	215
The Institution of Chemical Engineers Adjudication Rules (The Grey Book)	216
<b>10 The process</b>	<b>219</b>
Initiating the adjudication process	219
The notice of adjudication and the referral to the adjudicator	219
On receipt of the referral	221
After the issue of the initial directions	223

Submissions by the parties	224
Meetings with the parties	226
Investigating the facts and the law	228
Taking advice	229
Obstacles to the process	230
The reluctant party	230
The drawing of inferences by the adjudicator	231
The 'commercial' decision	232
What can be adjudicated?	232
Disputes relating to design	232
Disputes relating to extensions of time	234
Disputes relating to professional indemnity insurance	234
The 'unadjudicable' dispute	235
The large and detailed claim for loss and/or expense	237
The adjudicator who decides 'I cannot decide'	238
Some concerns about adjudication	239
The adjudicator and subsequent legal action	240
<b>11 The Decision</b>	<b>241</b>
The process of making the decision	243
Deciding the facts	244
The burden of proof	245
Probability	246
Assessing the evidence	246
Consistency	247
The balance of probabilities	247
The ascertainment of facts by the adjudicator himself	248
Deciding the law	249
Pulling the strands together	250
Draft decisions	251
Writing the decision	251
The title of the written decision	251
The general format of the written decision	252
The decision – the introductory section	252
The decision – the substantive aspect	254
The decision – reasons	255
The decision – interest	258
The decision – costs	259
Stakeholders	260
The decision – final matters	261
Checklist for decision	263
<b>12 Enforcement and Appeals</b>	<b>264</b>
The effects of the decision	264
Enforcement – initial considerations	265
Arbitration	267
The standard forms of contract	268
Litigation	269
Before <i>Macob v. Morrison</i>	269

Since <i>Macob v. Morrison</i>	271
Time	272
CPR Part 8 Alternative procedure for claims	273
The use of insolvency proceedings for enforcement purposes	274
Insolvent companies	274
Risk of bankruptcy	275
Set-off	276
Appeals	279
Grounds for resisting enforcement	280
Jurisdiction	280
Errors and mistakes	281
Procedural unfairness	285
Human rights	291
Final determination	292
Appendix 1 The Housing Grants, Construction and Regeneration Act 1996 Part II	294
Appendix 2 The Scheme for Construction Contracts (England and Wales) Regulations 1998	300
Appendix 3 The Construction Contracts (England and Wales) Exclusion Order 1998	309
Appendix 4 The Scheme for Construction Contracts (Scotland) Regulations 1998	312
Appendix 5 The Construction Contracts (Scotland) Exclusion Order 1998	320
Appendix 6 The Construction Contracts (Northern Ireland) Order 1997	323
Appendix 7 Joint Contracts Tribunal 1998 Edition Private With Quantities	331
Article 5	331
Clause 1.3	331
Clause 41A.1 - 8	331
The JCT Adjudication Agreement	336
Appendix 8 Construction Confederation Contract DOM/1	340
Clause 38A	340
Appendix 9 ICE Conditions of Contract 7th Edition	344
Appendix 10 New Engineering and Construction Contract	347
Appendix 11 Civil Engineering Contractors Association Sub-Contract for use with ICE 6th Edition Main Contract	
Clause 18	350
Appendix 12 GC/Works/1 with Quantities 1998	
Condition 59	353
Model Form 8 Adjudicator's Appointment (Condition 59)	355
Appendix 13 Technology and Construction Solicitors' Association (TecSA) Adjudication Rules - 2002 Version 2.0 Procedural Rules for Adjudication	357
Appendix 14 Centre for Effective Dispute Resolution (CEDR) Rules for Adjudication	363

*Contents*

xiii

Appendix 15	Construction Industry Council (CIC) Model Adjudication Procedure 3rd Edition	367
Appendix 16	Association of Consulting Engineers Conditions of Engagement	373
Appendix 17	Institution of Chemical Engineers Red Book	
	Clause 45	374
	Clause 46	375
	Guide Note Q	375
Appendix 18	Adjudication cases	377
	<i>Table of Cases</i>	382
	<i>Table of Statutes</i>	387
	<i>Table of Statutory Instruments</i>	392
	<i>Index</i>	397

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# Preface

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There are those who say that, until the courts had explained to the construction industry what adjudication is and how it operates, it was a case of the blind leading the blind. When we look back on what we wrote in the first edition in 1998, however, we are pleasantly surprised that much of what we said is as valid now as it was then.

It was thus with a light heart that in the spring of 2002 we embarked on what we thought would be a simple update to take into account the various decisions of the courts that affected the practice of adjudication. At that time there were about 100 published judgments of the courts dealing with adjudication matters.

Little did we imagine what the task would develop into. During the period that we originally set for the production of this edition (we originally aimed to finish in October 2002) the courts made a further 30 or so judgments. From then to December 2003 there have been nearly 40 more. Each time we thought that we were near finishing, yet another judgment would appear that put a slightly different nuance on the way that adjudicators should conduct themselves. The end result has been a substantial review of the whole of the text.

We have managed to unearth a total of 172 judgments up to December 2003 and we set out a list of these in Appendix 18. Most of these have come from the websites produced by adjudication.co ([www.adjudication.co.uk](http://www.adjudication.co.uk)) and BAILII (the British and Irish Legal Information Institute) ([www.bailii.org](http://www.bailii.org)). Others have come from the Court Service website ([www.courtservice.gov.uk](http://www.courtservice.gov.uk)) and the Scottish Courts website ([www.scotcourts.gov.uk](http://www.scotcourts.gov.uk)). A few have come from those involved in enforcement proceedings who have been kind enough to let us have notes of the judgment of the court. We must acknowledge our debt to all these organisations and people. We have no doubt that there are readers who will be aware of other matters that have reached the courts for enforcement or other proceedings in connection with adjudication. We should be pleased to hear from anyone who can help in this way.

Some may say that this is an inordinate number of cases needed to explain how the adjudication procedure works. We would counter that suggestion by saying that it is our understanding, gleaned in the absence of any hard information, that after more than five years there have probably been between 9,000 and 12,000 notices of adjudication. This is an extrapolation based upon the number of nominations made by the various adjudicator nominating bodies, our own experience and that of other adjudicators who receive appointments direct from the parties. In that context the number of cases where parties have had to resort to the courts is less than 2% of the total number of adjudications and probably nearer 1½%. It must always be remembered that, as most of these judgments relate to enforcement, there are many that deal with almost exactly the same matters and the actual issues dealt with by the courts are limited in number.

The seminal judgment relating to adjudication was that of Mr Justice Dyson in *Macob v. Morrison*<sup>1</sup> which was made in February 1999. This decision gave the lie to those who suggested that adjudication would not work, and made it clear that the courts would fulfil the intention of Parliament that adjudicators' decisions would be enforced.

At one time the view was that an adjudicator's decision would be enforced almost come

what may, but as the number of cases reaching the courts for enforcement has risen it has become more and more clear that there are two guiding principles that must apply to the adjudication process if the adjudicator's decision is going to be enforced. These are: the adjudicator must have jurisdiction to act, and in conducting the proceedings the adjudicator must be unbiased and fair.

The courts have laid down guidelines for adjudicators to follow in order that their actions may not transgress into areas that are seen by parties and the courts as being unfair, guidance that is particularly necessary where the process itself could well be described as intrinsically unfair. It does seem, however, that as long as the adjudicator follows the principles of the 'rules of natural justice', albeit slightly modified to allow for the extremely restricted time-scales involved, all other things being equal the courts will enforce the decision.

The other principal area that has exercised the courts has been the question of the adjudicator's jurisdiction. If the adjudicator has no jurisdiction, any decision that is produced is unenforceable. The questions that have been addressed by the courts in respect of jurisdiction have been many and varied, but in the main they boil down to two questions: 'Is there a dispute?' and 'Is there a contract to which adjudication applies?'. Many of the courts' judgments that have been handed down during 2003 relate to these questions and interestingly enough the penultimate case in our list in Appendix 16, *Galliford Try v. Michael Heal Associates*<sup>2</sup>, a decision of Judge Richard Seymour QC of the Technology and Construction Court, deals with questions which included whether or not a contract was concluded and if it was, whether it was a contract in writing.

The whole edifice of the courts' support for adjudication was initially, quite understandably, built upon judgments made in the Technology and Construction Court, that is, at first instance. A particular benefit of the delay in the production of this second edition is that there have, in October and November 2003, been three cases relating to the enforcement of adjudicators' decisions that have been heard in the Court of Appeal. Two of these deal with questions relating to an adjudicator's jurisdiction. In one of them, *Tally Wiejl v. Pegram*<sup>3</sup>, Lord Justice May reviews the adjudication process, considering the tensions between the intentions of Parliament as set out in the Housing Grants, Construction and Regeneration Act 1996 and challenges to jurisdiction. There are now eight Court of Appeal judgments and all are on the BAILII website; anyone interested in the process of adjudication should access them and read them carefully.

So we make no apology for the length of time that it has taken to produce this second edition. We thank all those who have regularly asked us 'When is it coming out?' for their patience, and also thank Julia Burden and all at Blackwell Publishing for bearing with us over a lengthy gestation period. We think that the end product has been well worth the wait and hope that they do too.

December 2003

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<sup>2</sup> *Galliford Try Construction Ltd v. Michael Heal Associates Ltd* [2003] EWHC 2886 (TCC 1 December 2003).

<sup>3</sup> *Tally Wiejl (UK) Ltd v. Pegram Shopfitters Ltd* [2003] EWCA Civ 1750, CA (21 November 2003).

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