



A PRACTICAL GUIDE TO ADJUDICATION UNDER THE CONSTRUCTION CONTRACTS ACT 2013

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Adjudication under the Construction Contracts Act 2013 (the 'Act') is a very accessible and efficient method of resolving payment disputes on construction projects. It is available "at any time" and a binding decision is usually provided within 28 days from the date the Referring Party (the claimant) delivers its initial claim submission.

The result is that adjudication is an attractive method by which to unlock funds quickly and cheaply, when compared to other formal dispute resolution methods.

In this publication we provide a practical step-by-step guide to the process of statutory adjudication for payment disputes in Ireland.

Contracts under which adjudication is available

Adjudication is available in respect of 'construction contracts', which are widely defined under the Act. In practicality, this means that adjudication will be available for most contracts (whether or not in writing) on a construction project including main contracts, sub-contracts and professional appointments.

Adjudication Procedure & Timetable

The entire adjudication procedure, from commencement of the dispute to receiving the Adjudicator's decision and any associated payment, generally takes between 6 and 8 weeks and involves the following:

Step 1: Service of Notice of Intention to Refer Payment Dispute for Adjudication

The service of the *Notice of Intention to Refer Payment Dispute for Adjudication*, or, *Notice to Refer*, is the formal step taken in order to commence adjudication. It is delivered by the claimant in the matter, who is called the Referring Party. The defendant is called the Responding Party.

The Notice to Refer identifies in simple terms what the payment claim involves. Although it is a short document, it is a very important document as it sets the scope of the dispute and so the Adjudicator's jurisdiction. Essentially, it identifies what the dispute is and tells the Adjudicator what he or she has to decide upon. It is vital to ensure that the scope of the dispute is adequately captured in the Notice to Refer in order to avoid jurisdictional challenges.

Step 2: Appointing an Adjudicator

After delivering the Notice to Refer, an Adjudicator needs to be appointed. This is done

either by agreement between the parties or, in the absence of agreement, by applying to the Construction Contracts Adjudication Service (CCAS). If the Adjudicator needs to be appointed by the CCAS, the Chair of the statutory panel of adjudicators will appoint an appropriate Adjudicator from the panel.

Step 3: Submissions:

Once the Adjudicator is appointed, they will confirm the formal timetable for the parties to provide various documents in the adjudication setting out their respective factual and legal positions. The first document is delivered by the Referring Party and is called the *Referral of Payment Dispute to Adjudicator*, known as the 'Referral'. As per the Act, the Referral must be delivered within 7 days of the Adjudicator's appointment.

It should be noted that the delivery of the Referral commences the 28-day period within which the Adjudicator's Decision must be delivered.

After delivering Referral, the following documents may then be delivered and are usually directed by the Adjudicator to be delivered in-line with the time periods identified:

- **Response** (delivered by the Responding Party 14 days after Referral)
- **Reply** (delivered by the Referring Party 7 days after Response)
- **Rejoinder** (delivered by the Responding Party 5 days after Reply)
- **Surrejoinder** (delivered by the Referring Party 3 days after Rejoinder)

The Rejoinder and Surrejoinder are usually only required when the dispute referred to adjudication involves a high level of complexity. If these submissions are required, the Adjudicator will likely request that the Referring Party agree to extend the period within which the Decision is to be delivered so that the Adjudicator has 7 clear days between the last submission and the date the Decision is provided.

With regard to the submissions that are delivered, it would not be unusual for the Referral, Response and Reply, at least, to attach witness statements and/or, if the issues in dispute call for it, Expert Reports.

It should also be noted that in the normal course adjudications are carried out on a documents only basis, but the Adjudicator may direct or the parties may request or agree that an oral hearing take place. In addition, the Adjudicator may request to visit the site the subject matter of the dispute if they consider that this will assist in making the Decision.

Step 4: Adjudicator's Decision

As mentioned, the Adjudicator's Decision should be delivered within 28 days of the delivery of the Referral. That is, unless the Referring Party has agreed that the Decision can be delivered later, up to a statutory maximum of 42 days after the date of the Referral.

The Decision should deal with the entirety of the payment dispute and any amounts awarded thereunder will usually be payable within 7 days of the date of the Decision unless the Adjudicator directs that payment should be made on a different date.

Crucially, and the main reason that adjudication is so attractive, is that the Adjudicator's

Decision is binding in the interim. That means that it must be complied with by the parties until a different decision is reached in litigation or arbitration should either of the parties decide to progress with the dispute beyond adjudication.

If the Decision is not complied with, there is a specialised fast-track procedure in the High Court to enforce the Decision. This means that proceeding down the route of adjudication, when compared with the traditional route of conciliation followed by arbitration, can be the difference between obtaining money in a matter of weeks and a matter of years.

Adjudication Costs

Costs of adjudication are heavily dependent on the complexity of the dispute as well as the manner in which the parties engage. That said, contrast in cost is stark when comparing the costs of adjudication with that of the traditional construction disputes route of conciliation followed by arbitration.

Depending on complexity, adjudications can be run very efficiently. But, even when disputes are complex, the difference in costs in adjudication versus conciliation/arbitration can be the difference between a few tens of thousands (if even) and hundreds of thousands.

The Adjudicator does not have the power to award parties' costs, so the parties bear their own costs of the process. However, the Adjudicator can award their own costs. Therefore, the unsuccessful party will usually be responsible for discharging the majority of the Adjudicator's fees and expenses. That said, Adjudicator's terms and conditions generally stipulate that each party will be jointly and severally liable for the Adjudicator's fees and expenses.

Before Commencing Adjudication

Before referring a payment dispute to adjudication, there are a number of questions always to ask:

- Is the dispute a "payment dispute"? The only dispute that is permitted to be referred to adjudication under the Act is a "payment dispute". Consequently, a claim for an extension of time only for example, may not constitute a dispute that is capable of being referred to adjudication. In practicality, most disputes will qualify as payment disputes but this needs to be considered at the outset.
- Do I have an entitlement? A robust and realistic assessment of your entitlement to claim under the strict terms of the contract should be made before referring a dispute to adjudication.
- What is the condition of my supporting documents? The existence of and properly organised supporting documentation is critical. Ultimately, you need to prove your claim and the best manner in which to do this is through contemporaneous documentation. Ensuring that your documentation is organised and well prepared before referring a dispute to adjudication will make it far more likely that you will be successful in the adjudication.
- How are my resources? Again, to give yourself the best chances of success, adequate resources need to be applied to the process, both personnel and financial. adjudication is an engaged process over a relatively short period which

means that it demands resources to be applied to it. If you are involved in other projects or matters that mean resources won't be available, then you should consider whether a referral to adjudication should be delayed.

- Do I need specialist advice? It is always best to obtain specialist advice early, particularly in relation to adequately assessing your entitlement and preparing your claim, but even more so if you have received a Notice of intention to Refer and need to prepare for defending claims made in adjudication at short notice. Obtaining specialist advice early will assist in developing the right strategic approach to the adjudication and avoid wasted costs in the short and long term.

If you would like to discuss any aspect of this article in further detail please contact our adjudication specialists Killian Dorney or Cian O'Gorman.

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