Defending adjudications in practice – 20 things to think about

If you receive a claim in adjudication, there can be a lot to do in a short time. This note lists some of the main points (in approximately sequential order) to bear in mind.

1. **Look out for tell-tale signs.** Referring parties often show signs that they may be about to launch an adjudication, e.g. by sending letters saying that their dispute has ‘crystallised’ or providing an unusually well put together note of their claim, frequently complete with an organised lever-arch file of supporting documents. Forewarned is forearmed – if you think an adjudication maybe coming, let your in-house legal team know.

2. **Remember the rules of privilege.** Any internal communication (emails, reports, etc.) about the dispute may become discloseable to the other side if the dispute goes beyond adjudication and ends up in litigation or arbitration, so do not speculate in an email or other correspondence, about your own liability in respect of the dispute.

3. **Notify your Insurers.** Under some insurance policies, there is an onerous obligation to notify insurers within a short time of a Notice of Adjudication being served. If you are confident that an adjudication is on the way, you may want to notify your insurance broker – it is one less thing to do later on and you may get helpful support.

4. **The Notice of Adjudication.** (Sometimes called the ‘Notice of Intention to Refer’). This is the document that begins the adjudication and starts the clock running. It will be prepared and sent by the referring party and should describe the contract and the parties, define the dispute and the nature of the redress being sought. **AS SOON AS YOU RECEIVE IT, SEND IT TO YOUR IN-HOUSE LEGAL TEAM, particularly if you have not previously told them that an adjudication may be coming.**

5. **Reserve your rights.** There is often a great deal of uncertainty at the early stage of an adjudication (e.g., has the dispute crystallised? Has more than one dispute been referred? Is there a mistake in the names? What type of adjudication is it, etc?) These may constitute valid grounds for you to challenge the adjudicator's jurisdiction. If there is any such uncertainty, you will want to ‘reserve your rights’.

   There are, broadly speaking, two types of reservation of rights – ‘general’ (usually when you are not sure whether or not your rights may be prejudiced) and ‘specific’ (when there is some expressly identified ground to challenge jurisdiction). Be ready to discuss with your in-house team whether or not there is a need to reserve rights.

6. **What type of adjudication is it?** The adjudication may be contractual (i.e. governed by the terms set out in your contract) or statutory (i.e. governed by the Construction Act). It can sometimes be complicated to work out what type of adjudication you are dealing with, but it is vital to know as it determines the rules which must be followed. The first step is to identify your contract (this may be a formally executed standard form, it maybe an exchange of emails) and see what it says.
7. **Check the date of your contract.** The adjudication provisions of the Construction Act were slightly amended on 1 October 2011 (not in Scotland) by the Local Democracy, Economic Development and Construction Act 2009.

If your contract pre-dates 1 October 2011, then these amendments will not apply.

8. **When is a dispute not a dispute?** Under statutory adjudication and under most contractual adjudication, the thing which is referred to adjudication is a ‘dispute’. If a dispute has not ‘crystallised’ (e.g. if you have not had an opportunity to admit or deny a claim), then there is no ‘dispute’ and therefore there can be no adjudication. Responding parties often waste a lot of time at the outset indignantly explaining why the claim referred has not crystallised into a dispute. However, the definition of dispute is very wide and, therefore this time could usually be better spent addressing the substantive claim (and the more you work on the substantive claim, the more it will become clear whether or not it is or is not a dispute). In the meantime, you can reserve your rights in this respect (see ‘5’ above), if appropriate.

9. **One dispute or multiple disputes.** In statutory adjudications, the referring party is not permitted to refer multiple disputes to a single adjudication at the same time. Again, the definition of what is a single dispute is quite wide. However, it may be worth bearing in mind if the scope of dispute(s) referred is causing you genuine problems.

10. **What evidence will you need?** The Notice of Adjudication is often only a short document and you may have to wait a further seven days for the Referral Notice, which will contain the full details of the claim, to be served. However, upon receipt of the Notice of Adjudication (if not before), start preparing the basic evidence. In almost every dispute, this will include:

    + a factual chronology of the main events out of which the claim arises, backed-up with the key documents;

    + a list of the main personnel involved and their roles. Those most closely involved may be asked to prepare witness statements at short notice; and

    + a layman’s explanation of any technical issues – photographs and drawings are always useful.

11. **Appointment of the adjudicator.** Sometimes, the contract names an adjudicator or names the organisation which is to nominate the adjudicator following a request from the referring party.

There is nothing to stop you from calling the referring party and trying to agree a mutually acceptable adjudicator, especially if the dispute raises an issue which requires particular expertise.

12. **Failure to serve a Pay Less Notice.** Is the adjudication an attempt to avoid the consequences of failing to serve a Pay Less Notice? Prior to a recent decision in *ISG Construction Ltd v Seevic College* [2014] EWHC 4007, it was becoming increasingly common for paying parties to construction contracts to avoid the consequences of failing to serve Pay Less Notices by quickly making a claim in adjudication and then setting off the adjudicator’s decision against the obligation to pay the amount in the application for payment.
The Decision in ISG v Seevic should prevent this from happening. However, the paying party is still entitled to make the claim in adjudication (it is just that it cannot set-off the award against its obligation to pay the sum due).

13. **Serial and parallel adjudications.** Because of the ‘one dispute per adjudication’ rule (see ‘9’ above) and sometimes simply to try to bully the responding party, the referring party may issue several adjudications at the same time with different adjudicators (in parallel) or one after the other (in series). You cannot prevent this, but if it is anticipated you can prepare for it. The key point is that the same dispute cannot be adjudicated more than once and, if it is, this is a valid ground for challenging the adjudicator’s jurisdiction.

14. **Procedure for the adjudication.** The rule under the Construction Act is that the adjudicator sets the timetable and the procedure for the adjudication. The timetable may be dependent upon the date for the decision (see ‘15’ below). However, the adjudicator should liaise with the parties regarding the timetable and the parties can make suggestions to the adjudicator. For example, do you want a meeting with the adjudicator, or can the case be dealt with on paper? Do you want the adjudicator to visit the site? Do you want to serve expert opinion evidence, etc?

15. **Date for the Decision.** Under the Construction Act, the adjudicator must reach his decision within 28 days of receipt of the Referral Notice. This date can be extended for an additional 14 days by the referring party and further extension(s) can be granted beyond 42 days provided that both parties agree.

16. **Having the last word – drafting adjudication ‘pleadings’.** Normally, the referring party serves its Referral Notice and the responding party serves a Response. Any further exchanges (e.g. a Reply by the referring party, a Rejoinder from the responding party and a Surrejoinder from the referring party) should strictly only be permitted to address new matters that have been raised for the first time in the immediately preceding ‘pleading’. If there is a new point, then you should be able to explain to the adjudicator why it is new and, therefore, why you should probably be entitled to address it. If the Referring Party is simply repeating previously raised arguments, you should draw this to the adjudicator’s attention and refer back to the ‘pleading’ in which you first answered them.

17. **Drafting your Response.** The Response is your opportunity to set out in detail your position in respect of the dispute which is the subject of the adjudication. Give it full priority.

18. **Meeting or hearing?** The adjudicator may direct that there be a meeting between him/her and the parties. Check what the status of that meeting is – is it an informal meeting at which the adjudicator wants to ask a few questions of each party to help understand the case or is it a full-blown ‘hearing’ at which each party is expected to present its complete case?

19. **What sort of decision do you want?** Do you want a fully reasoned, written decision (which will take more time and cost more to prepare) or will a short statement from the adjudicator suffice? Ask for what you want. For statutory adjudications, the adjudicator is not required to give reasons unless one of the parties requires him/her to do so.
20. **Costs.** Under the Construction Act, the adjudicator may make an order as to which of the parties pays his/her costs and in what proportion, but, generally speaking, the adjudicator has no power to order one party to pay the other’s costs.

Include within your Response any reasons why the referring party should pay the adjudicator's costs in any event. If the costs are likely to be significant (eg, when a QC has been appointed as the adjudicator for an extended adjudication that includes a hearing, the costs of the adjudication could easily amount to £50,000+), you could make a ‘without prejudice save as to costs’ offer to the referring party in respect of those costs.

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