

Contract adjudication



With pressure increasing to extend the scope of adjudication for the process industries, IChemE's update of its rules has an important role to play in dispute resolution, explains PAUL BUCKINGHAM

MOST construction projects are completed successfully to the satisfaction of all parties. Nevertheless, disputes can and do arise with the result that a wide range of procedures have developed which are effective at resolving disputes.

These are principally litigation, arbitration, adjudication, mediation, dispute boards and early neutral evaluation. Of these, adjudication is a statutory right of dispute resolution created by the Housing Grants, Construction and Regeneration Act 1996 to address the problem of endemic disputes in the building and

civil engineering industries and applies to all activities falling within the defined term of 'construction operations'. It has grown enormously since inception and contributed to a significant reduction in the number of construction disputes seen by the Courts in the UK.

Adjudication is a process by which a third party (the adjudicator), who is independent of the parties, is engaged to answer a particular question or determine a particular dispute. The adjudicator's decision is binding on the parties although it is not necessarily final. If either

party wishes to litigate, arbitrate or otherwise agree to a final resolution of the dispute at a later date they are free to do so, but in the short term the decision is temporarily binding and can be enforced. The adjudication process is intended to provide a quick and cost effective method of resolving disputes.

ICHEME RULES

The process industries were historically less contentious and relatively free from disputes. As a result, statutory adjudication was excluded from certain types of work on sites where

the main activity is nuclear processing, water or effluent treatment, or the production, storage or processing of chemicals, pharmaceuticals, oil, gas, steel or food and drink products. Although much of the construction work in the process industry is thereby excluded from the application of the statutory scheme, a set of adjudication rules was produced by IChemE to ensure that a practical procedure was available for use with IChemE's *Forms of Contract* should it be required.

IChemE's first set of Adjudication Rules were issued in 1998 and known as the Grey Book. Effective from 1 May 2016, a new 4th edition has been released and takes account of changes in the law and comments from users.

WHAT'S NEW?

A number of changes have been made to the 4th Edition which are relatively self-explanatory:

- amendments to the 3rd Edition in response to Court decisions have now been formally incorporated
- reference is made to amendments to the legislation made by the Local Democracy, Economic Development and Construction Act of 2009
- the forms set out in the annexes have been made 'example' forms rather than mandatory documents, which aligns more closely with actual practice
- the time periods for making minor amendments to decisions under the 'slip rule' provisions

have been amended to comply with the amended legislation

- the right of the adjudicator to meet the parties separately has been removed to avoid any concerns of bias or improper conduct
- the adjudicator's fees become payable irrespective of the enforceability of the decision in the example terms of appointment
- reference to IChemE's list of adjudicators has been removed, as this is no longer made publicly available

In addition, a note has been added to alert users to the implications of the decision of *Eurocom v Siemens* [2014] EWHC 3710 (TCC). In that case, Eurocom had applied to the Royal Institute of Chartered Surveyors to nominate an adjudicator but Eurocom's advisor listed a somewhat surprisingly large number of individuals who were said to be conflicted from deciding the dispute. The appointed adjudicator ultimately found in favour of Eurocom.

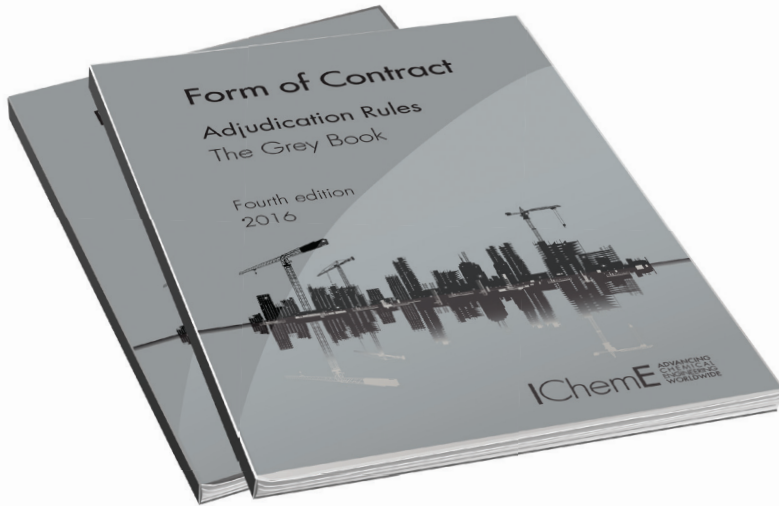
However, at the enforcement stage Eurocom's advisor admitted that none of the individuals he had listed did in fact have a conflict of interest, rather he just did not want them deciding the dispute. The Court was unimpressed and held that there had been a fraudulent misrepresentation rendering the decision a nullity. A specific warning has therefore been added to draw this decision to the attention of users, who should consider carefully whether a conflict of interest truly exists in the appointment of any adjudicator.

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FUTURE OF ADJUDICATION

Whilst certain activities are excluded from the scope of the statutory adjudication scheme, the definition of "construction operations" is sufficiently broad to include many contracts and subcontracts in the chemical and process industries. Where ambiguity has existed, the Courts have tended to take an expansive interpretation to widen the scope of inclusion into the statutory scheme, with the result that the number of truly excluded activities has diminished.

Contracts for activities both within and outside the definition of construction operations are termed "hybrid contracts", with some parts of the works being subject to adjudication and others not. This has created difficulties and recently attracted strong judicial criticism. In the case of *Severfield (UK) Ltd v Duro Felguera UK Ltd* [2015] EWHC 3352 (TCC), which concerned a hybrid contract, Mr Justice Coulson set out in forthright terms his own view that the exemptions granted to certain industries should no



longer be maintained: “I should add this. All of the difficulties here, in both the old and the new proceedings, can be traced back to s.105 of the 1996 Act and the legislature’s desire to exclude certain industries from adjudication. A review of the debates in Hansard reveal that parliament was aware of the difficulties that these exceptions would cause, but justified them on the grounds that (i) adjudication was seen as some form of ‘punishment’ for the construction industry from which (ii) the power generation and some other industries should be exempt, because ‘they had managed their affairs reasonably well in the past’.

I consider that both of these underlying assumptions were, and remain, misconceived. Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a ‘punishment’, it has been generally regarded as a

blessing by the construction industry. Furthermore, it is a blessing which needed then – and certainly needs now – to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too clearly, they too would benefit from the clarity and certainty brought by the 1996 Act.”

WHERE NEXT?

Adjudication has an important role to play in the dispute resolution process. It has been successful at reducing the number of disputes in the building industry for nearly two decades and has become an integral part of IChemE’s standard terms. IChemE’s update of its Adjudication Rules will give users access to an adjudication procedure compliant with the statutory scheme and consistent with IChemE’s Forms of Contract.

However, whilst much of the construction work in the process industry remains exempt from the statutory scheme, there is increasing pressure to extend the scope of adjudication. Those engaged in the process industries are likely to find that they do not remain entirely exempt from the statutory scheme and become increasingly involved in the adjudication process.

The *Forms of Contract Adjudication Rules, 4th edition – The Grey Book* – can be purchased at:

www.icheme.org/focdr

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