

# A guide to adjudication

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## What is adjudication?

Adjudication is a relatively quick method of dispute resolution, from as little as 28 calendar days, which is commonly used in the construction industry.

It is a process that is often described as a 'pay first, argue later' mechanism for resolving disputes. Whilst initially envisaged for disputes concerning interim payments, delay and disruption claims and defects claims, adjudication can be used to resolve a plethora of disputes including breach of contract, termination and professional negligence.

# Who can adjudicate?

Parties to a 'construction contract', as defined by the Housing Grants, Construction and Regeneration Act 1996 as amended, have the right to refer a dispute to adjudication at any time unless the contract is with a residential occupier. Some contracts will provide a contractual right to adjudicate, for example contracts with a residential occupier on JCT standard terms.

The rules that govern any such adjudication will depend on any applicable adjudication rules stipulated in the contract. This guide provides an overview of adjudication in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended.

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# Things to consider before commencing an adjudication

You must establish that you have a right to adjudicate before commencing an adjudication.

Prior to commencing an adjudication, you must also establish that a dispute has crystallised – if no dispute has crystallised there is nothing that can be referred to an adjudicator. In order to crystallise a dispute you must bring the subject matter of the claim to the attention of the opposing party to provide them with an opportunity to consider, admit or reject the claim.

Typically, a party is only entitled to refer a single dispute to adjudication at a time although the court adopts a broad view of what constitutes a single dispute and a single dispute may encompass multiple claims or issues. An adjudicator can only determine multiple disputes at the same time with the consent of all the parties.

# The process of adjudication

Adjudication is commenced by the referring party serving its notice of intention to refer a dispute to adjudication (the Notice). The Notice informs the responding party of the referring party's intention to refer a dispute to adjudication, what the dispute is and what remedies are sought.

Following service of the notice of adjudication, the referring party must seek the appointment of an adjudicator. This is usually done by way of an application to the adjudicator nominating body stipulated in the contract. The application form must be submitted along with the relevant fee and a copy of the Notice. The nominating body will then confirm the individual appointed to act as the adjudicator on or before the fifth day after the Notice.

Within seven days of the Notice, the referring party must serve its referral notice on the responding party and the adjudicator. The purpose of the referral notice is to set out clearly and concisely the referring party's case. It must contain all the relevant information the adjudicator requires to make their decision and it should be persuasive.

The referral notice should be accompanied by copies of, or relevant extracts from, the relevant contract and any other supporting documents, such as witness statements or expert reports, that the referring party intends to rely on.

Once the referral notice is issued, the 28 day period in which the adjudicator must issue their decision commences the following day, although this period can be extended by a further 14 days with the

referring party's consent or further with the consent of both parties. Following receipt of the referral notice, the procedure is then up to the discretion of the adjudicator. An adjudicator is empowered to decide on the procedure to be followed in the adjudication and may take the initiative in ascertaining the facts and the law necessary to determine the dispute.

Typically, a responding party will be permitted to issue its response to the referral notice within seven days of receipt of the referral notice. This is the responding party's defence and should set out a response to each and every allegation in the referral notice and the responding party's position. The response may also be accompanied by any witness statements or expert reports.

Following the response, if the matter justifies it, the referring party may be entitled to issue a reply, typically within five days of receipt of the response, which is limited to responding to the response on matters not already addressed in the referral notice.

Further submissions from each party in turn may then be allowed by the adjudicator, being a rejoinder and surrejoinder. It is often the case that the parties agree to extend time for the adjudicator's decision to allow such further submissions to be made.

Once the adjudicator has the submissions they require, the adjudicator will prepare and issue their decision.

# Benefits & risks - a summary

	Benefits	Risks
Short time scales	The referring party can recover money quickly, the dispute can be resolved without undue disruption to works and costs are likely to be lower.	It can increase the risk of errors being made as the parties may not have enough time to present their arguments and evidence.
Temporarily binding	The unsuccessful party can pursue a court claim or arbitration in relation to the same dispute.	The successful party has no assurance that the dispute has been finally resolved. Although in practice, an adjudication decision will often bring the end to a dispute because neither party chooses to litigate or a settlement is reached.
Successful party does not recover its costs	A party in a weak financial position can pursue their claim in circumstances where they might not have been able to risk an adverse cost order in litigation.	The inability to recover legal costs can reduce the net total amount recovered.
Tactics	The referring party has the tactical advantage of being able to refer a dispute 'at any time', therefore they can choose a time that is convenient for them and fully prepare their arguments.	The responding party may produce evidence or arguments that were not anticipated and therefore it may be difficult for the referring party to address them effectively.
Privacy	Adjudication proceedings are private, unless the decision is considered by the Technology and Construction Court in a public judgment at the enforcement stage. This may be beneficial when protecting commercially sensitive information and/or a company's reputation.	The successful party must ensure they keep the proceedings and findings made in adjudication private.

# Fees

## Adjudicator's fees

The adjudicator is entitled to reasonable costs and expenses. Adjudicator's fees may vary and typically the parties are jointly and severally liable for the adjudicator's fees and expenses.

Notwithstanding the joint liability, an adjudicator can allocate which party is responsible for paying his or her fees as between the parties and may direct that both parties pick up part of the bill or the unsuccessful party picks up the whole bill as between the parties. An adjudicator's fee is not normally paid prior to issuing their decision.

## Legal / professional fees

Generally the parties bear their own legal and professional costs unless there is an effective agreement between the parties otherwise. Parties involved in adjudication should note that the cost of representation can be high but will be determined by the issues and amount at stake.

## Nomination fee

If the referring party makes their request for the nomination of an adjudicator via a nominating body, they usually have to pay a small fee which is typically in the region of £400 plus VAT. Recovery of the nomination fee can be sought from the other party as part of the adjudication but is rarely awarded.

# The adjudicator's decision and next steps?

An adjudicator's decision is binding until the dispute is finally determined by court proceedings, arbitration or by agreement. This means the parties must comply with the decision even if they disagree with it, subject to issues on enforcement, until the dispute is otherwise determined to the contrary.

The adjudicator's decision will usually stipulate a time for compliance. If the losing party fails to comply, the successful party can apply to court to enforce the decision. Enforcement is usually granted unless there are exceptional circumstances. These issues usually centre around the ability of the receiving party to repay any sums received in the event the dispute is finally determined to the contrary or a challenge to the decision itself, for example the adjudicator lacked jurisdiction to determine the dispute in the manner they did.

# Key contacts



**Stephen Homer FCI Arb**  
Partner and practising adjudicator  
Construction  
[s.homer@ashfords.co.uk](mailto:s.homer@ashfords.co.uk)  
07968 447596



**Lianne Edwards**  
Partner  
Construction  
[li.edwards@ashfords.co.uk](mailto:li.edwards@ashfords.co.uk)  
07702 565025



**Mark Manning**  
Partner  
Construction  
[m.manning@ashfords.co.uk](mailto:m.manning@ashfords.co.uk)  
07515 577067



**Patrick Blake**  
Partner  
Construction  
[p.blake@ashfords.co.uk](mailto:p.blake@ashfords.co.uk)  
07968 728868

# ashfords

## Exeter

Ashford House,  
Grenadier Road,  
Exeter EX1 3LH  
T: +44 (0)1392 337000

## London

1 New Fetter Lane  
London EC4A 1AN  
T: +44 (0)20 7544 2424

## Bristol

Tower Wharf,  
Cheese Lane,  
Bristol BS2 0JJ  
T: +44 (0)117 321 8000

## Plymouth

Princess Court,  
23 Princess Street,  
Plymouth PL1 2EX  
T: +44 (0)1752 526000

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