

CONSTRUCTION LAW GLOSSARY

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Adjudication

Often described as a 'pay first, argue later' mechanism, Adjudication has been designed to offer a quick method for settling disputes during the process of a construction project.

Adjudicator

Overseer of the Adjudication. The Adjudicator's decision is binding on the parties until the dispute may finally be determined by legal proceedings, arbitration or by agreement.

ADR

Alternative Dispute Resolution. A collective description of various methods of resolving disputes as alternatives to the formal adversarial processes of litigation or arbitration.

Application for Payment

A construction document that outlines how and when a contractor will be paid, with justification for that payment. The required content of the Application for Payment will vary depending on the contract.

Bill of Quantities

A schedule of items required to carry out and complete the works. If the contract does not include a Bill of Quantities, the contractor may be asked to price a set of drawings and/or specifications of the proposed works.

CAR Policy

Construction all risks (CAR) insurance provides cover against the risk of accidental physical damage to construction works, however it may have been caused.

Collateral Warranty

A contract entered into between the person employed under the primary contract i.e. the contractor, sub-contractor or consultant (the warrantor) and a third party (the beneficiary) who either has or acquires an interest in the project to which the contract relates. A Collateral Warranty gives the beneficiary the right to sue the warrantor for breach of contract if the warrantor breaches the term of the warranty.

Compensation Event

This type of event typically entitles a construction sub-contractor to claim additional time and money. An example of a compensation event is a breach of the construction sub-contract by the project company (an act of prevention).

Construction Act

The Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"), also known as the 'Construction Act', is an important part of the law affecting the construction industry since it came into force on 1 May 1998. The Construction Act fundamentally altered the nature of contracts in the construction industry through the introduction of statutory implied terms regarding payment and Adjudication.

Contract Sum

The price agreed with the contractor and entered into the contract. Although the contract sum should be checked very carefully, contracts generally allow for the contract sum to be adjusted.

Contractor

Anyone who directly employs or engages construction workers or manages construction work. Contractors have an important role in planning, managing and monitoring their work to ensure that any risks are controlled.

Contractor's Proposals

A written statement that includes the key terms of the project to be completed by the Contractor. A Contractor's Proposal will generally include such information as estimated costs and terms of payment, a detailed description or drawing of the project, and the start and completion dates.

D&B

Design and Build contracts, (otherwise known as D&B) refer to construction projects where the main Contractor is appointed to design and construct the works, as opposed to a traditional contract where the client appoints consultants to design the development and then the Contractor is appointed to construct the works.

Due Date

The date provided for by the contract as the date on which the payment is due: the starting gun for many payment processes.

Default Payment Notice

In circumstances where the paying party fails to give a payment notice, the unpaid party may serve its own payment notice, known as a default payment notice. This may be given at any time after the date the paying party's payment was due and must specify the sum that the unpaid party considers is due and the basis on which that sum was calculated. If a default notice is served, the final date for payment will be deferred to reflect the delay in the unpaid party serving its default notice.

Employer

A person, company or organization that pays for a contractor to carry out Works.

Employer's Requirements

The term used in JCT and FIDIC contracts to describe the document(s) produced by the employer setting out its requirements in relation to the project, including the particulars of the project, insurance requirements and instructions to the tenderer.

Extension of Time

Most construction contracts allow the programmed duration of the works to be extended in instances where there is a delay that is not the Contractor's responsibility. This adjustment is known as an Extension of Time, an EOT or 'Adjusting the Completion Date.'

Final Account

The Final Account is the final calculation of the Contract Sum (including all necessary adjustments) and signifies the agreed amount that the Employer will pay the Contractor.

Final Date for Payment

If the paying party fails to make payment by the final date for payment (and has not served a valid pay less notice), this is the date after which the payee can adjudicate for payment, and can give notice to suspend performance of the construction contract for non- payment.

Fluctuations Provision

Also known as 'variation of price', 'variation in cost', 'rise and fall' and 'cost- adjustment', these are compensatory clauses in construction contracts that provide a risk- sharing mechanism for dealing with the effects of inflation. Historically associated with large projects lasting several years, the swiftly rising costs of construction in recent years have resulted in increasing amounts of negotiation around the inclusion of fluctuation provisions. These can be bespoke or standard clauses.

ICE

The Institution of Civil Engineers is an international organization established to 'foster and promote the art and science of civil engineering' which previously published the ICE conditions of contract.

JCT

The Joint Contracts Tribunal produces standard forms of contract for construction, as well as guidance notes and other standard documentation for use in the construction industry.

LADs

Liquidated and ascertained damages (LADs or LDs) are a predetermined measure of damage agreed between parties to a construction contract at the time the contract is entered into. They are based on a calculation of the actual loss the client is likely to incur if the Contractor fails to meet the completion date.

Latent Defect

A concealed defect in the workmanship or design that would not be discovered during an inspection that the article would reasonably be subjected to.

Letter of Intent

A document sent to a Contractor whereby the Employer states that it intends to enter into a contract for the works and, pending such contract being entered into, asks for work to be done. A Letter of Intent may have no binding effect if drafted informally. A letter of intent is not a replacement for agreeing a properly drafted contract.

Named Subcontractor

A Named Subcontractor is named by the Employer in the main contract, and is employed by the main Employer to carry out part of the main contract works. Naming the subcontractors enables the Employer to steer the main Contractor's choice of a subcontractor for particular works.

NEC

The New Engineering Contract, which is a suite of contracts created by the UK Institution of Civil Engineers that guides the drafting of documents on civil engineering, construction and maintenance projects from start to finish, with the aim of preventing costly disputes. There have been four generations of NEC, creatively called NEC1, NEC2, NEC3 and NEC4.

Notified Sum

The sum which the Paying Party must pay on or before the Final Date for Payment unless it serves a valid Pay Less Notice.

Novation

The transfer of one party's rights and obligations under a contract to a third party. In legal terms this amounts to the extinguishing of the original contract and replacing it with another contract in which a third party takes up the rights and obligations which duplicate those of the one of the original parties to the agreement.

Patent Defect

An observable defect which could have been reasonably discovered or apparent during the build process (in contrast to a Latent Defect)

Payment Notice

A document that should be issued for every payment provided under the contract in question. A construction contract must provide for a Payment Notice to be given no later than five days after the payment due date, and if the client fails to do so, the Contractor may issue a Default Payment Notice (unless its Application for Payment already satisfies the requirements of a Default Payment Notice).

Pay Less Notice

The unpaid party has the right to be paid the Notified Sum by the Final Date for Payment. Therefore, if the paying party wants to pay less than the Notified Sum, it must serve a Pay Less Notice, setting out the sum it intends to pay (even if nothing) and the basis for the calculation of the amended sum.

Pay When Paid

A clause which makes a payment under a construction contract contingent upon a payment being made by a third party under a separate contract. Such clauses are now void.

Practical Completion (“PC”)

The point at which a building project is complete, except for minor defects which may be put right without undue interference or disturbance to an occupier. This is the point at which the building project is capable of beneficial occupation and use. Contracts may include bespoke definitions of Practical Completion.

Professional Appointees

A wide range of specialists (the ‘professional team’) may be engaged depending on the needs of the individual project. The most common are: architects, engineers and project managers.

Relevant Event

An event on or off-site that causes a delay to the completion date of the works. For example, a Relevant Event could be something that happens during the design and manufacture process causing delay, or a site event that prolongs the installation works. A Relevant Event does not usually entitle the contractor to claim loss and expenses, and therefore the risk of these Events are usually borne by them.

Relevant Matter

A matter for which the client is responsible and affects the progress of the works, for example: failure by the client to supply goods or materials, or delays in receiving instructions. Relevant Matters may enable a contractor to claim direct loss and/or expense that has been incurred and therefore the risk of these Matters are borne by the client. Relevant Matters are also usually Relevant Events, but rarely vice versa.

Retention

Retention is a percentage (usually up to 5% of the contract sum) of each payment made under a construction contract that is retained by the client in order to try and ensure that works under the construction contract are completed to the required standard. Half of the Retention is usually released on PC.

RIBA

Royal Institute of British Architects, supporting British architects and introducing new people to the world of architecture. RIBA issues a suite of contracts regularly used by Architects in their professional appointments.

Scheme for Construction Contracts

A scheme which applies when construction contracts do not comply with HGCRA: it either supplements the provisions of the contract where there are deficiencies relative to the requirements of the Act, or replaces the contract where it is non-compliant. It is split into two parts: Adjudication and Payment.

Scott Schedule

Used in construction disputes, a Scott Schedule is a single-source document identifying the key issues between the parties and setting out for the judge in a single document a summary of the parties’ rival cases on an item-by-item basis.

Smash and Grab Adjudication

The term used to describe an Adjudication seeking payment on the narrow ground that the contractual payment mechanism has produced a Notified Sum and this has not been paid. It does not require an enquiry into the ‘true value’ of the payee’s entitlement.

TCC

The Technology and Construction Court ('TCC') is a specialist division of the High Court, which deals principally with technology and construction disputes. Certain county courts may also have a TCC list.

Term Partnering

Sometimes referred to as 'alliancing', Partnering describes a collaborative management approach that encourages openness and trust between parties to a contract, and should enable long-term integration of the entire project team for the mutual benefit of all.

True Value Adjudication

The term used to describe an Adjudication on the valuation of the payee's application, in order to determine its 'true value'. Usually, a party cannot commence a True Value Adjudication without first making payment of the Notified Sum.

Valuation

The objective criteria by which works are to be valued and interim payments made are usually set out in a value document. Schedules of rates or bills of quantities are the most popular methods of Valuation, providing the contract professional and the contractor with the means whereby the work can be progressively valued.

Variation

An alteration to the scope of work originally specified in the contract, whether by way of an addition, omission, or substitution to the works, or through a change to the manner in which the works are to be carried out.