

MDA CONSULTING



FIRST AID FOR CONTRACTS



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NEC

Introduction

The New Engineering Contract (Third Edition Engineering and Construction Contract (2005) (“the NEC3”)), sets out the dispute resolution process in Option W1 (which applies to contracts other than those in the United Kingdom for housing grants, construction and regeneration).

Option W1 provides a framework within which disputes arising out of or in connection with the contract are to be referred to and decided by “the Adjudicator”. The framework provides a very specific time frame within which a party may refer a dispute to the Adjudicator and failing such referral within the time so provided, a party may be out of time and therefore unable to refer the dispute for determination (the ever ominous issue of time barring). The time frame within which to refer a dispute to the adjudicator is between two and four weeks of the notification of the dispute to the other party and the project manager.

Option W1 stipulates that if the Adjudicator is not identified in the Contract Data (assuming that one should have been so identified hence the usage of the term “the Adjudicator” being a specific person) then in such circumstance the parties choose an

adjudicator jointly, alternatively the parties may request the Adjudicator nominating body to do so.

TO HAVE REFERRED? OR
NOT TO HAVE REFERRED?

That is the question...
Referring a dispute to
adjudication under the NEC3
and the issues that arise
where the identity of the
adjudicator is not agreed
upfront

But the question that then arises is this: What is the outcome if a dispute is notified, two weeks pass as required by Option W1 and an adjudicator is not agreed to or the dispute not submitted to the adjudicator so agreed by the end of the four week period after the dispute notification? The answer to that question in the writer’s opinion is this: the party referring the dispute to adjudication cannot be time barred at this stage because the referral to an adjudicator can only take place once there is an Adjudicator appointed, thus the time barring provisions only come into play after the Adjudicator’s appointment is effective. The reasons for this thinking is set out below.

W1 provides what could be termed a “cooling off” process between the notification of the dispute and the referral of the dispute to an adjudicator for determination. The contract provides an adjudication table, which sets out the notification and referral process for different disputes and which party may refer the matter. The common thread however is that a dispute may only be referred to an adjudicator once a period of two weeks after the dispute notice has elapsed but within four weeks thereafter. Hence it appears that the referral to an adjudicator must be within the four week period to be considered valid and not time barred.

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The problem however arises in the scenario where an adjudicator is not identified in terms of the contract and is instead to be jointly appointed in the event of a dispute. That is all well and good in theory, relying on the assumptions that firstly the employer and contractor will easily agree an adjudicator's identity and secondly that adjudicator will accept his/her appointment, sign an adjudication agreement and the dispute information is provided to the adjudicator so agreed within the given time frame of four weeks after the dispute notice.

Anyone in the dispute resolution realm will know, this is simply unrealistic bearing in mind that adjudicators must be aware of conflicts of interest, have very busy schedules (they often practice as engineers or attorneys and work after hours) and the parties must actually agree an adjudicator in circumstances where generally the potential of any agreement on any item for consideration has long gone out the window. If the parties cannot jointly agree an adjudicator, either party may ask the Adjudicator nominating body to choose one. The adjudication nominating body chooses an adjudicator within 4 days of the request and the chosen adjudicator becomes appointed.

So the question remains then, when is the dispute actually considered to be referred?

The first port of call when a court is called upon to decipher the meaning of a contract is to look at the ordinary grammatical meaning of a phrase or word, and only where there is ambiguity in such ordinary meaning to apply the principles of interpretation.

The Oxford dictionary definition of referral is "An act of referring someone or something for consultation, review, or further action". Implicit in the definition is the concept that the matter for review, consultation or further action must in fact be referred to someone. A referral without a referring party and accepting party cannot in the true sense be a referral. It is the writer's opinion then that for a matter to be capable of referral, the identity of the party receiving the matter for consideration must already be certain. This is of course not an issue where the parties have at the outset agreed the identity of the adjudicator.

In terms of the principles of deciding whether the contract can be interpreted to mean that the referral is only capable upon or after the appointment of an adjudicator, the case *Douglas v Baynes* 1908 TS 1207 is of some assistance. In this case the court opined that an agreement may be held to contain an implied term "*where the court is satisfied that there arises from the language of the agreement itself, and the circumstances under which it was entered into, such an inference that the parties must have intended the stipulation in question*". Applying this theory to the issue at hand it is clear that the language of the contract infers that the time periods applicable to the referral of disputes to an adjudicator only commences running once the adjudicator is chosen and appointed and a term to this effect can therefore be implied due to the following:

1. the appointment of an adjudicator is a joint act by the parties;
2. it only takes place in the event of a dispute, until then there is no need for an adjudicator or for the parties to act jointly;
3. no time period is set for the appointment of an adjudicator, no time is set for performance, it must simply take place within a reasonable time;
4. the adjudicator nominating body is not contractually obliged to nominate an adjudicator or within the time period of 4 days;
5. the contract continually refers to "the adjudicator" therefore contemplating that an adjudicator has already been appointed (ie is an identified person).

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There are other principles in favour of this interpretation, firstly penalty clauses and exemption clauses are to be interpreted strictly. The courts have protected the public for the abuse of these clauses by interpreting them narrowly and in doing so ensuring that the principles of justice, equity and principles of the *audi aletem partem* rule are upheld. Furthermore the constitutionality of time bar clauses has been considered on a few occasions and the principles that emerge from these cases are that time bars seek to limit judicial redress and whilst they serve an important purpose in that they prevent delays which may be detrimental to the interests of justice, not all limits are consistent with the Constitution. It is for that reason that such clauses are narrowly interpreted. The second principle in favour of this argument is that of the officious bystander test which when applied looks at what the reasonable person would infer the intention of the parties to be where both parties were acting honestly and reasonably. In applying this test the courts take into account the circumstances and what an honest person entering into such a transaction would have done. It must then be that the reasonable honest contracting party would have assumed that in order for a matter to be capable of referral to the “Adjudicator”, there must in fact be an appointed adjudicator or at least agreement of the identity of such person before the time periods and incumbent time bars commence.

Where the parties to the contract agree the adjudicator upfront at the commencement of the contract, the situation is clear and there is no ambiguity created. However, where upon the occurrence of a dispute, an adjudicator has not been agreed to upfront, the time bar provisions of W1 cannot be said to commence until such appointment has taken place. The matter is not capable of referral without a party to accept such referral and there must then be an implied term read into the contract that provides for the 4 week period within which to refer a dispute to an adjudicator commencing to run on the agreement of the parties to the identity of the adjudicator.

To interpret the contract in any other manner would result in absurdity and would in no doubt fall under constitutional scrutiny.

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