

# RESOLUTION

The Newsletter of ARBICON ADR Ltd

Arbicon ADR is regulated by the Royal Institution of Chartered Surveyors (RICS)

Volume 3 Issue 1

August 2008

Inside this issue:

- **Amendments to the Construction Act**
- **Successful Seminar**

The key members of the Arbicon Team are:

Ian J Purser  
Director

Jonathan Nugent  
Director

Jack Kirk  
Senior Consultant

Mike Norrish  
Senior Consultant

Tim Dyson  
Senior Consultant

Derek Wakefield  
Senior Consultant

Virginia Browne  
PA to Directors

Louise Steel  
Marketing Manager

## ***Government reveals proposed 2008 amendments to the Construction Act... time to prepare!***

Ten years ago the Housing, Grants, Construction and Regeneration Act 1996, and its supplementary sidekick the Scheme for Construction Contracts (England and Wales) Regulations 1998 otherwise known to us all as the "Construction Act" and "Scheme" respectively came into force. The Construction Industry has been revolutionised by this legislation improving payment rights and introducing statutory adjudication rights. This was all very much needed to deal with an Industry that suffers more than any other from contractual disputes. If you didn't know it, all construction contracts must comply with the provisions of the Construction Act, which sets out special contractual rights including the right to adjudicate, thus ignore its content at your peril!

The last ten years has tested the Construction Act, there have been many legal cases and a complex web of law relating to it has been formed mainly to do with enforcement of Adjudicator's decisions, where the risk of getting involved in the cost of adjudication lies.

There have been cases that fly in the face of common sense, where enforcement has not been granted on minor technicalities in procedure, which on the face of it have nothing to do with the dispute and denying the money clearly owed by one party to the other. The construction industry recognises that reform is now appropriate to "iron out" these undesirable legal principles handed out by courts judgements, thus in the next session of parliament there is a Bill to be debated to bring in new legislation, the details have now been published by BERR (Department for Business, Enterprise and Regulatory Reform) which if passed by parliament will become legislation known in its short form as the Construction Contracts Act 2008.

If you are a paying party take heed, the loopholes in the law are going and if you are a payee the risks of adjudication are reducing but you need to know how the new Act operates procedurally to ensure you do not fall foul of the rules.

The draft proposals could be more in plain English, but our interpretation of them are as follows:



# RESOLUTION

The Newsletter of ARBICON ADR Ltd

## **Section 107 – Contracts in Writing are to be repealed.**

The deletion of Section 107 of the Construction Act means that arguments relating to “no contract in writing”, which is the biggest risk in adjudication, will go! However, where there is reference in the Act for “writing” these parts are subject to the old rules. This only thus applies to the service of notices and new amendments to Section 108 requiring the adjudication procedure to be in writing. Presumably if there is no adjudication procedure in writing, pursuant to Section 108(5) the Scheme applies. If you do not serve a notice in writing you cannot prove your case anyway so the whole “written” problem disappears. This means on the definition of a Construction Contract” at Section 104, you will only need an “agreement” to carry out “construction operations”, which can by implication be partially agreed, oral or written, not a full blown contract or any requirement to agree all the terms, which have been the basis for many nonsense cases in the recent past.

The repeal of Section 107 represents the Construction Industry’s resolve to eradicate the court obsession with parties having to prove a perfect contract, a utopia that simply does not exist. It means that letter of intent type agreements or where all terms have clearly not been agreed will all now rightly be protected by statutory adjudication and a good deal if not all of the law relating to letters of intent in respect of adjudication should thankfully fall away.

## **Prohibition of Advance Agreements on Costs in Adjudication**

Any clause imposed in a contract which dictates how the costs are paid such as “*the subcontractor shall pay all the adjudication costs including the adjudicator’s fees and expenses and all the Contractor’s legal costs*” will be void. The new Act proposes that the only way costs can be agreed is after the adjudicator has been appointed.

## **Revised Payment Provisions**

Every Construction Contract will need revising to accommodate new payment rules regarding payment notification. Under current rules there is an obligation for the paying party to certify payments 5 days after the payment due date. This is retained, however under current procedures if this is not carried out, effectively a breach of contract to which there is no financial penalty there is no power for the payee to force valuation and payment except by adjudication. The new Act proposes to give the payee power in that if the payer fails to certify within the 5 days, the payee may serve notice that the application for payment becomes the sum due. This is provided an application for payment has been submitted on or 5 days after the due date. Both certification instances are subject to rights to withhold under further new strict rules with service of a “pay less” notice prior to the final date for payment. These are very important changes that paying parties need to pay particular attention to in respect of payment risk, training is recommended.

## **Prohibition of Binding Third Party Decisions relating to Interim Payments**

On the matter of entitlement to stage payments any contract attempting to give power to a third party to make a payment decision binding on the other party, particularly in advance of the time for the contract payment mechanism to operate will be void. This has implications for Architects, whose payment certificates can be opened up and will not be binding on the payee.

## **Prohibition of Payment conditions taking account of obligations under another contract**

Any provision which makes a condition that payment is subject to obligations being fulfilled under another contract will be void. This is designed to deal with “pay when certified” clauses. Typically, current conditions can be built into say sub-contracts making it a

# RESOLUTION

The Newsletter of ARBICON ADR Ltd

condition that payment becomes due after a payment certificate or final certificate is obtained under the main contract. This will be deemed an inadequate payment mechanism under the new Act. Such a clause will thus be void and the Scheme will apply entitling payment.

## Suspension of the Works due to non-payment

Some further clarity is added to this current right in that any or all of the obligations may be suspended, thus if one man is left on site after the other ten have been removed this may qualify as suspended works entitling the payee to an extension of time and loss and expense. In respect of loss and expense it is common place for paying parties to remove the payee's entitlement to recover costs and losses due to suspension. Such a condition will be void under the new proposals.

## Further Considerations

In essence that is it, the proposals don't address many other issues of risk, which may be brought to light, such as the need to void agreements on excessive payment periods, conditions diverting or delaying payments following adjudicator's payment awards and procedures for enforcement of an adjudicator's decision which are restrictive. There is nothing new on domestic contracts or consumer rights. Many would support the view that written adjudication provisions in contracts should not be necessary with the Scheme taking precedence; this makes common sense since the procedure would be clear and free of any technical failure. There is nothing too on outlawing the naming of the adjudicator by the paying party or changing the adjudicators powers in respect of determining jurisdiction or any restriction on court powers in the process, all areas of debate. The proposals also are not written in plain English, which has already been criticised, so there may be some way to go yet before we see the final animal.

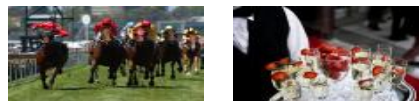
It is Arbicon's experience that most hurdles in adjudication are presented in the form of "no contract in writing" or the presence of so

called "Tolent" clauses, some 80% of Clients we see have fallen foul of these types of obstacle, which has prevented adjudication. Most main contractors we have seen, now employ a "Tolent" clause, which is often agreed to under duress by sub-contractors who need the work. This will become illegal.

The new Act improvements will allow adjudication to fire on all cylinders and make the process watertight and respected by all those in the Construction Industry.

If you have any questions on the current Construction Act or the new Construction Contracts Act 2008 proposals or would like Arbicon to review your procedures in preparation for the inevitable arrival of the baby please do not hesitate to call Jonathan or Ian on 01480 426560.

## Great Night at Newmarket



The sun was shining, the champagne and Pimms flowing and the racing was good. This was the Arbicon racing day at Newmarkets' July Course held on Friday 25 July. A wonderful afternoon and evening was had by all who attended. The evening was then topped off with a fabulous concert by UB40 where Arbicon guests enjoyed a brilliant view from the Arbicon marquee.

## Another Successful Seminar

**14 July** saw us host our second Seminar of 2008. The seminar was attended by a cross-section of local construction companies and explored the subjects of Risk Management and Dispute Resolution strategies that may be used by construction companies with the help and support of our team.

If this seminar sounds of interest you, or indeed someone you work with, please do not hesitate to contact us for more information, future dates, or to arrange for a bespoke seminar for your company and staff. Contact us today to find out how we can help you by calling 01480 426560 or via email to [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)

Tel: 01480 426560 Fax: 01480 426561 email: [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)  
or visit our website at [www.arbicon.co.uk](http://www.arbicon.co.uk)



# RESOLUTION

The Newsletter of ARBICON ADR Ltd

*Professional Quantity Surveying Services & Alternative Dispute Resolution Services*

Arbicon is a leading provider of Professional Quantity Surveying and Cost Management Services and Alternative Dispute Resolution Services including the following:

## Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

## Post-Contract Services

- Preparation of final accounts
- Contractual procedures advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of time claims
- Loss and expense claims
- Dispute resolution, mediation, adjudication and arbitration
- Support in litigation
- Risk management and dispute prevention
- Expert witness

**A warm welcome to  
Virginia**

We are pleased to announce the appointment of Virginia Browne as PA to the Arbicon directors.

**CURRENT OPPORTUNITIES**

Arbicon currently has the following opportunities:

### - **QUANTITY SURVEYORS**

Arbicon are actively seeking to recruit high caliber staff to join their expanding team. If you are interested and would like to be considered for any of our vacancies please send a copy of your latest CV to us at [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk), or for more information please call the Directors on 01480 426560.

**CALL US NOW ON 01480 426560 or email us at  
[advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)  
to see how we can help you**

Tel: 01480 426560 Fax: 01480 426561 email: [advice@arbicon.co.uk](mailto:advice@arbicon.co.uk)  
or visit our website at [www.arbicon.co.uk](http://www.arbicon.co.uk)

