

Just cause and impediment

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A decision of the Technology and Construction Court in Bristol just before Christmas last year has serious consequences for many contracts in the power and water industries.

As we all know, UK construction contracts are subject to Part 2 of the Housing Grants Construction and Regeneration Act 1996. That legislation has a lot to say about payment provisions in contracts, and adjudication as a method of resolving disputes.

Of course, for the Act to apply, the contract has to be a "construction contract" as defined by the Act. If the contract is not within that definition, the Act has no relevance at all.

But parties can agree to apply provisions of the Act to their contract, even if not obliged to do so. For example, the parties can adopt adjudication as the system for resolving disputes. This is often the case in contracts with residential occupiers or contracts for works in power stations that fall within the statutory exceptions.

JCT contracts are an example. They provide for adjudication, whether or not the works are covered by the Act. Article 7 of the standard JCT form is an agreement that either party may refer a dispute to adjudication. Rather than set out a detailed procedure for adjudications, the contracts incorporate the Scheme. It takes many less pages of drafting to do that than to set out all the detailed procedures.

Many "one off" contracts often adopt a similar approach. That was the position in the contract that gave rise to the decision in December.

RWE Npower contracted with Alstom Power for the repair and maintenance of the boilers at Aberthaw power station. The works overran and claims were made by the contractor for extra costs exceeding £1million. RWE on the other hand made claims for liquidated damages for delay. Alstom took its claim to adjudication under a specific term of the contract which, like the JCT clause, imported the Scheme for Construction Contracts as the appropriate procedure.

Alstom were partially successful in the adjudication and obtained a decision that RWE should pay £220,000. RWE then sought to set off its claim for liquidated damages, which was substantially greater than the sum due under the decision.

This would not have been possible if the contract was subject to the Act, and section 111 had applied. That is the section that says that there can be no set off against a sum due without a withholding notice. RWE had not served a withholding notice, but on the basis that the contract was not subject to the Act, that did not seem to matter.

RWE therefore declined to pay on the basis that it had a good claim for liquidated damages that was substantially greater than the sum that the adjudicator thought was due to Alstom. There were other quite different grounds for argument as well, which involved consideration of jurisdiction and natural justice. RWE decided not to wait for an application to the court to enforce, but made the first move by applying for a declaration that the decision was unenforceable.

The result was not what RWE expected, even though Alstom agreed that for the purposes of the application it could be assumed that the contract was not subject to the Act. The judge, His Honour Judge Havelock-Allan, concluded that "by choosing to incorporate the provisions of the Scheme rather than their own bespoke provisions for adjudication, the parties intended to import into the contract the parliamentary intention underlying the Scheme". He decided that the parliamentary intention was that adjudicators' decisions should be paid without any set off. If you adopt the Scheme with regard to adjudication procedure, you adopt all the other features of the Act with regard to payment including the requirement for a withholding notice.

This came as rather a shock to RWE, but also to those involved in the preparation of non-standard contracts that are not automatically subject to the Act. Many contracts involving work in power stations, sewage treatment plants and the like incorporate adjudication clauses and for the sake of certainty and simplicity adopt the Scheme, as do JCT contracts. This judgment suggests that by doing so they have unwittingly incorporated all the rules relating to payment (including of course inability to set off without withholding notices), which they assumed did not apply.

Curiously, if the contract had set out verbatim all the contents of the Scheme relating to adjudication, without actually referring to "the Scheme", the "parliamentary intention" would have been completely irrelevant and so would the payment provisions of the Act. Economy of drafting has produced a big surprise.