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FIRST AID FOR CONTRACTS



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NOTICES OF DISSATISFACTION UNDER THE NEC

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Notices of dissatisfaction. This is something that any party to a construction contract wishes to avoid. Firstly, it means there was a dispute. The inevitable has happened and a dispute arose which had to be referred to adjudication. Secondly, the dispute could not be resolved between the parties and the Adjudicator was required to provide the parties with his or her decision. Lastly, one of the parties does not agree with the Adjudicator's decision and wishes to refer it to arbitration.

Unfortunately, the above situation is inevitable for any party who is in the industry for long enough. The current economic climate and uncertainty, low margins and fierce competition will most certainly lead to an increase in disputes. Thus, although parties wish to avoid arbitrations at all costs (after all, that's not what they are in the industry for), parties must be aware of its contractual obligations and the

requirements to be met in order to refer an Adjudicator's decision to arbitration.

Your first port of call for any dispute under an NEC contract is option W1.

In its unamended form, option W1.3(10) states that an Adjudicator's decision is binding on the parties unless and until revised by the tribunal (for purposes of this article we will presume it is arbitration) and it is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. It further states that the Adjudicator's decision is final and binding if neither party has notified the other of its dissatisfaction with the decision, and its intention to refer the dispute to arbitration, within the times required by the contract.

Option W1.4 sets out the requirements for referring a dispute to arbitration, namely:

1. The dispute must have been referred to the Adjudicator in the first instance; and
2. The dissatisfied party must notify its dissatisfaction and its intention to refer the dispute to arbitration within four weeks of being informed of the adjudicator's decision.

Importantly, the notice of dissatisfaction must also meet the contractual notice provisions of clause 13.

The requirements set out above are relatively straightforward and most competent parties to a construction contract will not have any problems adhering thereto. These requirements, however, are not the only requirements a dissatisfied party should meet to fully protect its rights and entitlements afforded to it by the NEC, especially if the satisfied party wishes to enforce the Adjudicator's decision in court pending the outcome of an arbitration, and the dissatisfied party wishes to oppose or stay the enforcement proceedings.

In the recent case of *Sefton MBC v Allenbuild* [2022] EWHC 1443 (TCC), the Technology and Construction Court in England provided a further qualification as to the content which is required in a notice of dissatisfaction.

The brief background of the matter is as follows:

1. The employer received an adjudication decision in its favour for payment of the amount of £2.2 million.
2. The contractor issued a widely drafted notice of

dissatisfaction in which it notified its dissatisfaction with "the entirety of the Adjudicator's decision including all of the Adjudicator's conclusions, reasoning and decisions" and wherein it stated that "As a consequence of this Notice of Dissatisfaction, the Adjudicator's Decision shall not become final and binding".

3. The employer instituted enforcement proceedings of the Adjudicator's decision, which proceedings the contractor opposed placing reliance on its notice of dissatisfaction. The contractor sought a stay of the enforcement proceedings pending the outcome of the arbitration proceedings.

In considering the drafting of a notice of disagreement under the NEC, the TCC held as follows:

"I hold that whilst a notice of dissatisfaction need not descend into the details of any substantive challenge to an adjudicator's decision, the issue of validity of such decision is of a fundamentally different character from its substantive merits; and a notice of dissatisfaction needs to make it clear whether a challenge is being made to the validity of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits." (Emphasis added)

The TCC further held that the words used by the contractor in its notice of dissatisfaction, on its true construction, did not make clear that a challenge was being made to the validity of the adjudicator's decision on jurisdictional grounds as well as its substantive merits.

But what does this mean to a dissatisfied party?

Simply put, the following:

1. Firstly, the dissatisfied party must notify its dissatisfaction and its intention to refer the dispute to arbitration within four weeks of being informed of the adjudicator's decision, which notice must also meet the contractual notice provisions of clause 13.
2. Secondly, a clear distinction must be drawn in the notice of dissatisfaction between any challenge to the validity of the Adjudicator's decision (i.e., the Adjudicator lacked the necessary jurisdiction), if any, and a challenge to the substantive merits of the Adjudicator's decision.

If a dissatisfied party fails to challenge the validity of an Adjudicator's decision in conjunction with the substantive merits thereof, that party will most likely not be able to successfully oppose an application to enforce the decision.

On the other hand, if the dissatisfied party only challenges the validity of an Adjudicator's decision and fails to notify any dissatisfaction on the substantive merits of the dispute, the satisfied party might very well be able to argue that the dissatisfied party can only oppose the enforcement of the decision and cannot refer the dispute to arbitration if the enforcement is successful.

Whilst a notice of dissatisfaction seems to be a straightforward procedural document required to refer a dispute to arbitration, some thought must go into the drafting thereof. We strongly advise that any party who wishes to notify its dissatisfaction of an Adjudicator's decision, that party should get professional advice from a competent construction lawyer.