

# Quigg Golden

Construction Law | Dispute Resolution | Procurement | Training

## How might Adjudication impact on Payment Notices?

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# About Me



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# Quigg Golden Solicitors LLP



- **Construction Law**
  - PWC, NEC, FIDIC contract advice/drafting
- **Procurement Law**
  - Strategy, bid support, training, challenges
- **Dispute Avoidance/Resolution**
  - Conciliation/Mediation
  - Litigation
  - Adjudication
  - Arbitration
- **Project Management**



*“How will Adjudication impact on payment notices under the major forms of contracts used in Ireland, i.e. timing, procedure, form and content?”*

*Same as England or watch this space?”*



# Agenda

- The CCA Payment Notice Regime
- PWC Main contract
- The Experience in E&W, and NI
  - *Originally*
  - *The Amended Rules*
- Adjudication
- The Answer



# The CCA 2013

A construction contract covered by the Act shall provide for:

- the amount of each interim and final payment or an adequate mechanism for determining those amounts;
- the payment claim date for each amount due or an adequate mechanism for determining it; and
- the period between the payment claim date and the date on which the amount is due.



Number 34 of 2013

## CONSTRUCTION CONTRACTS ACT 2013

### ARRANGEMENT OF SECTIONS

#### Section

1. Interpretation.
2. Construction contracts: exceptions, etc.
3. Payments under construction contracts.
4. Payment claim notices.
5. Right to suspend work for non-payment.
6. Right to refer payment disputes to adjudication.
7. Right to suspend work for failure to comply with adjudicator's decision.
8. Selection of panel of adjudicators.
9. Code of practice for adjudication.
10. Delivery of notices, etc.
11. Expenses.
12. Short title and commencement.

#### SCHEDULE

PROVISIONS TO APPLY TO MATTERS REGARDING PAYMENTS

# Section 4 – Payment Claim Notices

- **Payment Claim Date (PCD)**
  - Valuation date
- **Payment Claim Notice (PCN)**
  - Notice relating to a Payment Claim
  - Issued within 5 days of the PCD
- **Response to PCN (Withholding Notice)**
  - No later than 21 days from PCD



# Payment Claim Notices

- S4(2) – Payment Claim Notice Requirements:
  - Amount claimed (even if zero)
  - Period stage of work or activity to which it relates
  - Subject matter
  - Basis of calculation



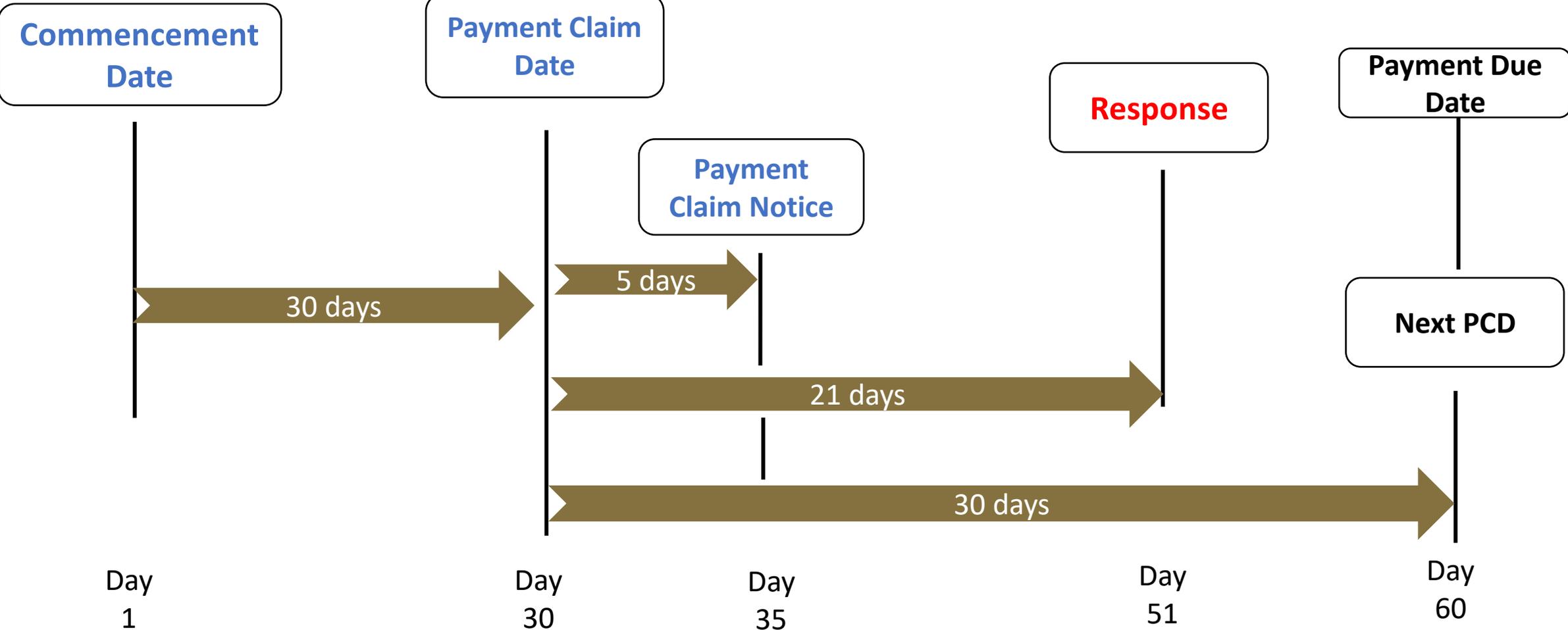
# Payment Claim Notices

- S4(3) - The Response (*if amount sought is contested*):
  - Delivered 21 days after Payment Claim Date (*not the PCN*)
    - Amount proposed to be paid
    - Reasons for difference
    - Basis of calculation

If the matter has not been settled by day amount due, the other party or specified person shall pay the amount proposed in the response by the Date Due



# Payment Timeframes under CCA



# Early drafting of CCA



- Reflected the “*default*” notice within UK legislation, an early draft of the CCA included provision whereby:
  - if there was no Payment Response issued against the PCN;  
then
  - the amount applied for within PCN became the default sum;  
meaning
  - this amount was automatically due for payment;  
(NB: this gave rise in UK to what are known as ‘smash-and-grab’ adjudications)
- **HOWEVER**, this was removed, and is not contained within the Act

# The PWC



## Construction Procurement Reform

**Public Works Contract**

**for**

**BUILDING WORKS**

**designed by**

**THE EMPLOYER**

**Public Works Contract**

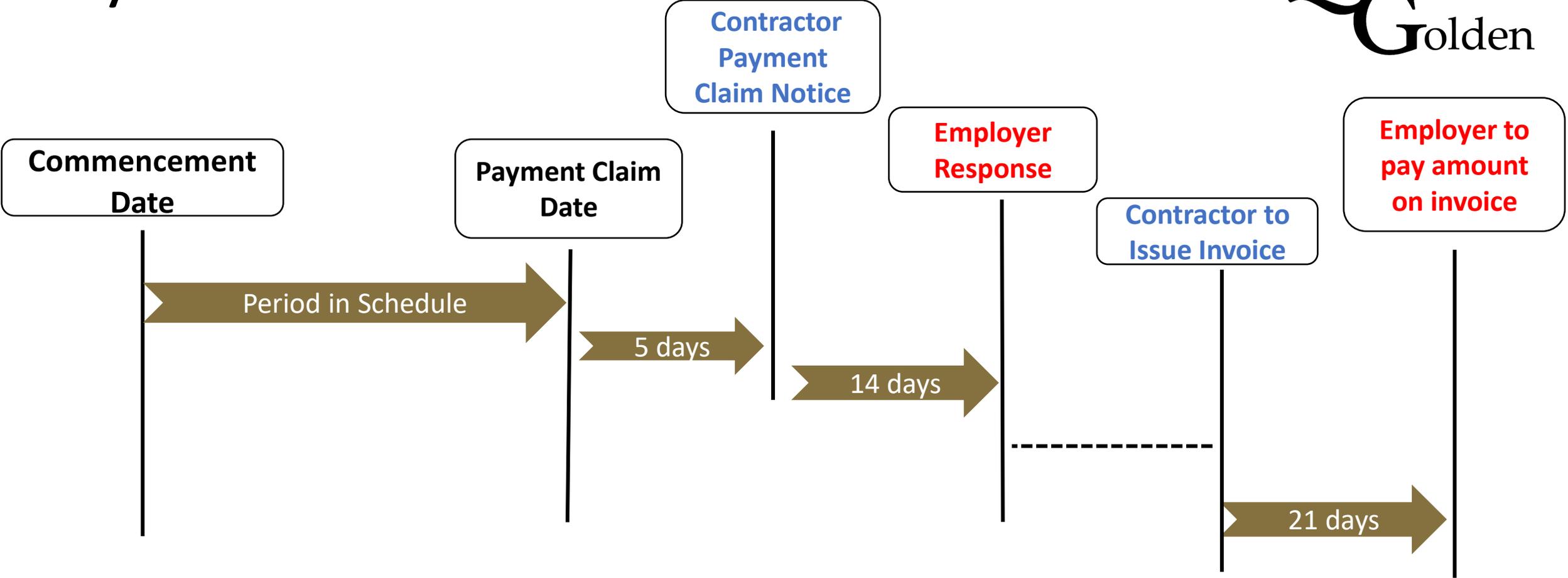
**for**

**BUILDING WORKS**

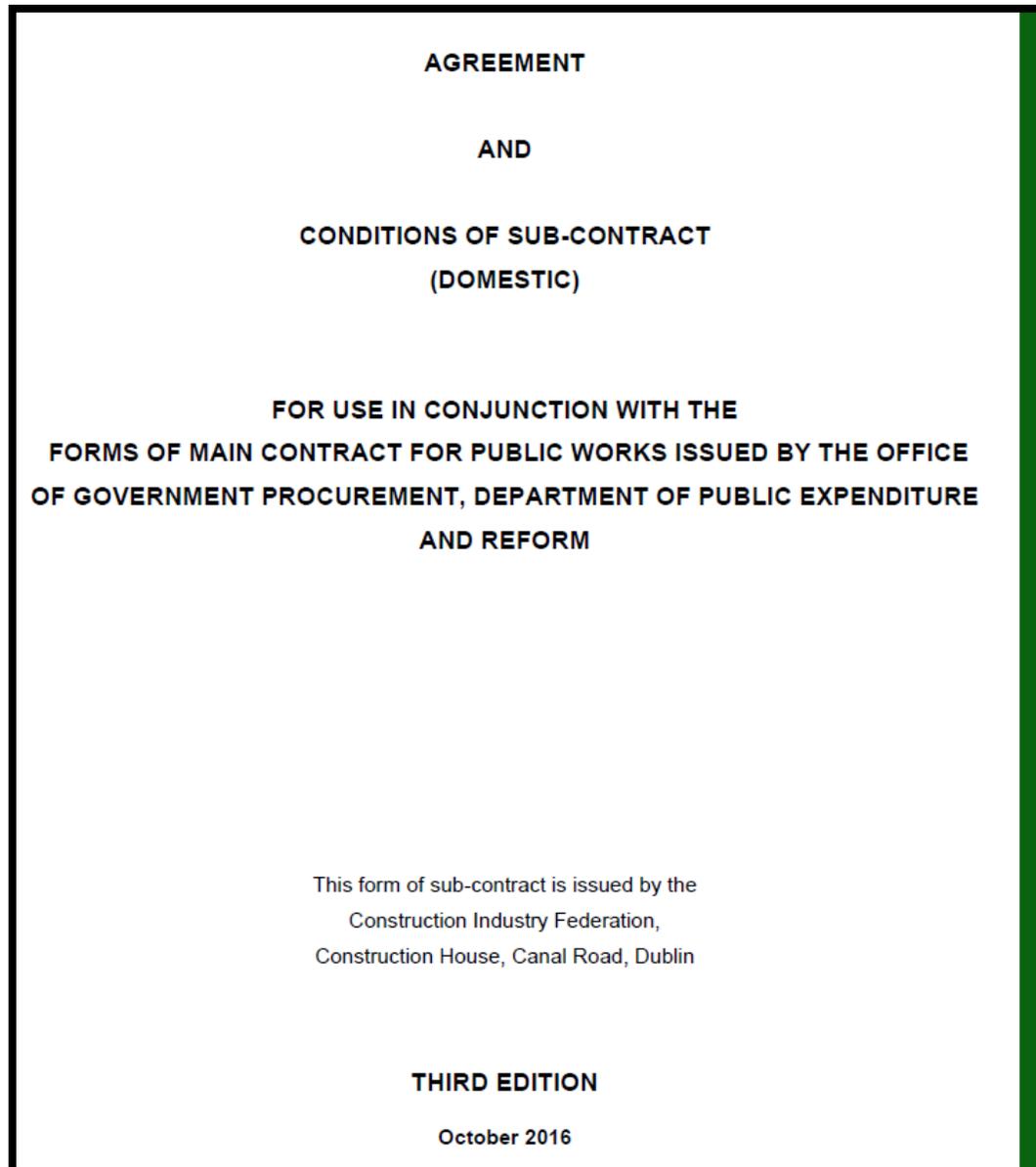
**designed by**

**THE CONTRACTOR**

# Payment under PWC



# The CIF



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# CIF – Default Clause 11(c)

**11(c)(2)** states:

*“If the Contractor does not issue a response to a Sub-Contractor’s Payment Claim in accordance with Clause 11(c)(1) the Contractor shall pay to the Sub-Contractor the full amount claimed in the Sub-Contractor’s Payment Claim without any deduction other than Retention (if not already allowed for in the Payment Claim)”*

= a default payment

= opens door to default payment notice adjudications

# The Housing Grants, Construction Regeneration Act 1996

Part II:

- **S.108**- Right to Refer Disputes to Adjudication;
- **S.109**- Entitlement to Stage Payments;
- **S.110**- Dates for Payment;
- **S.110A**- Payment Notices:  
contractual Requirements;
- **S.110B** Payment notices:  
payee's notice in default of payer's notice;
- **S. 111** Withholding notice and requirement to pay notified sum



# s.110(A) and 111 HGCRA

- Requires the payer/specified person, to give a notice to the payee (not later than five days after the payment due date) specifying:
  - The sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
  - the basis on which that sum is calculated
- Could issue a later withholding notice
- Act silent on what should happen if notice not given

## Different Views

- Some adjudicators thought the absence of a payment notice or a withholding notice would mean the amount applied for would be due
- A minority view
- Majority thought lack would be a breach, but no more, and would not mean the amount applied for would be due
- Regime lacked teeth



# Local Democracy, Economic Development and Construction Act 2009



- What if a payment notice should have been issued by the payer, or a specified person, but was not?
  - the payee may serve a notice at any time after the payment notice should have been issued by the payer
  - The notice must comply with the requirements of section 110A(3)
- If the contract permits the payee to make an application and he does so then that application will become the **default notice** and no new one can be given.

# Payless Notice - s.111(3)



- A payer may serve a '*Pay Less Notice*', if he intends to pay less than the notified sum.
- A Pay Less Notice must:
  - be given before the prescribed period before the final date for payment (Scheme =7 days)
  - must specify the sum due on the date the notice served (even if £0.00) and
  - the basis on which it is calculated.

A close-up photograph of an antique brass alarm clock with a white face and black numerals. The clock is positioned on the left side of the slide.

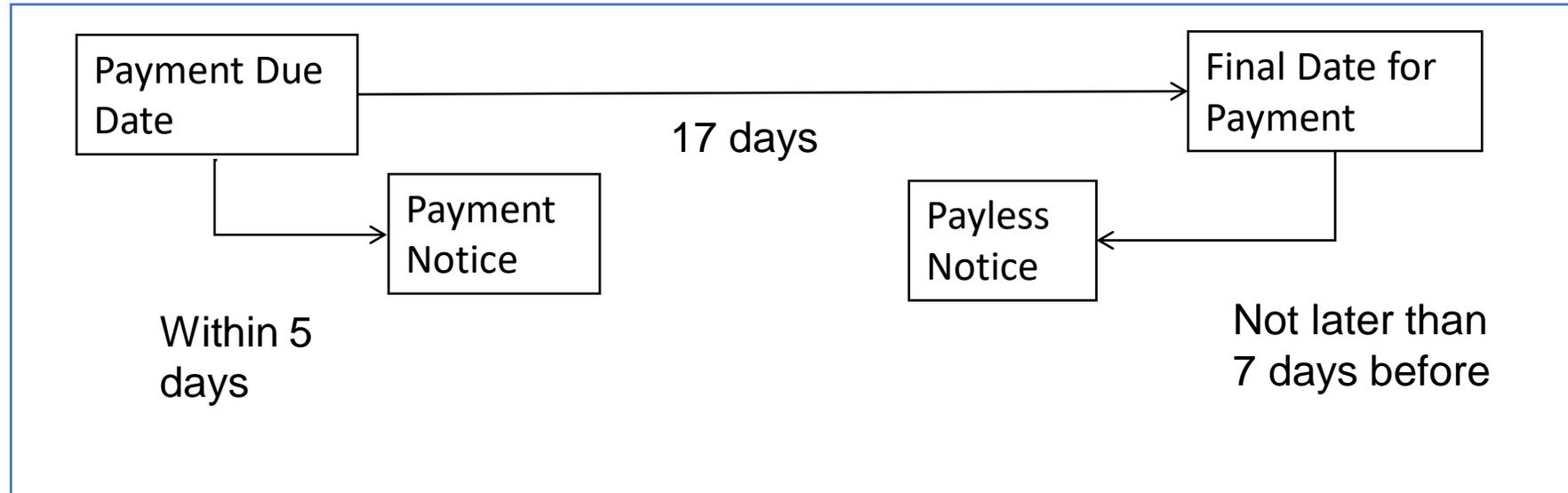
## Paying the Notified Sum

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- The notified sum is to be paid on or before the Final Date for Payment (section 111(1))
- Default period in Scheme is 17 days

# How it Looks

The standard position (this can be altered by the contract)



- Who issues payment notice is governed by the contract
- If contract is silent, it will be the payer

# Summary



- In both Ireland and UK:
    - The payment application / payment claim notice; and
    - The Payment notice / response to payment claim
- will set out where the differences lie
- In the UK the legislation goes further and provides that if an application is not responded to, it becomes the payment notice and the sum due
  - That is **not** true with the Irish legislation, but s.4(3) and some contracts might expressly say so (e.g. the CIF sub 3<sup>rd</sup> Ed)

# The role of adjudication

## What is it??

- A right to refer a dispute to an adjudicator who will make a (temporarily) binding Decision on that dispute within 28 days
- The Decision being '*temporarily binding*' may be open up and finally decided in arbitration or in court (not very often)
- See s.6(10) of CCA
- It allows disputes to be decided:
  - (a) quickly ; and
  - (b) inexpensively



# The interaction



- The Payment Notice regime is designed to identify and define disputes
- Adjudication is the way to *determine* those disputes
- Big picture: to stop on account payments, with no breakdowns, meaning no one knows what is agreed and what is not, until after the job is complete

# The Answer to Whitepaper's Question

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*“How will Adjudication impact on payment notices under the major forms of contracts used in Ireland, i.e. timing, procedure, form and content?”*

*Same as England or watch this space?”*

# Technical payment notice adjudications

- In UK it has meant that Payment Notices must be issued and set out how they have been calculated, or else the payee may issue a technical payment notice, or '*smash-&-grab*', adjudication and receive the amount in full that it has applied for;
- The CCA does not expressly set up a technical payment notice type argument, but s.4(3) and some contracts *may* make this a provision.

# So will payers in Ireland fail to issue payment claim responses?

- Perhaps, but not necessarily.
- If a payer does not issue a notice then:
  - An adjudicator may find for the payee in full
  - It runs a risk of not being able to defend itself
- What the payer puts in the response, it must be prepared to have forensically reviewed and be able to stand over it, or else lose
- We have seen general compliance with the duty to set out how much will be paid, and the basis on which it is calculated, but not full compliance.





# Questions

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Thank you

*Please keep in touch*

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