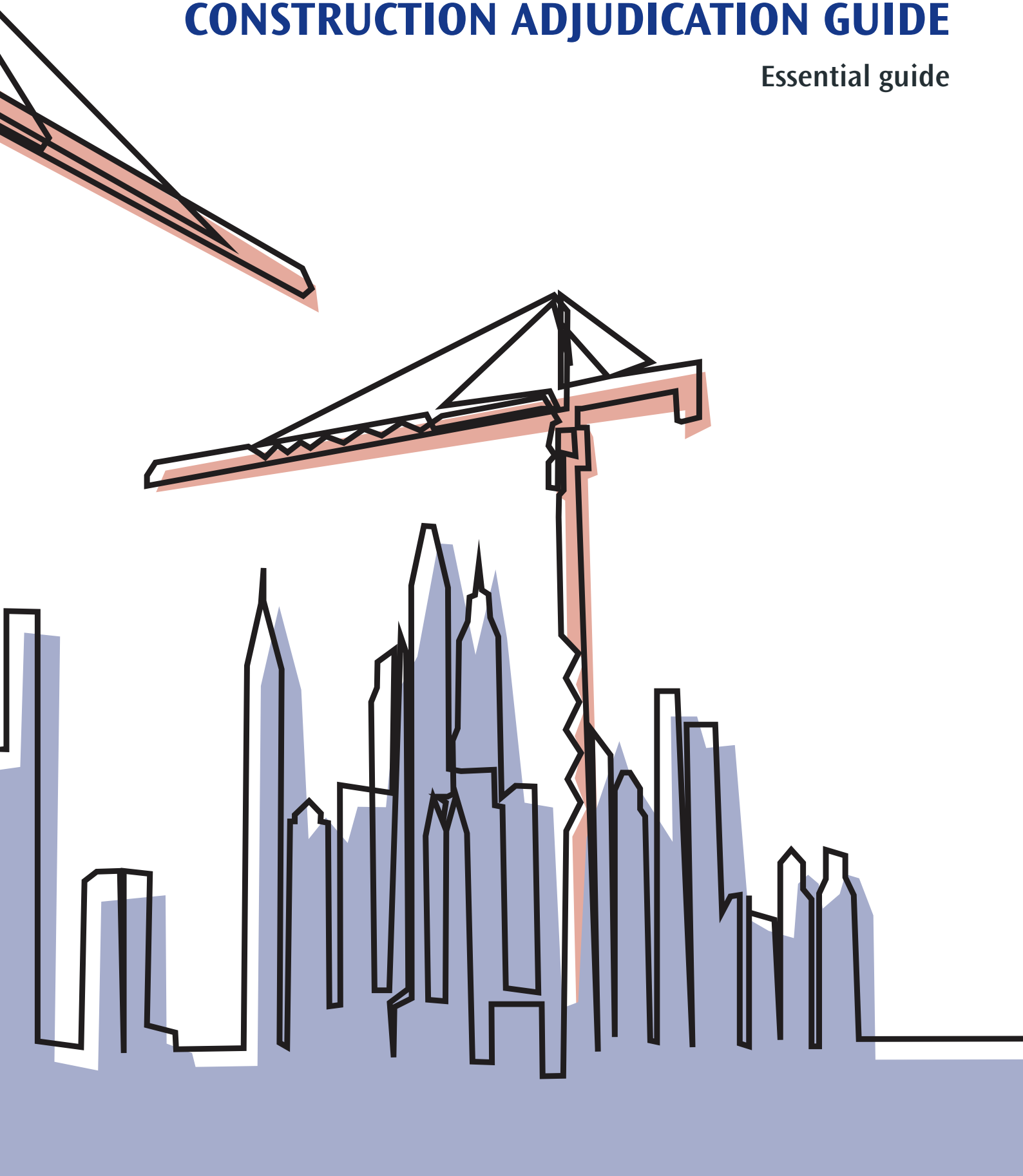
trowers & hamlins

CONSTRUCTION ADJUDICATION GUIDE

Essential guide



Contents

3 About Trowers & Hamlins Construction Disputes Team

3 Adjudication

3 The Statutory Basis

4 The Adjudication Process

5 The Adjudication flowchart

6 The Award

6 Costs

6 Enforcement

7 Conclusion

7 Key contacts in the Construction Disputes Team:

About Trowers & Hamlins Construction Disputes Team

We are an international law firm with one of the largest construction practices in the UK comprising more than 60 specialist construction lawyers. We have unrivalled experience in resolving construction disputes of varying complexity and value and are experts in conducting adjudications on behalf of contractors, subcontractors, employers and developers.

The purpose of this Adjudication Guide is to provide the reader with an introduction to adjudication. If you have any questions arising from this Guide or would like to discuss commencing or responding to an adjudication.

Adjudication

Adjudication is a quick and effective form of Alternative Dispute Resolution available to either party to a 'construction contract'[1] and which was introduced with the central aim of maintaining cash flow for contractors and subcontractors during a construction project.

The entire adjudication process is expected to take place within 28 days from commencement to receiving a decision (known as an **Award**) from the Adjudicator that can be enforced in Court, although the process is often extended to 42 days. This compressed timetable means that a party on the receiving end of a Notice of Adjudication (**NOA**) or Referral must act extremely quickly.

An Award is interim binding, which means it is binding on the parties unless and until it is challenged and overturned in court or arbitration proceedings (depending on the terms of the contract). Statistics show that parties generally accept the outcome of an adjudication, with less than 10% of Awards being challenged in subsequent court proceedings.

Courts take a robust approach to the enforcement of Awards and will enforce the Award even if the adjudicator has decided the law incorrectly or clearly reached the wrong decision.[2]

The Statutory Basis

Under the Housing Grants Construction and Regeneration Act 1996 (the **HGCRA**), parties to a 'construction contract' have the right to refer a dispute to adjudication "at any time". The parties cannot contract out of the adjudication provisions contained in section 108 of the HGCRA, which sets the minimum requirements for a valid adjudication procedure. If the 'construction contract' does not contain an adjudication procedure compliant with the HGCRA, the model procedure contained in the Scheme for Construction Contracts (England and Wales) 1998 as amended (the **Scheme**) will be implied into the contract.

[1]This is defined by reference to section 104 and 105 of the Housing Grants Construction and Regeneration Act 1996. Major exclusions apply to operations for drilling for, or extraction of, oil or natural gas (S.105 (2) (a); assembly, installation or demolition…on a site where the primary activity is nuclear processing, power generation or water or effluent treatment (S.105(2)(c)(i)); supply only contracts (105(2)(d)) and residential occupiers (S.106).

[2]This is subject to narrow exceptions briefly explained below and include, for example, if the Adjudicator did not have jurisdiction to hear the dispute, or there was a material breach of natural justice.

The Adjudication Process

The party starting the adjudication process is known as the Referring Party. An adjudication is commenced by serving a NOA on the other party to the 'construction contract', commonly referred to as the Responding Party. The NOA must briefly set out the nature of the dispute and the relief sought.

Before serving any NOA it is essential to check that:

- the dispute has 'crystallised'. In other words, the parties must have a clear disagreement whereby one party makes a claim which is disputed by the other party. If a dispute has not crystallised it cannot be referred to adjudication.
- that only one dispute has been referred to adjudication at a time (although one dispute is frequently made up of various sub-disputes or issues), unless the parties have agreed that the adjudicator can consider more than one dispute.
- that the dispute has not already been adjudicated upon. A party cannot refer a dispute that is the same or substantially the same as a dispute that has been decided in a previous adjudication.

Following service of the NOA, the Referring Party must apply for the adjudicator to be appointed. This application may be to a specifically named individual or to one of the adjudication nominating bodies (**ANBs**). The process will be determined by the mechanism in the contract or the Scheme.

Once the adjudicator has been appointed, the Referring Party must serve a Referral Notice (the **Referral**) on the adjudicator and the Responding Party which sets out full details of the claim and includes copies of all witness statements, expert reports and any other documents on which the Referring Party intends to rely in support of their claim.

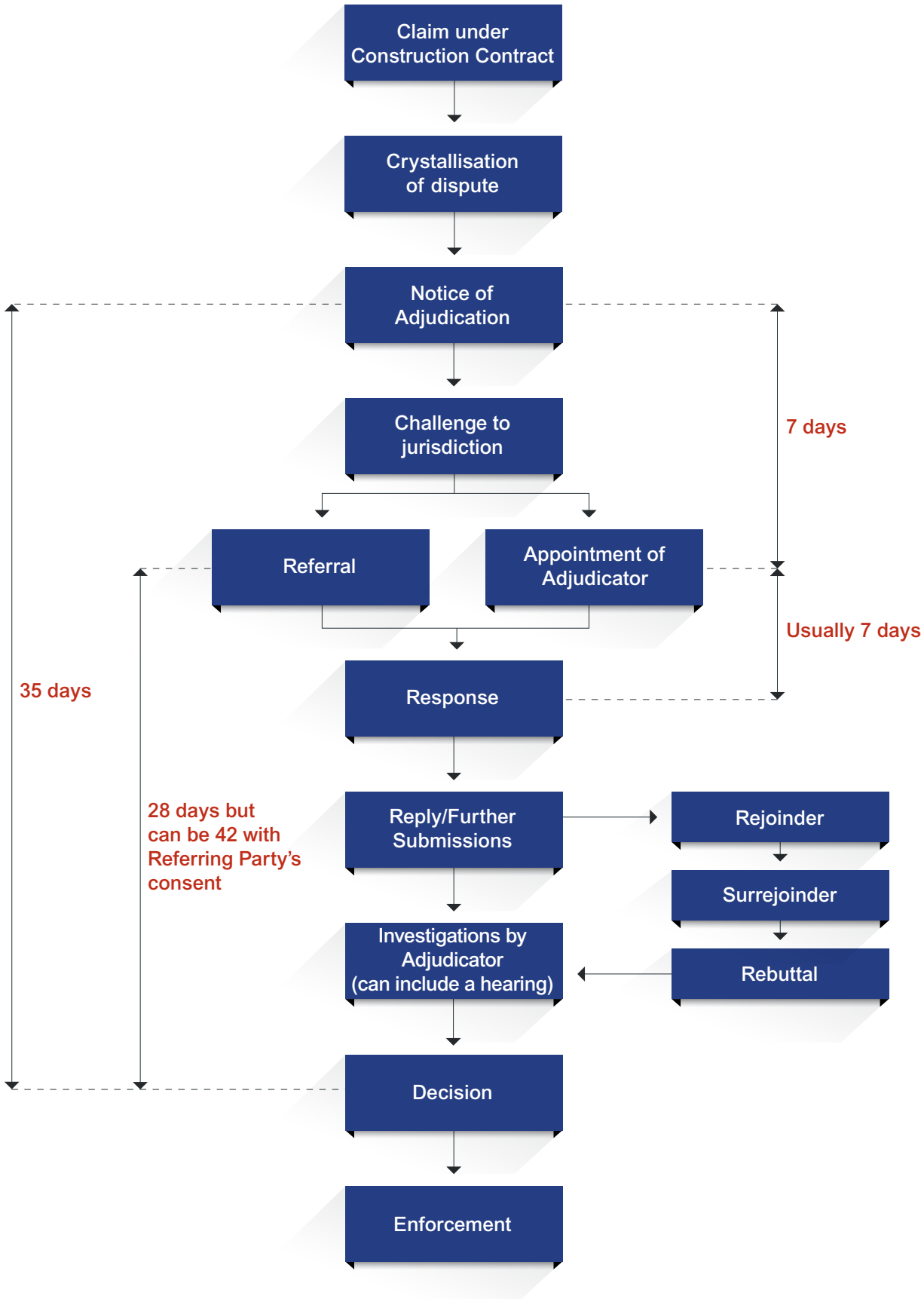
The Referral must be issued within seven days of the NOA or the adjudication will not be valid and the process must start again. Given this seven day requirement, it is essential for the Referring Party:

- not to delay in the appointment of the adjudicator. We have had situations where the ANB confirmed the appointment on day six of the seven day period and so any later application to appoint would have resulted in the seven day period being missed and the client needing to re-serve the NOA. This would take away some of the tactical advantage to the adjudication process as it would give the Responding Party more time to prepare its response.
- prepare the Referral and have all supporting witness statements, expert reports and other supporting documentation ready to be issued at the time the NOA is served.

The adjudicator sets the adjudication timetable and provides the parties with directions. The Responding Party will generally be given seven days to submit their response (the **Response**) to the Referral. The Response is a detailed document setting out why the Referring Party is not entitled to the remedies sought and will often be accompanied by witness statements and expert reports to rebut (to the extent possible) those provided with the Referral.

The adjudicator will generally allow or request additional submissions from the Referring Party (called a rejoinder) and may also permit a response from the Responding Party to the rejoinder (known as a surrejoinder). Whilst an adjudicator can request a hearing to have live evidence from witnesses and experts, or legal submissions, this is relatively rare unless the claim is particularly complex. Accordingly, the outcome is more usually based on the documents alone.

The Adjudication flowchart



The Award

The adjudicator's Award must be issued within 28 days of the Referral, but this period can be (and usually is) extended by up to 14 days (to a total 42 days) with the agreement of the Referring Party, or by any longer period the parties may agree. While the adjudicator's powers come to an end once they issue their Award, they can correct their decision to remove clerical or typographical errors within five days of delivering the Award under the slip rule. If requested, the adjudicator must provide reasons for their decision and this is advisable to allow the parties to understand the logic behind the Award and whether there are grounds to challenge enforcement.

Costs

The adjudicator will direct how their fees are to be paid. The general rule is for the losing party to pay the adjudicator's fees and expenses. Alternatively, the adjudicator's fees and expenses are divided between the parties depending on how successful each party has been in their arguments. Unless the parties agree otherwise in writing after service of the NOA (which is very unlikely), each party will be responsible for paying their own legal fees regardless of whether they win.

Enforcement

The adjudicator's Award is binding until or unless it is successfully challenged by legal proceedings or arbitration (depending on the dispute resolution mechanism in the parties' contract). The Award is enforceable in court and the Technology and Construction Court has a fast-track process to allow adjudication Awards to be enforced quickly (usually within 28 days).

The courts are well known for taking a robust approach to enforcement and will not enforce a decision in only a very narrow set of circumstances, for example:

- where the adjudicator has exceeded their jurisdiction
- there is a material breach of the rules of natural justice, for example:
    - o there was obvious bias or failure to act impartially
    - o serious procedural irregularity

Conclusion

Adjudication is the dominant means by which construction disputes are resolved and has been a life-line for parties to resolve disputes quickly to maintain cash flow. While adjudication is designed to be quick and accessible, it nevertheless remains a technical process with potential pitfalls which can lead to unenforceable Awards. It is therefore always advisable to seek advice from specialist construction disputes solicitors who are experienced in conducting adjudications before starting or responding to an adjudication.

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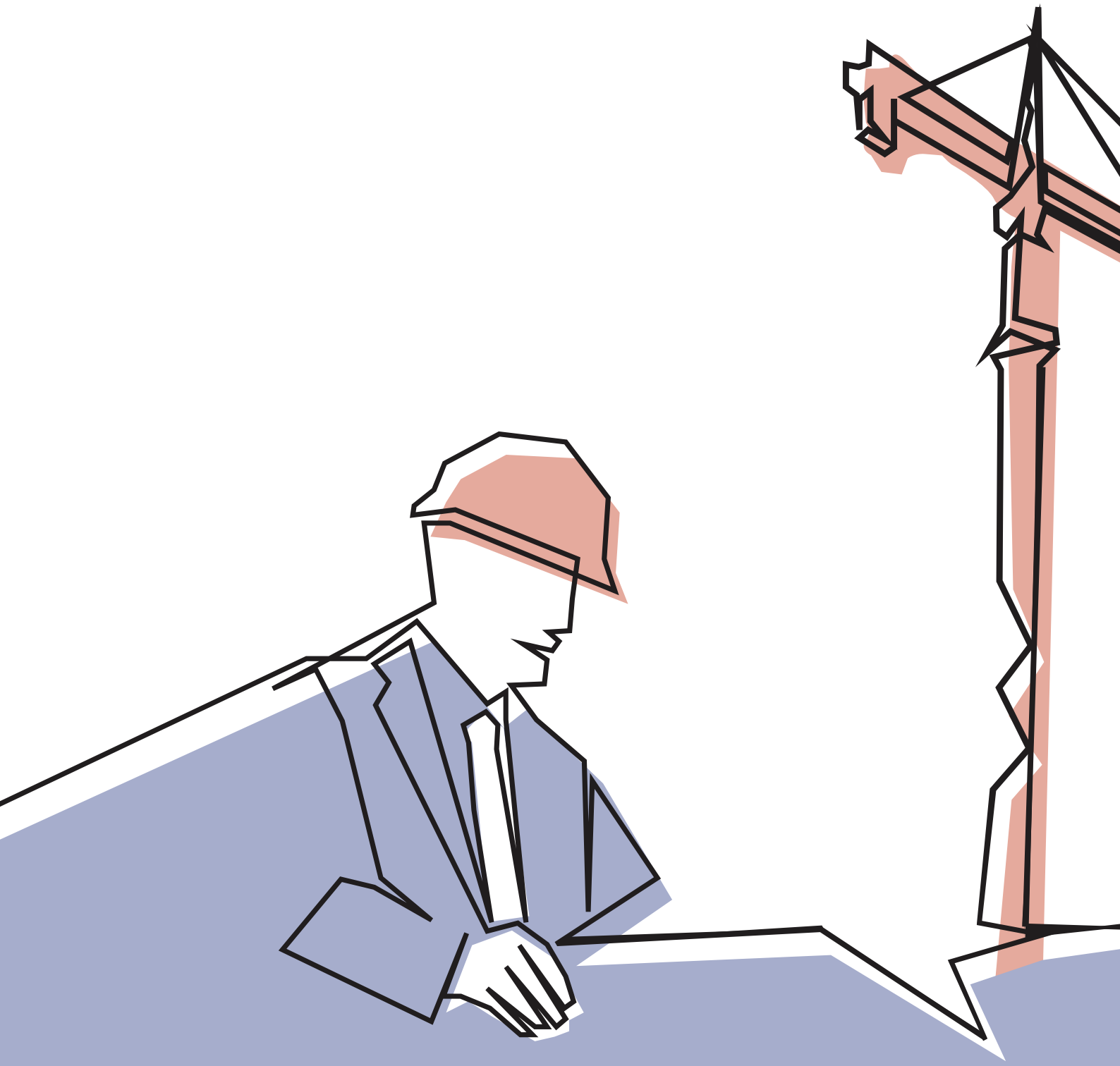
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