Chapter 7
The Appointment

Once a party to a construction contract has reached what he considers to be the point of no return in his dealings with the other party and has concluded that there is no alternative but to implement his right to adjudication, he issues a notice of adjudication.

Before he issues this notice it is essential that he is certain that there is a dispute and that it is sufficiently crystallised so that problems can be avoided should there be a need for enforcement proceedings. In the five years since the statutory right to adjudication came into force, this has become one of the common challenges to adjudicators' jurisdiction. Winning parties often have to commence proceedings in the court to enforce the adjudicator's decision and in these proceedings the other party may argue that there was no dispute at all or that it has insufficiently crystallised and thus the adjudicator had no jurisdiction to make his decision. We deal with this aspect in detail in Chapter 9 where we consider the adjudicator's jurisdiction.

One other principal matter that will exercise the mind of a party considering adjudication relates to the extent of the matters that he wants to refer to adjudication. In some instances a party may take the view that he wishes to refer only a discrete part of the overall matters that he considers to be in dispute to adjudication. Alternatively the parties may agree that it is in both their interests to refer specific generic issues to the adjudicator in the anticipation that once a decision is made it may be possible for them to apply that decision to other aspects of the overall dispute. If they do not succeed in this, there is of course no bar to starting an adjudication at any time, and to refer part of the dispute in this way will not prevent other parts being referred later, provided of course that they are different disputes.

Prior to 1 May 1998, adjudication was a consensual process and was exclusively the result of provisions in certain standard form contracts. These are now, by the definition in the Act, construction contracts. Then the parties provided for adjudication in their contracts by agreement. The right to adjudication was solely a contractual one. If there was no adjudication provision in the contract, a party had no right to adjudication. The only possible exception was an agreement to adjudicate reached subsequently to the formation of the contract, but in the absence of any culture relating to adjudication this was probably never done.

Since 1 May 1998 every party to a construction contract has a statutory right to refer their disputes arising under the contract to adjudication under a procedure complying with section 108 of the Act. As considered in earlier chapters, the Act requires that the right to adjudication must be included as part of the contract in the form of a compliant provision. If it is not, the Act by section 114 creates that right by requiring that the provisions of the Scheme are implied as terms in the contract.

At the time when a dispute occurs, a single party can therefore set the whole process in motion; it does not require the agreement of both the parties for an adjudication to commence. It is a unilateral right which arises from provisions in the contract that comply with the Act or from the implied terms of the Scheme. It is in fact very often the case that an

adjudication is brought by one party to a construction contract where the other party is extremely reluctant.

Adjudication can and does apply to contracts that are outside the provisions of the Act. Contracts in the JCT Minor Works Form for example include adjudication provisions. This form of contract is often used for works that would otherwise not be affected by the statutory right to adjudication. One example is a contract with a residential occupier which is excluded from the ambit of statutory adjudication by the provisions of section 106 of the Act. Another instance occurs where a contract in any of the standard forms used for construction work that includes adjudication provisions, which they all now do, includes work that is excluded from the definition of construction contracts in section 105 of the Act and to which adjudication would not otherwise apply. A party then applies its contractual right to adjudication and should it have difficulty in getting the other party to honour the decision the court will enforce the contractual right – see *Parsons Plastics* v. *Purac*[1].

Where there are contractual arrangements for adjudication that do not comply with the requirements of the Act, the Scheme normally applies under the provisions of section 108(5) of the Act. It is however not compulsory to exercise the right to imply the terms of the Scheme. The parties could choose to ignore the Scheme and adjudicate under their non-complying contractual arrangement. In so doing they would be bound by the results of that arrangement. The enforcement of any decision reached by an adjudicator acting under such a contractual arrangement would be the enforcement of a contractual rather than a statutory right to have an adjudicator make a decision on the dispute in question.

It is also possible that the parties have agreed provisions in relation to the adjudication process that are in addition to those that comply with the Act. This could be either where there are compliant provisions in the contract or where the Scheme applies in default. Examples would be a provision that requires a response from the responding party and sets a timetable for that response to be provided, or a requirement limiting the submissions to a certain number of pages. Where such provisions are in addition to the eight compliance points, there would appear to be no difficulty in applying the additional provisions on the basis of a contractual agreement between the parties.

In a situation where the contract provisions are not compliant, things are possibly a little more complicated. There are two possible interpretations that can be put on section 108(5) of the Act which reads: 'If the contract does not comply with the requirements of subsections (1) to (4) [of section 108] the adjudication provisions of the Scheme for Construction Contracts apply.' The first interpretation is that this means that all procedures in the contract, even those that do not conflict with the Act, go out of the window and only the provisions of the Scheme apply. The second is that the Scheme provisions apply to replace those that are non-compliant, but the parties' agreement as to supplementary provisions that do not conflict remains in place. We do not see this as creating any real problem for the adjudicator. If there is no objection from the parties to the additional provisions, it seems wise for the adjudicator to comply with the parties' agreement and follow them. If he does not, he might create some difficulty if the parties are expecting him to do so. To avoid possible problems later it would be sensible for the adjudicator to reflect the agreed provisions in his directions given at the outset of the adjudication. If a party objects to or fails to fulfil an additional provision the adjudicator should follow the same course as he does in any situation where there is a difference, or possible difference, between the parties, that is to obtain submissions from each party and decide between them.

[1] *Parsons Plastics (Research & Development) Limited* v. *Purac Limited* (13 August 2001) unreported; [2002] BLR 334, CA.

There is a view, strongly held by some adjudicators, that where the contract is non-compliant, the adoption of the Scheme supersedes all the contractual provisions regarding adjudication, and any additional agreements that do not conflict with the Scheme should be ignored. If this is the route chosen by the adjudicator, he should be careful to confirm in his directions at the outset of the adjudication that this is the way he intends to proceed.

If the parties are agreed that they wish to proceed under a non-complying contractual arrangement, the adjudicator is duty bound to proceed in that way. He cannot insist that the parties operate in accordance with the Scheme. It is however essential for the smooth running of the adjudication process that the adjudicator is aware of the parties' agreement, as the last thing anyone wants in the somewhat pressurised situation of an ongoing adjudication is for the adjudicator to try to apply procedures which are not agreed.

The Institution of Civil Engineers' standard forms include a provision for a matter of dissatisfaction to be followed before an adjudication can commence. We consider this provision elsewhere in detail. The courts have not, as far as we know, been asked to decide whether such a provision complies with the Act; the nearest to it has been the case of *Mowlem* v. *Hydra-Tight*[2], where the parties had agreed before the matter reached court that the clause did not comply. This agreement was endorsed by the court but it was given no specific judicial scrutiny. We suggest that this is probably the right answer given the statutory right to adjudication on demand. It is likely that any attempt to delay the commencement of an adjudication by citing this provision will fail, as it rightly should, so that the party desiring the adjudication is not improperly delayed from having his dispute decided. Whatever the rights and wrongs of this provision we are, however, of the opinion that this can be an admirable means of ensuring that the dispute has properly crystallised before commencing the adjudication.

A dispute that has already been adjudicated cannot be re-opened save in arbitration or litigation. It is vital when preparing a notice of adjudication where there has already been one or more adjudications, that the party preparing the notice identifies with utmost clarity what it is that is being referred so that it is clear that what is being referred has not been decided already. The adjudicator clearly has no jurisdiction to decide a dispute that has already been the subject of an adjudicator's decision, but see the discussion in Chapter 5 relating to paragraph 9 of the Scheme in which we consider this point.

Another problem arises from the provisions of paragraph 8 of the Scheme. Paragraph 8(1) provides that the adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on one or more disputes under the same contract. Paragraph 8(2) applies similar requirements to related disputes under different contracts. This provision was interpreted strictly in the case of *Grovedeck* v. *Capital Demolition*[3]. The losing party in *Grovedeck* was upset at having lost and was successful in using the provisions of the Scheme to avoid the consequences of the adjudicator's decision. It is generally the case however that there are considerable benefits in respect of time and cost if one adjudicator deals with related disputes, and it appears generally to be the case that parties accept this. This restriction does in any event only occur where the Scheme applies.

[2] *John Mowlem & Company plc* v. *Hydra-Tight Limited (t/a Hevilifts)* [2000] CILL 1650.
[3] *Grovedeck Limited* v. *Capital Demolition Limited* [2000] BLR 181.

Selecting the adjudicator

The time for the appointment of the adjudicator

The Act requires, at section 108(2)(b), that the construction contract must 'provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice [of adjudication]'. If it does not so provide, the Scheme applies.

It is a peculiarity of the Scheme that it contains a provision that in itself may mean that the seven-day period is not achieved. The Scheme provides that communication of the selection of an adjudicator by a nominating body must be made within five days of receiving the request to select. If the request for that selection is received by the nominating body more than two days after the notice of adjudication, the nominating body may do what the Scheme requires even though the selection [nomination] may still be outside the required seven days.

The timetable of seven days is not thought to be strict. The contract must only provide a timetable with the object of securing the appointment and making the referral within seven days. The Scheme itself uses the word 'shall' in the context of the seven-day period; it does however include no sanction if the nomination is outside the seven-day period. Arguments may be put up by the responding party to the effect that the person nominated lacks jurisdiction as adjudicator, but the majority of adjudicators now appear prepared to proceed in these circumstances if the referring party so desires, the challenge being seen to be the sham that it is. In the case of a referring party who is not prepared to take the risk, however remote, of the court refusing enforcement due to a late referral, it is a simple matter to make a further application to the nominating body and experience seems to be that in general such re-nominations will be made without further charge.

Who are adjudicators?

Adjudication as brought in by the Act is not new. What is new is the much wider remit the adjudicator is now given by the legislation. Over the 20 years or so prior to the Act coming into force, adjudication was available under the DOM/1 and DOM/2 type sub-contract arrangements, as they were then, and also under the JCT with Contractor's Design main contract. This process was however limited in its application and dealt principally with questions relating to payment. The statutory regime extends adjudication to all disputes arising under construction contracts, but perhaps unsurprisingly the majority of the disputes that are referred relate to money.

In essence, adjudication is a judicial process under severe time restraints. The powers of an adjudicator are great; he has, to all intents and purposes, total discretion as to the way in which he conducts the adjudication and the effects of his decision can be as far reaching as an arbitrator's award and, in some cases, more so. He makes decisions on the facts and law without anything like the in-depth investigation of the arbitrator. The adjudicator has to be very good at what he does.

When drafting the first edition of this book we said that it was hardly surprising that the initial trainees for adjudication had their roots and experience in arbitration. After five years we can say that many of the successful adjudicators are just those people. They understand the industry, they understand how construction contracts work and they can apply that knowledge in producing decisions that the parties can either accept as resolving their

dispute or use as a basis for such resolution. We accept that this is a rather different concept from the 'quick and dirty fix' originally envisaged, which by its very nature would almost automatically lead to the dispute being referred to arbitration or litigation, but it just shows that the adjudicators who have undertaken this complex, difficult, sometimes worrying but always rewarding task have provided a procedure that exceeds the expectations of many at the time that the process was introduced.

It is not just those with roots and experience in arbitration who are successful adjudicators, but it is clear that a major requirement for an adjudicator to be successful is an understanding of the factors identified above.

It is a rather sad but interesting reflection that as adjudication has taken off, it has affected the approach of arbitrators and there is some evidence, albeit mainly apocryphal, that many arbitrators are now applying some of the procedures used by adjudicators to the benefit of the arbitration process. Some might say it is a pity that it took the advent of adjudication to encourage this – the powers are all there in the 1996 Arbitration Act – but better late than never. The climate has changed and parties are far more prepared to look at procedures in arbitration that would have been far too radical for them before the introduction of adjudication, even with the advances resulting from the 1996 Arbitration Act. This must be to the benefit of those parties who are unfortunate enough to be unable to resolve their dispute after an adjudication has taken place. At the time of writing, amendments to the Construction Industry Model Arbitration Rules are on the stocks to provide for arbitration with a 100-day limit.

Anyone who is selected as adjudicator should have at the very least received accredited training and to have done this they will also have been vetted on the necessary experience and understanding of the industry. Adjudicators are those who are the exception in their field rather than the rule. It is arguable that those who only meet the normal everyday standards are, albeit often innocently, the cause of the disputes rather than the solution. Many panels of adjudicators have been set up. The requirements placed upon those achieving a panel can be varied but it is unlikely that any member of a panel run by a recognised nominating body will not have undergone some form of training. The majority of nominating bodies have understood the importance of adjudication to the industry and how important it is that the adjudicators who are appointed are competent to undertake the task involved. They have been rigorous in their selection process. They have tested the background and working experience in the industry of potential adjudicators. In addition, they have vetted particular dispute resolution experience and ability to understand and apply the law. There are adjudicators who have been found lacking but it is evident at the time of writing that many nominating bodies are starting to instigate procedures to review those already on their panels, to ensure that they are of a standard that satisfies the requirements of the industry.

In the same way that an arbitrator or a judge cannot have technical expertise in every field, nor can an adjudicator. It is important for an adjudicator to keep up to date in respect of current practices in his field. An adjudicator should be chosen for his track record and selection and training. What is needed from an adjudicator will necessarily include some managerial skills to find out the facts and the law and to control the parties. If particular knowledge is required the adjudicator can enlist experts in law or technical issues, either through the parties or himself. This should, however, be the exception rather than the rule; the time constraints of the adjudication process militate against the adjudicator who thinks of doing this.

Training of adjudicators

It is of great importance to a party seeking the appointment of an adjudicator, and of equal importance to the other party as well, that any adjudicator, whether selected by agreement or nominated by a third party, is competent to carry out the task. Competence covers not only his ability to deal with the procedural issues and make a decision, but also to understand the technicalities of the dispute.

An adjudicator's technical ability is not something that has formed any part of the training regimes that have been set up to cater for the demand for adjudicators since the passing of the Act. A certain level of assessment of technical ability goes on but the principal way in which those formulating lists of adjudicators have dealt with this requirement is to have required evidence of experience in the construction industry relevant to the type of dispute to which a particular individual is to be nominated. Where an agreed appointment is mooted, the customary way is for the parties to request the prospective adjudicator to submit his curriculum vitae setting out not only his experience and training as an adjudicator, but also his involvement in the industry at a practical level.

As far as training related to the procedural aspects of adjudication is concerned, all nominating bodies require some evidence of training in the specific area of adjudication and many provide it themselves.

A typical training programme would deal with the Act and the Scheme, the adjudication provisions in the commonly used forms of contracts and the various adjudication rules and procedures that are in common use. As far as the practicalities of the adjudication process are concerned, matters relating to the appointment, the procedure required to allow the parties to make their submissions and the adjudicator to make his decision within the short timescale allowed for the process, and such matters as decision-making and writing, are included in the training procedure. Two matters that have become of far greater relevance than some anticipated are a familiarity with the law of contract and matters relating to the jurisdiction of the adjudicator.

The one matter that is becoming evident is that the nature of the training offered needs to be reviewed. A three-day course originally put together as a conversion course for arbitrators who had already gone through an intensive and often lengthy training as arbitrators is clearly insufficient for those without such a background. A course culminating in a formal diploma in adjudication is being mooted at the time of writing and, in our view, this must be the way forward for the training of future adjudicators.

How can an adjudicator be appointed?

The appointment of an adjudicator can be made in the following ways:

- the parties can agree on a person to act as adjudicator
- an appointment can be made by prior agreement, almost invariably by naming an adjudicator in the contract
- an appointment can be made when the dispute occurs by agreement
- a party may appoint an adjudicator unilaterally by referring the dispute to an adjudicator nominated by an adjudicator nominating body (ANB).

Agreement on an adjudicator

There is always an advantage in consensus on who should be appointed. It saves time and acrimony to agree on a person to resolve the dispute. If somebody is selected who the parties know and can expect to do the job properly, there may be less of a problem with acceptance of the decision and therefore enforcement. An agreed person can be chosen with the particular dispute in mind. The particular specialism or area of expertise can be sought from a known source. The parties are then more likely to comply with any order as to timetable and more likely to co-operate in any investigation the adjudicator needs to undertake. If the parties have agreed, the selection process will have examined the competence of the adjudicator and therefore they will have confidence in the person and the process. ANBs have an excellent track record in finding the right adjudicator in the limited time they have, but there is always the possibility for whatever reason that an unsuitable person is nominated. An agreement between the parties will in all probability avoid this.

Naming an adjudicator by prior agreement

It is possible that the parties may suddenly come to the conclusion after a contract is made that they ought to agree an adjudicator, but the circumstances in which this may occur are difficult to envisage. It is far more likely that any such agreement is reached prior to the finalisation of the contract documents and that a name is inserted in them.

The earliest that an adjudicator's name can be put forward is in the tender documents. This may be because the party preparing the tender document is seeking to impose a particular adjudicator to act under the contract. Although there may be provision for naming the adjudicator at this stage, it may be that no name is provided until the tender is received. The intention may be to insert a name after discussion with the successful tenderer when the contract is signed. This often provides a formula for proceeding with the contract works with no named adjudicator at all. The problem that might arise in this instance, if there is no machinery in the contract for the nomination of an adjudicator by a third party, will be overcome by the provisions of the Scheme and the appointment procedures in them.

The particular benefit of having a named adjudicator is that there is no question as to who is going to adjudicate. The moment a dispute arises the named adjudicator should be immediately available to act. There is no delay in trying to agree an adjudicator or involving an ANB.

As far as the adjudicator himself is concerned, by reaching agreement the parties have the opportunity to choose someone with appropriate training and experience. The sort of questions that may require answering in such a case relate to such matters as: the nature of the training he has undertaken; his experience, both in respect of adjudication and the practical issues raised by the dispute; and his professional specialism. Almost certainly in these days of problems arising from the interpretation of what the agreement between the parties is, some familiarity with matters of contract law is essential.

There can be other benefits in naming an adjudicator from the outset, which may not apply if a dispute already exists. The contracting parties can select a person they know and trust. They can make the selection process as rigorous as they wish and interview unknown but eligible adjudicators. If there are a number of disputes throughout the currency of the works a named individual will acquire project knowledge, which should assist in eliminating learning curves in respect of each dispute. This should improve both the speed and the economics of resolving disputes. The decisions should also be consistent.

When the adjudicator is named in the contract the parties have made their selection of the appropriate person to resolve their disputes, but they have not necessarily secured an appointment and made a contract for the individual to resolve any particular dispute. In fact it is not uncommon for an adjudicator to be named without his knowledge. This is not always the best solution as the named adjudicator may well not be available or may have a conflict of interest when a dispute arises.

If the parties do want some certainty with a named adjudicator they can discuss the availability of the adjudicator should a dispute occur and, if they wish, provide for a retainer to ensure availability on the basis of a reasonable commitment. Parties to construction contracts are however notoriously unwilling to commit themselves to expenditure that may ultimately prove to have been unnecessary. Commitment fees for adjudicators have proved successful on larger projects and in the case of Dispute Review Boards that carry out a very similar function to an adjudicator, regular site visits to keep abreast with progress are not unknown. On small or medium-sized projects any form of retainer is however unlikely to be accepted by the parties.

Naming an individual from the outset can have the disadvantage that an appropriate specialist will not necessarily be chosen at the time to suit the dispute in question. An adjudicator could be named in the contract who is totally unsuited to the type of dispute that arises. A specialist electrical engineer could find himself involved with a structural engineering dispute. The parties might as well not have bothered to name him in the contract at all. There will be delay while an alternative adjudicator is found.

One way of overcoming the problem of an inappropriate or unavailable named adjudicator is the naming of more than one adjudicator so that disputes of various natures can be dealt with by an adjudicator with appropriate experience; this avoids the possibility that a single named adjudicator will either be unavailable or not have the competence to deal with the dispute. This can however lead to disagreement between the parties themselves if the nature of the dispute covers more than one discipline and is within the competence of more than one of the named adjudicators.

Naming an individual from the outset can have disadvantages relating to impartiality. If one of the parties to the contract seeks to impose an adjudicator on the other party, this could raise questions as to the impartiality of the individual named. If there is any question that the party naming the individual in the contract has sought to impose his 'own man' this must bring the whole question of his impartiality into doubt. This could inevitably lead to a challenge to the jurisdiction of the individual simply on the grounds he lacks the qualification on which to proceed, the qualification in this case being that he is impartial. There is also an argument that if an individual is named in a contract or a series of contracts he may develop a partiality. He could be named under a main contract and all the related sub-contracts. While he may be impartial at the outset he may become tainted and blasé, as the work proceeds, as he becomes familiar with the project and its disputes. He may develop, because of his involvement in earlier disputes, a lack of impartiality that was not there from the outset.

Early experience suggests there are obvious instances of naming an individual from the outset that flout the concept of impartiality. The naming of the project architect in a main contract or a director of the contractor in all the project sub-contracts are obvious examples. How can the architect rule as an impartial adjudicator on his own decisions made as architect under the contract, when those decisions are disputed? Equally, how can the director of the contractor make decisions that may affect the well-being of his firm and maybe his own remuneration, and yet remain impartial? Any suggestion that these arrangements are acceptable is untenable.

It should never be forgotten that the interpretation that is placed by the court on the impartiality of a tribunal is not that the tribunal will act impartially but that there can be no perception of bias in the eyes of an objective observer.

When naming an individual both parties should therefore carefully consider whom they name and that he satisfies the qualifying criteria. If the named adjudicator is not seen as being impartial, this will not prevent either party from pursuing adjudication. The contract will not have provided an impartial adjudicator and thus fails to provide the minimum for adjudication required by the Act. The right to refer disputes to adjudication will not be extinguished and the Scheme will apply.

The problem of unavailability of the named adjudicator cannot be entirely avoided. Simple matters such as the adjudicator planning a long holiday during the currency of the works can be established before the adjudicator is named in the contract. This will not avoid the possibility of illness or unexpected family commitments and the like, which cannot be predicted. It is unlikely that an individual adjudicator will accept being named in one contract and then say no to any further appointments. The ultimate scenario is that one adjudicator agrees to be named in a number of contracts and then, when demand for his service increases due to a number of disputes occurring at the same time, he is unable to cope with any one of them properly. One situation where there is a probability of such an occurrence is where an adjudicator's name is inserted in a contract without his knowledge. It is always advisable to ensure that any adjudicator so named is aware of that fact, albeit it is unlikely that a refusal will result; adjudicators are only human, and this problem may still occur.

A firm rather than an individual can be named in the contract, but caution needs to be exercised. This is a halfway solution between naming an individual and naming an appointing body. If a firm is to be named, the parties to the contract need to know all the individuals who are likely to be used as adjudicators should a dispute arise. This will avoid a 'pot luck' selection when the dispute occurs. It is more difficult to vet a firm than an individual. All the individuals within a firm need to be tested with the same rigour that a single named individual would be.

In the case of *Mowlem* v. *Hydra-Tight*, which has already been mentioned in this chapter in another context, Mowlem set out in the contract a 'list of approved adjudicators' which comprised the barrister members of Atkin Chambers, Gray's Inn, a perhaps surprising choice when made at the time of the letting of the contract as the probability is that any disputes arising will relate to payment and other technical matters. When it came to enforcement proceedings the court found that a defined pool of adjudicators is sufficient and a single adjudicator does not have to be named.

In naming a firm the parties could fall foul of the requirements in the contract, adjudication rules or the Scheme. The particular rules may specifically require an individual as adjudicator rather than a firm. The Scheme, for example, requires under paragraph 4 that 'Any person requested or selected to act as adjudicator . . . shall be a natural person acting in his personal capacity'. In this case the adjudicator who acts could not be the firm but would have to be a specific individual from the firm.

It was decided in *Mowlem* v. *Hydra-Tight* that it was not necessary to name the individuals within Atkin Chambers. The naming of that chambers was a valid way of deciding upon the adjudicator and an individual member of that chambers could be selected at the time the dispute arose, a procedure which did accord with paragraph 2.1(a) of the Scheme, 'the referring party shall request the person (if any) specified in the contract to act as adjudicator'. Common sense does however suggest that even in the instance of a barristers' chambers, if a grouping of individuals is used rather than a specific name, the individual

competencies of those that might do the adjudication should be ascertained before such an inclusion is made in a contract.

Appointment when the dispute occurs

Waiting until a dispute arises overcomes the problems associated with expertise and availability. The individual appointed as adjudicator will have to indicate that he is available and that he has the correct expertise, otherwise he will not be appointed. The downside is the time that is likely to be needed to get the adjudicator appointed. The parties may not be able to agree on the name of someone to approach. An adjudicator of the agreed expertise may not be readily available. If the parties do agree on a particular individual, he may not be available due to other commitments. Experience does however show that where an adjudicator is agreed the process often takes longer than seven days, but it will be pretty clear to the party seeking the appointment of an adjudicator if the other party is not 'playing ball'. Given the ability of the majority of the ANBs who offer their services to the industry to ensure a speedy nomination if a reluctance on the part of the other party is recognised, the situation can be remedied by an application to an ANB for a nomination.

All the matters that have been considered above in respect of the appointment of an adjudicator at the outset of a contract apply if the parties set out to agree an adjudicator after a dispute has arisen, and this is probably the best way of ensuring that the right person is appointed. A large number of adjudicators are appointed in this fashion but in the majority of cases where the parties do not have a name in their contract an ANB is relied on.

The appointment by a third party is generally to be regarded as a fall back as the parties, once the application for an appointment is made, lose control over the individual to be appointed. The danger is always that the quality of the appointee will suffer due to the ANB having such a short time to find someone to do the job. It would appear however that this is not a general problem. There are apocryphal tales of inadequate adjudicators and all ANBs do from time to time receive complaints, but these are in the main from parties who have lost an adjudication. There is however no great outcry as to the inadequacy of the adjudicators that have been nominated by ANBs.

What are Adjudicator Nominating Bodies?

The Scheme went through a number of drafts and in the early stages of development it was always the intention that a list of approved bodies for nomination of adjudicators would be published and would form part of it. These would be known as Adjudicator Nominating Bodies (ANBs). The particular bodies who were to be named had been vetted and approved to be included in the list in the secondary legislation. However, in the final stages of the drafts for the Scheme the naming of ANBs in the Scheme was dropped. The grounds for this were that each time it was required to add to the list or to remove a name from the list this would require further parliamentary time and debate.

All was not lost for those who had invested in training, setting up panels and an appointing infrastructure. Some were to be appointers or nominators in the Standard Forms of Contract in any event. Others could offer their services as nominators under the definition in paragraph 2(3) of the Scheme: 'an ''adjudicator nominating body'' shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.' This

wide definition gives almost anybody the opportunity to set up a firm to simply provide adjudicators at the request of a party, if they consider it a commercial proposition to do so, and some organisations have done just this.

There are commercial concerns who seek to sell either adjudication services or to appoint adjudicators or to act as ANBs. They may provide different permutations on appointment to those who were to be the original ANBs. Whether it is a commercial concern or an institution making the appointment, a fee will be charged for the service of providing an adjudicator.

The application for an appointment will in all probability require the referring party to provide details of both the dispute and the parties on an application form. The details requested on such application forms assist in the selection of an appropriate adjudicator and should eliminate problems with conflicts of interest. The application form may even require the inclusion of a suggested specialism for the adjudicator.

It would be invidious for the authors as individuals who are members of particular professional bodies to seek to draw comparisons between the various ANBs. We shall restrict our comments to the things that a party seeking a nomination should consider before approaching an ANB for a nomination.

A preferred ANB should be one that requires those individuals on its panel to have attained a senior level in a primary profession, to have experience of dispute resolution and adjudication and to have a sound knowledge of the law of contract. They should have been tested on those aspects before they are allowed on the list. There should also be a regime in place for ensuring that the panel members keep abreast of developments in adjudication and that they remain competent to carry out the functions of adjudicator.

When consulting an ANB, ask questions such as: how rigorous has the training process been? What is their appointing experience? What means of feedback and quality control are in place? How experienced are their adjudicators?

The question of how experienced the adjudicators are is of considerable relevance as adjudication has become more widely used. The fact that an organisation is making few appointments does not necessarily mean that their adjudicators have little or no experience as many adjudicators are on the panels of more than one ANB. It may also be the case that for geographical or other reasons an adjudicator who is on the panel of an ANB that makes lots of nominations has little experience.

The ability of an ANB to nominate sufficiently quickly so that the referral can be made in time, can be relevant. It is the general experience that most ANBs take this responsibility very seriously but there are some tales, possibly apocryphal, where an ANB has taken far longer than it should to make a nomination. The speed with which an ANB nominates is extremely important but this must be balanced with the quality of the adjudicator appointed and it may be that where an unusual specialism is required the time to nominate may be exceeded.

All ANBs generally appoint when asked, taking the line that the jurisdiction of the adjudicator is a matter between the parties and the adjudicator. There are times when it is obvious that the ANB has no jurisdiction to nominate and it will decline to act. Interestingly, in the case of *Mowlem* v. *Hydra-Tight*, mentioned earlier, the first ANB that was approached declined to nominate but another which was approached subsequently did nominate. The nominee of the latter was however found by the court to be without jurisdiction.

Each ANB has its own forms for an applicant to complete before a nomination is made. They will seek varying levels of information but this is generally nothing more than that they have jurisdiction to make the nomination and some idea of the nature of the dispute so that they can make an appropriate nomination. They will also require a fee for the service. Under the provisions of the Scheme, ANBs have five days to nominate and while they may well

take note of the time between the application for a nomination and the date of the notice of adjudication, they will be quite entitled to wait until the information that they require is made available and the appropriate fee paid before making a nomination. It is not the role of a nominating body to ascertain the detailed nature of the dispute or to investigate such matters as jurisdiction. The referring party could say no more than that there is a dispute, pay the fee and ask the ANB to select an adjudicator, but a bit more than this is required to get the right person for the dispute. The proper and most effective way is to provide the ANB with a copy of the notice of adjudication that is required by section 108(2)(a) of the Act, preferably with a copy of the notice of adjudication.

The adjudicator and appointment

The individual who is asked if he is prepared to have his name entered into a contract as adjudicator must find out the nature of the work that is to be carried out under the contract that the parties are signing. An adjudicator will in all likelihood be making decisions on technical issues as well as applying the law to the particular facts of the dispute. If he does not have a clue concerning these technical issues he should not put himself forward. In the case of a party-agreed appointment in the contract, the adjudicator will at least know the nature of the contract and will as a result be able to identify his general suitableness for adjudicating upon disputes arising from that contract. There is a limit on the number of contracts an adjudicator should be named in at any one time. The adjudicator needs to keep a record of all those contracts he is named in and their duration. The potential disaster for an adjudicator is the call on his time to handle several disputes on different contracts all within the same 28-day timescale. There must come a point where an adjudicator has too much potential commitment and should refuse to be named in any further contracts. This must also be balanced against the need to earn a living in the adjudicator's primary profession, the commitment to that profession and the possibility of conflict of interest arising not only from his other commitments but possibly from allegations that he has been named too many times by a particular contractor or employer.

Where an enquiry comes as a result of a nomination by a third party, the problem for the prospective adjudicator is that, due to the timescales involved, he is on occasion unlikely to have sufficient details on the technical aspects or the magnitude of the dispute. There may be the briefing papers that the ANB has received from the applicant party but often these do not reveal the true nature or extent of the dispute. When considering whether to agree to be nominated, the adjudicator will at least be in full knowledge of his other commitments during the following 28 days and should at the very least ensure that he sees a copy of the notice of adjudication so that he has some idea of the nature of the dispute.

Section 108(2)(a) of the Act, which requires the giving of a notice of adjudication, is a requirement of the contract. The Scheme has more detailed requirements in paragraph 1 on the content of the notice of adjudication. The nominating bodies will not therefore be required to appoint on receiving a telephone call from site, at least until it is followed up by a copy of the notice. There may be specific requirements in the particular contract relating to the notice, as there are in the Scheme. These should, in principle, be satisfied before an ANB accepts any duty to appoint, but there is no doubt that the ANBs generally put the duty to appoint before any requirement that they ensure that the detailed requirements of the Scheme or any contract have been followed in the notice of adjudication. This may well result in a challenge to the nominated adjudicator's jurisdiction on the basis that the dispute is inadequately defined and thus does not exist. It is, however, in keeping with the generally

held view that matters of jurisdiction are for the parties and the adjudicator to resolve and that ANBs should nominate within the requisite time limit when requested.

We have already mentioned the matter of dissatisfaction procedure which the ICE contracts and allied forms require to be followed prior to the commencement of an adjudication. We suggest that if a referring party is insistent on commencing an adjudication in the face of objections by the responding party, the adjudicator should proceed on the basis that to do otherwise is to interfere with the referring party's right to adjudication at any time. Any question as to the validity of the decision then becomes a matter of enforcement. This may, as noted elsewhere, be a non-existent problem if the ICE alters its provisions in this respect.

When the prospective adjudicator is approached with an enquiry as to whether he is prepared to take on the appointment, whether this be before or after the dispute arises, there are a number of matters that he must consider. After deciding whether he has the time and the desire to take the adjudication on, the principal matter for the adjudicator, in view of the wording of section 108(2)(e) of the Act, is can he act impartially? This impartiality has to be seen in the context of the common law. It is not just that he sees himself as being able to act impartially, it is that he can do this in the eyes of the parties and if necessary in the eyes of the court if his impartiality is challenged. In common parlance it is not actual bias that we are concerned with – the fact that no adjudicator will knowingly be biased has to be taken as read – it is the perception of the parties regarding any impression of bias that might be given by the adjudicator's actions or personal or business connections.

Ideally the prospective adjudicator should also satisfy himself in respect of the following matters prior to accepting appointment:

- Is there a dispute? Has it crystallised?
- Does the dispute relate to a construction contract within the meaning of the HGCRA? See sections 104 and 105. Also be aware of section 106 (contracts with residential occupiers). Adjudication of other disputes is always possible by agreement between the parties. This may even be written into their contract.
- Does the dispute come within the terms of section 108(1) or extend those terms?
- Has the person who has referred the dispute to adjudication the authority to do so?
- Is the ANB which has approached him empowered to do so?

Where the appointment of the adjudicator follows a nomination by an ANB, the timescales in the Act generally preclude any detailed prior investigation of these matters before the referral notice is received, and general experience appears to be that the notice of adjudication is issued, the adjudicator nominated and the dispute referred to him in such quick time that any matters of this nature come up for the first time as jurisdictional objections from the responding party.

It was confirmed in *Christiani & Neilsen* v. *The Lowry Centre*[4] that there is no absolute obligation upon an adjudicator to investigate his jurisdiction even if it is challenged. In any event, as decided in *The Project Consultancy* v. *The Trustees of the Gray Trust*[5], he has no power to decide his own jurisdiction unless the parties give him that power. It is however obvious that if there is a clear problem at the time that the adjudicator is approached, he ought to identify it even if the ANB has not done so and decline the nomination, thus saving a lot of wasted time.

The adjudicator will need to respond to any jurisdictional objection that may be made by

[4] *Christiani & Neilsen Limited* v. *The Lowry Centre Development Company Limited* (16 June 2000).
[5] *The Project Consultancy Group* v. *The Trustees of the Gray Trust* [1999] BLR 377.

the responding party but must not allow any concern regarding these matters to delay him from acting; his job is to get on with it and make his decision within 28 days of the dispute being referred to him. The court has during 2002 and 2003 considered a number of questions relating to the existence of a dispute and we consider these in some detail in Chapter 9.

The adjudicator will be making decisions that relate to the rights and duties of the parties. These will principally be in connection with the contractual agreement between the parties. He must therefore be confident that he has undertaken the necessary training and has the necessary knowledge to deal with the technical and contractual/legal aspects of the dispute before agreeing to be nominated or accepting an appointment by agreement.

If the adjudicator does not understand the law of contract and does not have the knowledge to interpret the nature of the agreement between the parties, how can he ascertain these rights and duties? More than just a basic understanding of the law is necessary to deal with the matters that are likely to be faced by an adjudicator, and an individual lacking this ability should not take on the task.

Section 108(1) of the Act states that only disputes arising under the contract are within the adjudicator's jurisdiction. If an adjudicator is unfamiliar with legal concepts he may deal with a dispute that relates to negligence, something that does not arise under the contract. The party required to pay by the decision may well succeed in resisting an action to enforce it. The adjudicator may not get taken to task as a result but if nothing else there has been a considerable waste of time and money.

These considerations are very important if the individual is asked if he is prepared to have his name entered into a contract as adjudicator. When that enquiry comes after the dispute is in being, they are vital.

The adjudicator's terms and conditions

It is extremely unlikely that any adjudicator will agree to adjudicate without some record of the terms that he will apply to his appointment.

If the appointment is by agreement with the parties, most adjudicators will act only after terms are agreed with the parties.

Some contract drafting bodies publish adjudication agreements in a standard format, of which more later, and require their use by the terms of the contract. This will be the case whether the appointment is by party agreement or after a nomination. Where a standard form contract does not apply it is the usual practice of adjudicators to prepare terms and send them to the parties.

Some adjudicators seek the agreement of the parties to their terms, others just send their terms with a covering letter to the effect that 'these are the terms that apply to my appointment'. While the former method has the benefit of some certainty for the adjudicator in that the parties will have agreed his hourly rate, he is in fact only entitled to be paid his reasonable fees and expenses and, however low his hourly rate may be, if his charges relate to what the parties consider to be an inordinate number of hours it may be that his fee will be challenged on that basis.

It is clear that an adjudicator cannot insist on agreement of his terms in the face of a reluctant party before he starts the adjudication as he would not then be complying with his obligations to the ANB which nominates him, as the nomination will be on the basis that the adjudicator is ready and willing to do the adjudication in the requisite 28 days.

The setting of the terms on the basis that 'they will apply' is fine as long as the terms suggested are not contentious. In general the adjudicator completes the adjudication,

charges his fee and that is the end of it. Where the hourly rate appears high to the parties there may be a conceptual problem but at the end of the day it is the overall amount charged that is important to the parties, not the hourly rate. An adjudicator who charges a high hourly rate may charge an overall fee that is considerably lower than an adjudicator with a lower hourly rate and there is some comment from unofficial surveys of the adjudication process that this may be the case.

Adjudicators who are registered for VAT or who issue their fee notes through their firms who charge VAT need to make the parties aware of that fact in their terms.

It does not hurt to record the adjudicator's charge per mile for using his car, and a confirmation of the class of travel to be utilised on train journeys will not go amiss.

Some adjudicators request an upfront payment to give them security for all or part of their fees and expenses and others seek to impose some form of lien by which they will not release their decision until they are paid. We shall discuss liens when considering the finalisation of the decision in Chapter 11. A request for an upfront fee of possibly some thousand pounds immediately after the nomination is notified can cause some consternation, particularly on the part of the referring party who will no doubt have to pay it. There is no real objection to such a procedure provided that the adjudicator does not refuse to act within the requisite 28 days if he does not receive it, and provided that it represents a payment upfront for fees yet to be earned. Any connotation of an appointment fee that is non-returnable is to be deprecated. Members of the RICS should of course be aware that any payment for work not yet done must be placed in a client's account as it is a breach of the RICS's regulations to do otherwise and may become a disciplinary matter.

Some adjudicators seek an indemnity from the parties in respect of possible action by third parties. Such a provision may, however, be difficult to enforce without specific agreement from the parties.

There are various other pet items that adjudicators include in their terms but all the common ones are noted above.

The standard forms of contract and appointment

All the standard forms of contract recognise that it is generally preferable that the parties agree the adjudicator but they allow for the fact that it is often the case that such agreement will be impossible and that a fall-back procedure will be necessary.

These contracts also recognise that adjudication is a right that can be invoked unilaterally and the procedures work on this premise.

The common way in which this is dealt with in the standard forms of contract is to allow for the appointment of an adjudicator by agreement, failing which a person or body is named as nominator or appointer. There is often a list of persons or bodies from which the parties can choose one by deleting those not wanted, with the fall-back position of one of those named being identified as appointer/nominator if no choice is made. In this way adjudication can be commenced unilaterally. Even where the parties have failed to select an appointer or nominator in their contract, the lists will include a body by default to make good the failure to complete the contract correctly.

At the time that the statutory right to adjudication came into force, the contract-writing bodies did not have their contract amendments in place in sufficient time for the commencement date of 1 May 1998. Ideally, had the contracts been in place about six weeks before that date, enquiries and bids could have recognised and incorporated the new contract regimes for contracts to be entered into after 1 May 1998. Because the contracts were not

available this far in advance, there were a number of contracts entered into after 1 May 1998 that did not have the new adjudication and payment provisions or had the pre-existing provisions that did not comply with the Act. On larger projects such contracts may still be current and the Scheme applies to these contracts unless the parties agree to use the subsequent amendments to the standard form to include compliant adjudication provisions. Rather surprisingly, even five years down the line, there are occasional instances where previous editions of the standard contracts are still being used and the parties will need to use the Scheme to invoke their right to adjudication.

Some organisations in the construction industry ignore standard forms, and many hybrid or non-standard forms are produced by such organisations to suit their individual purposes. There are no signs that this practice will stop. There are novel attempts to comply with the legislation including, in the early days, clauses drafted in an attempt to skirt round or modify the legislation, but these have been nipped in the bud by the support of the courts for the adjudication process.

Joint Contracts Tribunal main contracts

The Joint Contracts Tribunal (JCT) published its 1998 editions during that year but not until September 1998. These include the Standard Form of Building Contract which is published in the Private Editions (With and Without Quantities), the equivalent Local Authority editions and the With Contractor's Design edition. There are also the Intermediate and Minor Works Forms. These are the most commonly used versions but there are several others published to fill various special requirements.

In order to bridge the gap between 1 May and September 1998, Amendment 18 to the 1980 edition was published. There may well be contracts to which Amendment 18 applies which have not yet reached finalisation and adjudication may still be required. That said, the adjudication provisions in all the various JCT 1998 editions and those in Amendment 18 are, other than in two respects, identical. We deal with the whole of the provisions in JCT 98 first and then look at these relatively minor differences afterwards.

All the JCT forms of contract are set up to provide the right to adjudication in one of the 'Articles' which are included in the early pages of the forms concerned. It is in Article 5 in the Private Editions, stating simply 'If any dispute or difference arises under this Contract either Party may refer it to adjudication in accordance with clause 41A'. Clause 41A includes detailed adjudication procedures. In some versions the Article number changes and the number of the clause detailing the adjudication procedures also varies. The wording remains effectively identical. From now on we shall consider the Private Editions and use the numbering of these.

Two definitions relating to adjudication are included in clause 1.3 of the Private Editions and the With Contractor's Design Form (clause 8.3 of the Intermediate Form). There are no definitions in the Minor Works Form. The words so defined are an 'Adjudication Agreement' – cross referred to clause 41A.2.1 in the Private Editions which refers to 'the JCT Adjudication Agreement' and an 'Adjudicator' defined as 'any individual appointed pursuant to clause 41A as the Adjudicator'.

The JCT Adjudication Agreement is published separately from the contracts themselves. For a discussion on this see Chapter 8, Adjudicators' Agreements. The adjudicator must be an individual and not a firm. This follows the requirements of the Scheme in paragraph 4.

The JCT has taken a relatively simple approach to their standard route for appointment. They have sought to comply with the Act and also some of the representations they had from

industry through their constituent bodies. The identity (appointment) of the adjudicator is dealt with in clause 41A.2 as follows.

Identity of adjudicator

41A.2 The adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either Party, an individual to be nominated as the adjudicator by the person named in the Appendix ('the nominator'). Provided that

41A.2.1 no adjudicator shall be agreed or nominated under clause 41A.2 or clause 41A.3 who will not execute the Standard Agreement for the appointment of an adjudicator issued by the Joint Contracts Tribunal (the 'JCT Adjudication Agreement') with the Parties, and

41A.2.2 where either Party has given notice of his intention to refer a dispute to adjudication then

- any agreement by the Parties on the appointment of an adjudicator must be reached with the object of securing the appointment of, and the referral of the dispute or difference to, the adjudicator within 7 days of the date of the notice of intention to refer (see clause 41A.4.1);
- any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the adjudicator within 7 days of the date of the notice of intention to refer;

Upon agreement by the Parties on the appointment of the adjudicator or upon receipt by the Parties from the nominator of the name of the nominated adjudicator the Parties shall thereupon execute with the adjudicator the JCT Adjudication Agreement.

Footnote: [vv] The nominators named in the Appendix have agreed with the JCT that they will comply with the requirements of clause 41A on the nomination of an Adjudicator including the requirement in clause 41A.2.2 for the nomination to be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer; and will only nominate Adjudicators who will enter into the 'JCT Adjudication Agreement'.

The JCT deal with the eventuality that the adjudicator might die or be otherwise unable to adjudicate as follows.

Death of adjudicator – inability to adjudicate

41A.3 If the adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree upon an individual to replace the adjudicator or either party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the agreed or nominated adjudicator.

The standard route for appointment is based on the parties agreeing on an adjudicator at the time their dispute occurs. Where no such agreement can be reached, one or both of the parties can approach the nominator identified in the appendix to the contract for an adjudicator to be nominated. The nominators are the 'President or a Vice-President/ Chairman or a Vice-Chairman: Royal Institute of British Architects, Royal Institution of Chartered Surveyors, Construction Confederation and National Specialist Contractors Council'. If the parties have failed to complete their contract correctly by striking out all but one of the names of the nominators in the contract, by default the nominator is the President or Vice-President of the Royal Institute of British Architects. The concept of presidential or

chairman nominations might well have been dropped in view of the liberal definition of ANBs in the Scheme. However, this is the chosen method and the organisations named do generally manage to overcome the difficulties created by the personal nature of the nomination and still meet the timetable required in the contract. Some of the institutions operate under delegated powers so that an individual other than the President or Vice-President can deal with the appointment.

There is an important qualification for the appointment of an adjudicator. In clause 41A.2.1 no adjudicator should be agreed or appointed who will not execute a JCT Adjudication Agreement with the parties. This must be considered by the parties when reaching agreement. They should notify their potential adjudicator that one of the qualifications on appointment will be to execute the JCT Adjudication Agreement. Equally, any nominator must not nominate any person who is not aware of, or who will not agree to the execution of, the JCT Adjudication Agreement. We understand at the time of writing that the JCT is considering doing away with the JCT Adjudication Agreement and if this does happen this will no longer be a matter of concern to the parties or an ANB.

The JCT seeks to comply with the Act in terms of securing the appointment and referring the dispute to adjudication by using the words of the Act itself. In clause 41A.2.2 there is a notice of intention to refer a dispute to adjudication. This is the notice generally described as the notice of adjudication. This follows section 108(2)(a) of the Act. What follows is the stated intention from the Act, the object of securing the appointment and the referral to the adjudicator within seven days of the notice of intention to refer. This complies fully with the requirements of the Act and it is of no consequence therefore if an adjudicator is not in place within seven days of the notice of intention to refer. There is no effect other than the delay to the ultimate decision, and the failure to comply with the appointment timetable is not fatal to the process.

The final provision of clause 41A.2 requires that, as soon as the parties have agreed on the appointment or an adjudicator has been nominated, all three execute the JCT Adjudication Agreement. If the parties fail to execute this agreement this is not fatal to the process. Clause 41A.5.6 makes it clear that failure by one or both of the parties will not invalidate the decision. In practice there will be many instances where one or both parties fail to sign the agreement. This leads to the question as to why the agreement is needed at all and as noted above, the JCT is reviewing the Agreement at the time of writing.

The two differences in Amendment 18 are firstly an alternative procedure that was offered for appointment of the adjudicator in that the parties could by agreement name their adjudicator in the contract. The JCT decided that there were fewer benefits than advantages offered by this facility and, perhaps bearing in mind that general experience seems to be that the space for naming the adjudicator was left blank, it was discarded.

The second difference was a provision that the referral could be delayed until such time as the adjudicator signs the JCT Adjudication Agreement. This of course does not comply with the requirement that the contract is drafted with the intention of the referral being made within seven days of the notice of adjudication, which is why it was dropped in the 1998 edition. If faced with a contract that is based upon Amendment 18, the adjudicator will have to consider whether to proceed in accordance with the contract provisions or use the Scheme. He will possibly decide to use the Scheme but the parties may be quite content for him to use the contractual provisions and if they are there would appear to be no reason for the adjudicator not to do so.

Joint Contracts Tribunal sub-contracts

The JCT has published sub-contracts for use under the Standard Form and the Intermediate Form for nominated sub-contractors and named sub-contractors. These are the Nominated Sub-Contract Conditions NSC/C (for use with nominated sub-contractors under the Standard Form) and the Sub-Contract Conditions NAM/SC (for use where sub-contractors are named under the Intermediate Form).

The respective adjudication provisions are included in section 9 of NSC/C (related to Article 4 of the Form of Agreement NSC/A which is the basic provision relating to the right to adjudicate) and section 35 of NAM/SC (similarly related to Article 4 of Tender and Agreement NAM/T). These sections include provisions for adjudication, arbitration and legal proceedings but it is only the adjudication aspect that we are concerned with here. Other than the numbering the clauses are identical.

Apart from the clause numbering and references to form NSC/T the provisions are identical.

Since 2002 the JCT has produced its own domestic sub-contract DSC/A (Agreement) and DSC/C (Conditions) which include a list of appointing bodies with the RIBA as the default. The wording of the adjudication provisions follows that of the Standard Form Contracts.

Construction Confederation sub-contracts

The field of sub-contracting is probably where the adjudication provisions and also the payment provisions are of greatest importance. The standard forms of sub-contract are the benchmark documents for the industry. Despite this, there are a great number of sub-contracts let on hybrid in-house forms of sub-contract. As far as the appointment of the adjudicator is concerned, the situation seems to be very little different from what happens generally. Some contractors seem to like to name one or a list of adjudicators, others to rely on an ANB. There are, of course, those contractors who do not have formal procedures for appointing sub-contractors and these will in general have to rely on the Scheme provisions for appointment of the adjudicator.

Notwithstanding the emergence of the JCT DSC forms and the consequent obsolescence of the DOM/1 and DOM/2 forms, the habit of the industry to cling to forms with which it is familiar suggests that these forms will remain in use for a considerable time to come.

Not surprisingly, the DOM/1 and DOM/2 Standard Forms of Sub-Contract follow the approach adopted in JCT 98 and apart from the clause numbering the terms are identical. As with JCT 98 there is no optional amendment to permit the naming of the adjudicator in the contract. This differs from previous editions of this form – where adjudication only dealt with set-off – which were based on the adjudicator being named in the contract as the standard approach.

The nominators are set out in the Appendix and are the same as in JCT 98 but in this case the default nominator is 'the President or Vice-President of the Royal Institution of Chartered Surveyors'.

As with JCT 98 this contract requires that the adjudicator shall enter into the JCT Adjudication Agreement with the parties. A party cannot disrupt the adjudication by failing to do this and it is confirmed by clause 38A.5.6 that failure by one or both of the parties to complete the agreement does not invalidate the decision.

Institution of Civil Engineers' main contracts

The ICE has adopted an entirely different approach to the JCT. The adjudication procedure is contained in a separate document to the contract. They have also sought to redefine the point at which a dispute occurs. Before the adjudicator can be appointed the contract requires that there is another reference on a matter of dissatisfaction before the dispute comes into being. The new clause 66 works on the premise of avoiding disputes.

We have briefly considered this provision earlier but it is worth further consideration here. The object of this provision appears to be to exhaust any contractual mechanism before a formal means of dispute resolution is adopted. The old provisions on engineers' decisions have been replaced by matters of dissatisfaction. A dispute does not exist until the engineer has made his decision on the matter of dissatisfaction. The question is, even though the parties have contracted on this basis, does this prevent a party from taking a dispute to adjudication at any time? This is important from the viewpoint of whether or not an adjudicator can be appointed until the matter of dissatisfaction procedure has been exhausted. Is a matter of dissatisfaction a lesser being than a dispute or can a dispute exist as well as a matter of dissatisfaction? If the dispute can exist independently of a matter of dissatisfaction the parties can proceed to adjudication at any time. There is also a question as to whether the matter of dissatisfaction itself could be construed as a dispute for the purposes of the Act. Under the drafting of this particular clause the parties agree that a dispute does not exist until the matters of dissatisfaction provisions have been exhausted and a notice of dispute has been served.

Having contracted on the basis that in the civil engineering forms a dispute cannot come into being before the matter of dissatisfaction has been dealt with, it is arguable that in the absence of a dispute no adjudication can take place. The matter of dissatisfaction is dealt with either by an engineer's decision or by the lapse of one month of the reference to the engineer of the matter. There must be scope for a dispute on whether the engineer has actually dealt with the matter in his decision or indeed whether the matter was properly referred to him. If the parties take no issue with this procedure, it is, as we have already noted, an excellent method of ensuring that a dispute has properly crystallised before the adjudication commences. In the case of one party wanting adjudication in face of objection by the other party, it is probably correct for the adjudicator to proceed and leave the unresolved questions as to the validity of the matter of dissatisfaction procedure for any enforcement proceedings that may occur after he has completed his decision.

Clause 66(1) introduces the contractual procedures to facilitate the clear definition and early resolution (whether by agreement or otherwise) of disputes.

Clause 66(2) deals with matters of dissatisfaction by requiring that any party who is at any time dissatisfied as a result of any matter arising under or in connection with the contract or the carrying out of the works refers such a matter to the engineer who shall notify his written decision to the employer and the contractor within one month of the reference to him.

Clause 66(3) is to the effect that the employer and the contractor agree that no matter is a dispute unless and until the time for the giving of a decision by the engineer on a matter of dissatisfaction has expired or the decision given is unacceptable or has not been implemented and in consequence the employer or the contractor has served on the other and on the engineer a notice in writing, called the notice of dispute, or an adjudicator has given a decision on a dispute and the employer or the contractor is not giving effect to the decision, and in consequence the other has served on him and the engineer a notice of dispute. The dispute is then defined as that stated in the notice of dispute. The clause continues to confirm that for the purposes of all matters arising under or in connection with the contract or the

carrying out of the works, the word 'dispute' shall be construed accordingly and shall include any difference.

Clause 66(4) requires that the parties continue to perform their obligations under the contract notwithstanding the existence of a dispute following the service of a notice under clause 66(3) unless the contract has already been determined or abandoned.

Clause 66(4) also requires that the parties give effect forthwith to every decision of the engineer on a matter of dissatisfaction given under clause 66(2) and of the adjudicator on a dispute given under clause 66(6) unless and until that decision is revised by agreement of the employer and contractor or pursuant to clause 66.

There is further confusion when the matter of dissatisfaction procedure has been exhausted. A party may at any time refer a dispute to conciliation under the ICE Conciliation Procedure.

This provision in Clause 5 can be summarised as follows: The parties may at any time before commencing arbitration proceedings seek the agreement of the other for the dispute to be considered under the Institution of Civil Engineers' Conciliation Procedure (1994) and if the other party agrees to this procedure any recommendation of the conciliator shall be deemed to have been accepted as finally determining the dispute by agreement unless a Notice of Adjudication or a Notice to Refer to arbitration has been served in respect of that dispute not later than 1 month after receipt of the recommendation by the dissenting party.

This simply gives another option to the parties to choose the way in which to resolve the dispute. This procedure cannot be instigated once a notice of arbitration has been issued but there is nothing that prevents a conciliation after an adjudication, or even during the adjudication if the parties so desire.

Clause 66(6) in the ICE contracts, which deals with adjudication, is simple because it refers to the separate adjudication procedure. The principles of this clause are as follows:

The parties each have the right to refer any dispute as to a matter under the contract for adjudication and either party may give notice in writing to the other at any time of his intention so to do. The adjudication shall be conducted under the Institution of Civil Engineers' Adjudication Procedure (1997). Unless the adjudicator has already been appointed he is to be appointed by a timetable with the object of securing his appointment and referral of the dispute to him within seven days of such notice. The adjudicator shall reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.

The Institution of Civil Engineers' Adjudication Procedure

Unfortunately Thomas Telford, the publishers of the Procedure, have made it financially impossible for us to reproduce the Procedure in full and the reader will note its absence from our appendices.

Paragraph 3 of the Procedure deals with the appointment and it can be summarised as follows.

Paragraph 3.1 provides that where an adjudicator is named in the contract or has been agreed by the parties prior to the issue of the notice of adjudication, the referring party issues the notice of adjudication to the responding party and to the adjudicator, together with a request for confirmation from the adjudicator within four days of the date of issue of the notice of adjudication that he is able and willing to act.

Paragraph 3.2 provides that where an adjudicator has not been so named or agreed, the referring party may include with the notice the names and addresses of one or more persons

who have agreed to act for selection by the responding party who shall select and notify the referring party and the selected adjudicator within four days of the date of issue of the notice of adjudication.

Paragraph 3.3 provides that if an adjudicator is not selected in the aforesaid manner then either party may within a further three days request the person or body named in the contract, or if none is so named The Institution of Civil Engineers, to appoint the adjudicator.

Paragraph 3.4 provides that the adjudicator shall be appointed on the terms and conditions set out in the ICE Adjudicator's Agreement and Schedule and shall be entitled to be paid a reasonable fee together with his expenses. The parties shall sign the agreement within seven days of being requested to do so.

Paragraph 3.5 provides that if for any reason whatsoever the adjudicator is unable to act, either party may require the appointment of a replacement adjudicator in accordance with the procedure in paragraph 3.3.

The provisions on appointment deal with all possible options. The adjudicator can be appointed in the contract, agreed by the parties prior to the issue of the notice of adjudication, or where the adjudicator cannot be agreed the Institution of Civil Engineers will appoint. There is also the option to propose names of potential adjudicators at the time the notice of adjudication is issued. There is a standard form of Adjudicator's Agreement and Schedule. This covers the terms and conditions on which the adjudicator is appointed.

There is also a standard form on which to apply to the ICE for the selection or appointment of an adjudicator.

Civil Engineering Contractors Association sub-contracts

The Civil Engineering Contractors Association (CECA) is the successor body to the FCEC. The FCEC were responsible for publication of the old FCEC Blue Forms of Sub-contract for use with the ICE main contract forms. The main theme of those forms was to seek to make as far as possible the sub-contract forms 'back to back' with the main contracts. A similar approach has been adopted on those amendments brought about by the Act.

CECA produces a wide range of standard forms which relate to the following forms:

- ICE Conditions of Contract 5th Edition
- ICE Conditions of Contract 6th Edition
- ICE Conditions of Contract for Design and Construct
- GC & PC/Works/1 with quantities (including the without quantities supplement)
- GC & PC/Works/Single Stage Design and Build.

The provisions of the CECA forms of sub-contract relating to the ICE 6th edition are as follows:

18(1) If any dispute or difference shall arise between the Contractor and the Sub-Contractor or in connection with or arising out of the Sub-Contract, or the carrying out of the Sub-Contract Works (excluding a dispute concerning VAT but including a dispute as to any act or omission of the Engineer) whether arising during the progress of the Sub-Contract Works or after their completion it shall be settled in accordance with the following provisions.

(2) (a) Where the Sub-Contractor seeks to make a submission that payment is due of any amount exceeding the amount determined by the Contractor as due to the Sub-Contractor or that any act, decision, opinion, instruction or direction of the Contractor or any other matter arising under the Sub-Contract is unsatisfactory, the Sub-Contractor

shall so notify the Contractor in writing, stating the grounds for such submission in sufficient detail for the Contractor to understand and consider the Sub-Contractor's submission

(b) Where in the opinion of the Contractor such a submission gives rise to a matter of dissatisfaction under the Main Contract, the Contractor shall so notify the Sub-Contractor in writing as soon as possible. In that event, the Contractor shall pursue the matter of dissatisfaction under the Main Contract promptly and shall keep the Sub-Contractor fully informed in writing of progress. The Sub-Contractor shall promptly provide such information and attend such meetings in connection with the matter of dissatisfaction as the Contractor may request. The Contractor and the Sub-Contractor agree that no such submission shall constitute nor be said to give rise to a dispute under the Sub-Contract unless and until the Contractor has had the time and opportunity to refer the matter of dissatisfaction to the Engineer under the Main Contract and either the Engineer has given his decision or the time for the giving of a decision by the Engineer has expired.

The first part of this clause gives the link between the main and the sub-contracts. There are no actual provisions concerning matters of dissatisfaction themselves within the sub-contract but the link is to matters of dissatisfaction arising under the main contract. This enables the main contractor to postpone any adjudication with the sub-contractor where in the main contractor's opinion the matter in dispute gives rise to a matter of dissatisfaction under the main contract. This may involve the sub-contractor with a wait of more than one month before the engineer under the main contract has given his decision or the time for giving that decision has expired.

The sub-contractor and main contractor have an agreement similar to that in the main contract that a dispute does not arise until the matter of dissatisfaction procedure under the main contract has been completed. All the same arguments as we have considered in respect of the main contract apply here also and we have no doubt that the adjudicator should proceed with an adjudication when so requested by a sub-contractor even if the main contractor objects.

The provisions on conciliation are similar to those under the main contract:

(3) (a) The Contractor or the Sub-Contractor may at any time before service of a Notice to Refer to arbitration under sub-clause 18(7) by notice in writing seek the agreement of the other for the dispute to be considered under the Institution of Civil Engineers' Conciliation Procedure (1994) or any amendment or modification thereof being in force at the date of such notice

(b) If the other party agrees to this procedure any recommendation of the conciliator shall be deemed to have been accepted as finally determining the dispute by agreement so that the matter is no longer in dispute unless a Notice of Adjudication under sub-clause 18(4) or a Notice to Refer to arbitration under sub-clause 18(7) is served within 28 days of receipt by the dissenting party of the conciliator's recommendation.

Note that again conciliation cannot be commenced where there is a notice to refer to arbitration but this restriction does not apply to adjudication.

The adjudication provisions rely on the ICE Adjudication Procedure:

(4) (a) The Contractor and the Sub-Contractor each has the right to refer any dispute under the Sub-Contract for adjudication and either party may at any time give notice in writing (hereinafter called the Notice of Adjudication) to the other at any time of his intention to refer the dispute to adjudication. The Notice of Adjudication and the appointment of the adjudicator shall, save as provided under sub-clause 18(10)(b), be as provided at para-

graphs 2 and 3 of the Institution of Civil Engineers' Adjudication Procedure (1997). Any dispute referred to adjudication shall be conducted in accordance with the Institution of Civil Engineers' Adjudication Procedure (1997) or any amendment or modification thereof being in force at the time of the appointment of the adjudicator.

(b) Unless the adjudicator has already been appointed he is to be appointed by a timetable with the object of securing his appointment and referral of the dispute to him within 7 days of such notice.

...

(10) (b) If a Main Contract Dispute has been referred to conciliation or adjudication under the Main Contract and the Contractor is of the opinion that the Main Contract Dispute has any connection with a dispute which is to be (but has not yet been) referred for conciliation or adjudication under this Sub-Contract (hereinafter called a Connected Dispute), the Contractor may by notice in writing require that the Connected Dispute be referred to the conciliator or adjudicator to whom the Main Contract Dispute has been referred.

Clause 66(10)(b) places a bar on any sub-contract dispute being referred to a separate adjudicator if the main contractor so requires. This does place an obligation on the main contractor to tell the sub-contractor on receipt of a notice of adjudication from the sub-contractor that it is a connected dispute. If this is not done and the sub-contractor obtains the appointment of a different adjudicator there may be some arguments put forward by the contractor but the use of the same adjudicator is not a contractual obligation, being merely at the discretion of the main contractor, and it does seem that the adjudicator procured by the sub-contractor should get on with the adjudication as referred by the sub-contractor in such circumstances. If the adjudicator already appointed under the main contract dispute were to decline to take the connected dispute for any reason, this could not in any way prevent another adjudicator from taking it.

Government contracts

Adjudication existed before 1998 under government contracts; the predecessor (GC Wks/1 Edition 3) to the new forms of contract had an adjudication provision. There are now four new forms, which all have adjudication provisions to comply with the Act. The premise is that the adjudicator is appointed from the outset and that he should be named in the Abstract of Particulars.

The adjudication provisions on appointment are as follows.

Condition 59 Adjudication

(1) The Employer or the Contractor may at any time notify the other of intention to refer a dispute difference or question arising under, out of, or relating to, the Contract to adjudication. Within 7 Days of such notice, the dispute may by further notice be referred to the adjudicator specified in the Abstract of Particulars.

(2) The notice of referral shall set out the principal facts and arguments relating to the dispute. Copies of all relevant documents in the possession of the party giving the notice of referral shall be enclosed with the notice. A copy of the notice and enclosures shall at the same time be sent by the party giving the notice to the PM, the QS and the other party.

(3) (a) If the person named as the adjudicator in the Abstract of Particulars is unable to act, or ceases to be independent of the Employer, the Contractor, the PM and the QS, he shall be substituted as provided in the Abstract of Particulars.

(b) It shall be a condition precedent to the appointment of an adjudicator that he shall notify both parties that he will comply with this Condition and its time limits.

(c) The adjudicator, unless already appointed, shall be appointed within 7 Days of the giving of a notice of intention to refer a dispute to adjudication under paragraph (1). The Employer and the Contractor shall jointly proceed to use all reasonable endeavours to complete the appointment of the adjudicator and named substitute adjudicator. If either or both such joint appointments has not been completed within 28 Days of the acceptance of the tender, either the Employer or the Contractor alone may proceed to complete such appointments. If it becomes necessary to substitute as adjudicator a person not named as adjudicator or substitute adjudicator in the Abstract of Particulars, the Employer and Contractor shall jointly proceed to use all reasonable endeavours to appoint the substitute adjudicator. If such joint appointment has not been made within 28 Days of the selection of the substitute adjudicator, either the Employer or Contractor alone may proceed to make such appointment. For all such appointments, the form of adjudicator's appointment prescribed by the Contract shall be used, so far as is reasonably practicable. A copy of each such appointment shall be supplied too [sic] each party. No such appointment shall be amended or replaced without the consent of both parties.

One of the qualifications for appointment as adjudicator under this form is given in paragraph (3)(b). Any adjudicator appointed must comply with the requirements of condition 59. This should not cause any delay to an adjudication even if an adjudicator has not been named in the contract as this undertaking can be obtained very quickly by exchange of fax at the same time as the initial approach is made to the adjudicator.

NEC Engineering and Construction Contract

The New Engineering Contract was the form that Latham sought to be used as the model for a new universal construction contract. The recommendations of the Latham report have not borne fruit. The industry is not adopting this as its model form. What was the New Engineering Contract became the NEC Engineering and Construction Contract. The original New Engineering Contract contained its own provisions on adjudication. These provisions did not comply with the requirements of the Act. It was therefore necessary to make new adjudication provisions that do comply with the Act. The printed forms of contract have not been amended to reflect the Act but there is an addendum booklet, ADDENDUM Y(UK)2 (Ref NEC/ECC/Y(UK)2/April 1998, which accompanies all forms of the NEC contract.

Clause 90 Avoidance and settlement of disputes

Clause 90.1 requires that the parties and the project manager follow this procedure for the avoidance and settlement of disputes.

Clause 90.2 allows the contractor if dissatisfied with an action or a failure to take action by the project manager to notify that dissatisfaction to the project manager no later than four weeks after he became aware of the action or after he became aware that the action had not been taken. Within two weeks of such notification of dissatisfaction, the contractor and the project manager attend a meeting to discuss and seek to resolve the matter.

Clause 90.3 provides that if either party is dissatisfied with any other matter, he notifies his dissatisfaction to the project manager and to the other party no later than four weeks after he became aware of the matter. Within two weeks of such notification of dissatisfaction, the parties and the project manager attend a meeting to discuss and seek to resolve the matter.

Clause 90.4 provides that the parties agree that no matter shall be a dispute unless a notice of dissatisfaction has been given and the matter has not been resolved within four weeks.

Clause 90.5 provides that either party may give notice to the other party at any time of his intention to refer a dispute to adjudication. The notifying party refers the dispute to the adjudicator within seven days of the notice.

Document NEC/ECC/Y(UK) 2 April 1995 also includes an addendum clause 90 relating to sub-contracts which is drafted in the same terms as clause 90 of the main contract addendum.

Not surprisingly with their engineering background, both these contracts adopt similar provisions to the ICE contracts for avoidance and settlement of disputes. Matters of dissatisfaction form the preliminary procedure before the dispute can come into being. When the matter of dissatisfaction procedure is complete, either party can simply then refer the dispute to adjudication.

The Institution of Chemical Engineers' Form of Contract 2001

Clause 46 of the Red Book, Lump Sum Contracts, includes the following clauses leading up to the appointment of an adjudicator:

46.1 This Clause 46 shall only apply to disputes under a construction contract as defined in the Housing Grants, Construction and Regeneration Act 1996, or any amendment or re-enactment thereof.

46.2 Notwithstanding any provision in these General Conditions for a dispute to be referred to an *Expert* in accordance with Clause 47 (Reference to an Expert) or to Arbitration in accordance with Clause 48 (Arbitration), either party shall have the right to refer any dispute or difference (including any matter not referred to the *Project Manager* in accordance with Sub-clause 45.3) as to a matter under or in connection with the *Contract* to adjudication and either party may, at any time, give notice in writing to the other of his intention to do so (hereinafter called a 'Notice of Adjudication'). The ensuing adjudication shall be conducted in accordance with the edition of the 'Adjudication Rules' (the 'Rules') published by IChemE current at the time of service of the Notice of Adjudication.

46.3 Unless the adjudicator has already been appointed, he is to be appointed to a timetable with the object of securing his appointment within seven days of the service of the Notice of Adjudication. The appointment of the adjudicator shall be effected in accordance with the Rules.

Unfortunately the IChemE, while allowing reproduction of excerpts of its contract, has not given permission to reproduce its adjudication rules. We therefore précis the nomination procedure as follows.

Clause 3: Procedure for nomination

Clause 3.1 provides the right required by the Act to refer any dispute to adjudication at any time. The extent of the matters that can be referred includes matters arising in connection with the contract.

Clause 3.2 is in identical words to clause 3.1 of the ICE Adjudication Procedure. Where an adjudicator is named in the contract or has been agreed by the parties prior to the issue of the Notice of Adjudication, the referring party issues the Notice of Adjudication to the

responding party and to the adjudicator, together with a request for confirmation from the adjudicator within four days of the date of issue of the notice of adjudication that he is able and willing to act.

Clause 3.3 is again in identical terms to clause 3.2 of the ICE Adjudication Procedure. This provides that if an adjudicator is not selected in the aforesaid manner then either party may within a further three days request the person or body named in the contract or if none is so named The Institution of Civil Engineers to appoint the adjudicator.

Clause 3.4 is framed in similar terms, other than the nominator, to clause 3.3 of the ICE Adjudication Procedure. If an adjudicator is not selected in the aforesaid manner then either party may within a further three days request the President for the time being (or a Past President) of the IChemE to appoint an adjudicator. This application is required to be in a specific form which is included as Annex C to the Rules.

Clause 3.5 follows clause 3.5 of the ICE Procedure and provides that if for any reason whatsoever the adjudicator is unable to act, either party may require the appointment of a replacement adjudicator in accordance with the procedure in paragraph 3.3.

These clauses are very clear as to the procedure to be adopted and cater for every eventuality including the inability of an appointed adjudicator to act. The inclusion of an application form to the IChemE as the ANB is not something that is generally done elsewhere because where there are alternative ANBs named in a contract, or none at all, the inclusion of the application form for one ANB would not be proper and the inclusion of a form to cater for the individual requirements of every ANB that might be used is clearly impossible.

The requirements of the notice (of adjudication) under this form are that 'details of the matter in dispute' are given. This is far less prescriptive than the Scheme but providing that the details are sufficient for the other party, the IChemE as ANB and the adjudicator to identify the extent of the dispute referred and the adjudicator's jurisdiction, it will be perfectly adequate.

Clauses 4 and 5

The form then continues in clauses 4 and 5 to deal with the acceptance of nomination and confirmation of appointment.

Clause 4 provides that in the event that the selected nominee is willing to act as the adjudicator, he is to inform the parties in writing. He is also required to complete the form of agreement as given in Annex B and issue it to the parties for signature by them within seven days.

Clause 5 provides that signing the form of agreement and its return to the adjudicator by either of the parties shall constitute confirmation of the adjudicator's appointment, and thereafter the requirements of clauses 6 to 8 (dealing with the procedure after the adjudicator's appointment) shall apply.

The Association of Consulting Engineers

The ACE issued the second edition of its conditions of engagement in 1998. This includes a very simple adjudication provision as follows:

> Either party may refer any dispute arising under this agreement to adjudication in accordance with the Construction Industry Council Model Adjudication Procedure.

The appointment of the adjudicator will therefore follow the procedures set out in the CIC Procedure.

The Construction Industry Council Model Adjudication Procedure

The appointment provisions in the CIC Procedure 3rd Edition are as follows:

> 10. If an adjudicator is named in the Contract he shall within 2 days of receiving the Notice confirm his availability to act. If no adjudicator is named, or if the named adjudicator does not so confirm, the referring Party shall request the body named in the Contract, if any, or if none, the Construction Industry Council, to nominate an Adjudicator within 5 days of receipt of the request. The request shall be in writing, accompanied by a copy of the Notice and the appropriate fee. Alternatively the Parties may, within 2 days of the giving of the Notice appoint the Adjudicator by agreement.

The CIC Procedure provides for the eventuality of the nominated adjudicator being unable to act by allowing for a further nomination. It also has a standard Adjudicator's Agreement.

Clause 12 of the CIC Procedure provides for objections to a particular adjudicator in the following way:

> 12. If a Party objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the Adjudicator's appointment or any decision he may reach.

Centre for Effective Dispute Resolution

The CEDR Adjudication Rules require that a copy of the notice of adjudication is sent by the referring party to the adjudicator if he is named in the contract and that the adjudicator is required to notify the parties in writing that he is available to act.

The CEDR Rules also deal with the situation where no adjudicator is named in the contract, as follows:

> 2. If no Adjudicator is named in the contract or if the named Adjudicator does not confirm his or her availability to act then the Referring Party shall immediately apply to the Centre for Effective Dispute Resolution ('CEDR Solve') using CEDR Solve's application form to nominate an Adjudicator. CEDR Solve shall nominate an Adjudicator and communicate the nomination to all the parties within 5 days of receipt of:
>   - The completed application form
>   - A copy of the Notice of Adjudication
>   - CEDR Solve's nomination fee.
> 3. The Adjudicator shall, within 24 hours of receipt of the nomination, confirm in writing to the Parties that he or she is available to act, whether in response to receiving the Notice or to a nomination by CEDR Solve. The Adjudicator shall provide to them, at the same time, a copy of the terms on which he or she is prepared to act including information regarding fees and expenses.

As we have already discussed, it will be usual for any nominated adjudicator to confirm his terms to the parties on receipt of the nomination. These rules merely make than obligatory.

The Technology and Construction Solicitors' Association

The provisions relating to the appointment of the adjudicator in Version 2.0 of the TeCSA Adjudication Rules are very similar to those in the CEDR Rules and they too require that the adjudicator confirms availability.

The relevant provisions are as follows:

4. Where the Parties have agreed upon the identity of an adjudicator who confirms his readiness and willingness to embark upon the Adjudication within 7 days of receipt of the notice requiring adjudication, then that person shall be the Adjudicator.
5. Where the Parties have not so agreed upon an adjudicator or where such person has not so confirmed his willingness to act, then any Party shall apply to the Chairman of TeCSA for a nomination. The following procedure shall apply:
   (i) The application shall be in writing accompanied by a copy of the Contract, a copy of the written notice requiring adjudication and TeCSA's appointment fee of £100.
   (ii) The Chairman of TeCSA shall endeavour to secure the appointment of an Adjudicator within 7 days from the notice requiring adjudication.
   (iii) Any person so appointed, and not any person named in the contract whose readiness and willingness is in question, shall be the Adjudicator.
6. Within 7 days from the date of the [notice requiring adjudication]:
   (i) provided that he is willing and able to act, any agreed Adjudicator under Rule 4 or nominated Adjudicator under Rule 5(ii) shall give written notice of his acceptance of appointment to all parties, and;
   (ii) the referring party shall serve the Referral Notice on the Adjudicator and the Responding Party.

Final comments

There are, as described above, numerous variants in terms of the detailed procedure that enables a party desiring adjudication to get an adjudicator appointed. The ideal way is to agree an adjudicator who is available and suitable to deal with the dispute. Failing this the Act requires the contract to include a procedure to allow for nomination by an ANB within the required seven-day period. Either by means of the procedure in the contract or, should there be none, by the appointment provisions in the Scheme, an adjudicator will be in place and in all normal circumstances be ready to receive the referral by the seventh day.