Chapter 9
Jurisdiction, Powers and Duties

The three subjects of this chapter are closely linked. They are analogous to an egg. The shell is jurisdiction, the white or albumen is the powers and the yolk the duties. The white is always bounded by the shell. The yolk is bounded within the white and also the shell. Jurisdiction delimits the thing that the adjudicator is there to do. Powers deal with the way in which he can do it. The adjudicator's duties relate to both his jurisdiction and his powers. The parties also have duties placed upon them. We shall touch on these as we develop this chapter.

What are jurisdiction, powers and duties in essence?

The word jurisdiction is used to describe the nature and extent of the adjudicator's task. Jurisdiction is the authority granted to a man so that he can exercise justice in respect of matters brought before him. It will arise from the agreement between the parties that disputes will be referred to adjudication. It will, however, be limited by the character of the questions to be answered as are properly referred to him based on the notice of adjudication.

The powers of the adjudicator are what he is permitted to do in carrying out his task. They can arise in one of two ways. They can be set out within the parties' contract, either in the contract conditions themselves or within adjudication rules adopted by the parties, or they can come from the Scheme in the absence of a regime in the parties' contract. In either case the adjudicator has extremely wide powers as the very nature of the adjudication process, particularly the time limitation, means that he must be able to require the parties to assist him in his task and also be able to take steps to overcome any failure on the part of one or both parties in this respect.

The adjudicator's principal duty is to reach a decision within the time limit. He has one other overriding specific duty and that is to be impartial. There may be other duties imposed upon him, for example the requirements in paragraph 12 of the Scheme to the effect that he must reach his decision in accordance with the applicable law in relation to the contract and that he avoids incurring unnecessary expense.

Jurisdiction

The basic principles relating to the jurisdiction of an adjudicator are very simple. There must be a dispute and it must arise under a construction contract as defined in the Act. There are certain aspects in which this basic concept is widened, for example the parties can agree that adjudication applies to contracts that are not within the definition of construction contracts or that it can apply to matters wider than those arising under the contract.

The courts have now considered the adjudicator's jurisdiction in several cases. Many of these relate to the question of whether or not there was a dispute at the time that the notice of

adjudication was given. This point has been considered in two recent cases, *Beck Peppiatt* v. *Norwest Holst*[1] and *Orange* v. *ABB*[2].

In both these cases it was confirmed that the proper way to define whether or not a dispute exists is that in *Halki* v. *Sopex*[3]. That definition is that 'there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable'.

In the former, Forbes J, the judge in charge of the Technology and Construction Court, said that the law is satisfactorily stated in *Sindall* v. *Solland*[4] as follows:

> '4. . . . For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided.
> 5. In my view, Judge Lloyd's definition is simple and easily applied. It accords with the ordinary meaning of the English word ''dispute'' and has much to commend it. It is not in conflict with Halki. . .'

In *Cowling* v. *CFW*[5] it was confirmed that for there to be a dispute capable of being referred to adjudication, the referring party must be careful to ensure that the responding party has had sufficient prior opportunity to consider the matters which are intended to be raised.

In *Pegram* v. *Tally Wiejl*[6] the Court of Appeal considered questions relating to whether an adjudicator was properly appointed under the Scheme. This judgment deals with a specific situation relating to the adjudicator's appointment but paragraphs 8 to 12 inclusive are well worth reading for the Court of Appeal's appraisal of adjudication.

The Court of Appeal has considered a number of points regarding adjudicators' jurisdiction that relate to specific aspects of interpretation of the Act and we deal with these elsewhere.

Can the adjudicator determine his own jurisdiction?

The general rule is that the adjudicator has no jurisdiction to decide his own jurisdiction. This comes from arbitration before the Arbitration Act 1996. The two cases which confirm this point are *Smith* v. *Martin*[7] and the *Christopher Brown* v. *Oesterreichischer* case.[8] The principle established in this case is that 'Arbitrators whose jurisdiction is challenged are entitled to make their own inquiries into the question whether or not they have jurisdiction in order to determine their own course of action, although the result of their inquiry can have no effect on the rights of the parties. Their award is in no way affected by the fact that it expressly or impliedly refers to a finding by the arbitrators as to their jurisdiction.'

In *Project Consultancy* v. *The Gray Trust*[9], an adjudication case, the *Christopher Brown* case was used in argument as to whether or not there was an ad hoc submission to allow the adjudicator to determine his own jurisdiction. The argument failed; the complaining party

[1] *Beck Peppiatt Ltd* v. *Norwest Holst Construction Ltd* [2003] BLR 316.
[2] *Orange EBS Ltd* v. *ABB Ltd* [2003] BLR 323.
[3] *Halki Shipping Corporation* v. *Sopex Oils Ltd* [1998] 1 WLR 726.
[4] *Sindall Ltd* v. *Solland and Others* (15 June 2001).
[5] *Cowling Construction Ltd* v. *CFW Architects* (15 November 2002).
[6] *Pegram Shopfitters Ltd* v. *Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750, CA.
[7] *Smith* v. *Martin* [1925] 1 KB 745.
[8] *Christopher Brown* v. *Oesterreichischer Waldesbesitzer* [1954] 1 QB 8.
[9] *The Project Consultancy Group* v. *The Trustees of The Gray Trust* (16 July 1999).

had successfully reserved its position on jurisdiction. The distinction made in this case with the *Christopher Brown* case was as follows:

> '7. Ms Rawley draws an analogy between the position of an adjudicator and that of an arbitrator as it was at common law before section 30 of the Arbitration Act 1996 came into force. At common law, an arbitrator was able to inquire into his jurisdiction in order to determine what course of action to follow, but the result of his inquiry could have no effect on the rights of the parties. She draws my attention to *Christopher Brown Ltd* v. *Genossenschaft Oesterreichischer* [1954] 1 QB 8, 12-13. I do not find this analogy helpful. The question in the present case is one of statutory interpretation: what does ''decision'' in section 108(3) mean? I do not see how the common law position of arbitrators in relation to their own jurisdiction can shed any light on that. In any event, it is to be noted that Devlin J said that the result of an arbitrator's inquiry as to his own jurisdiction ''has no effect whatsoever upon the rights of the parties''. A decision by an adjudicator does have an effect on the rights of the parties in the sense that, if an adjudicator decides to make an award, the paying party is obliged to pay up at once, since the decision is binding until the dispute is finally resolved by one means or another.'

In our view the best guidance that currently exists on whether or not an adjudicator can decide his own jurisdiction is found in *Fastrack* v. *Morrison*[10]:

> '31. If a party challenges the entire jurisdiction of the adjudicator, as Morrison does, it has four options. Firstly, it can agree to widen the jurisdiction of the adjudicator so as to refer the dispute as to the adjudicator's jurisdiction to the same adjudicator. If the referring party agrees to that course, and the appointed adjudicator accepts the reference to him of this second dispute, the jurisdiction of the adjudicator could then be resolved as part of the reference. The challenging party could, secondly, refer the dispute as to jurisdiction to a second adjudicator. This would not put a halt to the first adjudication, if that had already led to an appointment, since the adjudicator has a statutory duty, unless both parties agree otherwise, to decide the reference in a very short timescale. The challenging party could, thirdly, seek a declaration from the court that the proposed adjudication lacked jurisdiction. This option is of little utility unless the adjudicator has yet to be appointed or the parties agree to put the adjudication into abeyance pending the relatively speedy determination of the jurisdiction question by the court. The Technology and Construction Court can, for example, resolve questions of that kind within days of them being referred to it. Fourthly, the challenging party could reserve its position, participate in the adjudication and then challenge any attempt to enforce the adjudicator's decision on jurisdictional grounds. That is the course adopted by Morrison.
> 32. The adjudicator can, of course, investigate any partial or entire jurisdictional challenge. He could, if he was satisfied it was a good one, decline to adjudicate on the part of the reference he regarded as lacking jurisdiction. Alternatively, he could decide that the challenge was a bad one and proceed with the substance of the adjudication. That is what happened in this adjudication. However, unless the parties have vested the jurisdictional dispute in the hands of the adjudicator in addition to the underlying dispute, the adjudicator cannot determine his own jurisdiction and the challenging party may seek to avoid enforcement proceedings by showing that the sum claimed was decided upon without jurisdiction. The court would give appropriate weight to any findings of fact relevant to that jurisdictional challenge but would not be bound by them and would either have to bear out the challenge with evidence or, if that was not necessary, determine the challenge and either enforce or decline to enforce the whole or part of the adjudicator's decision depending on the decision reached as to jurisdiction. The role of the court in a jurisdictional challenge summarised here is supported by recent decisions in the Technology and Construction Court, particularly the decision of my own in *Sherwood & Casson Ltd* v. *Mackenzie*, unreported, 30 November 1999; *The Project Consultancy Group* v.

[10] *Fastrack Contractors Limited* v. *(1) Morrison Construction Limited (2) Imreglio UK Limited* (4 January 2000).

The Trustees of the Gray Trust, unreported, 16 July 1999, Dyson J; and dicta in *Macob Civil Engineering Ltd* v. *Morrison Construction Ltd* [1999] Building Law Reports 93, Dyson J.'

There are interesting points in *Christiani & Neilsen* v. *The Lowry Centre*[11] concerning ad hoc agreements to decide jurisdiction and jurisdiction to decide a particular dispute referred:

'**The First Issue – Did the parties agree that the adjudicator could determine his own jurisdiction?**
It is trite law that the adjudicator had no jurisdiction to decide whether he had jurisdiction to act as an adjudicator under the scheme provided for by the HGCRA. This limitation was one which the adjudicator clearly accepted that he was subject to. However, the parties to an adjudication can always agree to vest in the adjudicator ad hoc jurisdiction to determine his own jurisdiction. Thus, the parties could have agreed to vest the adjudicator with the power to decide whether or not the relevant contract under which the dispute arose was entered into before 1 May 1998. What the status of such a decision would have been, and whether or not it could be challenged on the ground that it disclosed an error of law can only be decided following a consideration of the express and implied terms of the agreement to confer such ad hoc jurisdiction. I must therefore first determine whether such an agreement was entered into by the parties.
It has to be borne in mind when considering whether the parties did reach such an agreement that an adjudicator, faced with a challenge to his own jurisdiction, has a choice as to how to proceed. The adjudicator has three options:

1. He can ignore the challenge and proceed as if he had jurisdiction, leaving it to the court to determine that question if and when his decision is the subject of enforcement proceedings.
2. Alternatively, the adjudicator can investigate the question of his own jurisdiction and can reach his own conclusion as to it. If he was to conclude that he had jurisdiction, he could then proceed to decide the dispute that had been referred to him. That decision on the merits could then be challengeable by the aggrieved party on the grounds that it was made without jurisdiction if the adjudicator's decision on the merits was the subject of enforcement proceedings.
3. Having investigated the question, the adjudicator might conclude that he had no jurisdiction. The adjudicator would then decline to act further and the disappointed party could test that conclusion by seeking from the court a speedy trial to determine its right to an adjudication and the validity of the appointment of the adjudicator.

It is clearly prudent, indeed desirable, for an adjudicator faced with a jurisdictional challenge which is not a frivolous one to investigate his own jurisdiction and to reach his own non-binding conclusion as to that challenge. An adjudicator would find it hard to comply with the statutory duty of impartiality if he or she ignored such a challenge. Thus, given that the adjudicator in this case was clearly conscious of, and conscientiously seeking to comply with, his duty to act impartially, I have to consider whether the procedure adopted by him prior to his reaching his conclusion as to his own jurisdiction was one that followed an agreement to confer on him ad hoc jurisdiction to determine his own jurisdiction or was one which followed his adoption of an impartial procedure to assist him in reaching his own non-binding conclusion as to that jurisdiction.'

The important point here is that the adjudicator can make his own non-binding conclusion on jurisdiction. There is little point in framing such a conclusion as 'forming a view'; it is a decision which does not bind the parties and can be dealt with at enforcement. This decision does not give the adjudicator jurisdiction per se; it merely allows him to proceed or resign.

Where the parties give the adjudicator ad hoc jurisdiction to decide his own jurisdiction they will be bound by the decision he makes (*Whiteways* v. *Impresa Castelli*[12]). The jurisdiction was given here in the form of a letter and written submissions by the parties on jurisdiction.

[11] *Christiani & Nielsen Limited* v. *The Lowry Centre Development Centre Limited* (16 June 2000).
[12] *Whiteways Contractors (Sussex) Limited* v. *Impresa Castelli Construction UK Limited* (9 August 2000).

There is one area where there is express authority under the Scheme for the adjudicator to make a binding decision on jurisdiction. This is contained in paragraph 9(2) where the adjudicator can decide to resign when the dispute is substantially the same as one which has been previously decided (see *Sherwood & Casson* v. *Mackenzie*[13]).

Independence

An adjudicator may be acting beyond his jurisdiction if he is not independent of the parties or the subject matter of the dispute, so it is worth examining this concept here.

There is no general requirement that the adjudicator is independent. Independence in this sense means having no connection with either party or the subject matter of the dispute. The Act does not require the adjudicator to be independent. The Scheme, in paragraph 4, has a requirement that goes some way towards a requirement of independence. The adjudicator has to be a natural person acting in his personal capacity. Under the Scheme the adjudicator cannot be an employee of any of the parties to the dispute. If he has any interest, financial or otherwise, in any matter relating to the dispute he is not eligible to act as adjudicator. This would bar a firm of consultants who are acting for the employer either on the project in question or on another project.

It may be a requirement of the contract that the adjudicator is independent. Forms GC/Works/1, 2, 3 and 4 have this requirement. Such a term, although it goes beyond the requirements of the Act, is nevertheless enforceable and would go to the adjudicator's jurisdiction to act.

If there is no requirement for independence, as we have discussed in Chapter 7, there is nothing to prevent the employer naming his architect as adjudicator, or the main contractor appointing a commercial director as adjudicator in a sub-contract. Such a prospective appointee would have to consider the rules of conduct of his professional institution which may have a bearing on such a matter. The real problem with lack of independence is that it may encroach on impartiality as judged by the innocent bystander. If an adjudicator is perceived not to be impartial in this way he will not be complying with a basic requirement of the Act and thus will fail in this aspect of the jurisdictional requirements of an adjudicator.

Impartiality, natural justice, fairness and bias

The adjudicator has a duty to act impartially. This is founded in the Act. All of the contracts contain this duty. The Scheme in paragraph 12 requires that adjudicators shall act impartially. To act with impartiality or to be impartial is no more than to treat the parties equally. This does not mean that each is entitled to an equal amount of time. It is simply a matter of balance and the quality rather than some distribution of a timetable. In the way in which he conducts his inquiry and concludes with a decision the adjudicator must constantly remain impartial. Lack of impartiality manifests itself in bias. The adjudicator must be unbiased both in terms of showing no actual bias and there being no impugned bias. Impugned bias is to be seen to be biased whether you are actually biased or not. While impartiality may seem simple to define, it is difficult to exercise in practice. If a party does not feel the sense of being treated equally it will probably seek to attack the adjudicator or the decision on grounds of bias.

[13] *Sherwood & Casson Limited* v. *Mackenzie* (30 November 1999).

Does the duty to act impartially include the rules of natural justice or fairness? The drafting of the Act took certain provisions from the Arbitration Act 1996. Section 33(1)(a) of the Arbitration Act 1996 states: 'act fairly and impartially as between the parties, giving each party a reasonable opportunity to appoint his case and dealing with that of his opponent'. Fairly and impartially are not synonymous. There are those who would argue that a procedure to resolve disputes which is limited to a 28-day duration is inherently unfair. It is also argued that the failure to repeat the word 'fairly' from the phrase in the Arbitration Act 1996 means that the adjudicator need not be fair. It follows that if the adjudicator can act in an unfair way this supports the premise that the whole process is unfair. It may be reasonable to seek to imply a term of fairness, but it is not necessary to do so. The system of adjudication can work without such an implied term. To act fairly is to be just and unbiased and to operate in accordance with the rules. There is a link here with impartiality in that the adjudicator must behave in an unbiased way. It must follow that an adjudicator who acts impartially will also act fairly. The system with the restraint of a 28-day process, may give an impression that this will lead to unfairness. The adjudicator should always act in an even-handed manner insofar as the time and the conduct of the parties permit.

Do the rules of natural justice apply to adjudication? Adjudication is a judicial process. The adjudicator is applying the facts and the law to reach a decision on the rights of the parties to the contract. It also permits an inquisitorial approach rather than the traditional adversarial approach to resolving disputes. The term 'procedural fairness' has been coined to describe the way in which an adjudicator should act and this can be summarised as follows:

> the adjudicator must be, and must be seen to be, disinterested and unbiased; every party to the dispute must be given a reasonable opportunity to present its case and to answer the case of its opponent.

It would be difficult to operate outside of these rules and comply with the express duty to act impartially. However, in a procedure of such short duration, the rules of natural justice may prove to be particularly difficult to comply with. They will also be read having regard to the constraints of the timetable. Giving each party a fair opportunity to present its case and to deal with that of its opponent does not mean that inordinate time should be required or allowed. Providing the adjudicator maintains balance between the parties and tailors his inquiry to that properly necessary to reach a decision, he should not fall foul of the rules of natural justice.

There have been a number of cases where the courts have examined allegations of lack of impartiality by adjudicators or procedural unfairness during the course of the adjudication.

The basic principle was set in *Macob* v. *Morrison*, which we have already mentioned on a number of occasions. An adjudicator's decision is enforceable summarily in the courts whether or not there has been procedural irregularity, error or breach of natural justice.

This concept has been considerably eroded by subsequent decisions of the court, a number of which we set out briefly below.

In *Glencot* v. *Ben Barrett*[14] it was confirmed that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.

An adjudicator may, due to the time restraints, speak to a party separately but he should

[14] *Glencot Development & Design* v. *Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207.

inform the other party himself of the matters discussed. It is not appropriate to rely on the party he has spoken to informing the other party[15].

The adjudicator may not take evidence from third parties and not give the parties the opportunity to comment on it, and it is inappropriate for an adjudicator to give a witness statement for use in enforcement proceedings as this casts doubts on his impartiality[16].

In circumstances where the adjudicator was common in a number of adjudications between different parties on the same project, there where undoubtedly problems of obtaining information in one adjudication and its use in another which would give rise to concerns in regard to breaches of natural justice. In such circumstances and in the face of an objection by one of the parties, an adjudicator should withdraw from the appointment[17].

Where an adjudicator reaches his decision in part on reliance upon documents which the parties have not seen, there is breach of natural justice. Natural justice requires that the parties have an opportunity to know the case against them and an adjudicator should give them opportunity to comment on any material from whatever source including from his own knowledge and experience, if such information is to be given any significance in his decision[18].

An adjudicator has been found to be acting properly in ascertaining points of law and deciding them without reference to the parties even if the point has not been raised by either of them. While coming to this conclusion the court expresses some concern at the adjudicator's action[19].

The provisions of the Human Rights Act (HRA) have a bearing on questions of fairness. This Act has only been raised in two cases that we are aware of, *Elenay* v. *The Vestry*[20] and *Austin Hall* v. *Buckland Securities*[21]. In the former it was decided that the HRA did not apply to adjudication as it is not finally determinative of the parties' rights. This conclusion was accepted in the latter case in which it was also decided that an adjudicator is not a public authority and that adjudication does not contravene sections 6 or 7 (the right to a public hearing) of the HRA.

The Act

While the origin of all three aspects is to be found in the Act, the Act itself does not actually grant any jurisdiction, powers or duties at all. What it does provide, however, are the basic parameters and the things that have to be in the construction contract as a minimum for compliance with the Act. Adjudication and the adjudicator are not particularly well defined under the Act.

The right given in section 108(1) is the 'right to refer a dispute arising under the contract for adjudication under a procedure complying with this section'. This sets the boundaries for jurisdiction. It only deals with disputes arising under the contract (unless the parties agree in their contract to widen this). The procedure must comply with section 108. It is only parties

[15] *Discain Project Services Ltd* v. *Opecprime Developments Ltd* [2000] 8 BLR 402.
[16] *Woods Hardwick Limited* v. *Chiltern Air Conditioning Limited* [2001] BLR 23.
[17] *Pring & St Hill Limited* v. *C.J. Hafner T/A Southern Erectors*, TCC, 31 July 2002.
[18] *RSL (South West) Limited* v. *Stansell Limited* (16 June 2003).
[19] *Karl Construction (Scotland) Limited* v. *Sweeney Civil Engineering (Scotland) Limited* (21 December 2000) – Judicial Review 2002.
[20] *Elanay Contracts Ltd* v. *The Vestry* [2000] BLR 33.
[21] *Austin Hall Building Limited* v. *Buckland Securities Limited* [2000] BLR 272.

to a construction contract who have this right given to them by statute. If it is not a construction contract there is no statutory right, but there may be a contractual one and will be if the parties have included an adjudication provision in their contract. The definition of a construction contract contained in the provisions of sections 104 to 107 inclusive prescribes the boundaries of what constitutes a construction contract. These boundaries are further limited by the Exclusion Order. We have examined these provisions in earlier chapters. There is nothing to prevent the parties to the contract making provisions for adjudication that apply to work that goes beyond the definition of a construction contract in the Act. Nevertheless, the definition of construction contracts in the Act is complex and the provisions in the Exclusion Order further complicate this. This has already proved to be a ripe source of jurisdictional arguments for reluctant parties, as is evidenced by the nature of the arguments put up in court proceedings where enforcement has been resisted. If the contract that the parties enter into provides that all disputes that arise under the contract are subject to the right to adjudication (it may go further and include disputes that are in connection with the contract), the adjudicator's jurisdiction would not be fettered by the definition of construction contracts in the Act and it would be extended by the agreement of the parties.

As far as the adjudicator is concerned, he is only there to reach a decision on a dispute that has been referred to him under the contract. The Act does not give the adjudicator jurisdiction to deal with disputes that do not arise *under* the contract. He would not have jurisdiction to deal with disputes that do not fall within the various definitions in the Act of a construction contract or a contract in writing. Nor does he have the jurisdiction to operate under a procedure that is outside of the requirements of the Act. This in plain terms gives some boundaries that help to define jurisdiction.

Jurisdiction, powers and duties which give the adjudicator greater scope than the Act and do not conflict with it, are enforceable under the law of contract. An adjudication clause that permits the adjudicator to decide disputes which arise both under the contract and in connection with it, is a compliant clause. It provides the minimum required by the Act and goes beyond it. Parties cannot rely on the Act to restrict the provisions they have made in their contracts. Its provisions will bind them once the contract is made between the parties. It cannot be argued afterwards that the adjudication clause should be taken back to the minimum required by the Act. Such attempts to avoid a decision should not receive the support of the courts. It is incumbent upon the adjudicator to comply with the parties' agreement and he would not be doing his job properly if he were to ignore procedures that have been agreed between the parties.

An area of possible difficulty arises when the parties have failed to include the requisite provisions in their contract to comply with the Act, but they have included additional provisions that do not conflict with the Act. An example would be an agreement setting out a provision for a response by the responding party 14 days after the referral within a contract that does not comply with the Act. As the contract is non-compliant, the Scheme applies to the adjudication. Paragraph 13 of the Scheme however gives the adjudicator the right to decide the procedure for the adjudication. Does the adjudicator have jurisdiction to set his own procedure and ignore the agreement by allowing a more sensible period of seven days for the response or is he bound by the agreement of the parties to a 14-day period? Some might suggest that the adjudicator would be within his rights if he were to apply Paragraph 13 of the Scheme and set his own procedure. Others might say that the agreement of the parties is paramount, it does not conflict with the Act, albeit that it creates difficulties for the adjudicator in allowing the referring party a response and holding a meeting if one proves necessary within the remaining 14 days, and the adjudicator is bound by the parties' agreement to 14 days for the response.

Something that would perhaps go directly to the adjudicator's jurisdiction in respect of the matters referred would be an agreement that disputes arising in connection with the contract can be adjudicated in an otherwise non-compliant contract. Does the adjudicator deal with any issues that are clearly in connection with rather than under the contract? Whatever the adjudicator chooses to do, it is absolutely vital that he makes it quite clear in his directions at the earliest possible time what he intends. Difficulties are likely to result if the adjudicator decides to set seven days for the response and does not inform the responding party of that immediately on receipt of the referral, and the responding party is working towards the delivery of his response 14 days after the referral. Similarly, difficulties can occur if the adjuducator intends to deal with matters arising in connection with the contract, and the responding party makes no submissions in respect of them.

Section 106 of the Act further restricts jurisdiction. The statutory right to adjudication is excluded from contracts that concern works for residential occupiers. The case of a development which was only partly for the occupation on a residential basis by one of the parties was considered in *Thomas* v. *Bick & Bick*[22] where it was found that the proportion that was for the occupation of one of the parties, even though it exceeded 50%, was insufficient to come within the ambit of section 106, and the adjudicator's decision was enforced.

One point of note is that if a residential occupier enters into a contract with a contractor under an unamended JCT Minor Works Form, this contains an adjudication clause. The provisions of this clause will bind the parties and either party will have the right to have any dispute arising under the contract dealt with by adjudication.

This matter was explored fully in *Lovell* v. *Legg and Carver*[23]. This was a JCT Minor Works Form between a residential occupier and a builder. The residential occupier sought to argue in the court that the provisions on adjudication were not applicable under the Unfair Terms in Consumer Contracts Regulations 1999. In this case, rather than argue that the residential occupier was exempt from the adjudication provisions in the contract, entire reliance was placed on the Unfair Terms in Consumer Contracts Regulations 1999. The judge rejected this argument on the basis that nothing in the contract offended the legislation:

> 'To be unfair the terms must cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Any imbalance will not do: it must be a significant imbalance. Moreover that significant imbalance must be caused by the adjudication provisions contrary to the requirement of good faith. In my view neither requirement is satisfied in the present case.'

The fact that the parties are bound by a contract that contains adjudication provisions was also explored in *Mohammed* v. *Bowles*[24]. This contract contained adjudication provisions that complied with the Act. Here the residential occupier took adjudication proceedings against the builder. He then sought to enforce the decision by use of statutory demand. The builder argued that contracts with residential occupiers were exempt and therefore the adjudicator had no jurisdiction. The judge rejected this argument:

> '29. On the basis of the evidence before me I am satisfied that the parties entered into a contract for residential construction works that included a form of dispute resolution which adopted the framework of the dispute resolution procedure contained in the 1996 Act. For present purposes I do not have to consider whether the exchange of letters in October 2001 created a new contract, one which

[22] *Samuel Thomas Construction* v. *Bick & Bick (aka J&B Developments)* (28 January 2000).
[23] *Lovell Projects Ltd* v. *Legg and Carver* (July 2003).
[24] *Jamil Mohammed* v. *Dr Michael Bowles* (11 March 2003).

> replaced the existing contractual arrangements, although I comment that it seems doubtful to me that they did. The adjudicator has already determined this issue and it is not for this court to look behind the adjudicator's decision. If the applicant is unhappy with the adjudicator's determination upon the question of jurisdiction then his remedy is to apply to the court to have that decision set aside on the basis that he disputes the adjudicator's jurisdiction and/or to seek a declaration on the question of jurisdiction. I note that to date he has not chosen to adopt that course.'

There is one other case where a contract with a residential occupier was explored by the court; this was in *Picardi* v. *Cuniberti*[25]. In this case, the adjudicator's decision was not enforced. The distinction between this contract and *Lovell* v. *Legg and Carver* was that in the latter the contract had been insisted upon by the defendants in the enforcement proceedings, who were the employers under the contract and had been legally advised at the time the contract was drawn up. In *Picardi* v. *Cuniberti* it was found that specific clauses of the contract, including adjudication, had not been drawn to the residential occupiers' attention and that the adjudication, and other, provisions were not applicable.

Section 107 deals with agreements that are in writing. The definition of writing in section 107 is necessarily wider than would normally constitute writing. The definition is taken from the Arbitration Act 1996, which was designed to avoid the interminable arguments as to whether or not the arbitration clause was incorporated in the contract. What this does is restrict the instances in which it would be arguable that the agreement is not in writing. Where an agreement is not in writing under the definition in section 107, an adjudicator would not have jurisdiction to deal with any dispute.

The requirements of section 107 were examined by the Court of Appeal in *RJT* v. *DM Engineering*[26] where it was found that all the terms, and not merely the existence of a construction contract, had to be evidenced in writing if the contract was to be capable of being referred to adjudication. Leave to appeal to the House of Lords was refused on 10 October 2002.

In the context of a 'back of fag packet' agreement, which is not all that unusual in the construction industry, there is some difficulty caused by this decision. Even the briefest of agreements will generally have some record in writing of the amount that one party is to pay the other or, in the case of a daywork contract, how it is to be calculated. If there are no payment provisions the critical payment terms are imported from the Scheme. Other than a time for completion it is difficult to see the problem, but there it is. The result is that a large sector of the construction industry, which is one that perhaps needs adjudication more than most, is thus probably prevented from using it. A case perhaps for adjudicators to be bold in deciding whether there is a contract in writing?

There was a further examination of contracts in writing by the Court of Appeal in *Thomas-Fredric's* v. *Wilson*[27] but in this case the issue related to the name of one of the contracting parties.

Section 108 of the Act also has a bearing on the adjudicator's jurisdiction. In terms of the timetable, once the adjudicator is appointed, he is required to reach a decision within 28 days of the referral. He will have neither the jurisdiction nor the powers to operate outside that 28-day period without the agreement of the parties. However, the adjudicator's jurisdiction can be extended by the contract allowing the period of 28 days to be increased by up to 14 days with the consent of the referring party at the time. The adjudicator has a duty

[25] *Picardi (t/a Picardi Architects)* v. *Mr & Mrs Cuniberti* (19 December 2002).
[26] *RJT Consulting Engineers Ltd* v. *DM Engineering (Northern Ireland) Ltd*, CA (8 March 2002).
[27] *Thomas-Fredric's (Construction) Ltd* v. *Wilson* [2003] EWCA Civ 1367, CA.

to act impartially. This is both a duty and concerns jurisdiction. It is a duty because it is spelled out as a duty in section 108. It concerns jurisdiction because the adjudicator who does not act impartially is acting not in accordance with his jurisdiction and this may lead to any decision that he makes being void. In addition, the adjudicator may take the initiative in ascertaining the facts and the law. This is clearly a power that the adjudicator has from the Act but there is no compulsion that he exercises it.

While the Act may help with the understanding of the jurisdiction, powers and duties of the adjudicator, it is not of itself the real basis of these matters. The Act requires that all of the points in section 108 are incorporated in the construction contract. It will therefore be the construction contract itself that provides the basis of the adjudicator's jurisdiction, powers and duties.

One other aspect of jurisdiction that is important relates to what has been described by the court in *Carter* v. *Nuttall*[28], an action for an injunction to prevent an adjudication from proceeding, as 'threshold' and 'internal' jurisdiction. The court identified that threshold jurisdictional questions relate to the ability to set in train an adjudication process at all, whereas internal jurisdictional matters relate to the extent of the matters with which a properly appointed adjudicator can deal. For setting the adjudication in 'train' see the commentary in Chapter 3. Internal jurisdiction deals with the tasks the adjudicator has to carry out to reach a decision on the dispute or difference identified in the notice of adjudication.

Subsidiary questions

Making the decision can be characterised as answering a question. This is clear from the statement in *Nikko* v. *MEPC*[29]:

> 'If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.'

By its nature a subsidiary question must go to the main point or main question. The subsidiary question must be something which is essential to answer in order to answer the main question. It must be an integral part of the decision to be made.

This was first explored in a Scottish case where a claim for payment was inextricably linked to the terms of the contract on when the payment was due. This was the case of *Karl* v. *Sweeney*[30]:

> 'The adjudicator rightly or wrongly concludes that the sub-contract does not provide an adequate mechanism for deciding when instalment monthly payments become due. In the circumstances the adjudicator's position seems to be that she could not answer the central issue in the referral which was when in terms of the sub-contract provisions the relevant instalment becomes due and payable. She could not give effect to one or other of the parties' respective contentions because the sub-contract did not permit her to do this. Accordingly she would require in her decision to make a finding explaining why she was not going along one or other of the paths suggested to her by the parties. Such a finding would be an integral part of her decision on the reference. If the adjudicator rejects a suggestion that the sub-contract contains provisions about when payments become due,

[28] *R.G. Carter Limited* v. *Edmund Nuttall Limited* (21 June 2000).
[29] *Nikko Hotels (UK) Ltd* v. *MEPC Plc* [1991] 2 EGLR 103, at p. 108B.
[30] *Karl Construction (Scotland) Limited* v. *Sweeney Civil Engineering (Scotland) Limited* (21 December 2000).

> then because of the implications of this on her resolution of the referral it is difficult to say that the question of whether or not the sub-contract contains an adequate provision for governing when payment of instalments is due is not part of the dispute which has been referred and that the matter constitutes a separate and independent dispute requiring a different referral. Sweeney's claim for payment in terms of the Application for Payment No 5 is inextricably linked to the construction of the Sub-Contract. If the construction and application of the Sub-Contract payment provisions required (even in part) separate adjudication, it is easy to see what a tangle could result if a different adjudicator reached a different conclusion. We should find the very protracted wrangling which the summary remedy for provisional decisions by an adjudicator is designed to avoid. As it happens I do not find the reasons for the adjudicator's finding about the inadequacy of the payment provisions in the contract to be clearly set out.'

In *Joinery Plus* v. *Laing*[31] the courts looked at a necessary step along the route:

> '61. This decision is, in effect, that the construction of contractual terms, however erroneous, gives rise to a question of law within jurisdiction if that issue of construction arises as a necessary step along the route that the adjudicator must travel in order to determine the question that has been referred to adjudication. The clause in question formed part of the contract but its dismembered state gave rise to a question of construction as to what if any effect should be given to it. Thus, the decision as to that issue was one arising out of the contract and the underlying dispute that had been referred to adjudication. It must be said that this decision, which of course I must give effect to, goes near to the limits of errors of law within jurisdiction.'

The Scheme

If the construction contract does not meet the requirements of section 108(1) to (4) of the Act then the Scheme applies. We consider the machinery of how this is done elsewhere. In contrast to the Act, which has very minimal criteria, the Scheme is orientated towards providing 'nuts and bolts' procedures from appointment to the decision and the effect of the decision. In this event the Scheme, Part 1 of which deals with adjudication, becomes one of the bases of the adjudicator's jurisdiction, powers and duties.

The first likely question as to the adjudicator's jurisdiction is the validity of his appointment. The timetables and procedures for securing appointment are both complex and written in strict language. This is partly because there are a number of permutations from which appointments can occur. The Scheme deals with these in paragraphs 2 to 6 inclusive. The language concerning the number of days involved in the appointment process is strict. The words 'must' and 'shall' are used frequently. This could be interpreted that if the strict timetable is not met, the appointment may not be valid. Fortunately this does not appear to be creating difficulties in practice and the absence of any sanction in connection with the use of the word 'shall' in paragraph 7(2) coupled with the wording of the Act that there need only be an intention that appointment is achieved within seven days of the notice of adjudication, reinforces this. It is a fact that many referral notices are issued after the expiry of the seven-day period and also that adjudicators proceed to make their decisions in such circumstances, and it is relevant that, to the authors' knowledge, in the 170 or so enforcement proceedings in respect of which the judgments have been made available, not one has been refused enforcement because of a late referral.

Paragraph 1 of Part 1 of the Scheme sets out the requirements for a notice of adjudication

[31] *Joinery Plus Limited (in administration)* v. *Laing Limited* (15 January 2003).

and thus how, under the Scheme, the adjudicator's jurisdiction is delimited. Paragraph 1(1) follows the Act in terms of disputes arising under the contract. The notice required (the notice of adjudication) narrows the jurisdiction. This was dealt with in *Whiteways* v. *Impresa Castelli*[32] where it was held that the adjudicator should not look outside the four corners of the claim when dealing with abatement unless it has been mentioned in a notice of withholding. The jurisdiction is therefore to deal with the disputes in the notice of adjudication. The notice must comply with the requirements of paragraph 1(2) and (3)(a) to (d) inclusive otherwise it will not constitute a valid notice. The identity of the dispute, (3)(b), and the redress sought, (3)(c), narrows the matters the adjudicator can deal with.

Paragraph 7 deals with the referral notice. Nowhere does this paragraph give the referring party the right to refer a different dispute in the 'referral notice' to that in the 'notice of adjudication'. This matter is not assisted by paragraph 9(4), which permits the adjudicator's resignation, without loss of fees, where he finds he is no longer competent to deal with the dispute due to the dispute varying significantly from that referred to him. It is difficult to see where an adjudicator would have jurisdiction to decide a dispute other than the one referred to him in the absence of consent of the parties (*The Massalia*[33] and *The Kostas Melas*[34]).

An adjudicator will not have jurisdiction to make a decision where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication (paragraph 9(2) of the Scheme).

An adjudicator will not have jurisdiction to continue where both parties have revoked the appointment under paragraph 11. He will still have jurisdiction to determine his fees.

Paragraphs 12 to 19 inclusive are headed 'Powers of the adjudicator'. This is actually a mixture of jurisdictional points, powers and duties. Paragraph 12 covers the duties of acting impartially and avoiding unnecessary expense. The most important point in paragraph 13 is that the 'adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute'. This gives powers to conduct an inquiry rather than adopting an adversarial approach. The remainder of the paragraph amounts to no more than a shopping list. Paragraph 14 imposes a duty on the parties to comply with any request or direction of the adjudicator. Paragraph 15 gives the powers of sanction against parties who do not comply with any request or direction of the adjudicator.

Paragraph 20 gives the option to increase the scope of the adjudication to take into account any other matters that the parties agree should be within the scope of the adjudication and even allows the adjudicator, of his own volition, to take into account matters under the contract which he considers are necessarily connected with the dispute. The adjudicator should always be mindful of *Balfour Beatty* v. *Lambeth*[35] and *RSL* v. *Stansell*[36] and ensure that he acquaints the parties of his intentions in such circumstances. He is, by paragraph 20(a), given the particular power to open up, revise and review any decision taken or any certificate given by any person referred to in the contract. If the decision or certificate is stated to be final and conclusive, the adjudicator will have no powers to examine the contents at all.

The remaining paragraphs of Part I deal with the effects of the decision. The parties have a basic duty to comply with the decision and there may be some assistance if enforcement is necessary by making the decision peremptory, but this device is generally not seen as being necessary since the decision in *Macob*.

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[32] *Whiteways Contractors (Sussex) Limited* v. *Impresa Castelli Construction UK Limited* (9 August 2000).
[33] *Societe Franco-Tunisienne D'armement-Tunis* v. *The Government Of Ceylon* [1959] 2 Lloyd's Rep 1.
[34] *SL Sethia Liners Ltd* v. *Naviagro Maritime Corporation* [1981] 1 Lloyd's Rep 18.
[35] *Balfour Beatty Construction Ltd* v. *The Mayor & Burgesses of the London Borough of Lambeth* (12 April 2002).
[36] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).

The Standard Forms of Contract

Joint Contracts Tribunal Main Contract Form

The JCT has adopted the compliance points of the Act as the basis of its adjudication clause. Nevertheless, this is a lengthy clause, also adopting some parts of the Scheme in respect of the adjudicator's powers. We hear a rumour at the time of writing that the JCT may be considering reverting to the Scheme as the 'book of rules' for adjudication, but that is for the future. The recently published Major Projects Form adopts the Scheme as its adjudication provisions.

Clause 41A deals with settlement of disputes using adjudication. The first part of the clause deals with appointment, which we have looked at in Chapter 7. The section examined here, with relevant parts set out in the following extracts, deals with the referral of the dispute through to the decision.

Dispute or difference – notice of intention to refer to adjudication – referral

41A .4 .1 When pursuant to article 5 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall refer the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice. If an Adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment. The said Party shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider. The referral and its accompanying documentation shall be copied simultaneously to the other Party.

41A .4 .2 The referral by a Party with its accompanying documentation to the Adjudicator and the copies thereof to be provided to the other Party shall be given by actual delivery or by FAX or by special delivery or recorded delivery. If given by FAX then, for record purposes, the referral and its accompanying documentation must forthwith be sent by first class post or given by actual delivery. If sent by special delivery or recorded delivery the referral and its accompanying documentation shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting subject to the exclusion of Sundays and any Public Holiday.

Conduct of the adjudication

41A .5 .1 The Adjudicator shall immediately upon receipt of the referral and its accompanying documentation confirm the date of that receipt to the Parties.

The referral of the dispute basically follows the Act. The notice of adjudication itself need only briefly identify the dispute. Notices of adjudication under this form can therefore be drafted on a general basis giving the adjudicator wide jurisdiction. There are one or two points in the referral that may give rise to argument concerning jurisdiction. The essentials of the referral for it to be valid are particulars of the dispute or difference, together with a summary of the contentions on which the referring party relies, a statement of the relief or

remedy sought and any material the party wishes the adjudicator to consider. A copy of these materials must be sent to the other party.

Where contracts stipulate procedural matters, this usually gives rise to problems. If one of the parties does not follow the procedures stipulated in the contract, is there a breach? This may be merely a technical matter and have no other consequences, but it may be sufficient to suggest that there is no jurisdiction. In this case, if the notice of referral does not follow the requirements of the contract, it can be argued that there is no referral at all and therefore there is no jurisdiction. It is also important that the adjudicator confirms receipt of the documents from the referring party. Again, there is an argument here that if he does not do so there may be no jurisdiction.

41A .5 .2 The Party not making the referral may, by the same means stated in clause 41A.4.2, send to the Adjudicator within 7 days of the date of the referral, with a copy to the other Party, a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider.

41A .5 .3 The Adjudicator shall within 28 days of the referral under clause 41A.4.1 and acting as an Adjudicator for the purposes of S. 108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days; and that by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision.

The responding party 'may' within seven days issue a written statement of the contentions on which he seeks to rely. It can be argued if the responding party submits these matters at a later date, that the written statement or any material on which the responding party wishes to rely is not admissible and therefore the adjudicator would not have the jurisdiction to deal with or consider it. The word used is however 'may', not 'shall' and while such arguments have been tried by referring parties, the adjudicator should treat them for the tactical ploys that they are and allow the submissions. In any event it is usual for a responding party, who is unacceptably restricted by this provision, to seek an extension of time before the expiry of the seven days. The adjudicator is master of procedure in any event under clause 41A.5.5 and can amend any timetable unless it is written in mandatory terms. As long as the referring party is not prejudiced as a result, or the adjudicator's ability to deal with the dispute, a short extension of time should be granted.

Probably the most important provision in the whole of this adjudication procedure is contained in clause 41A.5.3. This requires the adjudicator to act as an adjudicator for the purposes of section 108 of the Act and not as an expert or an arbitrator. One of the problems here is that the Act does not actually define what an adjudicator is or what acting as an adjudicator might be. There is also a further problem that arises from this point. Nowhere in this clause is there any restriction that requires that adjudication only applies to construction contracts as defined in the Act. On this basis in any contract entered into on the JCT form there will be the facility for taking disputes to adjudication regardless of the restrictions of the Act. This was the JCT's intention. Whether they have succeeded in achieving a provision that goes beyond the limitation of the definition in construction contracts is debatable. Section 108(1) provides that 'A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section'. Therefore if the adjudicator under clause 41A.5.3 is to act as an adjudicator for the purposes of section 108, how can the limitation of construction contract in section 108(1) be avoided?

This point has not however to the authors' knowledge, been raised in an adjudication or in enforcement proceedings. This is an instance of a contract that complies with the requirements of section 108 and then goes beyond them. It is both an Act compliant and contractual scheme for adjudication. As a matter of contract it should be enforceable.

41A .5 .4 The Adjudicator shall not be obliged to give reasons for his decision.

The provision in clause 41A.5.4 leaves it for the adjudicator to decide whether or not he will give reasons for his decision. This differs from the Scheme, where a request from either party does oblige the adjudicator to give reasons. Current thinking is that reasons should be given for a decision. Clause 41A.5.5 requires the adjudicator to act impartially and he may use his initiative in ascertaining the facts and the law. This follows both the Act and the Scheme. The important power is that the adjudicator sets his own procedure. The adjudicator is very much master of the proceedings and needs to be having regard to the timetable.

41A .5 .5 In reaching his decision the Adjudicator shall act impartially and set his own procedure; and at his absolute discretion may take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:

- .5 .1 using his own knowledge and/or experience;
- .5 .2 opening up, reviewing and revising any certificate, opinion, decision, requirement or notice issued, given or made under this Contract as if no such certificate, opinion, decision, requirement or notice had been issued, given or made;
- .5 .3 requiring from the Parties further information than that contained in the notice of referral and its accompanying documentation or in any written statement provided by the Parties including the results of any tests that have been made or of any opening up;
- .5 .4 requiring the Parties to carry out tests or additional tests or to open up work or further open up work;
- .5 .5 visiting the site of the Works or any workshop where work is being or has been prepared for this Contract;
- .5 .6 obtaining such information as he considers necessary from any employee or representative of the Parties provided that before obtaining information from an employee of a Party he has given prior notice to that Party;
- .5 .7 obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved;
- .5 .8 having regard to any term of this Contract relating to the payment of interest, deciding the circumstances in which or the period for which a simple rate of interest shall be paid.

The list of powers in clauses 41A.5.5.1 to 41A.5.5.8 inclusive is similar to that in paragraph 13 in the Scheme. The list is not exhaustive. Although it does not say so in clause 41A.5.5.7 any advice that the adjudicator receives should be revealed to the parties before the decision is made (*RSL* v. *Stansell*). Clause 41A.4.1 requires that the adjudicator and the parties execute the JCT Adjudication Agreement. This could be a source for challenging jurisdiction, where one of the parties fails to execute the agreement, if it were not for the provision in clause 41A.5.6. The adjudicator must execute the JCT Adjudication Agreement but if one or both of the parties fails to execute the Agreement this will have no effect on the decision. If the JCT Adjudication Agreement is to form the contract between the parties and the adjudicator, all this provision does is protect the decision. It does nothing to protect the relationship between the parties and the adjudicator and particularly the fees of the adjudicator. This

clause also states 'or to comply with any requirement of the adjudicator under clause 41A.5.5'. This was explored by the courts in *Costain* v. *Wescol*[37] where it was held that these provisions were non-mandatory as far as the decision was concerned.

41A .5 .6 Any failure by either Party to enter into the JCT Adjudication Agreement or to comply with any requirement of the Adjudicator under clause 41A.5.5 or with any provision in or requirement under clause 41A shall not invalidate the decision of the Adjudicator.

41A .5 .7 The Parties shall meet their own costs of the adjudication except that the Adjudicator may direct as to who should pay the cost of any test or opening up if required pursuant to clause 41A.5.5.4.

The parties costs are dealt with in clause 41A.5.7. The parties shall bear their own costs, although there is nothing to prevent both parties agreeing that the adjudicator can deal with party costs and the adjudicator will have to do this under his obligation, once having accepted appointment as adjudicator, to adjudicate in accordance with the parties' agreement. The adjudicator may direct who bears the costs of any opening up or testing. The presumption here is that one of the parties will already have paid for this. There is no express mention of how any fees for obtaining technical or legal advice (covered by clause 41A.5.5.7) are to be paid. The JCT Adjudication Agreement is silent on this point but given that there must be a statement or estimate of the costs involved before the advice is obtained, the implication is that the parties will be liable for these costs.

41A .5 .8 Where any dispute or difference arises under clause 8.4.4 as to whether an instruction issued thereunder is reasonable in all the circumstances the following provisions shall apply:

.8 .1 The Adjudicator to decide such dispute or difference shall (where practicable) be an individual with appropriate expertise and experience in the specialist area or discipline relevant to the instruction or issue in dispute.

.8 .2 Where the Adjudicator does not have the appropriate expertise and experience referred to in clause 41A.5.8.1 above the Adjudicator shall appoint an independent expert with such relevant expertise and experience to advise and report in writing on whether or not any instruction issued under clause 8.4.4 is reasonable in all the circumstances.

.8 .3 Where an expert has been appointed by the Adjudicator pursuant to clause 41A.5.8.2 above the Parties shall be jointly and severally responsible for the expert's fees and expenses but, in his decision, the Adjudicator shall direct as to who should pay the fees and expenses of such expert or the proportion in which such fees and expenses shall be shared between the Parties.

.8 .4 Notwithstanding the provisions of clause 41A.5.4 above, where an independent expert has been appointed by the Adjudicator pursuant to clause 41A.5.8.2 above, copies of the Adjudicator's instructions to the expert and any written advice or reports received shall be supplied to the parties as soon as practicable.

Clause 41A.5.8 was not in the early amendment to the contract. This specifically deals with the provisions of clause 8.4.4 of the contract and whether or not any instruction issued under that clause is reasonable. This covers the powers of the architect when the work is not in accordance with the contract. The points to note are that these provisions require an adjudicator with expertise and experience in the specialist area or discipline relevant to the instruction.

[37] *Costain Ltd* v. *Wescol Steel Ltd* (24 January 2003).

Where this is not possible or practicable, the adjudicator is compelled to obtain specialist advice via an independent expert and he must issue his instructions to the expert and the report to the parties.

The fees of the expert are to be met by the parties who are jointly and severally responsible save that the adjudicator in his decision shall direct who pays those fees or the proportional liability for those fees.

Adjudicator's fee and reasonable expenses – payment

41A .6 .1 The Adjudicator in his decision shall state how payment of his fee and reasonable expenses is to be apportioned as between the Parties. In default of such statement the Parties shall bear the cost of the Adjudicator's fee and reasonable expenses in equal proportions.

.2 The Parties shall be jointly and severally liable to the Adjudicator for his fee and for all expenses reasonably incurred by the Adjudicator pursuant to the adjudication.

Under clause 41A.6.1 the adjudicator should state how his fees should be apportioned between the parties. Where he fails to make such a statement the fees are borne equally. Some adjudicators have confused this statement in the contract to mean that the parties should always bear the fees equally. This is incorrect. Fees should always be allocated on a 'costs follow the event' basis. This provision is purely about liability and has nothing to do with the joint and several liability the parties have for the fees and expenses under clause 41A.6.2.

Effect of Adjudicator's decision

41A .7 .1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

41A .7 .2 The Parties shall, without prejudice to their other rights under this Contract, comply with the decision of the Adjudicator; and the Employer and the Contractor shall ensure that the decision of the Adjudicator is given effect.

41A .7 .3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.7.1.

The decision is binding on the parties until it is finally determined in arbitration or litigation or by an agreement in writing. Both parties are under the duty to comply with it. There is also an additional provision in clause 41A.7.2 requiring the parties to give effect to the adjudicator's decision. Failure to give effect to the decision will be a breach of contract. This provision was no doubt inserted to assist when it comes to enforcing the decision but in light of the approach of the courts to the enforcement of adjudicators' decisions it is probably unnecessary.

Immunity

41A .8 The Adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as Adjudicator unless the act or omission is in bad faith and this protection from liability shall similarly extend to any employee or agent of the Adjudicator.

The alternative provisions, which permit naming the adjudicator in the contract rather than appointing when the dispute occurs, only affect one point in respect of jurisdiction. The adjudicator must be an individual and not be an employee or otherwise engaged by either party.

Joint Contracts Tribunal Sub-Contract forms

At the time of writing the JCT has published three sub-contracts for use with the JCT main contract forms. They are the Nominated Sub-Contract documents and Domestic Sub-contract DSC/C (replacement for DOM/1) for use with JCT 80 and the Named Sub-Contract documents for use with the Intermediate Form of Contract. The provisions which cover adjudication are so close to the JCT 80 provisions described in the above section that they do not warrant further repetition here. There is also at the time of writing a further suite of Domestic Sub-contract documents to be produced which will replace the DOM suite of documents.

Construction Confederation

The Construction Confederation has published the revised DOM/1, DOM/2 and IN/SC forms. Save for a difference in numbering, these forms follow the adjudication provisions in the JCT main forms of contract. These will shortly be withdrawn from publication.

The predecessor to the new DOM/1 form was also called DOM/1 and contained its own version of adjudication provisions to deal with set-off. There are no longer any special provisions to deal with set-off. Set-off features in the payment provisions sections of the Act and is subject to the notices required in dealing with payment. Any dispute concerning set-off will therefore be dealt with in the same way as any other. This was the cause of some consternation by the sub-contract organisations in the consultation process on the revised DOM/1. They felt that a special procedure for dealing with set-off was still warranted. The details of the discussions are not known but the new DOM/1 was not endorsed by some of the sub-contract organisations.

Institution of Civil Engineers' main contracts

One of the most common challenges to jurisdiction is whether or not a dispute exists. The Institution of Civil Engineers has chosen the 'matter of dissatisfaction' route as discussed in Chapter 6. This, we suggest, even though it seems that it does not comply with the requirement that a party can take a dispute to adjudication at any time, is actually one of the best ways of ensuring that any matters referred to adjudication are actually in dispute between the parties and the issues are clearly identified for the adjudicator. As we have already noted, we understand that a modified procedure is under discussion at the time of writing.

The Institution of Civil Engineers has retained their conciliation procedure in clause 66(5). In clause 66, which is headed 'Avoidance and Settlement of Disputes', four ways are set out in which to resolve disputes, three of which depend on the matter of dissatisfaction procedure occurring first. There is then a further procedure for enforcing the adjudicator's decisions.

We set out a précis below.

Clause 66(6) has six sub-clauses, each of which reproduces one of the six compliance points in section 108(2) of the Act. There is an additional provision to the effect that the adjudication shall be conducted under the Institution of Civil Engineers' Adjudication Procedure (1997) or any amendment or modification of it.

Clause 66(7) provides that the decision of the adjudicator shall be binding in the precise terms of section 108(3) of the Act, and that the adjudicator and any employee or agent of the adjudicator has contractual immunity as required by section 108(4) of the Act.

Clause 66(7) also provides that all disputes arising under or in connection with the contract or the carrying out of the works shall be finally determined by reference to arbitration, and when an adjudicator has given a decision under clause 66(6) in respect of the particular dispute the notice to refer must be served within three months of the giving of the decision otherwise it shall be final as well as binding.

Failure to give effect to a decision of an adjudicator is excluded from the arbitration provision.

This adjudication clause states that disputes can be referred at any time but it must be read with the definition of a dispute set out in clause 66(2) which purports to prevent a party from doing this until the matter of dissatisfaction procedure has been gone through. As noted above, this may well be a non-compliant provision which would mean that the whole adjudication procedure has to be discarded and the Scheme comes into play. That is obviously a matter for the adjudicator to resolve at the time that a party, who will almost certainly be the contractor or sub-contractor referring party, seeks to have a matter adjudicated.

As for whether or not the adjudicator should proceed with the adjudication if the prior matter of dissatisfaction procedure has not been followed beforehand, the authors' view is that he should. The referring party has the right to adjudication and wants it. It then becomes a matter of enforcement as it did in *Mowlem* v. *Hydra-Tight*[38] where it was held that the matter of dissatisfaction procedure under the NEC contract does not comply with section 108 of the Act. This decision was however not subject to legal argument as the parties had agreed that it did not comply and did not ask the judge to consider the point.

The procedural matters in the contract are straightforward. The adjudication shall be conducted under the Institution of Civil Engineers Adjudication Procedure (1997). Clause 66(6), (7) and (8) contain the essentials required by the Act. The duties concerning timetable, impartiality and the power to take the initiative in ascertaining the facts and the law are included in these clauses. The relationship with the arbitration clause is also covered. Three months are allowed in which to serve any notice of arbitration following the decision of an adjudicator, otherwise that decision shall be final and binding. This may give rise to jurisdictional problems if a party seeks to move the decision on to arbitration outside the stipulated period of three months.

The provisions of the ICE Adjudication Procedure in respect of the conduct of the adjudication are as follows.

Clause 5.1 provides the standard time scales of 28 days, such longer period as is agreed by the parties after the dispute has been referred and the 14-day extension with the consent of the referring party.

Clause 5.2 provides that the adjudicator shall determine the matters set out in the notice of adjudication, together with any other matters which the parties and the adjudicator agree should be within the scope of the adjudication.

[38] *John Mowlem & Company Plc* v. *Hydra-Tight Ltd (t/a Hevilifts)* (6 June 2000).

In any event he does not have jurisdiction to do other than this. There is a provision to extend the jurisdiction by agreement with the parties to include any other matter which it has been agreed should be within the scope of the adjudication. There would be nothing to prevent the parties and the adjudicator making such an agreement even if this provision were not there.

Clause 5.3 provides that the adjudicator may open up, review and revise any decision (other than that of an adjudicator unless agreed by the parties), opinion, instruction, direction, certificate or valuation made under or in connection with the contract and which is relevant to the dispute. He may order the payment of a sum of money or other redress, but no decision of the adjudicator shall affect the freedom of the parties to vary the terms of the contract, or the engineer or other authorised person to vary the works in accordance with the contract.

This sits uneasily with the provision for adjudication in clause 66(6)(a) which refers to matters 'under the Contract' without any extension. The provision here seems to widen that referral to matters in connection with as well as arising under the contract. It is limited to those things listed such as opinions, instructions, directions, certificate or valuations. Presumably if an independent opinion were sought on a matter in connection with the contract, the adjudicator under this provision could revise that opinion.

Nothing the adjudicator does can affect the freedom of the parties to vary the terms of the contract, or the engineer or other authorised person to vary the works in accordance with the contract. The adjudicator himself cannot vary the terms of the contract. This is strictly a matter between the parties. They can choose to vary the contract at any time by agreement, whether in response to an adjudicator's decision or prior to that decision. Adjudicators simply do not have any jurisdiction to vary the contract itself and impose new terms on the parties. There would be jurisdiction to deal with any new terms the parties agreed upon in deciding any future dispute. This is giving effect to the terms rather than varying the contract. An adjudicator does not have any express authority to vary the works. He cannot restrict the authority of others under the contract in this respect. He can reach decisions which state that there is an entitlement to an instruction or a variation under the contract. This action does not constitute the issuing of the instruction or variation.

Clause 5.4 gives the responding party 14 days from the date of referral to submit any response he may wish to make. This period can be extended by agreement between the parties and the adjudicator. Setting a period of 'within 14 days' for the responding party is a restraint on the process. If the adjudicator is to comply with the procedure agreed by the parties, there is an obligation here for him to allow the 14-day period agreed. It would however have been better if this provision had not been made. In practice it is almost impossible to give the referring party a reasonable period to reply to the responding party's submission, and hold a meeting if one should prove necessary, within the remaining 14 days after the response is served. It is the practice of one of the authors to seek a 7-day extension of time on receipt of the referral so that the referring party has a proper opportunity to respond and a sensible time is made available before and after the meeting that will in many adjudications prove to be necessary. It has never been refused and the referring party almost invariably wants time to make a proper written reply.

Clause 5.5 states that the adjudicator has complete discretion as to how to conduct the adjudication and shall establish the procedure and timetable, subject to any limitation that there may be in the contract or the Act. He shall not be required to observe any rule of evidence, procedure or otherwise, of any court.

The adjudicator's discretion is obviously subject to any restrictions that there may be in the Act or the contract. It is arguable that this provision was almost unnecessary. If the

adjudication procedure were silent on these matters, the adjudicator would still have complete discretion as to how to conduct the adjudication. There is express provision that the adjudicator is not required to observe any rule of evidence, procedure or otherwise, of any court. Whatever procedure the adjudicator may wish to adopt, adjudication is a judicial process. He will have to apply the facts to the law to determine the rights of the parties under the contract.

Clause 5.5 continues with the customary non-exhaustive list of powers. The adjudicator may:

(a) ask for further written information;
(b) meet and question the parties and their representatives;
(c) visit the site;
(d) request the production of documents or the attendance of people whom he considers could assist;
(e) set times for (a)–(d) and similar activities;
(f) proceed with the adjudication and reach a decision even if a party fails:
    (i) to provide information;
    (ii) to attend a meeting;
    (iii) to take any other action requested by the adjudicator;
(g) issue such further directions as he considers to be appropriate.

Clause 5.6 allows the adjudicator to obtain legal or technical advice having notified the parties first. There is however no mention here of having to obtain an estimate of the likely cost and notifying the parties of that.

Clause 5.7 provides that any party may at any time ask that additional parties be joined in the adjudication. Joinder of additional parties is subject to the agreement of the adjudicator and the existing and additional parties. An additional party has the same rights and obligations as the other parties, unless otherwise agreed by the adjudicator and the parties.

Part of any agreement to joinder, by necessity, must take account of a timetable that will permit the adjudicator to hear and deal with all the inter-related matters going to the collective dispute. It is unlikely that any situation where there is joinder will permit completion of the adjudication in 28 days and the parties to the first adjudication or adjudications will have to take this into account when deciding whether or not to agree to a proposed joinder situation.

Clause 6.1 relates to the decision. The prime task of the adjudicator is to reach his decision and so notify the parties within the time limits in paragraph 5.1.

There is an important additional power in paragraph 6.1. This allows the adjudicator to reach a decision on different aspects of the dispute at different times. He will therefore be able to conclude any dispute in stages, summarising the whole position in his final decision. This is a sensible procedure in a minority of cases but, in the context of a procedure where the response does not come in until 14 days after the referral, it is probably only useful where there are separate and distinct issues within the same dispute, some of which may require longer consideration and an extension of time while others can be dealt with without delay.

Clause 6.2 provides that the adjudicator may direct the payment of such simple or compound interest at such rate and between such dates or events as he considers appropriate.

The right to interest is already contained in some contracts. Where no such right exists this is a useful provision. There may also be the additional burden of considering interest in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 if that matter comes within the ambit of the adjudication.

Clause 6.3 deals with the situation where the adjudicator fails to reach his decision and notify the parties in the due time. Either party may then give seven days' notice of its intention to refer the dispute to a replacement adjudicator appointed in accordance with the procedures in paragraph 3.3. Clause 6.4 provides that notwithstanding any failure of the adjudicator to reach and notify his decision in due time, if he does so before the dispute has been referred to a replacement adjudicator under paragraph 6.3 his decision shall still be effective.

Clause 6.4 continues by providing that if the decision is not notified to the parties then it is of no effect and the adjudicator shall not be entitled to any fees or expenses. The parties are however responsible for the fees and expenses of any legal or technical adviser appointed under paragraph 5.6 subject to the parties having received such advice.

This is a practical provision dealing with the adjudicator's decision that arrives late. If no other adjudicator has been appointed the decision is nevertheless effective. This obviously deals with the situation where the decision may be late by an odd day through some mishap or oversight.

Clause 6.5 provides that the parties shall each bear their own costs and expenses incurred in the adjudication.

By clause 6.5 the parties are also made jointly and severally responsible for the adjudicator's fees and expenses, including those of any legal or technical adviser appointed under paragraph 5.6, but in his decision the adjudicator is permitted to direct a party to pay all or part of his fees and expenses. If he makes no such direction the parties are required to pay them in equal shares.

It would be unwise for any adjudicator not to direct in his decision who is responsible for the payment of his fees and expenses. There is however some wisdom in having a default position where the adjudicator's decision is silent on the matter.

Clause 6.6 allows the adjudicator, at any time until seven days before he is due to reach his decision, to give notice to the parties that he will deliver his decision only on full payment of his fees and expenses. Any party may then pay these costs in order to obtain the decision and recover the other party's share of the costs in accordance with paragraph 6.5 as a debt due.

There is nothing in law that requires any person in commerce to give credit. There was reluctance, when the Act and the Scheme were drafted, to allow any lien on the decision. The ability of the adjudicator to secure payment of his fees and expenses before he delivers the decision is therefore important to him. The CIC, which originally followed the ICE as regards liens, has now omitted this provision as a result of the decision in Scotland in *St Andrews Bay* v. *HBG*[39] where the adjudicator sought to impose a lien and the court found an obligation to notify the decision by the 28th or other properly extended day.

Clause 6.7 states that the parties are entitled to the relief and remedies set out in the decision and to seek summary enforcement of them, regardless of whether the dispute is to be referred to legal proceedings or arbitration. This clause also provides that no issue decided by an adjudicator may subsequently be laid before another adjudicator unless so agreed by the parties.

Clause 6.8 provides that in the event that the dispute is referred to legal proceedings or arbitration, the adjudicator's decision shall not inhibit the court or arbitrator from determining the parties' rights or obligations anew.

The provision on summary enforcement of the decision may be of assistance to the courts

[39] *St Andrews Bay Development Ltd* v. *HBG Management Ltd* (20 March 2003).

or an arbitrator as well as the party seeking enforcement. The parties are bound by the decision until such time as the dispute is heard anew.

Clause 6.9 allows the adjudicator on his own initiative, or at the request of either party, to correct a decision so as to remove any clerical mistake, error or ambiguity provided that the initiative is taken, or the request is made, within 14 days of the notification of the decision to the parties. The adjudicator is required to make his corrections within seven days of any request by a party.

The adjudicator thus has authority to correct any clerical mistakes, errors or ambiguities within 14 days of the notification of the decision to the parties. Without these express powers it would be arguable that there was no authority to correct such slips. This is therefore a sensible provision in this adjudication procedure.

Clause 6.9 is effectively a copy of the provision in the Arbitration Act 1996 for the correction of an arbitrator's award. There is however no specificity as to what the words 'clerical mistake, error or ambiguity' actually mean. These words can be either construed as limiting correction first to clerical mistakes, second to clerical errors and third to ambiguities or as extending the second category to errors of any description. It appears from the decisions of the court in *Bloor* v. *Bowmer & Kirkland*[40] and *Nuttall* v. *Sevenoaks*[41] that the court may take the wider view where there is no provision at all in the adjudication provisions for the correction of a decision. We examine this further in Chapter 11.

Our unrepentant view is that an adjudicator should not trouble himself with such definitions. If he has made an error he should correct it; he should generally allow the parties to make submissions to him before making the correction and should always do so if the error is of some magnitude. His decision then properly reflects his findings rather than leaving the situation of an obvious error that can only be sorted out by further dispute resolution processes. If a party objects to the correction having been made, it becomes a matter for the court in any enforcement proceedings to decide if the adjudicator has exceeded his jurisdiction by making the correction.

Civil Engineering Contractors' Association sub-contracts

The provisions in the CECA sub-contracts do not differ greatly from the ICE main contracts that they complement. They also rely on the ICE Adjudication Procedure for conduct of the adjudication. The main important difference is the interface between the sub-contract form and the main contract. There is no matter of dissatisfaction procedure under the sub-contract itself. A dispute comes into being without such a procedure. The link with the main contract is where the sub-contractor considers he is entitled to a payment greater than the amount determined by the contractor. Where in the opinion of the contractor this gives rise to a matter of dissatisfaction under the main contract, he gives notice to the sub-contractor and the matter is pursued under the main contract. Obligations are then imposed on the main contractor to keep the sub-contractor fully informed and on the sub-contractor to provide information and to attend meetings to resolve the matter of dissatisfaction. The parties have contracted on the basis that no dispute shall arise until the matter of dissatisfaction is resolved under the main contract. This attracts the same comments and criticisms that we have considered earlier when reviewing the main contract form.

[40] *Bloor Construction (UK) Limited* v. *Bowmer & Kirkland (London) Limited* [2000] BLR 314.
[41] *Edmund Nuttall Limited* v. *Sevenoaks District Council* (14 April 2000).

Clause 18

18 (1) If any dispute or difference shall arise between the Contractor and the Sub-Contractor 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.

This may give rise to a further dispute if the sub-contractor thinks that the main contractor is not justified in forming the opinion that the payment matter is also a matter of dissatisfaction under the main contract. This dispute, by the terms of the clause itself, has to wait for the completion of the matter of dissatisfaction procedure under the main contract. It seems inevitable that in these circumstances the sub-contractor will suffer a delay of up to one month before adjudication can even be commenced. The same challenge that a matter of dissatisfaction constitutes a dispute and there is therefore entitlement to immediate adjudication, applies under the sub-contract as it does under the main contract. These matters provide the initial jurisdiction problems in any adjudication. Given the apparent failure to allow access for the sub-contractor to adjudication at any time we repeat our view expressed earlier that the adjudicator should proceed with the adjudication if so requested by the sub-contractor and it then becomes a matter of enforcement.

(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.

The sub-contract maintains the conciliation procedure in the same way as the main contract. The conciliation procedure might conflict with adjudication. The sub-contractor could issue a notice to proceed to adjudication and the contractor could in response issue a notice to proceed to conciliation. It would then require agreement of the sub-contractor to proceed to conciliation.

(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 paragraphs 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.

(c) 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.

(d) The adjudicator may extend the period of 28 days by up to 14 days with the consent of the party by whom the dispute was referred.

(e) The adjudicator shall act impartially.

(f) The adjudicator may take the initiative in ascertaining the facts and the law.

(5) The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or by arbitration (if the Sub-Contract provides for arbitration or the parties otherwise agree to arbitration).

(6) The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith and any employer or agent of the adjudicator shall similarly not be liable.

(7) (a) All disputes arising under or in connection with the Sub-Contract, other than failure to give effect to a decision of an adjudicator, shall be finally determined by reference to arbitration. The party seeking arbitration shall serve on the other party a notice in writing (called the Notice to Refer) to refer the dispute to arbitration.

(b) Where an adjudicator has given a decision under sub-clause 18(4) in respect of the particular dispute the Notice to Refer must be served within three months of the giving of the decision, otherwise it shall be final as well as binding.

The remainder of the clause and the use of the ICE Adjudication Procedure is the same as the main contract form. The comments made under the main contract form apply here.

Government contracts

There are 1998 versions of GC/Works/1, 2, 3 and 4 contracts. They provide a sensible approach to jurisdiction. There is no attempt to qualify contracts to cover only construction contracts as defined in the Act. The adjudicator may deal with disputes, differences or questions arising under, out of, or relating to the contract. This is drafted as widely as any arbitration clause. It enables all disputes likely to be encountered in a construction project under this form of contract to be dealt with by adjudication in the first instance.

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.

. . .

(4) The PM, the QS and the other party may submit representations to the adjudicator not later than 7 Days from the receipt of the notice of referral.

(5) The adjudicator shall notify his decision to the PM, the QS, the Employer and the Contractor not earlier than 10 and not later than 28 Days from receipt of the notice of referral, or such longer period as is agreed by the Employer and the Contractor after the dispute has been referred. The adjudicator may extend the period of 28 Days by up to 14 Days, with the consent of the party by whom the dispute was referred. The adjudicator's decision shall nevertheless be valid if issued after the time allowed. The adjudicator's decision shall state how the cost of the adjudicator's fee or salary (including overheads) shall be apportioned between the parties, and whether one party is to bear the whole or part of the reasonable legal and other costs and expenses of the other, relating to the adjudication.

It is unfortunate that there is an earliest date for the adjudicator to reach his decision. If the philosophy of adjudication is to reach early decisions to avoid delay to the works, there are instances where a decision could be made much earlier than the ten days stipulated here. For example, a dispute concerning the quality of brickwork ought to be capable of resolution in much less time than ten days. There is also a limitation here on the adjudicator's fee. In his decision he is required to state how the fee is to be apportioned between the parties. The fee may be calculated on the basis of salary plus overheads. Alternatively, the fee is at a quoted rate.

(6) The adjudicator may take the initiative in ascertaining the facts and the law, and the Employer and the Contractor shall enable him to do so. In coming to a decision the adjudicator shall have regard to how far the parties have complied with any procedures in the Contract relevant to the matter in dispute and to what extent each of them has acted promptly, reasonably and in good faith. The adjudicator shall act independently and impartially, as an expert adjudicator and not as an arbitrator. The adjudicator shall have all the powers of an arbitrator acting in accordance with Condition 60 (Arbitration and choice of law), and the fullest possible powers to assess and award damages and legal and other costs and expenses; and, in addition to, and notwithstanding the terms of, Condition 47 (Finance charges), to award interest. In particular, without limitation, the adjudicator may award simple or compound interest from such dates, at such rates and with such rests as he considers meet the justice of the case—

(a) on the whole or part of any amount awarded by him, in respect of any period up to the date of the award;

(b) on the whole or part of any amount claimed in the adjudication proceedings and outstanding at the commencement of the adjudication proceedings but paid before the award was made, in respect of any period up to the date of payment;

and may award such interest from the date of the award (or any later date) until payment, on the outstanding amount of any award (including any award of interest and any award of damages and legal and other costs and expenses).

Not only does the adjudicator have authority to take the initiative in ascertaining the facts and the law but also both the employer and the contractor are under a duty to enable him to do so. It must of course always be remembered that there is a duty upon the adjudicator to

put matters that he ascertains in carrying out this initiative to the parties before reaching his decision (*Balfour Beatty* v. *Lambeth* and *RSL* v. *Stansell* mentioned earlier.)

The adjudicator is also given jurisdiction to take into account the way in which the parties have behaved during the course of the contract in complying with any procedures in the contract. Whether this will have any real effect is doubtful. If a notice is expressed to be a condition precedent in the contract and no notice has been issued, it will be of no effect in any event. This is merely following the contract. The adjudicator does not really have the power to penalise a party who has been slipshod in the administration of the contract.

The jurisdiction and powers of the adjudicator are considerably widened by this clause. For an adjudicator to be invested with the same powers as an arbitrator under Condition 60 of the contract is much wider than anything ever intended by the Act. The minimum criteria of the Act are satisfied and there is nothing to prevent the parties from increasing the scope of matters that can be dealt with by adjudication as this clause does.

(7) Subject to the proviso to Condition 60(1) (Arbitration and choice of law), the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the Contract provides for arbitration, or the parties otherwise agree to arbitration), or by agreement: and the parties do not agree to accept the decision of the adjudicator as finally determining the dispute.

(8) In addition to his other powers, the adjudicator shall have power to vary or overrule any decision previously made under the Contract by the Employer, the PM or the QS, other than decisions in respect of the following matters–

(a) decisions by or on behalf of the Employer under Condition 26 (Site admittance);

(b) decisions by or on behalf of the Employer under Condition 27 (Passes) (if applicable);

(c) provided that the circumstances mentioned in Condition 56(1)(a) or (b) (Determination by Employer) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice under Condition 56(1)(a), or to give notice of determination under Condition 56(1);

(d) decisions or deemed decisions of the Employer to determine the Contract under Condition 56(8) (Determination by Employer);

(e) provided that the circumstances mentioned in Condition 58A(1) (Determination following suspension of Works) have arisen, and have not been waived by the Employer, decisions of the Employer to give notice of determination under Condition 58A(1); and

(f) decisions of the Employer under Condition 61 (Assignment).

In relation to decisions in respect of those matters the Contractors's [sic] only remedy against the Employer shall be financial compensation.

Rather than simply declare the rights of the parties under the contract, this provision permits the adjudicator to vary or overrule decisions made under the contract by the employer, project manager or quantity surveyor. There is a limitation on the matters listed in paragraph (8)(a) to (f). These are not to be varied or overruled by the adjudicator but he can decide that the remedy shall be financial compensation where he would otherwise have varied these decisions.

(9) Notwithstanding Condition 60 (Arbitration and choice of law), the Employer and the Contractor shall comply forthwith with any decision of the adjudicator; and shall submit to summary judgment and enforcement in respect of all such decisions.

(10) If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision. Such requests may only be made within 14 Days of the decision being notified to the requesting party.

(11) The adjudicator is not liable for anything done or omitted in the discharge or purported

> discharge of his functions as adjudicator, unless the act or omission is in bad faith. Any employee or agent of the adjudicator is similarly protected from liability.

Reasons must be given for the decision if so requested. It is clear from the drafting of paragraph 10 that this may be after the decision has been given and the adjudicator who has produced an unreasoned decision should have his reasons ready and be prepared to answer such a request pretty quickly. It is not acceptable for him to have to rework his decision to come up with his reasons. What happens if the answer that he comes up with after going through his reasons in detail is different from that which he has already sent to the parties?

NEC Engineering and Construction Contracts

These contracts attempt to cover the bare minimum required by the Act. They follow the policy in the civil engineering contracts on matters of dissatisfaction. It is therefore debatable that these contracts do not include the statutory right to refer a dispute to adjudication at any time. The lack of prescription in this contract must regard the adjudicator as having all the powers necessary to enable him to reach his decision as required by the timetable.

At the time of writing the adjudication provisions are set out in supplement Y(UK)2/ APRIL 1998. The forms of contract have not been revised. This supplement includes amendments to the earlier form which are set out below.

We have considered clauses 90.1 to 90.5 in Chapter 7.

Clause 90.6 provides for the party referring the dispute to the adjudicator to include with his submission information to be considered by the adjudicator. This clause then goes on to say that any further information from a party to be considered by the adjudicator is provided within 14 days of referral.

This seems to suggest that the referring party itself can provide further information in the 14-day period. This could cause difficulty unless the adjudicator brings some order to the proceedings and directs a response within seven days and a reply seven days after that.

Clause 90.7 requires the parties and the project manager to proceed as if the action, failure to take action or other matters that are the subject of the referral to adjudication were not disputed until the adjudicator has given his decision on the dispute.

Clause 90.8 covers the Act's requirements that the adjudicator acts impartially and that he may take the initiative in ascertaining the facts and the law.

Clause 90.9 covers the Act's requirements that the adjudicator reaches a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred and that the adjudicator may extend the period of 28 days by up to 14 days with the consent of the notifying party.

Clause 90.10 requires the adjudicator to provide reasons for his decision. In addition to notifying these to the parties he is required to do this to the project manager as well.

Clause 90.11 confirms that the decision of the adjudicator is binding until the dispute is finally determined by the 'tribunal' or by agreement. The definition of the 'tribunal' is left blank in the contract data section of the standard form for insertion by the parties. The choices will be either legal proceedings or arbitration in conformity with section 108(3) of the Act..

Clause 90.12 provides the contractual immunity required by section 108(4) of the Act.

Clause 91 is entitled 'Combining procedures'.

Clause 91.1 provides that if a matter causing dissatisfaction under or in connection with a sub-contract is also a matter causing dissatisfaction under or in connection with this con-

tract, the subcontractor may attend the meeting between the parties and the project manager to discuss and seek to resolve the matter.

Clause 91.2 provides that if a matter disputed under a sub-contract is also a matter disputed under the main contract, the two disputes can be submitted to the adjudicator at the same time.

Clause 92.1 confirms that the adjudicator settles the dispute as independent adjudicator and not as arbitrator. It also confirms that the decision is enforceable as a matter of contract and not as an arbitral award. This clause also confirms that the adjudicator can review and revise any action or inaction of the project manager or supervisor in relation to the dispute. It requires communications between one party and the adjudicator to be communicated to the other party. Lastly, it relates the adjudicator's decision to the 'compensation event' procedure in this form of contract.

Clause 92.2 deals with the situation where the adjudicator, who is by this form of contract named in the contract data, resigns or is unable to act. The parties are then required to choose a new adjudicator but if they fail to do so there is a provision in this clause for a nominator. There is no nominator specifically named in the contract data, it being left to the parties to insert their own choice. This does create a difficulty if no nominator is named. If the parties cannot agree the name of an adjudicator, a party cannot be deprived of its right to refer to an adjudicator and in these circumstances we have no doubt that, as a last resort, the nomination procedure in the Scheme should be used. The new adjudicator is appointed when the dispute is submitted to him.

One interesting drafting point is that the appointment of the adjudicator named in the contract does not refer to the NEC Adjudicator's Contract but the appointment of the replacement adjudicator does.

The sub-contract follows the pattern of the main contract.

The Institution of Chemical Engineers Adjudication Rules (The Grey Book)

Subsequent to the procedure relating to the adjudicator's appointment, which we deal with in Chapter 7, the IChemE procedure is split into three sections: procedure on appointment, procedure for the adjudication, and the decision. These sections set out in considerable detail the powers and duties of the adjudicator and also the duties of the parties. We deal with the first two of these here and the provisions as to the decision in Chapter 11.

As noted elsewhere we have not been given permission to reproduce these clauses verbatim which is rather unfortunate as they give excellent guidance in respect of procedural matters. We set out a précis below.

Clause 6 is entitled 'Procedure on appointment'.

Clause 6.1 provides that the adjudicator directs each party in writing to produce the following 'within specified times which shall be reasonable':

- a statement setting out a detailed view of the dispute including a summary with supporting documentary evidence and a copy of the contract;
- details of representative(s) at any meeting;
- the address of any place which the adjudicator may need to visit; and
- details of witnesses of fact and/or opinion including the subject to be covered by each.

Clause 6.1 covers both the referral and the response by the responding party. It sets out in detail the requirements of these documents. In Chapter 7 we considered the appointment, which under this form is the signing of the form of agreement which appears in Annex B to

this form of contract, by either of the parties. This fulfils the requirement that the adjudicator's appointment be confirmed. Clause 6.1 does not deal with the usual situation that the referring party will send the referral notice almost as soon as the nomination is made. It appears that the requirement that the adjudicator writes to the parties on appointment, that is set out in clause 6.1, will generally go by default and these requirements will follow receipt of the referral.

Clause 6.2 sets out further matters that the adjudicator is to direct:

- that the parties must copy all documents sent or given to the adjudicator to the other party at the same time (unless otherwise agreed); and
- that the adjudicator is to be informed if a party intends to discuss the dispute with the other party and the adjudicator is subsequently to be provided with an agreed written account of any conclusions reached. Discussions between the parties on possible settlement of all or any part of the dispute are not be reported to the adjudicator unless and until a settlement has been concluded.

The provision in clause 6.2 that requires the adjudicator to direct that a party informs him of its intention to discuss the dispute with the other party is an interesting one. We suspect that this is a little over the top and may well be considered by parties to be an intrusion into their privacy.

The requirement placed on the adjudicator to direct these matters does seem rather over the top when they are set out in detail in the contract itself.

Clause 6.3 deals with the situation where the parties reach an agreement on all or any part of the matter(s) under dispute. They are required to send the adjudicator a statement to that effect, requesting the adjudicator to terminate the relevant part of the adjudication and render accounts of the fees and expenses due for payment by the parties.

Clause 6.4 contains the required time period of 28 days and the provisions for extension of this period required by section 108 of the Act. This clause also defines the date of referral of the dispute as being the date upon which the adjudicator received all the documents and information referred to in sub-clause 6.1(a) from the referring party.

Clause 7 is entitled 'Procedure for the Adjudication' and is a detailed guide to what any adjudicator has power to do in order to reach his decision. It includes the following provisions. Clauses 7.1, 7.2 and 7.3 provide as follows:

- The adjudicator has sole discretion as to the conduct of the adjudication. The adjudicator establishes the timetable for the adjudication subject to any limitation that there may be in the contract or the Act.
- The adjudicator is not required to observe any rule of evidence, procedure or otherwise of any court.
- The adjudicator is to consider the matters set out in the notice and any other matters which the parties and the adjudicator agree should be within the scope of the adjudication.

Clause 7.4 provides that the adjudicator has the power to:

- decide any question of interpretation of the contract between the parties that is relevant to the dispute;
- ask for further written information;
- meet and question the parties either separately or together;
- require any party to make available for inspection any premises or item pertinent to the dispute but he must allow representatives of the parties to be present if they so wish;
- require the production of documents or the attendance of people;

- direct the preservation and, if necessary, storage of any property of or under the control of either party;
- call meetings with the parties' representatives. Locations and times to be chosen by the adjudicator after consultation with the parties. If a party objects unreasonably to the adjudicator's proposed location, the adjudicator may proceed to hold the meeting and advise the objecting party of the outcome;
- impose reasonable time limits on the parties for replies to requests by him for information. In the event of a party failing to respond in accordance with the time limits imposed, to proceed with the determination in accordance with evidence available, and to draw such inferences as seem to be appropriate arising from such failure;
- set times for the previous and similar activities;
- proceed with the adjudication and reach a decision even if a party fails to provide information, to attend a meeting or to take any further action requested by the adjudicator;
- give a decision on different aspects of the dispute at different times;
- issue such further directions or take such actions as he considers to be appropriate.

This is an unusually exhaustive list and is in our opinion very useful for the sake of the understanding of the parties as to the adjudicator's role. The IChemE is to be congratulated on its approach. It must of course be remembered that any such list can only be non-exhaustive and, as is set out in the final item, the adjudicator can in appropriate circumstances give further directions or take other actions that he considers to be appropriate for the adjudication in question.

Clause 7.5 allows the adjudicator in addition to engage advisers on any matter to assist in reaching a decision. He must however give the parties notice before making such appointment and if possible provide an indication of likely costs. This clause also states that the appointment of advisers does not alter the fact that all decisions in the case are the adjudicator's alone.

Clause 7.6 allows the adjudicator to open up, review and revise any decision (other than that of an adjudicator unless agreed by both parties) made under or in connection with the contract and which is relevant to the dispute. He may order the payment of a sum of money, or other redress. In particular, he may open up, review and revise any decision taken or certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive.