Chapter 10
The Process

Section 108 of the Act approaches adjudication in a rather different way from that in which the Arbitration Act 1996 deals with arbitration. There are none of the detailed procedures or lists of powers that can be found in the Arbitration Act that govern the arbitration process. These are left for the Scheme or the contract between the parties and any adjudication rules that may apply.

All section 108 says about the adjudication process, once the dispute has been referred to the adjudicator, is:

- that the adjudicator must reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
- that 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;
- that the adjudicator must act impartially; and
- that the adjudicator may take the initiative in ascertaining the facts and the law.

There may be provisions in the contract or in any applicable rules which set out more than this but, unless there are, the adjudicator is totally at liberty as to the procedure that he may adopt to enable him to reach his decision within the time allowed. Most adjudication rules in fact do no more than set out a non-exhaustive list of actions that the adjudicator may take and the Scheme does not differ in this respect.

Initiating the adjudication process

The notice of adjudication and the referral to the adjudicator

The parties to the contract are in dispute and one of them has decided to exercise his right to refer that dispute to adjudication. The first thing he has to do is issue his notice of intent to refer the dispute to adjudication ('the notice of adjudication'). The notice must comply with the minimum requirements of the contract or any rules adopted by the contract. The Scheme is quite specific as to its content. It is vital that the referring party makes every effort to make his notice of adjudication as specific as he can. The primary reason for this is that the notice sets out the details of the dispute that is to be referred and thus sets the adjudicator's jurisdiction. The notice also enables the prospective adjudicator, whether he be named in the contract, agreed by the parties or nominated, to understand the nature of the dispute. Where an ANB is involved it will need to have a clear idea of the nature of the dispute so that it has the opportunity of nominating the best person for the job of adjudicator. If the notice is too widely drawn it may be considered not to identify any dispute.

All the various adjudication clauses and the Scheme set out requirements as to the nature of the notice of adjudication. They require varying degrees of detail but in principle what is

required is sufficient information for the other party to identify the disputed matters and for the most appropriate adjudicator to be identified.

The Chartered Institute of Arbitrators uses an application form for the nomination of an adjudicator which, in addition to requiring that the notice of adjudication be provided, includes a list of typical disputes that the referring party has to tick as appropriate. This eases the problem for the appointing body in identifying the right adjudicator. The other ANBs have their own permutations of forms necessary for their purposes to make an appointment or nomination. It is important that the forms are completed correctly and accompanied by the correct fee. Most ANBs do not consider that time is running until they have received a properly completed form and the appropriate fee.

The next stage after the adjudicator is either agreed or nominated, is for the referring party to send its referral notice to the adjudicator and to the other party. If the parties are pragmatic and have not allowed the dispute to fester and develop in size and complexity, the referral notice may be very brief. The practical approach is to be well prepared and to exercise the right to adjudication on a dispute that contains a discrete issue or issues. Adjudication is most likely to succeed in terms of the timetable and result if this approach is adopted.

Quite often, however, the matters referred include a complete final account where many hundreds or thousands of variations are in dispute between the parties; there is a prolongation and disruption claim with the associated claim for loss and/or expense. There are divergent views on the practice of submitting a dispute of such a nature to adjudication. Some consider that this almost amounts to an abuse of the adjudication process and should be actively discouraged. Others have a rather more pragmatic view, however sizeable the dispute, and provided that the parties are prepared to allow sufficient time for the adjudicator to consider and reach a decision on the totality of the dispute properly, what is wrong with a process that will produce a decision that could well be accepted by the parties or used by them as a means to settle the dispute? Even if the result is a decision that does not lead to a resolution of the dispute, the adjudication may well result in a narrowing of the issues and as a result reduce the costs of a later arbitration or court proceedings.

If the referral notice is succinct and to the point, it will allow the adjudicator to set the most appropriate procedure for the adjudication. Human nature being what it is, the more likely scenario is one where the referring party will have done a considerable amount of preparation beforehand and will submit what would be, in arbitration terms, a statement of its case.

In the early days of statutory adjudication great concern was expressed with regard to the referring party setting an ambush for the other party in this way. This does of course sometimes happen but most adjudicators are alive to the problem and can take steps to deal with the unfairness that can result. If the referring party produces a referral that involves matters of considerable complexity, the adjudicator may well in any event be unable to deal with the matter properly unless time is extended, and there is no doubt that responding parties are only too willing to allow extensions greater than the 14 days to which the referring party is limited, to give them the time to make a proper response. We deal with the possibility of ambush that may arise out of the possible imbalance in preparation time, in more detail later in this chapter.

One matter that has become evident with regard to the referral is the view held by some that the referral notice should set out the dispute in its entirety, with the full detail of both parties' contentions being included. This procedure is all very well when the referring party is professionally represented, but the practicalities of adjudication are that many referring parties do it themselves; this after all is the great attraction of adjudication, and the last thing

that they will consider doing is putting the other side's case. However beneficial such an approach is to the adjudication process and in particular in ensuring that the dispute has properly crystallised in the way set out in the various judgments of the court, the practicalities of adjudication are that this ideal situation seldom happens. While we have sympathy with the concept of the referring party presenting both sides of the case from the point of view of avoiding problematical jurisdictional situations and making the adjudicator's life easier, we suggest that any adjudicator who decided that he would not adjudicate unless the referral was presented in this way would find very few adjudications to do.

It is vital however that the referral relates to matters that have already been debated between the parties. See *Sindall* v. *Solland*[1] and *Beck Peppiatt* v. *Norwest Holst*[2]. The addition of new material may be considered to create a new dispute that is not within the jurisdiction of the adjudicator, see *Nuttall* v. *Carter*[3].

On receipt of the referral

Whatever the nature of the referral notice the adjudicator will have to make sure that he has time to read it in detail on the day he receives it. Anything of any complexity will require the allocation of a reasonable amount of time on the first day to digest it and to prepare a plan of action for the forthcoming 28-day period.

The adjudicator may be of the view that he would ideally like to get his fees agreed with the parties. This may be possible and in many cases the procedure will require that an adjudicator's agreement accompanies the referral notice, which will provide the opportunity to resolve the issue of fees from the outset. The adjudicator should not allow this to interfere with his duty to complete the adjudication within the very restricted timescale. ANBs will take a very dim view if a party that had previously applied for a nomination approached them with a complaint to the effect that the person nominated as adjudicator would not proceed because he wanted his fees agreed beforehand. The more usual approach, save in cases where the appointment is by agreement and terms are settled between the arbitrator and the parties, is for the adjudicator to state what his fees will be and rely on his entitlement to a reasonable fee.

It is vital that the adjudicator stamps his authority on the proceedings from the outset. He should therefore acknowledge receipt of the referral notice immediately by fax or e-mail as is specifically required by some forms of contract. If the referral notice is short he should consider it immediately, decide what the procedure will be and include his directions with his acknowledgement. If the referral notice is of any length or complexity he should merely acknowledge receipt and inform the parties that he will be issuing his directions as soon as he has considered and decided what the appropriate procedure should be. This does not mean that the adjudicator can sit back; it is of paramount importance that he issues his directions at the earliest possible moment to avoid vital time being lost.

He must at this time satisfy himself that the dispute is of the same nature as he believed it to be when he told the parties or the ANB that he would take it on. He must also check that the matters referred are within the ambit of the notice of adjudication. Anything that is not identified in the notice of adjudication and is included in the referral is not within the

[1] *Sindall Ltd* v. *Solland and Others* (15 June 2001).
[2] *Beck Peppiatt Ltd* v. *Norwest Holst Construction Ltd* [2003] BLR 316.
[3] *Edmund Nuttall Limited* v. *R.G. Carter Limited* [2002] BLR 312.

adjudicator's jurisdiction and, if he makes a decision on such things, that decision is unenforceable. It does no harm to repeat that it is vital that the adjudicator does have an understanding of the subject matter of the dispute. If he is being asked to adjudicate on something wholly outside his expertise he should tell the parties immediately, put it down to experience and withdraw.

The authors have no sympathy with the view that has been expressed by some members of the arbitral community to the effect that anyone who can arbitrate can also adjudicate on any matter that is put before them. This totally misses the point of adjudication. If an adjudication is to succeed, it is vital that the adjudicator not only has a grasp of the principles of dispute resolution and the law of contract but that he is also well up to speed with the current practical aspects of the adjudication process and that part of the construction industry out of which the dispute emanates. The adjudicator who takes on disputes in areas in which he does not have experience is likely to be found out quickly, both in that particular adjudication and in the marketplace. Where the modern arbitrator and the adjudicator are similar is that both must be prepared to be innovative in approach, a good manager, particularly skilled in time management, and command respect because of their competence.

The adjudicator must also find out what the contract is, whether it has any particular procedural requirements and whether there are any adjudication rules that apply. If there are, the adjudicator must ensure that any procedure he sets up complies with these requirements.

Before he issues his directions the adjudicator will need to ask himself a considerable number of questions, among which are the following:

- What do the contract and/or the applicable rules say?
- How will this affect his approach to the adjudication?
- How long will be needed to reach and to write the decision after all the information is to hand?
- Having considered the referral, are the issues involved of a nature that he should seek an extension of time?
- What is the available period for information gathering, allowing for the submissions of the parties and for his own investigations? Any dates that he sets must ensure that the period that he needs for this purpose is not eaten into in any way. The first rule for any adjudicator must be: never get backed into a corner that you can avoid; the time limits are going to impose immense pressure without making it worse for yourself.
- Is his diary clear for the requisite number of days immediately before the expiry of the 28-day period? If not, the period in question should be lengthened and the period for information gathering reduced as a result.
- Is the referral notice adequate? Does it set out the position of the referring party in an understandable fashion or does it need amplification?
- Is the question framed in a way that he can answer? It is vital that the question does not ask him to make a decision in a form that will usurp the authority of the architect, the contract administrator, the engineer or engineer's representative. There may be jurisdictional problems if a question is put to the adjudicator that he does not have authority to answer. At this juncture he should consider taking the initiative and telling the parties the question he is prepared to answer.
- If the question needs amplification, should the referring party be given the opportunity to set out something further in writing or should the adjudicator convene an immediate meeting and set about ascertaining the facts (and possibly the law) himself?

- If it appears appropriate to get something further in writing, how long should be allowed before it must be submitted?
- Are there any documents that appear vital to the adjudication that are not included in the referral notice?
- Does it appear that a site visit will be necessary and are there likely to be any restrictions in obtaining access to the premises?
- How is he going to organise a site visit? Should he allow the parties some flexibility in respect of dates or is he going to state a date and time (after ensuring access is available) and expect them both to fit in?
- Does it appear that any tests or experiments will be required?
- Does it appear that legal or technical advice will be needed? Is he required to notify the parties or obtain agreement from them to do this? How long will it take?
- Is he likely to be using his own knowledge or expertise? If he is going to use his own knowledge or expertise or obtain advice, the parties must be given the opportunity to comment. How will this affect the programme?
- Should the responding party be given the opportunity to respond in detail in writing? Do the applicable rules require him to allow such a response? If so, what period should be allowed? Do the contract or rules specify a period?
- Should this submission be restricted in length? Do the contract or rules require such a restriction?
- Should the responding party's response be restricted to a fact-finding meeting?
- What periods of time should be allowed for the parties to make further submissions?
- A meeting with the parties may well be needed. Should he set a provisional date at the outset or should he wait and see how things turn out before doing anything?

The adjudicator must, as noted above, in considering each of these points and any others that, in the circumstances, appear appropriate, ensure that he takes into account any rules that govern the adjudication.

Once the adjudicator has considered these matters and has decided what he is going to do, he must tell the parties what he intends. It is for the individual adjudicator to decide how he will do this but, in keeping with the spirit of adjudication, the method preferred by most adjudicators is a simple letter addressed to both parties setting out precisely what he is going to do and wants them each to do, and by when. Alternatively, it could be more formal and be set out as directions reminiscent of the arbitral process. This may not always suit the impression of the more informal nature of adjudication, but even the letter, however informal, should be framed in a way that indicates to the parties that the adjudicator means business and will expect them to comply in order that he can reach his decision in the allotted period.

In the case of a dispute that requires his attendance at site, a telephone call to each party, in conference mode if that is felt to be more appropriate, followed up by a written confirmation, might well be a way of getting things moving quickly, but communications by fax will generally be as quick as anything and avoid possible misunderstandings.

Progress of the adjudication

After the issue of the initial directions

The ideal adjudication will take the following path. After the referral the adjudicator receives a response followed, if appropriate, by a reply from the referring party. These can be

written or oral as suits the circumstances of the case. He then has the time necessary to satisfy himself with regard to any matters upon which he requires clarification, either from the parties or by his own efforts. He will have time to take legal or technical advice as necessary. The parties will have sufficient time to comment upon the results of the adjudicator's own investigations and any advice received. The adjudicator will then have time to give proper consideration to all the information that he has to hand. All this should be completed in sufficient time to allow the adjudicator to set his conclusions down on paper and to ensure that he deals with everything that he has been asked to.

To achieve this it is vital for the adjudicator, once he has issued his directions, to keep a checklist which has every action set out on it, with a note of who has to do it, and when it must be done by. If he doesn't do this there is the danger that a date will be missed and the whole process will then be thrown into disarray.

Each direction must be reviewed frequently and adjustments may well have to be made as the reactions of the parties are received. The referring party will probably make every effort to comply but it is not inconceivable that the responding party will be less than helpful. In this event it is for the adjudicator to make it quite clear that he has his job to do and that he will be making his decision in the allotted time whether or not the responding party complies with his directions. This should at the very least bring such a party to its senses and to a realisation that there is no benefit whatsoever in not co-operating with the process. We look at what the adjudicator should do in the face of non co-operation by a party a little later in this chapter.

Whatever the adjudicator does, he must at all times remember his obligation to reach his decision within 28 days or any agreed extension to the time and he must subordinate everything else, other than his duty to act impartially and as fairly as the time limitations permit, to achieving this target.

Submissions by the parties

All standard form contracts, rules and the Scheme are drafted to enable an adjudicator to be appointed and for the dispute to be referred to him within seven days of the issue of the notice of adjudication. The requirements for this referral notice can vary from minimalistic to comprehensive. In most cases it is likely that the referring party will have done some homework beforehand and even where the requirements for the referral notice are slight there will be a substantial submission. Whatever the requirements are, the 28-day period will not commence until any specific requirements for the referral have been complied with properly.

Where the submission of the referring party appears long and complex, the immediate reaction of the adjudicator may be to seek more time than the normal 28-day period. The adjudicator may have to use some persuasive powers on the referring party in this circumstance, perhaps indicating that he will draw adverse inferences if additional time is not allowed and the responding party is not allowed a proper opportunity to answer all the points made. Any sensible referring party will be more than happy to extend the period but the adjudicator must be prepared for those with less amenable attitudes.

Save in the case of the CEDR Rules, there is no specific requirement in respect of the nature of the responding party's submission. This leaves the decision as to how the responding party is to acquaint the adjudicator of its position totally in the adjudicator's hands.

The responding party will, in all likelihood, wish to make a written submission and this is probably the preferable course in all normal instances. If the adjudication relates to a simple

discrete issue there will be ample time for a response from the responding party, still allowing the adjudicator time to ask his own questions if he so desires and to prepare his decision.

If, however, the parties have allowed the dispute to escalate and there is a complex web of issues involved, the adjudicator may have to consider the imposition of procedures that may appear rather radical to those more used to the timescales allowed for arbitration and litigation. This is where the concept of adjudication must be seen as a separate function from the more traditional forms of third party dispute resolution. The normal procedure in litigation or arbitration is for the parties to set their stalls out formally by the exchange of pleadings or statements of case. This allows the parties to know what the other party's case is all about and to identify those matters that are in dispute and those that are agreed.

In adjudication there is no time for such detailed procedures. If the parties want such procedures it would be far better if they followed the arbitration route with the detailed checks and balances which that procedure provides. The spirit of adjudication is a speedy decision and the adjudicator should be looking for ways in which he can achieve such a result while endeavouring to get as near as he can to an answer that will place the parties in a position to finally resolve the dispute.

It is possible to take the responding party's submissions orally at a meeting or series of meetings but any party responding to a detailed written referral document of almost any kind will invariably want to respond in writing.

Whatever he does, the adjudicator should make every effort to allow for a response by the responding party. The adjudicator should avoid, if at all possible, having to decide the dispute on the basis of the referring party's submission and his own investigations. There is one particular reason for this and that is the overriding requirement upon the adjudicator to act fairly albeit this must be within the restrictions of the time limits imposed by the Act. In the law this concept is described as the 'rules of natural justice' which we looked at in the context of adjudication in the last chapter.

The time allowed for this response will be extremely limited. A cut-off date for receipt of information and evidence must always be borne closely in mind by the adjudicator. He should never accept the situation where the responding party's submission arrives too late for him to deal with it or more particularly for the referring party to respond to. What happens if it raises more questions than it answers? In any event it is not unusual for the responding party's response to raise points that are not covered in the referring party's original submission, and the adjudicator must allow time for these to be answered if they are within his jurisdiction. It must therefore be incumbent upon any adjudicator to allow a sufficient time after the responding party's response for the referring party's reply and his own investigations, when he sets his original programme and sends out his initial directions.

Parties do have a habit of not meeting deadlines and there could be a few critical days when the adjudicator is busy elsewhere and suddenly everything is delayed. If the delay has been on the part of the referring party, the adjudicator would, it is suggested, be right to tell that party that more time should be allowed and that they should agree to an extension of time. This can of course be done unilaterally. Any reluctance on the part of the referring party to agree to such a delay can in appropriate circumstances be met by the comment that adverse inferences could be drawn in respect of the refusal.

If the boot is on the other foot and the responding party has produced its response late, the referring party may well allow more time as it will probably want to consider and respond to it. The referring party is likely to make things more difficult for itself if it refuses an extension of time in these circumstances.

There will be times, however, when things conspire against the adjudicator and there just is not any time for a party to make a written response. The adjudicator may have decided

that the matter is of such complexity that he wishes to obtain the responding party's submissions orally as has been suggested above. He may be aware of a large number of points made by one party that have not been answered by the other. Whether the answers are satisfactory or not, he is in difficulties without them. In these circumstances it is almost inevitable that the adjudicator will have to take proactive action to fill in the gaps, and convene a meeting between himself and the parties.

One matter that has developed as a problem for adjudicators since the decision of the court in *Nuttall* v. *Carter*, mentioned earlier, relates to questions surrounding the nature of the dispute referred and how restricted the responding party will be in making its defence. It is clear that the dispute that is referred must have been that which has crystallised between the parties. This means that new disputes cannot be referred and they must be aired between the parties in order that the adjudicator has jurisdiction. A referring party cannot raise new issues but what if the responding party wishes to develop its defence? It is possible that the dispute has reached a stage that the parties can take no further. When the referral is received the responding party realises that there are defences that it has not put to the referring party beforehand. Can these be put in the response? If *Nuttall* v. *Carter* is followed to the letter it would appear that they cannot. But what about fairness? Is it right to find that a claim succeeds because the responding party is prevented from making a proper defence? There are two principal scenarios. Firstly, the referring party can agree to the introduction of the new defence and an extension of time is agreed to allow the new matters to be addressed properly. Secondly, if the referring party refuses to do this the responding party puts its contentions to the referring party outside the adjudication and creates a new dispute which can be referred to adjudication. The responding party may then seek to resist enforcement of any award against it pending the finalisation of the second adjudication.

Meetings with the parties

The timescale within which the adjudicator has to work is such that often he will, as noted above, have to take proactive steps to obtain as much information as possible. This will ensure that his decision, when made, has the best chance of reflecting the contractual rights and obligations of the parties. One of these steps is likely to be meeting the parties.

It is self-evident that, unless the circumstances of the adjudication are most unusual, the parties themselves will have most, if not all, of the evidence that the adjudicator will need in order to reach his decision. The parties may be able to provide him with all he needs in writing by means of their submissions. He will not require a meeting in this event.

It may be that neither party wishes to elaborate on their written submission and resists attempts of the adjudicator to act in any way that might be considered inquisitorial. In this event the adjudicator will have to do his best on the basis of the written submissions, however unsatisfactory they may be. If the parties are set on an adjudication that is entirely on the basis of documents, we suggest that there is little if anything that the adjudicator can do other than go along with it. He could force the situation and insist on a meeting, but this should not be done if such a move would be counterproductive. It would be most appropriate for the adjudicator to set down any questions that he may have in writing and request that the parties provide him with their answers in writing as well. Where the adjudicator feels that he has been unable to obtain answers to everything that he would have liked, he may, if asked to give reasons, be likely to use the formula, 'on the basis of the submissions made to me' rather a lot, as he may be reaching conclusions that he feels may well have been different had he had the opportunity to make some more extensive investigations of his own.

More usually, the parties are receptive to the adjudicator's expressed desire for a meeting and where appropriate he should not be afraid to hold one. The authors would suggest that it is not described as a hearing; that sounds too formal and may put the parties in the wrong frame of mind. It should be described as a meeting and tend towards some level of informality as this will encourage rather less defensive attitudes on the part of the parties, and the meeting may be rather more productive as a result. This does not mean that the adjudicator should let the parties have a completely free hand; in that way lies disaster. It is vital for the adjudicator to maintain total control, particularly as disputing parties can express every ambit of emotion and there is nothing worse than a meeting that degenerates into a 'slanging' match.

That said, as long as the adjudicator remains entirely in control, it is often the case that a frank discussion between the people who are at the heart of the dispute, even of the 'you did, I didn't' variety, can lead the adjudicator to a much better understanding of the differences than the most expert of cross-examinations will reveal. Any risk of the meeting getting out of control is, in the authors' experience, quickly quelled by a quiet comment from the adjudicator such as, 'gentlemen, you are no longer assisting me'.

Another reason for holding a meeting is something that is well known in the field of mediation. That is the technique of 'venting'. It is often found that if the parties have the opportunity of telling a third party what is troubling them, blowing off steam and giving vent to their frustrations if you like, it can assist in reaching an agreement. This is a process that is also not unknown in arbitration, especially in smaller cases where the parties themselves are involved without representation. It is often done on documents alone but many arbitrators convene a short hearing to allow some face-to-face presentation to make up for any inadequacies in the documentary submissions and for the parties to make their feelings known. In all these cases the parties are often more likely to accept the end result if they feel that they have had an opportunity to acquaint the decision maker with their feelings on a face-to-face basis.

There is no reason why a similar technique should not be used in adjudication. There is considerably less time for the preparation of submissions, especially for the responding party, and it may well be that the parties will be more inclined to accept the decision as resolving the dispute if they have had a chance to make some form of oral presentation.

Before convening the meeting the adjudicator should have familiarised himself totally with the submissions of the parties and have identified the questions that he believes need answering. There is nothing wrong with setting out an agenda of the matters he wants to discuss and the questions that he wants to be answered. He should have made the parties aware of his agenda and if possible asked them if there are any matters that they want to be included in the discussions. This can be quite important if witnesses to the matters that are the subject of the dispute attend, either by invitation of the adjudicator or of the parties' own volition. There is little point in the adjudicator arriving primed to examine the witnesses in detail if what the parties really want is to carry out a cross-examination of the other side's witnesses themselves. In the time that the adjudicator has had available for preparation it is in any event far more likely that the parties themselves will know the right questions to ask to bring out the facts, than will the adjudicator himself.

It is for the adjudicator to decide whether he will allow the meeting to proceed in a way similar to a traditional formal arbitration hearing, and allow the parties to present their respective cases and then to ask questions himself, or whether to take a more inquisitorial stance from the start. Each individual dispute will have its own differing characteristics and personalities involved and an appropriate procedure will have to be devised accordingly.

Investigating the facts and the law

There is no obligation upon the adjudicator to take any positive action other than to set the procedure for the adjudication. He can just sit back, require the parties to make submissions to him, and, once these are received, reach his decision by a process of analysis of the documents before him.

The adjudicator will generally be able to ascertain the facts from the submissions of the parties, the relevant documents and from any questions that he puts to them. If he needs to carry out tests or investigations, or have them carried out on his behalf, he should have the technical expertise to ensure that these are done properly or, if done by others, to understand the results.

Investigating the law may be slightly different and more difficult for the technical adjudicator who is not familiar with that specific area. He may just take the submissions of the parties as to the contract and deal with them as best he can; in everyday terms he comes to a reasonable commercial view. The problem with this is that he may well not be properly fulfilling his obligations as adjudicator. As we have noted previously, the adjudicator's job is to ascertain the rights and duties of the parties under the contract. Where the parties have agreed that a commercial view can be taken then he may be able to act in this way, for example the TecSA Rules, but otherwise he may be skating on thin ice.

The adjudicator is obliged to apply the law in reaching his decision on the contractual rights and duties of the parties. A losing party to an adjudication will be understandably upset if the adjudicator reaches a decision that is patently wrong in respect of established law. The winning party could also be rather concerned if it is faced with a reference to arbitration or the courts that could have been avoided had the adjudicator applied a well established and well known point of law correctly.

It is therefore paramount that an adjudicator is able to apply the established law in a capable manner to the dispute he is called upon to resolve. Whether he does this from his own knowledge or by obtaining legal advice is for the individual adjudicator in any specific circumstances that he finds himself. One thing that has become clear over the first years of adjudication is that it is vital that adjudicators do understand the law of contract and if there is one area that has been a source of complaint it is that certain adjudicators have shown inadequacies in the knowledge and application of the law of contract.

It is not for a practical guide such as this to attempt to offer any guidance in respect of the law. In any event it is not a requirement for an adjudicator to have an exhaustive knowledge of the subject. What the adjudicator needs is an awareness that certain concepts exist and to be able to recognise when he may be getting out of his depth and as a result that it might be appropriate to obtain legal advice. A few pointers follow.

First, and most importantly, the adjudicator must have an understanding of the way contracts are put together. He must be able to understand the concepts of offer, acceptance and consideration. He must be able to identify when a contract is formed and what terms it contains. He must be conversant with how the actions of the parties before and after the contract is formed are admissible as evidence in construing a contract. Given that contracts in the construction industry are very often made using standard forms which are supplemented by large numbers of supporting documents, the adjudicator must understand the rules governing the primacy of these documents in the event of conflict.

We would also go so far as to say that an adjudicator must have some idea of the concept of rectification and the parameters that apply in a situation where the matters put to him encompass the argument that the contract as written does not reflect the agreement that was reached. The adjudicator does not have authority to deal with such matters in disputes

arising under the contract; however, some contracts may give him such authority. He must be able to identify those points over which he has jurisdiction so that he can eliminate those over which he does not.

Section 108(1) of the Act limits the right of a party to refer a dispute to adjudication to one that arises under the contract. This means that a dispute must arise under the contract and not in connection with it unless the contract so provides. An adjudicator should therefore be able to differentiate between them. If he cannot do this, he is at risk of incurring the parties in considerable costs that could later be shown to be abortive. A losing party might well seek to avoid a decision being enforced by showing that the adjudicator exceeded his jurisdiction by dealing with a dispute that does not arise under the contract. One point that the adjudicator must be aware of, however, is that whilst negligence is a tort and a dispute in this respect does not arise under the contract, what is commonly called 'professional negligence' can often in fact be a breach of contract.

An adjudicator should also be aware of the basics of the law of evidence and specifically to recognise relevance and hearsay. He must be able to understand the concept of giving 'due weight' to evidence put before him.

There is one set of circumstances in which the adjudicator will have to take active steps to ascertain the law and that is when he is adjudicating under a regime that places specific obligations upon him in this respect. The Scheme is one such. Paragraph 12(a) of the Scheme requires that the adjudicator 'shall reach his decision in accordance with the applicable law in relation to the contract'. It can be that the submissions of the parties to an adjudication that is conducted under the Scheme do not even remotely touch on the legal rights and duties of the parties in any ordered way. The Scheme does, after all, only operate when the parties who have entered into the contract are not using a standard form and, unless the parties are represented, they are thus likely to be rather less sophisticated and knowledgeable of legal and contractual concepts. If the dispute requires the adjudicator to interpret the terms of the contract he will have an obligation to make his decision in accordance with the law applicable to the contract. If he does not, he is in breach of the terms of his undertaking as adjudicator.

Taking advice

The adjudicator may take advice of a technical or legal nature. It is to be hoped that adjudicators will not generally need to take technical advice. It is almost inevitable that on occasion the non-legally qualified adjudicator will feel that he must take legal advice in order to deal properly with the matter put to him for his decision.

It has already been said that the adjudicator is making a statement of the parties' rights and duties under the contract. If he does not have sufficient legal knowledge himself to deal with a specific dispute he may well consider it appropriate to take legal advice. There is a requirement under the Scheme that the adjudicator shall reach his decision in accordance with the applicable law in relation to the contract. He should therefore do everything that he can to reflect the applicable law. He may have detailed submissions from the parties in this respect and have to choose between them if they differ. In this case he may not need to take legal advice. Alternatively, there may be no such submissions and if he is not legally qualified he might well feel safer taking legal advice rather than risking making his own interpretation of the situation, which may subsequently turn out to be patently wrong.

It must be a cardinal rule for any adjudicator, unless time just does not permit, to allow the parties to comment upon any matters that he ascertains for himself before he reaches his

decision. This must include any specialist advice that he obtains. The person giving the advice may take up a fair amount of the time that is available for the adjudication and the earlier that such advice is sought the better. There is then the greatest possible chance of the parties having an opportunity to comment upon the advice as they choose. Even the time factor may not always be too much of a problem. A suitably worded confirmation of the reasons why the advice is needed ought, if framed in a suitable way, to result in the parties agreeing to allow further time. The adjudicator must be wary not to fall into the trap of applying any findings that his researches may uncover to his decision without allowing the parties the opportunity to consider and make submissions upon them (*Balfour Beatty* v. *Lambeth*[4] and *RSL* v. *Stansell*[5]).

There are certain situations where the adjudicator may not be in a position to make arrangements to obtain advice immediately after he has read the referring party's submission. The referring party's submission may need amplification; it may for instance not include the contract between the parties. There may be a requirement placed upon the adjudicator to inform the parties of his intention to take advice before he takes it. In some instances there may be a requirement to obtain agreement from one party before he does so. Cost estimates may have to be given. It may in fact be as a result of the responding party's response that the adjudicator decides that he should take advice. The adjudicator may well find that he is unable to obtain the advice that he considers that he needs within the set timescale. In this event the adjudicator is very much in the parties' hands. He should make every effort to persuade the parties that they should extend the time necessary and it may be that they both agree. If one agrees and the other does not, it is for the adjudicator to draw the appropriate inference. If neither agree, the adjudicator will just have to get on with the adjudication and accept that his decision will not be as satisfactory as it otherwise might be.

Whenever advice is sought it is on the basis that the adjudicator will take account of that advice in reaching his decision. Legal or technical advice is not a substitute for the adjudicator reaching the decision himself. It is not part of the task he is there to perform to 'sub-contract' out of parts of the process. In the final analysis the decision is that of the adjudicator and nobody else.

Obstacles in the process

The reluctant party

As distinct from arbitration, which is a consensual process in which the parties choose to have an arbitration clause in their contracts, adjudication provisions in contracts are required by legislation. The right to refer a dispute to adjudication can be exercised by one party to a contract alone. An arbitrator has to make every effort to ensure that a party who does not initially take part in the arbitration has been given every opportunity to do so before he proceeds in that party's absence. The position in adjudication is different; the time limit is paramount. There must be an obligation on the adjudicator to attempt to contact the responding party, but, given the timescale involved, he must fulfil his primary obligation, to reach his decision, even if he is unable to get any reaction from the responding party.

The failure of the responding party to take any action means that the referring party may

[4] *Balfour Beatty Construction Limited* v. *The Mayor & Burgesses of the London Borough of Lambeth* [2002] BLR 288.
[5] *RSL (South West) Ltd* v. *Stansell Ltd* (16 June 2003).

have problems of enforcement but this is not a matter that should concern the adjudicator, at least not directly. The adjudicator must of course ensure that he carries out his duties in accordance with the contract or any applicable rules and there may be specific requirements with which he has to comply as a result. If he fails to act as required by the contract or rules, his decision will possibly be unenforceable.

The adjudicator has two choices when faced with an unco-operative party. He can proceed simply on the basis of the referring party's submission or he can decide to investigate the facts and the law. Proceeding in accordance with the referring party's submission effectively means accepting it at face value. Even the most inexperienced adjudicator must recognise the difficulties that this will ultimately present. Claims are generally put together in the most favourable light for the referring party and a totally uncritical acceptance of the referring party's contentions will, in all likelihood, mean that the decision will be rather more in favour of the referring party than it perhaps should be.

The adjudicator may also come to the view that the claim is exaggerated. In this case it would be remiss of the adjudicator not to endeavour to acquaint the referring party of the position and give him an opportunity to respond, but as with all matters in adjudication the timescale is paramount and this may not always be possible.

This situation arose in an arbitration where the arbitrator came to the view that the claim was vastly exaggerated and a 'try on'. In *Fox* v. *Wellfair*[6] the arbitrator reduced the claim substantially and on appeal was found to have misconducted himself in failing to put his alternative evidence to the claimant's expert.

The adjudicator should always remember the possibility that what appears to be an exaggeration may in fact be an inadequacy in the evidence that can be remedied. If this is the case he will have rendered the referring party a service and that party may request the adjudicator to make a 14-day extension of time to remedy the inadequacy.

If the adjudicator is required to reach his decision in accordance with the applicable law, as he is when operating under the Scheme, he will have to take specific action in this direction as he will not have the responding party's views as to what the applicable law is. This may well mean taking advice. It is almost certain that the unco-operative party will contest the decision and consequently it is very important that the adjudicator does not give that party an obvious opportunity by producing a decision that clearly does not properly reflect the applicable law.

The drawing of inferences by the adjudicator

We have on a number of occasions suggested that the adjudicator will draw adverse inferences from the actions or non-actions of a party. As a general rule if a party refuses to do something that quite evidently should be done to assist the adjudication process, it can be reasonably assumed that that party believes that the action, if taken, will be to its own disadvantage.

This is where the adjudicator would be perfectly within his rights to seek to uncover what that party might be trying to hide. Time may, however, preclude this, and in any event it must be remembered that the adjudicator does not have the same powers to order discovery as does an arbitrator and the information may remain concealed. The adjudicator would then be quite within his rights to draw the inference that the information that is not offered or that cannot be obtained would be damaging to that party's cause.

[6] *Fox* v. *Wellfair* (1981) 19 BLR 52, CA.

The 'commercial' decision

The first edition of the ORSA (now TeCSA) Adjudication Rules allowed the adjudicator, 'if it appears to him to be impossible to reach a concluded view upon the legal entitlements of the parties within the practical constraints of a rapid and economical adjudication process' to make his decision on the basis that it 'shall represent his fair and commercially reasonable view'. ORSA, who took a bold step in allowing adjudicators to make commercial decisions, have reviewed this provision and it has now been amended to read:

> 'Where it appears to the Adjudicator impossible to reach a concluded view upon the legal entitlements of the Parties within the practical constraints of a rapid and economical adjudication process, his decision shall represent his fair and reasonable view, in light of the facts and the law insofar as they have been ascertained by the Adjudicator of how the disputed matter should lie unless and until resolved by litigation or arbitration.'

This is the only such provision of which the authors are aware. It is unlikely that any such provision will appear anywhere else.

A commercial decision has connotations of allowing a departure from the establishment of the strict contractual rights and obligations of the parties. It also suggests a lower standard of proof than 'on the balance of probabilities' and even a decision which may not relate to the evidence.

One other question relating to commercial decisions is whether the adjudication process has to be 'fair'. We have already looked at this point in some detail in Chapter 9. As a process it has to be as fair as it can be in the time available and comply as far as is possible with the rules of natural justice. It is not, however, within the remit of any adjudicator to try to make a fair decision in the face of the contractual provisions, which may on the surface appear extremely onerous on one party to the benefit of the other. If that is the contract that they have entered into, the adjudicator should always remember that the contract agreement will, or should, have reflected the risks involved. He should also remember that he does not actually have the power to do anything other than find in accordance with that contract.

What can be adjudicated?

Disputes relating to design

One area that it is suggested will cause difficulty is where the adjudicator assumes a design responsibility and thus takes it away from the design team. It is unlikely that many adjudicators will fall into this trap. The typical example is where a builder has been instructed to demolish and rebuild a wall. He applies to the adjudicator for a counter instruction to the effect that the wall should remain. This is not the adjudicator's function. If the architect/contract administrator/engineer has instructed that the wall should be removed, that instruction must be complied with unless the architect/contract administrator/engineer has no power to order such an instruction. The adjudicator must not take away any design responsibility from the members of the design team. They are responsible for design and must remain so. The adjudicator has contractual immunity and if he gives an instruction for work to be done or retained that ultimately proved defective, the employer has nowhere to seek redress. The questions that the adjudicator must answer are whether the wall as built complies with the specification or has the architect/contract administrator/engineer issued an instruction that properly accords with the contract. If the adjudicator finds that the wall

does comply with the specification, the wall still comes down but the employer pays for the demolition and reconstruction in addition to the first time it was put up. If the adjudicator finds the instruction was not issued in accordance with the contract, the architect/contract administrator/engineer will still have the opportunity to issue an instruction that does comply and the wall can still be taken down.

The end result is that the employer may think he is paying for the wall twice. All that has really happened, however, is that the onus of seeking redress has passed from the contractor to the employer. The employer will have to make the decision as to whether it is really worthwhile going through the litigation or arbitration process in the hope of recovering the money. This is what contractors have always had to do. The boot is now on the other foot. Employers, and contractors in a similar position in relation to sub-contractors, will argue that putting the money with the contractor, or sub-contractor, means that there is a risk that the party holding the money will go bust before the money can be recovered. This is true, but isn't this the risk that contractors and sub-contractors have always run? In any event, there is a substantial argument that runs to the effect that the employer or contractor had the whip hand when letting the contract and they always had the choice not to enter into the contract if they felt that there was a chance that the other party was financially unsound.

There is one other reason for the adjudicator to avoid getting involved in design and that is that his immunity is contractual only. A subsequent owner of the building would not be restricted from suing the adjudicator if something that he instructed either to be built or to remain later proved defective.

When a notice of adjudication is framed in such a way as to invite the adjudicator to give an instruction, the prospective adjudicator has the option to refuse the nomination. If it were the referral notice that offends in the absence of a prior indication in the notice of adjudication, the adjudicator would, in our view, be right to decline to proceed at least in respect of those parts of the referral not covered by the notice of adjudication. These points actually go to whether the adjudicator would have jurisdiction to do what is being asked of him, as well as what liability he might have if he carried out a task that was beyond his remit. If the adjudicator were simply to resign in these circumstances there would be nothing to prevent the parties putting the same question to any number of other adjudicators until they found one who would act. This would not of itself make the question or the decision valid. Most matters concerning design and quality can be answered by a declaratory-type decision which says yes the wall is in accordance with the contract or no it is not. They can also be answered on the basis of reducing the matter to a sum of money. The wall was in accordance with the contract and the contractor is entitled to the cost of rebuilding it. It is simply a matter of procuring the right questions from the parties on which to make a decision. There is nothing to prevent the adjudicator writing to the parties and stating 'having read your notices and submissions these are the questions I am prepared to answer and this is where I get my authority to do so'. Most pragmatic parties will be persuaded by such an approach.

One further point relating to design is where the dispute relates to work that must be 'to the architect/contract administrator/engineer's reasonable satisfaction'. This is not a major problem for the adjudicator who is familiar with the normal standards that would apply to work instructed by an architect/contract administrator/engineer. It might be more difficult for an adjudicator who is, for example, rather more familiar with the costing of building work. This may be an instance where the adjudicator should say at the outset on receiving the referring party's submissions that the adjudication should go to someone who is more familiar with the specific issues involved. If such an issue comes up as a limited part of a wider dispute it may be that technical advice from someone experienced in the specific

matter that is outside the adjudicator's own experience can be obtained very quickly and the problem is resolved in that fashion.

Disputes relating to extensions of time

We have already identified that the adjudicator would be very unwise to usurp the design responsibility of the contract administrator. This is equally so in the case of disputes relating to extensions of time. The adjudicator must be exceedingly careful not to usurp the certifier's responsibility. All he should do is to make a decision that the contractor is entitled to an extension of time of *x* weeks for the reasons stated. The adjudicator cannot grant the extension of time; all he can do is declare the entitlement. The contractor will then be absolved from the responsibility of paying liquidated and ascertained damages. Extensions of time of themselves only give relief from liquidated and ascertained damages; they are not, unless the parties have so agreed, a prerequisite or condition precedent to entitlement to loss and expense. In answering questions concerning extensions of time, the adjudicator should not stray into the area of relief from liquidated and ascertained damages or loss and expense unless he is asked to do so. Where an adjudicator's decision declares that there is an entitlement to an extension of time of *x* weeks, it will be for the architect/contract administrator/engineer to grant that extension of time and thus provide relief from liquidated and ascertained damages. The parties are bound by the decision until such time as it is heard anew in arbitration or litigation or until they agree it is final. Such a decision is a defence where the employer then seeks to deduct damages where his architect/contract administrator/engineer has declined to grant the extension of time.

Claims under professional indemnity insurance

Professional service contracts fall within the remit of the Act and therefore disputes which arise under them are subject to the right to adjudication. The establishment of claims against professional men or others carrying out similar services and the rebuttal of such claims is a process that may involve a great deal of investigative work. Such claims are, in the authors' view, matters that will create considerable difficulties in accumulating the necessary evidence if the timescales set out in the Act are not relaxed. It may be that both parties will relax the timescales but, if such extensions are not allowed, the adjudicator will just have to do his best in the time available. He will certainly have to take the utmost care in the production of his decision. Professional indemnity (PI) insurers back most professionals. The adjudicator has no jurisdiction to decide that a PI insurer meets the claim as a result of the decision. The contract of insurance itself is exempt from the operations of the Act by virtue of the Exclusion Order. The insurers will nevertheless be faced with 'picking up the pieces' as a result of any decision that goes against the insured party.

It is reasonable to say that insurers were somewhat late in taking grasp of the effects that adjudicators' decisions might have on the insured and therefore on the contracts of insurance. There are anecdotal reports of insurers making unrealistic and unreasonable demands on the insured if they are to hope that the appropriate cover remains in place following the decision. There are reputedly insurers demanding notice of any adjudications that occur on contracts whether or not the insured is a party to the dispute. These matters do not affect the adjudicator. The adjudicator must perform the task he is there to perform and not be influenced by whether or not insurers will meet the claim.

The note of caution here is for all those who are covered by professional indemnity insurance. They should be aware of any requirements of their insurers as to whether or not they are actually insured for the effects of an adjudicator's decision and what they must do to ensure they remain insured when a notice to refer is received.

The 'unadjudicable' dispute

There have been many debates about the 'unadjudicable' dispute. The first draft of the Scheme, which reached the House of Lords' committee stage, had a provision to deal with the unadjudicable dispute.

Paragraph 32 of this draft Scheme stated:

> The adjudicator may terminate proceedings in respect of any matter if, or to the extent that, he decides that the matter is not suitable for resolution by the procedures under the scheme. This will constitute all or part of his award, and a party may not then lay the same matter before another adjudicator unless agreed with all other parties.

This matter was then revisited in the consultation document, which was the forerunner to the current Scheme. Under the heading of 'Issues to resolve', Question B39 stated:

> What should happen if the adjudicator indicates that he is unable to make a decision?

Two answers were given to this question, neither of which, to the authors, seemed satisfactory. Response B39.1 stated:

> parties may treat the procedure as in failure and start again with another adjudicator. To make the appointment any party may choose whether to rely on any existing agreement or use an appointing body specified in the Scheme.

Response B39.2 stated:

> in such cases only reasonable expenses incurred by the adjudicator need to be met, and parties are not obliged to pay fees.

The situation we are now left with is less satisfactory than that proposed in the first draft of the Scheme. This would have offered total control over the ambush situation and the unadjudicable dispute. To the authors' knowledge there is no situation that would allow the adjudicator the powers expressed in the first draft of the Scheme.

The adjudicator is required to make a decision within the 28-day period or any extended period. The construction industry has got adjudication, warts and all. The industry and the adjudicators must make the system work. For this to happen adjudicators must not be looking for reasons not to adjudicate; they must provide decisions.

The basic principle that the authors would espouse is that there are few disputes that are unadjudicable. A decision can always be made on the evidence presented whether or not this evidence is extensive. An adjudicator may be faced with a submission that includes a great number of documents submitted as evidence that may be contained in a large number of lever arch files. The response from the other party may be similarly lengthy. It is not appropriate for the adjudicator to throw his hands up and say that it is impossible to reach a decision in the given timescale on receipt of such submissions. The submissions themselves will probably be relatively short. The voluminous documents that accompany the submis-

sions are generally by way of back-up evidence. They cannot be totally ignored but a pretty good view of their content can be gleaned from a consideration that is not as exhaustive as it might be were there more time.

People should not put themselves up as adjudicator if they are incapable of identifying and understanding the basic contentions contained within a lengthy written submission. It is perfectly within the capability of a person experienced in the ways of the industry to consider a lengthy submission and to pick out the matters of importance within it. If the adjudicator cannot do this he should not be offering his services in this field.

It is obvious in these circumstances that the adjudicator will have to cut corners and probably make intuitive steps. He will not be able to analyse the submissions in detail but will have to take a view based on the balance of probabilities.

One example of this that might be considered to cause difficulties is the disruption claim by a contractor. For an entitlement to costs resulting from disruption it is necessary to show that the disruption suffered has resulted directly from the actions of the other party. It is relatively easy to make a 'judgement' that the referring party has been prevented from proceeding efficiently with the contract works, for example because there have been a considerable number of variations, or because there have been deficiencies in the provision of information, or that a sub-contractor has been disrupted because of a delay in the completion of earlier works. It is rather more difficult to decide the extent of the disruption and the financial entitlement that results. This is where the adjudicator is going to have to make use of his powers to ascertain the facts. He will have to do everything he can to find out what actually happened. He will have to work very hard. He will have to interview site staff, head office staff and, if allowed, members of the professional team and the employer's own staff. He will have to put all this information together and come to his decision. He must not concern himself with the possibility that a fuller forensic investigation in a later arbitration or litigation may show up something different. He cannot be criticised if he makes every effort to ascertain what went on and reaches his decision on that basis.

One thing that the adjudicator must realise in dealing with matters such as disruption is that he makes his decision on the balance of probabilities. He must get away from the mindset that is sometimes apparent in the approach of the professional team to disruption claims by contractors or by contractor's staff when in receipt of a claim from a sub-contractor. It is not unknown for a surveyor, in carrying out his contractual obligation to 'ascertain' the amount of direct loss and/or expense, to require that the organisation making the claim establishes liability to a standard that is to all intents and purposes 'beyond reasonable doubt'. This is in fact a higher standard of proof than is required in a civil action or arbitration. If the adjudicator is satisfied from the information presented to him that the disruption that is evidenced by the referring party was, on the balance of probabilities, caused by the responding party, he should frame his decision accordingly.

Unless the adjudicator is empowered to make his decision on the basis of a 'commercial view', the decision must always be based on the evidence and weighed using the balance of probabilities; it cannot be an intuitive leap. The acid test is always: 'has the claiming party proved its case on the balance of probabilities?'

One point when considering disputes that may at first appear to be unadjudicable, is to remember the opportunity that the adjudicator has to draw inferences. A party may refuse to allow additional time for a proper examination of their claim or perhaps for tests to be carried out. This refusal may appear unreasonable to the adjudicator. If it does the adjudicator is at liberty to draw the inference that the fuller examination or the tests might well show that the case put up by the party who is refusing to co-operate is not as convincing as it may at first appear.

The large and detailed claim for loss and/or expense

A specific type of claim that might in some eyes come within the category of disputes that are possibly unadjudicable is a claim for loss and/or expense.

There are two court decisions that provide some guidance relating to the way an arbitrator should deal with such claims, which are of assistance to adjudicators. In *McAlpine* v. *Property and Land Contractors*[7] Judge Humphrey Lloyd QC said:

> 'Furthermore ''ascertain'' means ''to find out for certain'' and it does not therefore connote as much use of judgment of an opinion as had ''assess'' or ''evaluate'' been used. It thus appears to preclude making general assessments as have at times to be done in quantifying damages recoverable for breach of contract.'

These words were examined by Dyson J in one of the many *How* v. *Lindner*[8] judgments:

> 'Judge Lloyd applied this approach when answering a question of law that had been raised in relation to a claim in respect of plant. He said that in ascertaining direct loss or expense, the actual loss or expense incurred must be ascertained and not any hypothetical loss or expense that might have been incurred by way of assumed or typical hire charges or otherwise.
>
> I do not understand Judge Lloyd to be saying that there is no room for the exercise of judgment in the process of ascertainment. I respectfully suggest that the phrase 'find out for certain' might be misunderstood as what is required is absolute certainty. The arbitrator is required to apply the civil standard of proof.'

The only standard form contracts that actually require an 'ascertainment' of loss and expense are the JCT 98, IFC 98 and JCT with Contractors Design 98 Contracts. The adjudicator has to reach his decision in accordance with the contract and when asked to determine loss and/or expense under these forms he should take into account the contract requirement that this be ascertained but in doing so he should bear in mind the comments of Dyson J.

The requirements of the other standard forms do not include the word ascertain in connection with the determination of entitlement relating to delay or disruption:

- In the ICE contracts the words 'loss and expense' do not appear. The term that is used is 'cost' which appears in various places. It can be cost 'that the Engineer considers fair'. The cost 'as may be reasonable' or the cost 'as determined'.
- The NEC Engineering and Construction Contract uses the word assess.
- The IChemE contract uses the word evaluate.
- GC/Works says that loss and expense shall be 'determined'. This must, in the eyes of the drafters of that contract, mean something less than 'ascertain' as that was the word used in the 1977 edition of this contract.
- The JCT Minor Works 98 form says that the architect shall value loss and expense 'on a fair and reasonable basis'.
- DOM/1 states that the recovery of direct loss and/or expense shall be 'the agreed amount'.
- DSC/C states that any direct loss and/or expense shall be 'an amount agreed by the parties'.

The adjudicator may have to consider making a request for more time if faced with a detailed and lengthy claim, but we would suggest that none of these formulae for the

[7] *Alfred McAlpine Homes North Limited* v. *Property and Land Contractors Limited* (1995) 76 BLR 59.
[8] *How Engineering Services Limited* v. *Lindner Ceilings Floors Partitions plc*, CILL July/August 1999 p. 1521.

determination of the amount a referring party is entitled to recover in respect of loss and expense, including the main JCT 98 contract and its fellows, should give an adjudicator cause to think that the dispute is unadjudicable.

The adjudicator who decides 'I cannot decide'

Can an adjudicator say, 'my decision is that I cannot decide'?

On the basis of the discussion set out in the paragraphs above, the authors have some difficulty in formulating a situation where an adjudicator comes to a decision that he cannot decide, but it is a question that is often asked. This is not in the least bit helpful.

There is in the authors' view no reason why the adjudicator should make such a decision. His duty is to state the rights and duties of the parties, albeit on a temporary basis. The adjudicator will not have performed the task he has been employed to do and any such decision might well be void. What this situation really amounts to is that the claiming party will have failed to prove his case. Where the weight of argument and evidence is equal between the parties, the claiming party will still not have done enough to prove his case and therefore loses. That is the decision the adjudicator should make rather than saying 'I cannot decide'.

The parties will realise the strengths and weaknesses of their respective positions and as a result settle or abandon their differences or reframe their strategy for the next 'round' in arbitration or litigation.

There is clearly a conceptual difficulty in deciding that a claiming party loses in such circumstances, especially if the chances are that additional evidence will be available. The real nub of the difficulty in such situations is the lack of time for the adjudicator. If more time is made available it will always be possible to adjudicate. The difficulty will only occur when one of the parties will not grant further time to reach a decision. The adjudicator is then faced with the situation that if he adjudicates on the basis of the documents that he has, it may be suggested that he has shown bias to one of the parties. If he is biased he has failed to act impartially or with fairness.

The solution to this lies in the relationship between the parties and the adjudicator. The three parties (or more) are in a contractual relationship. The terms of that contract will require that the adjudicator reaches a decision within 28 days. The terms will also include the ability to extend time by 14 days with the consent of the referring party and by a longer period with the consent of both parties. It therefore forms part of the contract that there will be occasions where time needs to be extended before a decision can be reached. It will form part of the implied term as in the contract between the adjudicator and the parties that the parties will do all things necessary to allow the adjudicator to adjudicate and reach a decision. There should be no difficulty in implying this term into the contract between the adjudicator and the parties. This is a common implied term in contracts; where one party is to perform a task, the others must facilitate the performance of that task. If one of the parties seeks to prevent the performance of this task by not allowing sufficient time, this is a breach of the implied term and will amount to repudiation of the contract. It would amount to repudiation as the adjudicator is prevented from carrying out the task that he was employed to do. The adjudicator can treat the contract as at an end and would be entitled to his fees and expenses up to the date of the repudiation. When faced with this the reluctant party will probably allow the time needed rather than abandon the adjudication and be faced with a similar scenario in a further adjudication.

Some concerns about adjudication

In the first edition we said that a number of matters had been raised by those who felt that adjudication was likely to cause more problems than it solved. In view of the support for adjudication by the courts, many of these fears have been addressed but it is still worth reviewing these points.

The first point that was identified was the fact that the losing party may be unable to recover monies that have been paid because of an adjudicator's decision. This would happen, for example, where the winning party goes bankrupt before the subsequent arbitration is complete. As we have said already, a building contract is an allocation of risk. Contractors have worked for years under the threat that they may be entitled to recover money for work done but may be unable to do so. The payment of monies to a contractor who may go bust is doing no more than shifting the risk. The court has however stated that where there was a real doubt as to the receiving party's ability to repay, a stay of execution might be granted pending final determination of the proceedings[9]. In at least one case[10] the court has decided that the adjudicator's decision should not be enforced due to the financial position of the winning party.

Another objection, as already discussed, is where the employer may have to pay twice for work condemned by the architect/contract administrator/engineer but found to be in accordance with the specification by the adjudicator. Instead of the contractor only being paid once, although he has carried out the work twice, and having to seek recompense later, the employer is the one who pays twice. Ultimately, the end result should be the same but instead of the employer benefiting from any reluctance of the contractor to open up such matters after completion of the works, the contractor may benefit in the same way.

Another concern expressed was that the adjudicator's decision would produce a less accurate result than litigation or arbitration. Our comment remains the same. It is unlikely, in the timescales allowed, that the result will be as accurate as the full forensic investigation that is carried out in arbitration or litigation. This is true, but who, save for very few, can afford the luxury of a full forensic investigation? The vast majority of arbitrations and matters dealt with by the courts settle before the arbitrator or the judge has pronounced on the matters in issue. Where is the accuracy then? At least with adjudication the party that may be less well financed and thus forced to settle at a disadvantage will have the benefit of the conclusions of an impartial third party. The party is likely to receive a recompense that is closer to its actual contractual entitlement than it would have been if it was forced to settle due to having inadequate funds to continue with an arbitration or litigation.

We also considered the possibility that the adjudicator may undermine the authority of the architect or other person supervising the works. This is a matter for each individual practice. Design matters have been considered at some length earlier in this chapter but what must be remembered is that one of the reasons that adjudication was introduced was a perception that architect and engineers do not necessarily always carry out their functions in the totally impartial way that the contract assumes.

While these matters are all still of understandable concern, the introduction of adjudication has meant a change of culture in the construction industry. Adjudicators may sometimes get their decisions wrong but the courts have expressed a clear support for the process. Adjudication has had a definite effect on the cash flow of the industry and this has been with no obvious evidence that it has done anything other than what it was intended to do.

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[9] *Herschel Engineering Limited* v. *Breen Property Limited* [2000] BLR 272.
[10] *Ashley House Plc* v. *Galliers Southern Ltd* (15 February 2002).

The adjudicator and subsequent legal action

In concluding this chapter on adjudication practicalities one particular question that is asked is worth considering: 'Is an adjudicator likely to get involved in later legal action?' The answer, after 170+ cases that have been through the courts, is that it is unlikely.

There is one case, *Woods Hardwick* v. *Chiltern*[11], where the adjudicator was involved in the proceedings to enforce his decision in which he provided evidence in support of the application to enforce. This did not assist the party seeking enforcement in that the adjudicator's involvement was seen as evidence of bias.

[11] *Woods Hardwick Limited* v. *Chiltern Air Conditioning* [2001] BLR 23.