Critical analysis of the Construction Industry Board "Review of the Scheme for Construction Contracts"

by Nicholas Turner.

ABSTRACT

The Housing Grants Construction Act 1996 came into force in England and Wales on the 1st May 1998. This Act introduced adjudication as a statutory right for all parties, with some limited exceptions, enabling them to refer any dispute or difference arising out of a construction contract to an independent third party, in order to obtain a swift temporarily binding decision. There was much coverage in the construction press with regards to the likely impact that adjudication would have on the construction industry. The commentators were offering both favourable and unfavourable reviews. Despite much initial concern over the impact it may have, most commentators and indeed parties involved in construction contracts appear to agree that it has been a success.

Previously the only options available to parties seeking to resolve a dispute or difference was to pursue their claims through arbitration (if so provided by the contract or otherwise agreed by the parties) or the courts. The introduction of adjudication enabled the quick resolution of disputes, usually within 28 days, unless there was an agreement to extend the process between the parties. The adjudicator, upon accepting a nomination to act on a matter, is required to reach a decision within 28 days. The decision is immediately enforceable. The courts have been supportive of the adjudication process, enforcing adjudicator's decisions, apart from exceptional circumstances. Indeed, as will be discussed later, the courts will even enforce a decision, which is wrong.

Adjudication is described as producing a temporarily binding decision. It is temporary in that a party may seek a final resolution of a dispute through the courts or arbitration, after the adjudication process is complete and a decision made (the decision must still be complied with immediately but may be reversed or upheld upon final resolution).

The Construction Industry Board, which is made up of members representing the various interested parties to construction contracts, was requested by the then Construction Minister, Nick Raynsford, to carry out a review of the process in order to establish the current industry view of adjudication provisions of the Scheme for Construction Contracts[1]. The Construction Industry Board issued their comments, contained in their *"Review of the Scheme for Construction Contracts December 2000"*. The Department of the Environment Transport and the Regions issued their response to the Construction Industry Board.

It is the writer's intention to critically review the proposals and recommendations of both the Construction Industry Board and the Department of the Environment Transport and the Regions.

In chapter 1 there will be an introduction as to the origins of adjudication and the writer will briefly review the content of the Housing Grants Construction and Regeneration Act 1996 along with the Scheme for Construction Contracts.

Chapter 2 will detail the both the Construction Industry Board Report and the response from Department of the Environment Transport and the Regions. Some, additional information will be provided in chapter 2 by the writer, in order to explain the significance of the comments and proposals contained in the report.

In chapter 3 the writer will critically evaluate the comments and proposals detailed in chapter 2, including the opinions of leading commentators.

Finally chapter 4 will detail the writer's conclusions.

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[1] The Scheme for Construction Contracts is the default procedure for adjudication in the event that the parties own contract does not provide a compliant set of guidelines governing the process of adjudication in the event that a matter is referred to an adjudicator. An adjudication procedure is only compliant if it complies with the requirement of s108 of the Housing Grants Construction and Regeneration Act 1996.

Chapter 1
Statutory Adjudication in the Construction Industry

The process of construction is complex. It is almost inevitable that every building or road that is constructed will vary from the last. Even repetitive construction projects, such as house building, McDonalds Restaurants or highways will vary from project to project. Houses built next to each can vary in as much as the ground conditions might change, access problems become more apparent or even the sub contract team is different. Inevitably therefore, disputes occur on a regular basis within the industry.

A significant proportion of these disputes will be resolved either by negotiation or perhaps by means of a larger commercial agreement. Those disputes, which cannot be settled by such mean's will therefore need to be resolved with the intervention of a third party. Adjudication in the construction industry is a form of alternative dispute resolution, whereby a third party is appointed to reach a decision regarding the dispute, which may be binding, at least temporarily upon the parties. General issues that requirement, are usually dealt with by the Contract Administrator, e.g., through certification, as a decision of fact. Disagreement with the decision amounts to a dispute. Under ICE, the same administrator (despite concerns of bias or self interest and breach of the rules of Natural Justice in that one cannot be a judge in one's own cause) has the power to rule on the dispute. Arguably the adjudicator has no jurisdiction until this decision is issued, and if adverse, a dispute crystallizes. It should be noted that in the FIDIC contract, where adjudication is involved, this second role of the civil engineer has now been removed from the contract. ICE have yet to follow suit.

Statutory adjudication, under the Housing Grants Construction and Regeneration Act 1996 (hereinafter referred to as HGCRA), came into force in England and Wales on 1st May 1998. Part II of this Act, commonly referred to as the Construction Act provides the right for disputes arising out of a construction contract to be referred to adjudication.

Prior to the introduction of the HGCRA there was much dissatisfaction in the construction industry. In the event of a dispute arising during a construction contract the options available to the parties concerned was either to arbitrate or to litigate, both processes were generally lengthy and expensive. Redmond[2] refers to statistics in the 1996 Woolf Report, which stated that the cost of pursuing a claim of between £12,500 and £25,000 would typically amount to 86% of the claim value. It was further stated that this was the value of recovered costs, which probably only represented 75% of the total costs of a party. Therefore in a dispute involving say £15,000 the legal cost for the successful party could be in excess of £17,000, of which they could realistically expect to recover only £12,900.

In an article by Wragge & Co[3] it was asserted that prior to the introduction of statutory adjudication

> *"An aggrieved party had to take his dispute to either litigation or arbitration, and the legal or arbitral system with all their rules relating to pleadings, discovery, evidence, proof and adversarial methods were totally unsuitable to deal with the vast majority of disputes that commonly arose out of construction projects. The consequence of the lack of an available remedy was to increase the strength of the paymaster and make easier the routine abuses that were carried out."*

In July 1994 a report titled "*Constructing the Team*"[4] was issued. The Government had requested that the report be carried out. This report by Latham was a comprehensive review of the UK construction industry. One of the 30 recommendations made by Latham in the report was that adjudication should be used as the normal method by which disputes in the construction industry are resolved in the first instance. Latham stated in his report that[5]

> *"If a dispute cannot be resolved first by the parties themselves in good faith, it is referred to the adjudicator for decision. Such a system must become the key to settling disputes in the construction industry."*

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2 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science p2

3 *Anon. Trends in adjudication – a potted history.* (visited 16th September 2002) http://www.wragge.com/wragge/PressOffice/Articles/fullstory.cfm?ob…

4 Latham, M., (1994). *Constructing the Team.* Department of Environment. HMSO.

5 Ibid p87

Other recommendations made by Latham were that an award made by an adjudicator should be immediately enforceable. If a party so wished they could take the matter to court or arbitration, but not until after the practical completion[6] of the construction works (except if there is a serious issue of law in which case that matter should be dealt with immediately).

Prior to the Latham Report limited versions of adjudication had been available as a method of dispute resolution. The JCT[7] forms of sub contracts provided that adjudication could be used to review disputes concerning matters of set-off. Redmond[8] suggested, in regards this form of adjudication, that whilst people in the industry were familiar with it, the process was seldom used.

Whilst many of the proposals contained in the Latham Report have not been acted upon by Parliament, the proposal that adjudication should be introduced as the standard means of dispute resolution, at least in the first instance, in the construction industry, were introduced by means of the Housing Grants Construction and Regeneration Act 1996. This Act came into force on the 1st May 1998. The writer considers that most people who are involved in the construction industry would agree, whether favourably or not, that adjudication has had a major impact on dispute resolution.

Part II of the HGCRA contains the statutory provision for adjudication in the construction industry. Part II is not solely concerned with adjudication. The Act also deals with such issues as entitlement to regular payment, payment notices and the prohibition of the paid when paid clauses[9]. On reflection it does seem logical keeping adjudication alongside payment issues, as inevitably a dispute will almost always be resolved by means of a financial settlement.

Having considered the need and origins of statutory adjudication in the construction industry, we will now review the contents of the HGCRA in relation to adjudication. The intention is not to carry out a forensic review of the act, but to gain a sufficient understanding in order that the review and critical analysis of the Construction Industry Board *Review of the Scheme for Construction Contracts* and the Department of Environment Transport and Regions comments on the aforementioned report are placed in context.

Until now the writer has made reference only to the HGCRA itself. The HGCRA actually only makes a provision for adjudication to be a statutory right in construction contract disputes. Parliament also produced a supplementary document called the Scheme for Construction Contracts (hereinafter referred to as the Scheme). The HGCRA sets out the basics rights in relation to adjudication. Parties to construction contracts are free to determine the actual adjudication procedure, which will be followed in the event of a dispute. Providing the procedure contained in the contract complies with the basic requirements set out in the HGCRA, then that procedure is valid.

If however the parties do not have such a procedure written into their contract or the procedure does not comply fully with the criteria set out in the HGCRA then the contents of the Scheme will apply. The Scheme provides details of the adjudication procedure, which the parties and the adjudicator must follow.

What is a construction contract? Not all activities, which could be assumed to be construction works, are actually deemed to be construction activities for the purpose of the HGCRA.

Section 105 (1) details a long list of activities, which are deemed to be construction operations. The list is quite comprehensive and covers all the typical activities, which the writer would consider to be related to construction. Section 105 (2) defines the exclusions to the definition of construction operations.

The list commences with the unsurprising section 105 (2) (a), which excludes the *"extraction of, oil or natural gas"*. Section 105 (2) (c) is far more contentious in that it excludes the

> *"assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -*

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6 Practical completion of a construction project is considered generally to be when the end user of a building can take beneficial occupation of it, even though some small remedial works may be required for the building works to be wholly completed.

7 Joint Contracts Tribunal

8 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science p5

9 The Act provides provisions for regular payments and also prohibits the main contractor introducing terms into a contract which state that they will not make payment until they receive payment themselves.

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food or drink;"

The exclusion in s105 (2) (c) is quite complex. Certain construction activities that take place in say for instance a power station will not be covered by the HGCRA. This exclusion has resulted in some slightly surprising results. In **ABB Power Construction Ltd v Norwest Holst Engineering Ltd**[10] a contract for the insulation of boilers was found to be a contract for the plant and as such was excluded from the HGCRA by virtue of s105 (2) (c). In **Homer Burgess Ltd v Chirex (Annan) ltd**[11] the pipe work connecting items of plant was also deemed to be plant and as such was therefore excluded.

Section 106 (1) (a) states that the HGCRA does not apply

"*To a construction contract with a residential occupier…"*

It is important to remember that this section only excludes a contract between the occupier of a house and a builder. If a contract involved someone other than the occupier, such as a developer, then they would not be classed as a residential occupier and the Act would apply.

Section 107 of the HGCRA stipulates that the Act only applies to construction contracts, which have been made in writing. There is a reasonably wide definition of what is deemed to be a contract in writing, similar to the provisions contained in the Arbitration Act 1996 section 5. Section 107 (2) states that

"There is an agreement in writing –

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by the exchange of communications in writing, or

(c) if the agreement is evidenced in writing."

Section 108 is perhaps the most important section of the HGCRA with regards to adjudication. This section deals with a party's right to refer a matter to an adjudicator. Section 108 (1) states

"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.

For this purpose 'dispute' includes any difference."

There are two important points contained in this section. Firstly a dispute is clarified as any difference. This helps prevent any confusion as to whether a dispute actually exists or not. Secondly, that any procedure, which a party seeks to use in relation to an adjudication, must comply with the requirements contained in section 108.

The remainder of section 108 clarifies what the requirements governing adjudication procedures actually are.

Section 108 (2) (a) states that the contract shall

"Enable a party to give notice at any time of his intention to refer a dispute to adjudication;"

A party has the right to refer a dispute to adjudication at any time. It has been held by the courts that this right overrides any other contract clauses, including amongst other things an agreement to take disputes to mediation in the first instance[12]. As will be discussed in both Chapters 2 and 3, some contract writing bodies have sought to introduce steps prior to adjudication, such as the ICE matter of dissatisfaction. The Courts have also held that a parties right to adjudicate remains even after the determination of a contract[13].

Section 108 (2) (b) states that a contract shall

"*Provide a timetable with the object of securing the appointment of the adjudicator and the referral of the dispute to him within 7 days of such notice;"*

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10 (2000) BLR 426

11 17-CLD-06-01; (2000) CILL 1580

12 Carter (RG) Ltd v Edmund Nuttall Ltd (2000) www.adjudication.co.uk/cases/christiai.htm

13 A & D Maintenance and Construction Ltd v Pagehurst Construction Services Ltd 17-CLD-09-07; (1999) CILL 1518.

Whilst any procedure is required to include a timetable, which facilitates the appointment of and subsequent issue of the referral document to the adjudicator within 7 days, it is less clear whether a failure to actually achieve the appointment and issue of the referral document within 7 days will invalidate a notice. Redmond[14] is of the opinion that

> *"failure in practice to meet the seven day target does not invalidate the procedure."*

Section 108 (2) (c) states that a contract shall

> *"require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;"*

This section, it is submitted can be considered to be the most important aspect of adjudication. An adjudicator must reach his decision within 28 days of receiving the referral document. The parties do retain the right to agree to extend the process, but considering that the majority of parties who reach the stage of adjudication will already be in dispute, it would probably be the exception to the rule for the parties to agree to defer the decision. It would seem even more unlikely that a referring party, who will normally be seeking payment of an outstanding debt of some kind, will agree to delay the resolution of the dispute.

Section 108 (2) (d) states that the contract shall

> *"Allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;"*

It is more likely that, the referring party might allow an extension of up to 14 days, particularly where a more complex dispute is involved.

Section 108 (2) (e) states that the contract shall

> "*Impose a duty on the adjudicator to act impartially; and"*

This duty to act impartially is no more than any reasonable independent third party would consider being their duty anyway. An adjudicator who fails in any way to act impartially will immediately fall foul of the rules of natural justice. The implications for an adjudicator who breaches the rules of natural justice are reviewed in Chapters 2 and 3.

Finally section 108 (2) (f) states that the contract shall

> *"enable the adjudicator to take the initiative in ascertaining the facts and the law."*

This is very important to the success of the adjudication process. This section provides the adjudicator with the right to act in an inquisitorial manner whilst reviewing the facts.

The next sub-section, 108 (3)[15] establishes that whilst an adjudicators decision is immediately binding, unlike arbitration, the parties are able to seek a final determination of the dispute in arbitration or litigation. In effect, adjudication provides a temporarily binding decision. Temporarily, in that a party may, if they are not satisfied with the decision reached by the adjudicator, take the dispute for final resolution. If both parties decide that no further action will be taken then the decision becomes finally binding.

Finally sub-section 108 (4) limits an adjudicator's liability in discharging his duties, except to where he is shown to have acted in bad faith.

In the event that a contract stipulates adjudication proceedings that do not encompass all of the requirements of section 108 (1) to (4), section 108 (5) provides that the Scheme for Construction Contracts will apply. If a contract deviates only slightly from these requirements the whole procedure will be omitted and be replaced by the Scheme, in it's entirety. It is therefore of vital importance that if parties are seeking to employ their own adjudication procedure, they must ensure that as a minimum all of the aforementioned requirements have been incorporated.

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14 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science p50

15 *"s108 (3) The contract shall provide that 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 agree to arbitration) or by agreement.*
The parties may agree to accept the decision of the adjudicator as finally determining the dispute."

Critical analysis of the CIB "Review of the Scheme for Construction Contracts"

The Scheme for Construction Contracts Part I, deals with adjudication. It comprises of some 26 paragraphs. The Scheme provides a set procedure, which parties and adjudicator's must follow in carrying out adjudication, in the event that they do not have their own procedures or that their procedures do not comply with the requirements of section 108 of the HGCRA. The writer does not intend to review all 26 paragraphs, but instead will endeavour to briefly comment on those with the most relevance to the contents of Chapters 2 and 3.

Paragraphs 1 to 6 deal with the procedures associated with the issue of the notice of intention to refer a dispute to adjudication, to the appointment of the adjudicator. Paragraph 6 details the procedure where an adjudicator has been named in the contract but is unable or unwilling to act in the matter.

The first paragraph to be looked at in more detail is number 7. This paragraph sets out the procedure for the issue of the referral document. This is perhaps the most important document that is issued. The referral document identifies the dispute, upon which the adjudicator is to make a decision. The referral also dictates the extent of the adjudicator's jurisdiction in the proceedings. Paragraph 7 (1) states that the referral document must be issued to the adjudicator within 7 days of the issue of the notice of adjudication. Paragraph 7 (2) states that

> *"A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely on."*

Paragraph 7 (3) is of vital importance in that it places an obligation on the referring party to send a copy of his referral and it's accompanying documentation to all other parties involved in the adjudication process. Should a referring party fail to comply with this requirement he would certainly be in breach of the rules of natural justice, namely to ensure the other party is aware of the case against him, as well as the requirements of paragraph 7 (3).

Paragraph 8 provides the mechanism whereby an adjudicator may adjudicate on various disputes arising out of a contract or even where one of the parties is involved in a separate dispute with a third party under the same contract. It is important to remember that this right is at the discretion of the parties.

Paragraph 9 identifies the right of an adjudicator to resign, or indeed the circumstances when an adjudicator should resign. Paragraph 10 provides that if a party objects to the appointment of an adjudicator, this does not in itself invalidate the appointment of the adjudicator. However paragraph 11 states that an adjudicator's appointment may be revoked if the parties agree to do so. The parties will be liable for all reasonable costs incurred by the adjudicator for the time during which he was acting in the dispute.

Paragraphs 12 to 19 deal with the powers of the adjudicator. This section is of particular reference to Chapters 2 and 3, as a number of the comments by the DETR suggest that the adjudicator could deal with the supposed problems by using the powers he is given in paragraphs 12 to 19. Paragraph 12 re-iterates that the adjudicator shall act impartially. This paragraph also imposes a duty on the adjudicator to avoid any unnecessary expense.

The next paragraph, number 13 identifies the core powers which an adjudicator has at his disposal to ensure the smooth running of the adjudication process. Paragraph 13 starts by providing that the adjudicator may take the initiative in the adjudication. These are very important powers, in that it allows an adjudicator to act in an inquisitorial manner in order to review the dispute and reach a decision. The adjudicator is also empowered to decide on any procedural issues.

Generally paragraph 13 provides that:

(a) the adjudicator may request the issue of documents or witness statements,

(b) make decisions concerning language to be used,

(c) meet the party and or their representatives and question them,

(d) visit sites for inspections

(e) arrange for tests and or experiments to be carried out

(f) subject to notifying the parties he may engage expert advisors,

(g) dictate timetable of the adjudication

(h) and issue other directions as necessary.

It should be remembered that the above is not intended to be an exhaustive list, but rather a list of examples of the procedural decisions which an adjudicator may make. In order to reinforce the powers given to the adjudicator in paragraph 13, paragraph 14 states that

> "*The parties shall comply with any request or direction of the adjudicator in relation to the a*djudication."

Paragraph 17 requires that the adjudicator consider all relevant information which is issued by the parties. This particular paragraph is of great importance with regards to the submission of a response by the responding party. Nowhere else is there a specific right enabling the responding party to put forward their case. Paragraph 17, whilst not specifically referring to a right of response, does impose a duty on the adjudicator to consider all relevant information. The Scheme has been criticised in that it is not always clear to a layperson whether the right to respond exists. In contrast it is also necessary for the adjudicator to assess what information is deemed to be relevant. The timescale of only 28 days to reach a decision does not facilitate the review of unlimited information.

Paragraph 19 stipulates that the adjudicator must reach his decision within 28 days, or longer if agreed by the parties as discussed earlier in this chapter.

The adjudicator's decision is dealt with in paragraphs 20 to 26. Paragraph 20 (a) prevents an adjudicator from reviewing a decision or certificate that the contract describes as being final and conclusive. This provision has been criticised, particularly in that there is the potential that a party may try to produce contracts, whereby decisions regarding payments are deemed to be final and conclusive, thus preventing the review of them in an adjudication process. Further discussion is devoted to this in the following chapters.

Paragraph 22 states that an adjudicator is obliged to provide the reasons for his decision, if requested to do so by either of the parties to the adjudication. Paragraph 23 (2) is of great fundamental importance to the whole concept of statutory adjudication in the construction industry in that

> *"The decision of the adjudicator shall be binding on the parties, and they shall comply with it 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 between the parties"*

This reinforces the concept that an adjudicator's decision is a temporarily binding decision. Unlike arbitration, whereby the award of an arbitrator is deemed to be final and binding, either party may, if they so wish, take the dispute to either litigation or arbitration. It must be remembered that the adjudicator's decision is enforceable immediately, and remains so until further action is concluded.

Finally the paragraphs 25 and 26 provide that the parties are jointly and severally liable for the adjudicator's costs and that the adjudicator cannot be held liable for any omission or act arising out of his carrying out his duties, except where he is shown to have acted in bad faith.

Having concluded the review of the HGCRA provisions in relation to adjudication and the Scheme, Chapter 2 will detail the proposals of the CIB in their review of the first two years of adjudication. Alongside each of the CIB proposals the writer will also detail the responses of the DETR. Chapter 3 will then critically review both the CIB and DETR proposals and comments.

Chapter 2

Construction Industry Board Review and the Department of the Environment Transport and Regions Response

In December 2000, the Construction Industry Board (CIB) issued a report[16] to the then Construction Minister Nick Raynsford. The Minister had requested that the CIB[17]

> *"provide the Construction Minister with an impartial assessment of the industry's current view of the adjudication provision of the Scheme for Construction Contracts and of any changes which might be thought necessary"*

The CIB, in an overview of the report, commenced by confirming the original intentions and objectives of construction adjudication as being[18]

> *"to provide a quick, low-cost and impartial means of resolving disputes during projects"*

The membership[19] of the board conducting this review comprised of delegates from the Construction Industry Council, Construction Industry Employers, Constructors Liaison Group and the Construction Clients Forum.

The CIB were of the opinion that adjudication had been successful, in particular as a result of the support provided by the judiciary in ensuring the intent of the scheme was upheld. However, perhaps not to surprisingly, it was also agreed that adjudication might benefit from some changes, albeit the extent of any changes to be proposed should be limited.

The concept of statutory adjudication was generally an untested method of alternative dispute resolution (ADR). Whilst adjudication was facilitated in some forms of JCT Subcontracts, it's use had been limited to reviewing items of set-off and was generally little used by industry. Therefore the introduction of statutory adjudication, covering a significant portion of the construction industry was a new and innovative idea. As with most new ideas, however well thought out in advance, there will inevitably be teething problems. Statutory adjudication is no exception.

The CIB were in agreement on three general areas of improvement. Some minor changes to the Housing Grants Construction and Regeneration Act 1996 (HGCRA) should be made. Secondly the contract-writing bodies, Adjudicator Nominating Bodies and individual firms should be approached regarding the making of voluntary improvements. Finally it was recommended that the appropriate ministers should instigate a further review in two years.

It is the opinion of the CIB that the majority of problems that have arisen in adjudication are as a result of parties not adopting the Scheme. It is all too common to encounter a dominant party to a contract who has sought to introduce deviations from the scheme to give them an advantage in the event that a dispute is referred to the adjudication process for resolution[20].

CIB Recommendations

It is the writer's intention in Chapters 2 and 3 to review each individual proposal of the CIB in their report, in the order in which the CIB have addressed the issues. Further to the issue of their report, the CIB received a detailed response[21] from the then Minister for Housing and Planning, the RT HON Nick Raynsford MP, on behalf of the Department of Environment Transport and the Regions (DETR). In Chapter 2 the writer will introduce each of the issues raised by the CIB and also any response from the DETR. In Chapter 3 the writer will critically evaluate the CIB and DETR proposals or indeed lack of them and consider their potential impact on adjudication, particularly under the Scheme.

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16 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December

17 ibid Page 1.

18 ibid Page 1.

19 Ibid Appendix 1 contains a list of members.

20 Examples of clauses seeking to offer advantages are reviewed in chapter 3

21 Raynsford, N. (2001) *Adjudication and the scheme for construction contracts* Department of the Environment Transport and the Regions. Exact date unknown.

Rather than carrying out separate reviews of the CIB report and the DETR response, both the proposal and response will be considered side by side. It is the writer's opinion that this will assist in the analysis of the likely affect of any changes or indeed a decision to take no action at all. The CIB have tried to identify all the key areas where they felt that the Scheme had not been totally successful in implementing the original intention of the HGCRA.

Ambush

The initial concern that a referring party may try and ambush the responding party by commencing adjudication proceedings, perhaps just before Easter or Christmas when staff holidays etc. might prevent or restrict the ability to respond effectively, has not been a significant problem the CIB suggest.

However the CIB consider that a type of ambush being used by parties is[22] *"that of enormous quantities of 'relevant information' in the submission"*. Furthermore under paragraph 17[23] of the Scheme an adjudicator is obliged to consider all the information provided to them.

A suggestion that perhaps a size limit could be imposed on submissions was rejected by the CIB as being potentially detrimental in that parties would start producing all submissions as close to the size limit as possible.

It was stated that in practice some adjudicators had dealt with the problem by instructing a party who had submitted an extraordinarily large submission, to resubmit a summary of their submission. This was done on the basis that the original was to large to consider in the timescale of 28 days[24] allowed for the adjudicator to reach his decision.

The CIB went on to propose that paragraph 17 be omitted from the Scheme. This was in order to remove the risk that a party might complain that an adjudicator is acting contrary to paragraph 17 in preventing them submitting all relevant information.

The DETR response concluded that they did not agree with the CIB proposal to delete paragraph 17. The reasoning of the DETR was that paragraph 13[25] makes provision for the adjudicator to set down guidelines for various matters including the length of submissions. Furthermore the DETR considered that paragraph 17 provides a right for a party to submit relevant information. Between the adjudicator's powers under paragraph 13 and the party's rights under paragraph 17 an equitable balance should be found.

A final comment by the DETR was *"that both adjudicators and the parties would benefit from guidance on their respective powers, duties and rights provided for by the scheme"*.

Natural Justice

The CIB have raised the issue of natural justice as a result of the decision by HHJ Bowsher QC in **Discain Project Services v Opecprime Development Ltd**[26]. In this case the court had refused to enforce an adjudicators decision. The adjudicator, during the course of the adjudication had conducted a number of telephone conversations with the referring party. The discussions encompassed matters other than administrative ones. It was held that holding these discussions and not informing the other party immediately was a breach of the rules of natural justice and the court would not enforce a decision reached in such circumstances.

It was the CIB concern that because of the nature and concept of adjudication, a number of adjudicators will have limited, if indeed any, legal background. The CIB considered that some action was required to mitigate the potential for *"attacks on adjudicators decisions, as this has the potential to discredit the whole process"*[27].

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22 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 2.

23 Paragraph 17 of the Scheme states "*The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute….*".

24 Section 108 (2) (c) requires that a contract shall *"require the adjudicator to reach his decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred"*

25 paragraph 13 sets out the powers of the adjudicator, 13 (g) states *"give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with…"*

26 (2000) BLR402

27 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 2.

The CIB's proposal in this instance was for Ministers to consider how better guidance could be given to adjudicators. The DETR response on this point is decidedly scant. The only comment was an agreement that guidance is required. No comment was made as to how this could be achieved.

Entitlement To Submit A Response

The CIB considered that the right for a defendant to respond to the referral is not clear. They recommend in their report that an additional section be added to paragraph 13. The suggestion of the CIB is that paragraph 13 (a) be introduced, containing wording requiring that an adjudicator "*advise the party or parties complained against of their right to put forward a response, and determine a date no later than 14 days after receipt of the referral notice before which such response to the referral notice should be submitted"*[28].

The DETR did not concur with the CIB in this matter. In the opinion of the DETR the right of a party to respond was already inherent in the Scheme in paragraphs 7(3) and 17.

Paragraph 7(3)[29] requires that the referring party must copy all parties with the referral documents. As discussed earlier in this chapter paragraph 17[30] provides that the adjudicator shall consider *"..any relevant information.."* that he receives.

Despite the conclusion of the CIB that a change was required, the DETR considered that a change was not necessary in this instance. The writer will review both the CIB suggestion and the rejection in Chapter 3, but it does appear to the writer that the DETR comments might not be accurate if a party, with no legal or contractual background, were involved in their first adjudication. Adjudication as intended to facilitate a quick resolution of disputes during a project particularly to assist with cash flow. If the Scheme itself is not to be made clear for a layman to understand are the DETR not almost enforcing a requirement to obtain legal advice for any party involved in a dispute. In the absence of legal advice would a party inexperienced in adjudication fully appreciate their apparent inherent right to respond to the allegations contained in the referral document?

Furthermore the potential implications of this rejection by the DETR should be considered in relation to the next concern raised by the CIB, namely that of intimidatory tactics. Intimidatory tactics alongside an inexperienced party could lead to an inequitable result.

Intimidatory Tactics

The CIB expressed concern that parties to adjudication proceedings have used intimidatory tactics. In particular *"..Overly-legal jargon used by law firms on behalf of their clients against inexperienced (in legal matters) adjudicators."*[31] The CIB report further goes on to state *"All parties feel strongly about this matter and feel that it is necessary to publicise the problem more widely"*[32].

There is no recommendation for any specific action to be implemented by the CIB in order to deal with this problem, which they feel so strongly about. Indeed the CIB recommend no actual change but do suggest that all relevant parties keep the matter under review.

The DETR make no comment with regards to criticising the purported practice. This is not particularly surprising, as it would seem to the writer that it would be difficult to prevent legal firms representing parties in adjudication from acting in a manner that may assist in achieving the best possible outcome for their client.

The DETR suggest that it might be possible to provide guidance to adjudicators about dealing with such situations.

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28 ibid Page 2.

29 Paragraph 7(3) states *"The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents every other party to the dispute."*

30 Paragraph 17 states *"The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account when making his decision."*

31 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 2.

32 ibid Page 2.

Human Rights Act

The CIB expressed a concern over the potential implications that the Human Rights Act 1998 might have on adjudication. The CIB further suggest that whilst the courts have already determined that adjudication is not classified as being final and binding by a 'public authority', the issue of the test of fairness remains.

The Human Rights Act 1998 (hereinafter referred to as the HRA) came into effect on 2 October 2000, introducing into domestic law some of the rights in the European Convention on Human Rights of 1953. The aforementioned test of fairness is found in Art.6 (1) of the HRA

> *"In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly."*

The DETR did not issue any comment in response to the concerns of the CIB in their report. The CIB recommended that the matter of the HRA and it's potential impact on the adjudication process be kept under review by both the relevant ministers and industry bodies.

Slip Rule

The CIB suggest that the Scheme should be amended to allow an adjudicator to correct mistakes in their decisions. This facility already exists in the Arbitration Act 1996 (hereinafter referred to as AA96) in section 57(3). If an arbitrator makes a mistake in his award, such as an arithmetical error, he is allowed to correct it.

There had been some confusion in early adjudications as to whether an adjudicator was allowed to correct such mistakes in a decision that had been issued. In **Edmond Nuttall Ltd v Sevenoaks District Council**[33] an adjudicator realised that he had made an arithmetical mistake in decision. The adjudicator acknowledged that he had made an error but did not consider that he had the authority to correct the mistake.

It was held by the courts that the adjudicator did have the power to amend his decision, albeit any correction must be made in a reasonable time. In the case of **Bloor Construction (UK) Ltd v Kirkland (London) Ltd**[34] the court found that there was an implied term that the adjudicator could amend a mistake in his decision.

The DETR stated that there was already "*an implicit power to amend manifest errors of typography or arithmetic."*[35] and did not believe that there was there was a particular need to amend the Scheme.

The DETR also stated that any amendment to include a slip rule should be limited to the type of manifest errors referred to above. The DETR went on to explain that in their opinion, to include a wider ability to correct mistakes such as that found in the Arbitration Act 1996 "*would risk extending 'corrections' to controversial matters requiring more extensive consultation, prolonging arguments and extending timescales, detracting from the speed and simplicity of the adjudication process"*[36].

In conclusion the DETR do not appear to have arrived at a decision as to whether they consider that the Scheme should be amended. The courts appear to have decided that there is an implicit right for an adjudicator to amend mistakes, in a reasonable time. As of yet a definition of what is a reasonable time has not been decided. In Edmund Nuttall the adjudicator had realised his mistake within hours, clearly well within the boundary of what is reasonable. Whether after two days or even a week it would still be considered reasonable is unknown.

It remains to be seen if the DETR's general reluctance to amend the Scheme will prevent Parliamentary action being taken to clarify matters.

Costs

Redmond[37] states "*The Act is silent about the adjudicator's fees and how costs should be dealt with between the parties and by the adjudicator. The parties are therefore free to agree anything they wish about these aspects."*

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33 LTL 27/9/2000

34 (2000) CILL 1626

35 DETR. (2001). *DETR response to recommendations of CIB task group*. Page 2. Exact date unknown.

36 DETR. (2001). *DETR response to recommendations of CIB task group*. Page 2. Exact date unknown.

37 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science p158.

This silence in relation to costs is considered as an area of concern by both the CIB and DETR. The reason for this concern is that some contract drafters have introduced terms, which the writer considers that both bodies deem to be onerous. These terms will generally state that the referring party will be liable for all costs associated with any adjudication. This means paying the other parties costs, the adjudicator's costs as well as their own costs. The AA96 Clause 60 prohibits any agreement in relation to costs for future disputes. The DAC[38] considered the matter to be one of public policy.

In **Bridgeway Construction Ltd v Tolent Construction Ltd**[39] a groundwork's sub-contractor commenced adjudication proceedings against the main contractor. The adjudicator decided that the main contractor should pay £32,000.00 to the sub-contractor. When they paid the main contractor deducted £10,000.00 for his costs that he contended were payable by the sub-contractor under the sub-contract conditions of contract.

The sub-contractor commenced proceedings to recover the £10,000.00, on the basis that it breached the HGCRA. The court held that the HGCRA did not cover the issue of costs. The parties had entered freely into a contract and the terms and conditions relating to the referring party paying both parties costs were therefore valid.

The CIB were quite strong in their condemnation of this practice by parties and stated[40] *"we condemn those bespoke contracts which require the referring party to pay all fees related to the adjudication – this is against the spirit and intention of the Act, and the industry umbrella bodies were united in originally excluding this option from the Scheme"*. The CIB recommended that not only should the Scheme be amended but that the HGCRA should also be amended if possible.

The DETR agreed, albeit they did not use such strong wording as that used by the CIB, that a change was required. The Scheme itself should be amended in the interim, with consideration being given to the changes to the HGCRA. The DETR went on to acknowledge that the change to the Scheme alone would not solve the problems that had been highlighted and considered that a change to the Scheme alone *"might encourage greater use of 'bespoke' adjudication provisions."*

Timing of Reasons

The CIB suggested that an amendment be made to paragraph 22 of the Scheme. Paragraph 22 states

> *"If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision."*

It was suggested that any request by a party must be given before the issue of an adjudicator's decision. Further the CIB recommend that if reasons are requested, then the reasons must be issued to all interested parties involved in the adjudication. This is obviously a follow on from the requirements of paragraph 7(3), which requires that the referring party send his referral to the responding party as well as the adjudicator. It is to ensure openness.

The DETR expressed concern that *"the proposed amendment will provoke parties always to submit a precautionary request in advance for reasons, which might add to the complexity and time taken in some cases."*[41] However the DETR did consider that the adjudicator should provide reasons, and that the timing of the request would be better at an early stage.

It was therefore proposed by the DETR that adjudicators be given guidance, in order that under their existing powers of paragraph 13 of the Scheme they could advise the parties of the timescale for making a request that reasons be provided. The DETR considered this to be a more pragmatic approach than that of changing the Scheme.

Finally the DETR added that it might be necessary for an amendment to be made to paragraph 22, stipulating that the adjudicator does have the right under paragraph 13 to set down the timeframe in relation to any requests for the giving of reasons with their decision.

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38 Saville, LJ., et al., (1996) *Departmental Advisory Committee on Arbitration Law*. P56.

39 (2000) www.adjudication.co.uk/cases.htm

40 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 3.

41 DETR. (2001). *DETR response to recommendations of CIB task group*. Page 2. Exact date unknown.

In their response it is noticeable, that the DETR made the comment that an adjudicator should give reasons for their decision, no matter if they are detailed or not. The CIB had not raised the issue of whether the adjudicator should always provide reasons for his decision.

The DETR might possibly decide that there is a change required here, that was not in the minds of the CIB in their review of the Scheme. The potential impact on the adjudication process, particularly in relation to time and the potential increase in ability of parties to challenge an adjudicator's decision in the courts will be considered further by the writer in Chapter 3.

Enforcement Mechanism

The CIB were critical of paragraph 24 of the Scheme, which they state *"seeks to provide a remedy by cross-referring to the Arbitration Act"*[42] in the event that a party fails to comply with a decision of an adjudicator. The CIB were of the opinion that *"In practice this paragraph is inoperable"*[43] and that *"in the event of a financial award, the remedy should continue to be debt recovery procedures in the Courts; in the event of a non-monetary award, a mandatory injunction."*[44]

Paragraph 24 of the Scheme states that *"Section 42 of the Arbitration Act 1996 shall apply to this Scheme"*. The Scheme then goes on to change the word *"tribunal"* to *"adjudicator"* in section 42 of the AA96.

Section 42[45] of the AA96 deals with the *"Enforcement of peremptory orders of tribunal"*. Redmond[46] questions whether an adjudicator's decision is in fact a peremptory order. Redmond identifies a peremptory order in the AA96 as being a follow up order[47], used when a party has not complied with an earlier one.

Redmond then goes on to raise the question as to whether an adjudicator will or even can issue a peremptory order. If his original decision is not a peremptory order and a party requests him to make one, it is quite possible that an adjudicator will consider that he is no longer involved in the matter since his decision was already issued.

On the other hand it might be that in his original decision the adjudicator declares that the decision in fact is a peremptory order and a party may go to the courts to seek the courts assistance. However this is clearly not a peremptory order as intended by the AA96.

Dyson J, in **Macob Civil Engineering Ltd v Morrison Construction Ltd**[48] considered that *"section 42 apart, the usual remedy for failure to pay in accordance with an adjudicators decision will be to issue proceedings claiming the sum due, followed by an application for summary judgement"*.

In response to the CIB's request that paragraph 23 (1) and 24 be deleted, the DETR concluded that the paragraphs did not appear to have caused any problems.

Final and conclusive provisions

The CIB also considered the implications of paragraph 20 (a) of the Scheme, which prevents an adjudicator from reviewing any certificate deemed to be final under the contract. The report however considered merits both for and against the amendment of the scheme.

The CIB stated that they were not able to make any proposal in relation to any alteration of paragraph 20 (a) at this time. The DETR response did not include any reference to the debate over possible changes to paragraph 20 (a).

Compliant contract forms

Under this heading the CIB reviewed both the position in relation to compliant forms and also pre-adjudication procedures.

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42 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 3.

43 Ibid Page 3.

44 Ibid Page 3.

45 This section provides that, in the absence of any other agreement, the court can order a party to comply with a peremptory order of the tribunal. Subsection 2 details who and how an application may be made.

46 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science pp175-176.

47 A peremptory order in the AA96 is made available via section 41 (5), which facilitates the giving of a peremptory order to a party who has failed to comply with an earlier order of the tribunal, thus enforcing them to comply.

48 (1999) BLR 93

The CIB state that there had been a fear that many parties, particularly the dominant ones in a contract would employ methods by which the intention of the HGCRA could be at least partly defeated, appear to have been largely unfounded. However there are still a number of instances whereby contracts have been found to be non-compliant with the requirements of the HGCRA.

Whilst the CIB recognised that when a contracts adjudication procedures are found to be non-compliant, the Scheme will replace the contract conditions by default, they also considered that a "*reliance on this default mechanism increases the risk of jurisdictional challenge*"[49].

The second issue of pre-adjudication procedures was raised by the CIB in relation to the introduction of the "notice of dissatisfaction" which is intended to delay the point at which an issue may be deemed to have become a dispute. The CIB also commented that the courts were questioning the validity of this practice.

The conclusion of the CIB in these matters is perhaps the most radical suggestion arising from their review of the Scheme. The CIB have put forward the suggestion that the Scheme become mandatory "*The Scheme would thus become the statutory procedure.*"

The intention of the CIB is that the Scheme would become the only adjudication procedure available to parties in dispute. The dominant parties would in theory be unable to manipulate contracts to seek an advantage over the weaker party. Parties in construction contracts would only have to refer to a single source for details of the adjudication process for the settlement of disputes.

Familiarity should in theory ultimately help to reduce costs of adjudication processes, by such means as reducing the need for expensive professional assistance in dealing with disputes. The propensity for jurisdictional challenges should be dramatically diminished and generally the need for matters to be placed before the courts should also be greatly reduced.

Adjudicators Fees

The CIB considered that fees in relation to adjudicators are proving reasonable and the matter of fees charged by representatives of the parties is a matter for the parties themselves. The CIB do not however support calls by some adjudicators that they may withhold their decision until such time as their fees are paid. In practice it is quite common for adjudicators to request payment prior to the issue of their decision. It is questionable whether they are entitled to do so. They are required to issue their decision within 28 days of the submission of the referral document. If they do not issue a decision within 28 days they are likely to be in breach of their duty to the parties.

[49] Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 4.

Chapter 3

Critical Analysis of CIB Report and the DETR Response

In Chapter 2 the writer laid down the concerns of the CIB, including any proposals for improving Adjudication. The writer also provided information on the response given by the DETR, on both the issues raised and solutions suggested. It is the writer's intention in this chapter to critically review the views and opinions of both the CIB and DETR. As per chapter 2 the sequence will follow that in which the issues had been first raised by the CIB in their report.

Ambush

The CIB concluded that the initial concerns that a flurry of adjudications would commence at Christmas, Easter and other public holidays, has not been a significant problem. However does a party need to start an adjudication process at these particular times to instigate a strategy designed effectively to catch the other party on the hop. What about issuing a notice of intention to refer a dispute to adjudication when the referring party is aware that a key member of personnel in the responding parties organisation will be on holiday for a fortnight. Whilst it is perhaps less common nowadays, some construction companies still shut completely at certain times of the year, particularly during the summer when they might close for two weeks. A well-timed notice, under a JCT form of contract, could cause, and has indeed to the author's knowledge caused immense problems if issued the day before the annual closure. The response could be due to be returned during the period of shut down.

Other examples of strategy being used to ambush a responding party could be such as utilising the knowledge that the other party are consistently late in issuing payment and withholding notices. Indeed the writer has himself employed this strategy in order to prevent a responding party raising the issue of contra charges in settling a protracted final account.

Tony Norris in his speech at Bevan Ashford's Annual Construction Conference considered that there are a number of ambush tactics that had been employed by referring parties[50]

> *"Shot selection – The Referring Party selects exactly what 'issue in dispute' he wants to refer to the Adjudicator. He may refer the whole dispute between the parties or he may select one of the issues amongst all of the issues actually in dispute"*

An Adjudicator may only deal with the matters covered by the notice of intention to refer a matter to adjudication[51]. If the notice is therefore carefully worded it can prevent the responding party from raising other issues in dispute, which perhaps being more favourable to them, could have mitigated the effects of any decision relating to the actual disputes raised in the notice.

> *"Short or long game – Frequently it can be difficult to know, as a Responding Party, whether the Notice of Adjudication and impending adjudication is actually a short game being played for instant cash or instead part of a long game being played for significantly more amounts of cash and/or other remedies. For instance, preliminary issue claims for declaratory relief can pave the way for an easier ride on quantum.*

Whilst the writer considers that there may be occasions when this type of tactical approach would be a benefit, the writer is of the opinion that they would be the exception rather than the rule. It perhaps is more likely that this type of strategy would be considered in a larger scale, complex dispute.

> *"Time and place – The Responding Party will usually have a very short timescale (7 days under the JCT 98) to respond to the Referral Notice which may well have taken many months of preparation."*

The writer at the beginning of this chapter has already discussed this method of ambush. It is perhaps the type of strategy, which most people would initially associate with the term ambush.

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50 Norris, T., (2001) *Adjudication it's rough, tough and dirty – isn't that construction?*, Bevan Ashford Solicitors, pp 3-4.

51 FW Cook v Shimuza (UK) Ltd (2000) BLR 199

The CIB had concluded that this type of ambush had not been a significant problem. Norris[52] refers to research carried out by Liam Holder[53] whereby out of 115 companies who were surveyed and had experience of adjudication, 57% stated that they felt that they had been subjected to ambush.

It is not clear from the CIB report on the basis by which they had reached their conclusion, but the report does not refer to any statistical source. The writer is of the opinion that ambush is perhaps more widely used by referring parties than the CIB report infers.

A question which the writer considers to be fundamental in deciding the extent of the problems of ambush is that the HGCRA is quite clear in section 108 (1) that *"A party to a construction contract has the right to refer any dispute"* to adjudication. A dispute by its nature comprises of a difference of opinion. Therefore both parties must be aware that there is a dispute, which could therefore potentially be referred to adjudication.

John Huxtable writes in Building Magazine[54] that

> *"If the victim of an alleged payment default starts adjudication to protect it's cashflow, the payer should have a ready-made statement of it's case. If it has no such case prepared, it has only itself to blame and should not whinge about being ambushed"*

John Huxtable's comments are extremely valid in respect of all types of ambush. If there was no dispute then there could not be an ambush. Is it not a question of being prepared? If there are differences of opinion over the value of work completed for example, both parties should be clear as to why they dispute the other party's claims. If this is not the case then surely they have contributed to their own problems if a defence is not capable of being submitted in a short period of time.

In the writers opinion it is quite likely that many of the disputes that arise over payment have hidden agendas. An example could be that a main contractor who is slow to pay sub contractors may have erred in pricing the works and is applying commercial tactics in order to pass their losses onto the sub contractors or it could simply be that the employer is slow in paying.

The CIB, after commenting that they do not consider that the original ambush fears have caused a significant problem, suggest that an alternative form of ambush, the issue of large quantities of relevant information, is a tactic that has been employed by referring parties.

This, the writer agrees, places unfair pressure on the responding party. Whilst it may be aware of a difference of opinion, it is not realistic to expect a party to spend significant resources on preparing large detailed defences on every occasion. Construction is a complex process. Just about every building will differ from the last in some way. It is therefore inevitable that differences of opinion will occur. However the majority of these differences will be resolved between the parties without referring the matter to a third party.

It is unrealistic to expect either the responding party or an adjudicator to review excessive volumes of information in so short a time. The responding party will seek to respond to all the information. If however they only have seven days to do so it may be an impossible task, not to mention that a response compiled in seven days is unlikely to be as comprehensive and well prepared as one which has taken several months to generate.

The CIB recommendation was to delete paragraph 17[55] of the Scheme. The DETR considered that this paragraph fulfilled an essential role in facilitating a response from the responding party. The DETR rejected the proposal. The DETR recommendation was that guidance should be given to adjudicators on combining paragraphs 13 and 17. The intention was that the adjudicator must strike a balance between allowing all relevant information and restricting unnecessary volumes of information.

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52 Norris, T., (2001) *Adjudication it's rough, tough and dirty – isn't that construction?*, Bevan Ashford Solicitors, p4

53 Holder, L., *Statutory Adjudication – the success of rough justice*, contained in Patterson & Britton, *The Construction Act, Time for Review* (2000)

54 23 March 2001, p52.

55 Paragraph 17 of the Scheme states "*The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute….".*

The Construction Umbrella Bodies Adjudication Task Group in July 2002 issued guidance for adjudicators[56]. A section was devoted to the issue of unmanageable documentation. It should be remembered that this document was clearly referred to as being for guidance and was not binding.

The guidance addresses the concerns of adjudicators that in limiting the amount of information that a party may issue might be in breach of either natural justice or paragraph 17, which allows all relevant information to be submitted. The guidance clarifies that[57]

> *"natural justice requires (amongst other things) that the adjudicator must give each party a reasonable opportunity to present its case and act fairly between the parties. However, 'fairness' must be set within the context of adjudication as a fast and interim procedure.*
>
> *Paragraph 17 of the Scheme requires the adjudicator to consider 'any relevant information submitted to him'. Paragraph 13(g) gives the adjudicator power to limit the length of written documents submitted to him."*

The guidance then goes on to give advice on how the adjudicator should deal with the problems. Firstly the adjudicator is solely responsible for deciding if information is relevant. The definition of *"relevant information"* is given as being *"information that is evidential of the issues or events that a party has to prove in order to further its case"*. Secondly, the right under paragraph 13 allowing an adjudicator to dictate procedural matters should temper paragraph 17 rights. Other suggestions include requesting an extension of time, the use of paragraph 13 powers in setting out limits at the beginning and requesting a party to provide a summary of its case referring to the bulk matter.

This is all very sensible advice. The writer does however have doubts as to the ability of the average adjudicator to consider and consistently reach the equitable balance between the parties rights, whether by paragraph 17 or under natural justice, and facilitating the adjudication process to be adhered to.

The basic principle of natural justice is a matter most adjudicators will grasp. The writer does not consider that the principle of natural justice and the intention of paragraph 17 differ greatly. However the average adjudicator, as per the intention behind adjudication, will not be predominantly drawn from the legal profession. He will more likely be an architect, engineer, quantity surveyor or project manager. The writer accepts that a certain level of legal knowledge is necessary. When confronted by a referring party employing a firm of solicitors, many adjudicators will be intimidated if presented with arguments justifying why all the material is relevant inferring and that he will be in breach of paragraph 17 or natural justice to conclude otherwise.

There is unlikely to be an easy answer to this problem. The initial proposal of the CIB to delete paragraph 17, in the writer's opinion, is largely a red herring. Even if the paragraph were deleted, natural justice would still apply, providing the same basic rights of a party to present their case. The DETR suggestion of better guidance is valuable, but there appears to be a real need to ensure that the issue of natural justice forms a core part of an adjudicators training. If an adjudicator is required to attain a relevant level of understanding of the rules of natural justice then in the writers opinion they are far less likely to be intimidated when required to reach decisions concerning these same rules.

Natural Justice

We have already considered some issues relating to natural justice. The concerns raised by the CIB in this context relate to problems such as that encountered in the case of **Discain Project Services v Opecprime Development Ltd**[58]. As discussed in Chapter 2, the adjudicator in this instance had engaged in conversations with one party concerning matters of jurisdiction. Whilst the adjudicator did write to the other party informing them of his conversations, it was two days later that the letters were written. The courts considered that it was a breach of the rules of natural justice, in that a fair minded individual would have reason to suspect that bias was possible.

The courts did make the comment that they did not actually consider that the adjudicator was biased, but that the actual consideration was whether or not there was an appearance of bias. The guidance from the court

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56 Construction Umbrella Bodies Adjudication Task Group, July 2002, *guidance for adjudicators.*

57 Ibid, p6

58 (2000) BLR402

was that an adjudicator should avoid telephone conversations with parties in all matters other than administrative ones. The problem is that a conversation may drift from administrative issues to substance.

In the case of **Woods Hardwicke Limited v Chiltern Air Conditioning Limited**[59] an adjudicator was found to have acted in contravention of paragraph 17 of the Scheme. Information, upon which the adjudicator placed reliance, was not made available for the respondent to comment on. Further the court found that a statement by the adjudicator, issued to assist the court, appeared to show that the adjudicator was strongly against the respondent.

In Discain it would appear that the adjudicator did not intentionally fall foul of the rules of natural justice and ignorance and lack of experience would seem to have contributed to the problems. In contrast the adjudicator in Woods apparently forgot that he was to act impartially. The courts concluded that, at least in appearance, the adjudicator started to strongly favour one side.

The conduct of the adjudicator in Woods raises questions about the suitability of that individual to act as an independent third party. Accepting an appointment to act as an adjudicator is a position of immense responsibility and should be approached with a great deal of thought and respect.

However, as discussed earlier in this chapter, the writer considers that the problems in Discain could possibly have been avoided with proper training being given. Procedural knowledge is of vital importance in adjudication proceedings.

The CIB and DETR accept that there is a potential problem, which must be dealt with. The CIB being primarily concerned that losing parties will try to claim a breach of natural justice to avoid enforcement wherever possible. Obviously this could result in the discrediting of adjudication. Neither the CIB nor DETR have produced a clear proposal, which may be acted upon. Guidance is the suggested course of action.

The guidance issued by the Construction Umbrella Bodies Adjudication Task Force[60] has a section entitled Natural Justice. Natural justice is described as not being a defined term. The guidance advises adjudicators that there are two main aspects, namely *no bias and fair hearing"*[61]. It is emphasised that for a breach of natural justice it is only required that bias be apparent not that actual bias is established[62]. The guidance goes on to give examples of how bias might be assumed by a reasonable person.

With regards to a fair hearing the guidance sets out the basic steps of ensuring that a party is able to present its case,[63] is aware of the case it has to answer and is in possession of all the relevant information upon which an adjudicator is going to base his decision.

Whilst the guidance is very useful and understandable, the writer is surprised that neither the CIB nor the DETR have called for nominating bodies to be regulated. There is also a distinct lack of any valid accreditation system for adjudicators. This could be via a self-regulatory body or as a statutory requirement. The body would be able to agree a common curriculum, which would ensure that all adjudicators would have attained a certain level of relevant expertise. Obviously some adjudicators will still perform better than others, but the basic performance levels should be raised and the propensity for errors such as those in Discain reduced if not eliminated.

Entitlement to submit a response

The CIB had commented that the right of a party to submit a response to the referring party's document was not clear. The DETR countered that between paragraph 7(3)[64] and paragraph 17[65] of the Scheme the right to

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59 (2001) BLR23

60 Construction Umbrella Bodies Adjudication Task Group, July 2002, *guidance for adjudicators*

61 Ibid p2

62 This was the basis of the courts decision not to enforce in the case of Discain Project Services Ltd v Opecprime Development Ltd (2001) BLR285

63 As also required by paragraph 17 of the Scheme.

64 Paragraph 7(3) states *"The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents every other party to the dispute."*

65 Paragraph 17 states *"The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account when making his decision."*

issue a response was inherent. Furthermore as mentioned under the heading of Ambush, the rules of natural justice provides a right for a party to have their case heard.

The DETR are essentially correct in their comments. However the writer considers that they are perhaps forgetting one of the key principles of adjudication, in that it is intended to provide a quick resolution to disputes during a construction activity in order to prevent cashflow problems. Generally the adjudication process was to be such that a party did not need to engage legal advisors, but could carry out the process themselves.

A professional legal person or an individual experienced in construction disputes may very well consider the Scheme and conclude that there is an inherent right of response. The writer has doubts as to whether the owner of a labour only carpentry business has the necessary knowledge to reach a similar conclusion. Is this not exactly the type of person who should be benefiting from adjudication? Cashflow is likely to be a determining factor in the make or break of his business.

Why then has the DETR rejected, what on the face of it is a reasonable suggestion by the CIB to make the Scheme easier to understand for the average layperson? Tony Norris[66] suggests, *"there is no current political will to make changes"*. The writer would be disappointed if this was found to be the case. If the Scheme was otherwise thought to be functioning perfectly and no changes had been proposed, the writer might possibly accept that to change the Scheme just to clarify the entitlement to respond would be unnecessary.

The fact is however that the DETR has accepted that certain changes are required. As detailed in Chapter 2, the DETR have accepted the CIB proposals to make changes in relation to costs and have indicated that they are considering a change to paragraph 22, timing of reasons. The writer is interested in any DETR proposals that will ensure that parties to adjudication are made aware of their right of response.

Intimidatory legal tactics

The CIB's concern, which prompted the inclusion of this issue in their report, was that some parties involved in adjudication processes were employing intimidatory tactics. The CIB made particular reference to law firms using *"overly-legal jargon"*[67], the intention of which was to intimidate adjudicators. As discussed in Chapter 2 the DETR made no comment in this matter.

The writer has already commented that it is difficult to see how this practice could be prevented. Law firms will adopt any tactic, which might benefit their client's chances of success or simply to mitigate potential losses. The writer does consider that the use of such tactics simply to intimidate the adjudicator is ethically wrong, no matter what the supposed justification might be.

This problem also overlaps with other issues discussed so far in this chapter. In particular the issues relating to natural justice. How many adjudicators would not be at least slightly intimidated by allegations of a breach of natural justice, issued by lawyers, in response to the adjudicator setting out restrictions on sizes of submissions.

If it is not possible to prevent the lawyers resorting to intimidation as a weapon in their adjudication armoury, the adjudicator needs to be suitably equipped to deal with such attacks. The obvious course of action must once again be structured training for adjudicators. The writer accepts that there is a limit to how much legal knowledge an adjudicator must acquire, but is of the opinion that a grounding in areas such as natural justice will provide a great deal of confidence. This confidence will enable an adjudicator to deal with the more general intimidation.

In the event that the arguments are clearly beyond the ability of the average adjudicator to deal with, then the adjudicator can advise the parties that he will seek an opinion from a suitable professional. The writer would also applaud an adjudicator who passes the cost of obtaining such advise back to the party raising the issue, if it is reasonably found to be an intimidatory tactic.

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66 Norris, T., (2001) *Adjudication it's rough, tough and dirty – isn't that construction?*, Bevan Ashford Solicitors, p5

67 Construction Industry Board (2000) *Review of the scheme for construction contracts*. December. Page 2.

Human Rights Act

There was much speculation prior to the introduction of the Human Rights Act, as to its potential impact on the process of adjudication. Bartlett[68] suggested it could be argued that

> *"the requirements of the Convention ought to apply to adjudication, since there are circumstances in which an adjudication may prejudice a party's ability to take advantage of his ordinary right to a fair hearing in subsequent litigation or arbitration – as Dyson J has recognised. When a court is asked to enforce an adjudicator's award, the court, as a public authority, must give effect to the requirements of the Act"*

The question as to whether or not the HRA will impact on adjudication appears to have been resolved, at least for now. Havery J in the case of **Elanay Contracts Ltd v The Vestry**[69] held that adjudication was not covered by Art.6 of the HRA. In reaching his decision he stated

> *"The question is whether article 6 applies to proceedings before an adjudicator. In the first place, the proceedings before an adjudicator are not in public, whereas the procedure under article 6 has to be in public. I can see that problems arise over whether one refers to a decision as a final decision or whether one has to consider whether article 6 applies to a decision that is not a final decision. But it seems to me that if article 6 does apply to proceedings before an adjudicator, it is manifest that a coach and horses is driven through the whole of the Housing Grants Construction & Regeneration Act. In my judgement, article 6 does not apply to an adjudicators award or to proceedings before an adjudicator, because although they are a decision or determination of a question of civil rights, they are not in any sense a final determination."*

The basis of the decision was that a party to adjudication still has the right to take the matter to arbitration or litigation to obtain a final decision. It was also interesting to note the comment that to allow adjudication to be affected directly by the HRA would be to drive a coach and horses through the HGCRA. Dyson J stated in **Bouygues UK Ltd v Dahl-Jenson UK Ltd**[70] that

> *"It is inherent in the Scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation…"*

In the event that an adjudicator makes the wrong decision, albeit in good faith, the courts will still enforce that decision. The aggrieved party would therefore need to take the dispute for final resolution in the courts or arbitration.

What of the party who encounters such an injustice? They may pursue the claim through the courts. However, if the other party becomes insolvent, there is no way in which they may recover monies incorrectly paid. In this instance the comments that adjudication is not a final decision in a matter is wrong. There have been attempts by parties seeking to resist enforcement of an adjudicator's decision on the basis that the other party will potentially become insolvent, thus preventing an attempt at recovery through the courts or arbitration.

Dyson J in **Herschel Engineering Ltd v Breen Property Ltd**[71] suggested that a court might stay the enforcement of an adjudicator's decision if there was evidence to suggest that the monies may not be available to be repaid in subsequent court proceedings. However prior to the granting of any stay there would have to be evidence that the other party would be unable to pay. Wilcox J in **Absolute Rentals Ltd v Gencor Enterprises Ltd**[72] reached a similar decision in that he considered that he was unable to *"…judge the financial standing of either company."* Wilcox J further commented that *"…(adjudication) is a robust and summary procedure and there may be casualties…"* In conclusion, it is theoretically possible for a party

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68 Bartlett, A., (2000). *Construction Adjudication – Some unresolved issues.* Talk given to TECBAR and SCL on 18th January.

69 LTL 13/10/2000

70 (1999) CILL 1566

71 (2000) CILL 1616

72 (2000) CILL 1637

on the wrong end of an incorrect adjudicators decision to resist enforcement on the basis that other party would be unable to make the necessary payments resulting from future proceedings. In reality they must establish sufficient proof to convince the courts of the other party's financial difficulties.

It is the writer's opinion that the issue of Art.6 and the HGCRA is perhaps not concluded. It is quite likely that a party in the near future will challenge the enforcement of an adjudicators award where there is some suspicion of financial difficulties, or even that a party has intentions of disposing of the monies in order to avoid possible repayment. A further option which the Courts could consider, is that whilst the HRA must apply, it should do so in a manner proportionate to the process, and that different standards apply to different grades of process.

Slip rule

The CIB, in the writer's opinion, raised a valid concern with regards to including a slip rule in the Scheme. It is inevitable that an adjudicator might make mistakes from time to time, particularly whilst dealing with a complex dispute in only 28 days. There has been some confusion amongst adjudicators as to whether or not they were entitled to correct a mistake, say in their calculations.

In the case of **Edmond Nuttall Ltd v Sevenoaks District Council**[73] an adjudicator realised that he had made an error in his calculations. Whilst he acknowledged that he had made an error he did not consider that he had the right to correct it after its issue. The court declined to grant enforcement in relation to the amount of money affected by the error. An implied right to correct an error was found by Judge Toulim in **Bloor Construction (UK) Ltd v Kirkland (London) Ltd**[74]. The judge considered that the adjudicator did have the right to

> *"correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached, providing this is done within a reasonable time and without prejudicing the other party"*[75].

The writer considers it is essential that adjudicators be given this power to correct these types of errors. In **Bouygues UK Ltd v Dahl-Jensen UK Ltd**[76] it was held that even though an adjudicator had made an obvious error in his decision, that decision is still enforceable. Therefore if an adjudicator is not allowed to correct an error, at least within a reasonable time, the result will be an injustice.

The next question is what is a reasonable time? The CIB and DETR did not stipulate a timescale. However it would seem that a timescale of 5 days is being proposed[77]. Bingham in the Building Magazine[78] is of the opinion that 5 days is a very short period of time. The AA96, section 57 allows an arbitrator 28 days to rectify an error. Perhaps the strict 5-day timescale is just another hardship to be borne in order to maintain the advantages of a quick dispute resolution process.

The Construction Umbrella Bodies Adjudication Task Group has also provided guidance[79]. This guidance quotes the comments of Judge Toulmin, as detailed above, in that adjudicators do have a right to amend a decision to correct an error, providing it is done so in a reasonable time. No definition of a reasonable time is provided. The guidance only suggests that

> *"Bear in mind how much time has elapsed since you delivered the decision, and any action that the parties may have taken."*

This is not particularly helpful. If Bingham was aware of a proposed 5-day limit in September 2001, why did the guidance not at least suggest 5 days as a benchmark target to revise a decision? In conclusion the writer concurs with both the CIB and DETR in that this is an area of concern and that action is required to clarify the position. The 5-day period is quite stringent, but places a greater impetus for the parties as well as the

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73 LTL 27/9/2000

74 (2000) CILL 1626

75 Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd (2000) BLR 314, TCC, at p320

76 (2000) 17-CLD-06-11; CA TLR 17 August 2000

77 Bingham, T., *Fair do's*. Building Magazine. 7 September 2001. Bingham stated that the draft proposed amendments to the Scheme included a timescale for the correction of errors of 5 days.

78 Ibid

79 Construction Umbrella Bodies Adjudication Task Group, July 2002, *guidance for adjudicators*

adjudicator to review and satisfy themselves that the decision is error free, maintaining a speedy dispute resolution process.

Costs

There was complete agreement between both the CIB and DETR in the matter of costs. The practice, employed by certain companies, of making one party responsible for both party's costs in an adjudication was condemned as being inequitable. The CIB recommended that not only should the Scheme be amended, but the HGCRA should also be amended to prevent non Scheme adjudications being exempt from this requirement.

The question as to whether or not one party could be awarded that their costs be paid from the other party has been the subject of much debate since the inception of statutory adjudication. In the case of **John Cothliff Ltd v Allen Build (North West) Ltd**[80] Judge Evans decided that an adjudicator was able to include the issue of a party's costs in his decision. The adjudication had been covered by the Scheme. This decision by Judge Evans was rejected by Judge Bowsher in **Northern Developments (Cumbria) Ltd v J&J Nichol**[81], who considered that there was no inherent right for an adjudicator to award parties costs. Judge Bowsher went on to state that

> *In general, an adjudicator has no jurisdiction to decide that one party's costs of the adjudication be paid the other party, but in the circumstances of this case*[82]*, I find that he was granted such jurisdiction by implied agreement of the parties."*

The courts having established that parties costs could only be dealt with if they had both given the adjudicator jurisdiction to do, then dealt with the issue of contract terms which stated that one party would pay all the costs.

This is the real concern of the CIB and DETR. The courts in the case of **Bridgeway Construction Ltd v Tolent Construction Ltd**[83] dealt with the issue of agreeing costs for future disputes[84]. The responding party's sub contract terms and conditions stipulated that the referring party would be liable for both party's costs plus the adjudicator's costs. This term was held to be valid by the courts.

Tolent Construction claim[85] that the use of this particular clause was aimed at deterring potential spurious claims by sub contractors. In this instance the referring party were successful in the majority of their action. Tolent still relied upon their contract terms to recover their own costs. If indeed the aim was to deter spurious claims why did they then insist on recovering their own costs in a matter found not to be spurious. The writer considers that rather than the intention to deter spurious claims, the intention was to deter all claims. A party who referred a matter against Tolent would have to do so in the knowledge that they would be liable for costs, probably in the region of £8,000 to £12,000 whatever the outcome.

In a survey conducted by L Holder[86] it was found that out of 115 returned questionnaires, when asked what was the value of disputes being referred to adjudication, the majority of disputes were between £10,000 and £50,000 in value. Approximately twenty percent of disputes being referred to adjudication were for sums less than £10,000.

How many of those disputes would have ultimately been referred to an adjudicator under contract terms such as employed by Tolent Construction Ltd? Those involved in disputes of less than £10,000, could quite possibly win their case but end up paying money to Tolent rather than receiving any. Even when a sum of £30,000 was involved the prospect of £10,000 being irrecoverable costs would perhaps prompt a party to consider accepting a significant reduction in their claim rather than risk the money on adjudication.

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80 17-CLD-09-04; (1999) CILL 1530

81 17-CLD-05-19; (2000) BLR 158

82 Both parties had requested that the other pay their costs and it was on this basis that Judge Bowsher decided that they had given the adjudicator jurisdiction to decide on costs.

83 (2000) 17-CLD-06-11; (CA) TLR 17 August 2000

84 (2000) www.adjudication.co.uk/cases.htm

85 Bingham, T., *Fighting for one's cause*. Building Magazine. 14 July 2000

86 Holder, L., *Statutory Adjudication – the success of rough justice*, contained in Patterson & Britton, *The Construction Act, Time for Review* (2000)

The CIB recommended that both the Scheme and the HGCRA be amended so that parties were responsible for their own costs. The DETR whilst concurring in principle with the CIC recommendations had reservations about the change to the HGCRA, and commented that any change would require consideration. The DETR suggested that an interim amendment be made to the Scheme.

The Guidance[87] issued for adjudicator's comments briefly on the history of court decisions regarding an adjudicator's power to deal with costs, as discussed above. The Guidance[88] further comments that each party are responsible for their own costs in the absence of an agreement to the contrary. There is no reference to the issues dealt with in the Tolent Case.

Whilst the writer considers that the CIB recommendation, that each party shall pay it's own costs, is the preferred solution to the problem of costs, there are others who consider that this is wrong.

Bingham[89], in an article in Building magazine considers that

> *The CIB recommendation is wrong. Instead of saying each party will pay its own costs, it is better to say the loser will pay the winners costs."*

The arguments that Bingham puts forward is that a party seeking to recover, a genuine, £20,000 may ultimately spend an irrecoverable £4,000 or £5,000, thus reducing their actual recovery to perhaps as little as £15,000. In essence the fact that they cannot recover their own costs could provide a deterrent to parties with legitimate claims.

The writer has given much thought to this argument. In an ideal world costs should surely follow the event. Unfortunately this is not an ideal world. If costs followed the event, that in itself could deter a party from pursuing an adjudication. Consider a small sub contractor with a claim of say £15,000. This company will carry out some sort of risk analysis, either consciously or sub-consciously. If they were successful in their referral they would recover the majority of the £15,000 plus potentially a few thousand pounds in costs. However if they were to lose the majority of their referral, which in a complicated construction industry is not beyond the realms of possibility, they could end up paying more in their own, and the other party's costs than they actually recover. This the writer considers could be a deterrent to most small claimants.

On the other hand if both parties were to pay their own costs, they are in control. They can limit, at least within reason, their own expenditure in producing and managing the case. The risk analysis would be quite simple. The costs to produce will be x number of pounds, give or take a little. The only real question to be considered is that of how good their case actually is. The other problem that could arise in relation to costs following the event is the type of representation, which a party will employ. A leading firm of solicitors will incur far greater costs than a local firm of construction consultants. It could be argued that it was not necessary to engage a leading firm of solicitors. The writer is not convinced that this would be sufficient reason to dismiss such costs. The party who employs the solicitors could use them regularly for all manner of things. Is it reasonable to expect them to find alternative representation because the other party's costs are significantly cheaper.

Timing of Reasons

The CIB recommended that paragraph 22 of the Scheme be amended, in order that there is a time constraint for parties requesting the adjudicator to provide reasons for their decision. Further, the CIB recommended that if one party requests reasons, then they should be issued to all interested parties.

The DETR, as discussed in Chapter 2, went further in their recommendations. The DETR commented that in their view reasons should be provided. With regards to setting down a cut off date for a request for reasons the DETR were of the opinion that paragraph 13 of the Scheme provided the adjudicator with the power to dictate procedural matters and therefore advise the parties when a request for reasons to be supplied be issued. However the DETR did concede that an amendment to paragraph 22 would put the matter beyond any doubt.

The Guidance[90] to adjudicators is that which the DETR has made above. The adjudicator should advise the parties at the outset of the process when a request for reasons should be made.

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87 Construction Umbrella Bodies Adjudication Task Group, July 2002, *guidance for adjudicators*

88 Ibid. p10.

89 Bingham, T., *We'll all be losers.* Building Magazine. 15 June 2001.

The writer, whilst not having a particularly strong view either way, questions whether or not the DETR comment that reasons should always be provided is necessary. Adjudication is not necessarily a final or binding process. A party who does not like a decision has still got the opportunity to pursue the matter through the courts or in arbitration. Is it possible that a party will request reasons in order to maximise their chances of challenging any decision made by the adjudicator. If no reasons are issued then it is far more difficult for a party to challenge the enforcement of a decision, except in the case where it is found on the facts that no reasonable adjudicator could have reached the same decision. On the other hand, well reasoned decisions will deter subsequent challenges since the party is given a reality check on the likelihood of success.

Enforcement Mechanism

The CIB were of the opinion that the enforcement mechanisms contained in the Scheme were inoperable. Paragraphs 23 (1) and 24 cross-referenced the AA96. As discussed in Chapter 2, it is questionable if the attempt to introduce the enforcement mechanisms of the AA96 will actually work in any event.

This issue was considered by Dyson J in **Macob Civil Engineering Ltd v Morrison Construction Ltd**[91] where he stated that *"… the usual remedy for failure to pay in accordance with an adjudicators decision will be to issue proceedings claiming the sum due, followed by an application for summary judgement"*.

The DETR in their response suggest that there is no evidence that paragraph 23 (1) and 24 has given rise to any problems. If we consider what the DETR are saying, it appears that whilst they do not dispute that the paragraphs are not used, as yet they have not caused any problems. It would appear to the writer that this view is more consistent with a reactive rather than a proactive approach.

If it is found over the next couple of years that there is a previously un-realised side affect of keeping, what are in effect useless paragraphs, then perhaps the DETR will take action.

It would seem far more sensible, in the opinion of the writer that if they provide no useful function, remove them now. If a problem does arise in the future, how long will it take the DETR to act? Judging by the length of time it has taken already for these recommendations to be considered, and given that even those matters which the DETR have agreed need to be changed have still not been resolved, it could take at least a couple of years. The DETR are making changes at the moment. Surely it would be easy enough to delete these paragraphs. No one has raised any arguments to suggest that they are required.

Final and Conclusive Provisions

The CIB were undecided as to whether or not a change was required in respect of paragraph 20 (a)[92] of the Scheme. This paragraph prevents an adjudicator from reviewing any decision or document, which is deemed to be final and conclusive. Perhaps due to the absence of any recommendation from the CIB, the DETR remained silent on the issue of reviewing final and conclusive certificates or decisions.

Previously the courts themselves had no power to open up and review a certificate. In **Northern Regional Health Authority v Derek Crouch Construction Co**[93] it was held that the court were unable to open up and review Architects Certificates. The only person able to do this was an arbitrator. Whilst this decision seemed odd, in that an arbitrator was given powers, which the courts did not enjoy themselves, it was not overturned until the case of **Beaufort Developments (NI) Ltd v Gilbert Ash NI Ltd**[94].

However adjudicators do not enjoy such a privilege, unless the adjudication procedure specifically allows it. The intention is to protect such certificates as the Final Certificate under a JCT contract. The writer agrees that in such instances such certificates should be exempt. However the concern is that some parties might try

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90 Construction Umbrella Bodies Adjudication Task Group, July 2002, *guidance for adjudicators*

91 (1999) BLR 93

92 paragraph 20 (a) states an adjudicator may *"open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,"*

93 (1984) QB 644; 2 All ER 175

94 (1998) BLR 1

and manipulate the restrictions in paragraph 20 (a) to prevent a party from referring a matter to adjudication. Redmond[95] is of the opinion that

> *"In practice, few main contractors or employers appear to have tried to take advantage of this provision to prevent subcontractors and others from exercising their right to go to adjudication. Some commentators who seek to defend the subcontractor from contractual provisions that are perceived to be unfair, argue that a term can be implied that any decision that has contractual effect would be subject to a requirement of reasonableness."*

Redmond further states that the decision in **John Barker Construction Ltd v London Portman Hotel Ltd**[96] is an authority supporting this view by the commentators.

It is not difficult to appreciate the difficulty the CIB had in trying to reach a conclusion with regards the issue of the restrictions imposed by paragraph 20 (a). The CIB is made up of representatives from different sectors of the construction industry. Each of the parties will have a differing perspective to the other. The conclusion they reached was that there was no conclusion. The DETR could perhaps have put forward their own point of view, as they should have been able to take a more impartial view than the parties making up the CIB. However, the DETR did not address the issue or even offer some thoughts. This lack of response is not a great surprise, given that the DETR do appear to be a little reluctant to make any changes to the Scheme and in particular the HGCRA. This generally is hidden under the guise that it might be difficult to introduce changes without compromising the elements, which have been successful.

The writer will also reserve opinion on this matter at this time. Perhaps in time the courts will have to decide on the issue of when a certificate may be opened and reviewed by an adjudicator. The writers concerns are that it will take a robust and extremely confidant adjudicator to decide, along the lines raised in **John Barker Construction Ltd v London Portman Hotel Ltd**[97] that any decision be subject to a test of reasonableness. It should also be noted that the certificate can still be challenged by Judicial Review. The problem is that the time limit is three months to apply and it might take six months for a hearing. If the certificate was opened up and struck down, monies might become payable. If they are not paid a dispute then arises, that can be submitted to adjudication. Since it was kept out of earlier proceedings it is now a new cause and is therefore admissible. It would obviously be better if the adjudicator could review the matter in the first place.

Compliant Contract Forms

The first concern of the CIB in relation to the issue of compliant forms was that in some instances dominant parties were trying to introduce terms into their standard contracts that sought to give them an advantage in the event of a future dispute being referred to adjudication.

The writer has encountered such forms in his own experience. The main contractor in one instance had an adjudication procedure whereby a sub contractor would issue a notice of their intention to refer a dispute to adjudication. The main contractor would then have seven days in which to decide on which appropriate nominating body would be used for the appointment of the adjudicator.

At first glance it might be difficult to ascertain exactly what advantage the main contractor might have tried to achieve by this term. If the Scheme had applied then it is likely that the notice and the application for the appointment of an adjudicator would have been issued simultaneously. An adjudicator could have been nominated within 48 hours. In no more than 3 days the referral document could have been issued to the adjudicator and responding party and the 28-day clock started ticking.

Under these terms and conditions it is unlikely that the main contractor will move with any degree of haste. More likely in the writers opinion the main contractor will not seek the appointment any earlier than seven days. In fact they may not even bother to advise of the nominating body. The referring party has already lost seven days.

The terms could be considered to be non-compliant. Section 108 (1) to (4) of the HGCRA must be complied with or otherwise section 108 (5) states that

> *"…the adjudication provisions of the Scheme for Construction Contracts apply."*

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95 Redmond, J. (2001). *Adjudication in construction contracts*. Blackwell Science pp135.

96 (1996) 83 BLR 31

97 Ibid

Section 108 (2) (b) states that the contract shall

> *"provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days…"*

If the main contractor fails to ensure that an appropriate nominating body is named in sufficient time to allow both the appointment and issue of the referral to take place within 7 days, it is in breach of section 108 (2) (b) and the Scheme will apply.

The main contractor has already delayed the process by up to 7 days. The nominating body is still not named. The sub contractor can decide that the Scheme should therefore apply and seek the appointment of an adjudicator. What if the main contractor claims that their procedure is valid and that they will not recognise the jurisdiction of any adjudicator, which the sub contractor appoints under the Scheme. In the absence of any commercial pressure it seems that the main contractor should take a run and jump. They failed to adhere to their own procedures. However, some doubts will be cast into the mind of the sub contractor and their advisors. If the main contractor decides to resist enforcement on these grounds, is it guaranteed that the courts will not accept their arguments? The writer would be surprised if a court would condone such practices. The risk element could quite possibly act as an impetus for the sub contractor to accept a lower settlement figure than he might otherwise.

The matter of costs has already been discussed in this chapter.

The second matter raised by the CIB was that of pre-adjudication procedures. In particular the CIB refer to the ICE form of contract, which has tried to introduce a step before adjudication called *"a matter of dissatisfaction"*. In essence the ICE have tried to place a restriction on ambush by seeking to restrict when it can be said that a dispute exists between the parties.

In order for a matter to be referred to adjudication there must be a dispute[98] between the parties. If there is no dispute then there is in essence no matter which can be referred to adjudication. Clause 66 (3) of the ICE 7th Edition Main Contract provides that

> *"The Employer and the Contractor agree that no matter shall constitute nor be said to give rise to a dispute unless and until in respect of that matter*
>
> *(a) the time for the giving of a decision by the Engineer on a matter of dissatisfaction under Clause 66 (2) has expired or the decision given is unacceptable or has not been implemented and in consequence the Employer or the Contractor has served on the other and on the Engineer a notice in writing…"*

In respect of say an arbitration process this clause would probably be found to be valid. An arbitration process is a contractual agreement between the parties. There is no reason therefore why the same contract cannot also stipulate when the parties are actually in dispute. Adjudication on the other hand is not a contractual agreement. It is a statutory right. Regardless of any contractual agreement that the parties might make, the right to refer a dispute to adjudication, at any time, is still available to both parties.

Similar provisions to the ICE were contained in the NEC[99]. The adjudication provisions in the NEC were considered in the case of **John Mowlem plc v Hydra-Tight Ltd**[100] where Judge Toulmin decided that the provisions in the contract for referring matters to adjudication were not compliant and therefore the Scheme applied.

The courts have adopted a robust approach with regards to a party trying to stay adjudication proceedings for whatever reasons. In **R G Carter Ltd v Edmund Nuttall Ltd**[101] Judge Thornton held that an agreement to take any disputes to mediation prior to adjudication was not enforceable. The right to refer a dispute to adjudication would therefore override any agreement to the contrary.

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98 Section 108 (1) of the HGCRA states *"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication…"*

99 New Engineering Contract

100 (2000) CILL 1650

101 www.adjudication.co.uk/cases/christiani.htm

The writer can certainly appreciate that the writers of both the ICE and the NEC forms were acting with good intentions in seeking to resolve disputes without referring matters to adjudication. It is quite clear though that the right to adjudicate will not be denied by drafting of contracts.

The CIB's recommendation is that the Scheme be made mandatory for all adjudication processes. The DETR responded by commenting on not wanting to change things too much.

As the writer has commented in Chapter 2, there would appear to be no good reason for not making the Scheme mandatory. After much deliberation and consideration the writer cannot identify any significant disadvantages in making the Scheme applicable to all adjudications. This is of course with the exception of those few who would seek to manipulate and try to prevent a party from referring matters to adjudication.

Chapter 4
Conclusion

The aim in writing this thesis was to critically review the CIB Review of the Scheme for Construction Contracts and the DETR response to the Review. Adjudication was over two years old at the time the Review was undertaken by the CIB. Since it came into force, it has had a significant impact on the construction industry. Weaker parties in a construction contract now have a speedy and relatively low cost, dispute resolution option available to them. In only 28 days, except where the parties agree to extend the process, an adjudicator will reach a decision. This decision is immediately enforceable. It is possible in some instances that the decision reached may be the wrong one. The number of incorrect decisions appears to be quite low in the writer's opinion, based on the limited number of references that the writer has encountered during research. It is surely inevitable that on occasions, particularly where a dispute of a complex nature is concerned, an injustice will occur. The pressure on the party's in respect of compiling documents, which will fully justify their respective cases, along with the pressure on the adjudicator to analyse those same documents in only 28 days, is intense.

Unlike arbitration and litigation, adjudication is not necessarily a final determining process. If a party considers that the decision reached is incorrect in part or its entirety, they may then proceed to arbitration or litigation to obtain a final decision on the matters in dispute. On balance, particularly in that a party retains the traditional right to take a matter to arbitration or litigation, an occasional flaw in a system that seeks to reach a decision on a potentially complex matter in only 28 days would seem an acceptable price to pay. Furthermore it is a fundamental requirement that prior to any matter being referred to adjudication, there must be a dispute. A prudent party to a construction contract should surely ensure that all their administration is in order and up to date. If this is done then the majority of information required should be readily available at short notice.

The CIB were requested by the Construction Minister to carry out a review of adjudication under the Scheme, which they submitted to him in December 2000. The CIB as well as reviewing the Scheme also considered adjudication generally. The DETR responded to the CIB review and its comments.

The CIB identified a number of problem areas. The extent to which the problems were deemed to be affecting the adjudication process varied. Ambush, surprisingly, was not considered by the CIB as being a matter of much concern. The CIB claimed that the expected abuse of the adjudication process, with parties choosing to refer their disputes at the most inopportune times for the responding party, had not been a frequently encountered problem. This conclusion was in contrast to research carried out by others. The majority of those questioned[102] considered that they had been ambushed.

An alternative form of ambush, which was considered to be causing a problem, was the provision of excessive amounts of information by the referring party. The CIB recommended the deletion of paragraph 17, which imposes a duty on the adjudicator to consider all relevant information. The writer considers that to remove paragraph 17 is unnecessary as the rules of natural justice require that the parties be given the right for their case to be heard.

The topic of natural justice was the second area of concern raised by the CIB. It was felt that some party's might seek to use natural justice as a means of defending against the enforcement of an adjudicators decision. The CIB referred to recent cases such as **Woods Hardwicke Limited v Chiltern Air Conditioning Limited**[103] where an adjudicator had been held to be in breach of the rules of natural justice. Surely the only answer to this problem is to ensure that adjudicators have adequate knowledge of the rules of natural justice. The CIB themselves stated that the rules were largely founded upon common sense. The writer will consider the issue of training in more detail later in this chapter.

In response to the suggestion by the CIB, that a specific right to respond be included in the Scheme, the DETR considered that an implied right was already available in combining paragraphs 7(3) and 17. The writer agrees with the DETR in that the implied right is in the Scheme. Irrespective of the contents of the

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102 Holder, L., *Statutory Adjudication – the success of rough justice*, contained in Patterson & Britton, *The Construction Act, Time for Review* (2000)

103 (2001) BLR23

Scheme, the rules of natural justice provide that a party has the right for their case to be heard. The flaw in the DETR reasoning is that parties with no legal training will find it difficult to imply such rights upon reading the Scheme. Adopting such an approach will lead to adjudication becoming the sole demise of the lawyer or construction consultant, which is surely not the intention of adjudication.

Despite much speculation amongst industry commentators on the likely affects of the HRA on adjudication, it was held in **Elanay Contracts Ltd v The Vestry**[104] that a party's right to have their case determined in court has not been affected. The decision appears to be at least partly one of policy. If the HRA was found to have applied to adjudication, the whole process could have become invalid. It would seem that the matter of the HRA and adjudication might not have been finally determined. The courts have suggested that if there was sufficient evidence of impending insolvency, they may allow a party to resist enforcement on the basis that the adjudication could be deemed to be conclusive and final if there were no opportunity to take the matter for final determination, which would obviously be the case if a party became insolvent.

The CIB and DETR were in agreement that a slip rule should be introduced to the adjudication process. The writer concurs with the comments made. It is only practical that an adjudicator is allowed to correct an error in his decision. It is critical that a reasonable time scale be allowed for the correction of an error. It had been suggested that 5 days be allowed. Whilst this is quite stringent, it should be sufficient time for both the party's and the adjudicator to review the decision and advise of any corrections that might be necessary.

Despite some concerns by the writer over the issue of whether costs should follow the event, the writer concluded that it would be fair that each party should pay their own costs. Both the CIB and the DETR considered that it was inequitable and contrary to the spirit of the Scheme that the referring party should be liable for the costs of the other party. Irrespective of some comments that the term was purely intended as a deterrent of spurious claims, the writer considers that the intention is to deter all claims including righteous ones. The short-term proposal is to amend the Scheme. In the longer term the DETR are going to amend the HGCRA. The DETR should not waste any time in outlawing these types of clauses. The amendment should be comprehensive, applying to all adjudications arising out of the HGCRA.

The writer concurred with both the DETR and the CIB with regards the timing of reasons. The DETR stated that they considered that an adjudicator should always provide reasons for his decision. The writer does not have a particular opinion in respect of whether or not it should be compulsory that reasons are given, but does agree that a time constraint be placed on when a party is able to advise the adjudicator that reasons are required.

The Scheme provides an enforcement mechanism, which relies on a direct reference to the AA96. In practice the enforcement mechanism is not used. Indeed the mechanism is impractical to use. The DETR have adopted the stance that the enforcement mechanisms, whilst not being required, have not caused any problems and thus there is no reason to delete them. The provisions provide no useful function. Why not remove them? The DETR approach is certainly not a proactive one. The fact that no problem has yet been caused does not mean that no problem could be caused in the future.

Generally the CIB did review a wide range of issues affecting adjudication under the Scheme. What the CIB Review did not devote sufficient time to was the wider issues of the ANB's and adjudicators. There are currently no regulations governing the ANB's. In theory anyone can decide to set up as an ANB. This seems to the writer to be a fundamental error. The way in which the ANB's are organised and run has a direct impact on the quality of adjudication.

The majority of adjudicators are nominated via an ANB. These same adjudicators receive their training through the ANB courses. The ANB will ultimately determine whether or not an individual is suitable to act as an adjudicator. Therefore if the ANB procedures are not satisfactory, it is likely that at least some of the adjudicators will insufficiently qualified or trained to fulfil their duties. The proposed solutions to the majority of the concerns raised by the CIB were to provide more effective guidance to adjudicators. If the ANB's were regulated, the training courses for adjudicators could be regulated also, ensuring that comprehensive training was provided, thus providing the necessary guidance from the outset.

It might be that a form of self-regulation could be established. The ANB's, with which the writer is familiar, are all reputable bodies. The writer is of the opinion that it is in the interests of the ANB's to promote

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excellence. The setting up of a regulatory body could monitor and control the training of adjudicators, ensuring that all necessary continuous professional development is followed and provide a consistent standard of adjudicator's for the industry.

In the USA training bodies for mediation and arbitration are regulated and it is likely that dispute resolution board membership will be regulated. The training body has to be accredited by the state in order for it to offer compliant training courses. The courses have a minimum 40 hour requirement. This approach should be adopted in England and Wales. The first three concerns raised by the CIB concerned the rules of natural justice. The ANB's could be required to ensure that the rules of natural justice are covered in sufficient detail as part of their training course.

The ANB's should also create a disciplinary procedure to monitor competence. The writer is not aware of any such procedure in any of the main ANB's. In order to ensure that adjudicators are maintaining the highest standards, a disciplinary procedure should be made available. If an adjudicator fails to achieve the necessary standards the ANB would be able to review the case and take any necessary steps in order to prevent future problems arising. Where the courts strike out the decisions of an adjudicator for a breach of due process, the ANB could convene a disciplinary proceeding where the court found there was more than a mere technical breach.

Another issue, which the CIB could have considered, is that of standard form contracts. These forms such as the JCT family of contracts should provide a greater choice of ANB. In the JCT the ANB's listed at present are the RIBA, RICS and ACIArb. The default provision is the RIBA.

A greater certain, could be attained if a panel of adjudicators were named at the start of a contract. The panel could comprise of adjudicators with different skills to suit the likely disputes that might arise from the contract. This would remove any problem associated with the naming of an adjudicator if a dispute should arise. If the dispute centred around the value of variations, the quantity surveyor member of the panel would be appointed, if the dispute involved a design detail the architect would be appointed, and so on.

Well-trained robust adjudicators would be a real asset to the process of adjudication. However, many of the problems, which arise, were caused by adjudication provisions contained in contracts. There is no consistency in these contracts. The Scheme should be made compulsory. The CIB actually recommended this in their review, but no comment was made by the DETR. The writer discussed the advantages in earlier chapters. A single process would ensure far greater consistency. All parties would be familiar with the process. It is likely that more parties would endeavour to act for themselves in adjudication's, helping to reduce cost. The temptation to manipulate the process by the dominant party would be removed, resulting in a far more equitable system for all. It would also provide a perfect opportunity for the HGCRA to be redrafted in plain English.

Along with making the Scheme the mandatory process for adjudication, a campaign for greater awareness of adjudication in the construction industry should be embarked on. In the writer's own experience, it is all to common to encounter small sub-contractors who, even if they have heard of it, are unaware of even the most basic concepts of adjudication. The mere threat of adjudication can often be sufficient to prompt even the most hardened main contractor into the negotiation process.

In conclusion, whilst the writer does consider that both the CIB and DETR have made a valiant effort to address the problems inherent in adjudication in its present form, further changes must be made. Adjudication is a credit to the construction industry. Maintaining a regular cash-flow is essential for any business to survive and indeed prosper. Adjudication has successfully filled the gap between negotiation and the more lengthy and formal processes of arbitration and litigation. The introduction of statutory adjudication was innovative, but the industry and in particular the DETR must continue the work already started. It is not acceptable to say that it works well and that we won't change it just because of a few minor problems. Continuous self-assessment must be carried out and continuous improvements must be made, if the construction industry in the UK is to enjoy its benefits for generations to come.

It is noted that the CIB plans to conduct a second review in two years time. If the second review is to be a worthwhile exercise, then the conclusions reached in the first review must surely be implemented first.