NATIONWIDE ACADEMY FOR DISPUTE RESOLUTION

ADR NEWS

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For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

WHY CHOOSE NADR ?

"Why should an organisation choose to adopt the services provided by the Nationwide Academy for Dispute Resolution in preference to the services of other ADR organisations ?"

We will presume that the reason you are considering this issue at all is because you have already considered another question "*Why should our organisation choose to settle disputes by adopting ADR processes rather than by resorting to the traditional method of litigation?"* and have concluded that ADR is beneficial, hence the question "Who provides the most appropriate ADR services for our organisation?"

Beyond Arbitration, ADR is relatively new. Globally, its availability is far from uniform. The USA has going on for 30 years of significant ADR provision, but the roots of Mediation in the US are over 80 years old. Australia has about 12 years of significant ADR provision. Canada has 3 years of significant ADR provision. In the UK, through the auspices of ACAS, ADR has been available in one form or another for over 50 years with The Centre for Dispute Resolution (CEDR) launching the first major wave of commercial provision in 1990. This was closely followed by the ADR Group under the auspices of the Law Society and by an experiment in the London County Court. ADR has now been firmly cemented in the consciousness of UK commerce for about 3 years. Hong Kong, Malaysia and Singapore have heard much about the concepts of ADR and their advantages but have little experience of ADR in practice. By contrast the principal forms of dispute resolution in the People's Republic of China are ADR based, with the courts representing the "alternative" to traditional non-judicial dispute settlement systems.

With this in mind where can one go to find an ADR provider? How do the provisions of the various providers differ? Which ADR provider should one chose? Which system is the most appropriate for your organisation?

Given the depth of experience in the USA and the fact that there are in excess of 26,000 ADR providers in the USA this might seem a logical, if somewhat daunting place to start. The problem for organisations based outside the US, in turning to the US ADR market, is that by enlarge the US providers are very parochial. Much of the considerable ADR expertise in the US revolves around maximising the special circumstances of the diverse jurisdictions of the US and the peculiarities of US state and federal law and the implication of and vicissitudes of jury trial for the settlement of commercial disputes, coupled with the compulsory provision of ADR in many states. In some respects the limited global vision of US practitioners means that there is an inbuilt resistance towards the accommodation of alternative cultures which makes the US based providers somewhat unattractive on the global market.

The traditional ties between the Commonwealth and the UK inevitably mean that there is a tendency for Commonwealth organisations and for the legal practitioners, who have modelled their legal systems on the UK, to look to the UK for inspiration. The Centre for Dispute Resolution (CEDR) is the longest established ADR provider in the UK. The CEDR model and variants of it have been adopted by a number of other ADR providers in the UK and so the CEDR model might appear to provide a perfect exemplar of what would be the most suitable ADR model for Commonwealth Countries and other countries with close trading ties with the UK. This leaflet will therefore analyse the differences between the CEDR model and the NADR model and set out the merits of and disadvantages of each.

Before doing so, let us consider what ADR embraces. Alternatives to judicial settlement of disputes include :-

1 Arbitration and its many variants including Adjudication, Expert Determination and Ombudsmen;
2 Conciliation or non binding settlement;
3 Mediation and amalgams of the above such as Mediation/Arbitration, Mediation/Adjudication and Dispute Review Boards.

The principal established provider of all variants of ADR is the American Arbitration Association (AAA). The CIArb has restricted its provision until recently to Arbitration. In 1998 it adopted Adjudication and is currently assessing what role it will play in the provision of Mediation and its variants. ADR providers in the UK such as CEDR have concentrated on mediation provision. NADR personnel have had experience in all fields of ADR provision and NADR is in a position to offer a complete range of ADR services to the global community.

MEDIATION

What is mediation ? Disconcertingly, the answer is that "Mediation is many things to many people". You might believe, especially if you have heard about or been involved in a mediation process that you know what mediation is. What you will have seen or heard about is likely to have been a particular model of mediation. Even if that mediation model was not suitable for your business requirements you may be surprised to learn that there are mediation models specifically designed to cater for the needs of industry and commerce.

Early western practitioners tested a range of mediation models with varying degrees of success. Experience has shown that there is a need for a variety of mediation models. The needs and expectations of the people involved in commercial disputes are quite different from those of the people involved in social disputes. The way mediation operates differs from country to country. The US for example has introduced legislation which mandates the use of mediation. This affects the way mediation is conducted in the US.

Which Mediation Model is best for Commercial Users? Academics have identified in excess of 28 models of mediation but these can be grouped into 4 basic models.

THE ORCHESTRATOR: This is the basic NADR Model. This is the most modern mediation style. The Orchestrator : Asks **many** questions about the facts, evidence and jurisprudence in the case : Uses his questions to probe the parties' positions and perceptions : Tries to conciliate : Focuses primarily on the process : Gets the parties talking about liability, damages, costs, verdicts in the area, risks, high-low-average values for the case, perceptions of the community, e.g. motorcycles and alcohol use : Employs ***multiple*** joint sessions and assists and encourages the parties to communicate ***directly!*** The Orchestrator does ***NOT*** use coercion or "arm twisting" to force settlements. He is the "Guardian of the Process". If he can not mediate a settlement, he will mediate the process so you always obtain some results from the mediation.

THIRD PARTY NEGOTIATOR: Sometimes used in the UK. The Third Party Negotiator is the original "shuttle diplomat". After the first joint session, this mediator separates the parties ***and keeps them apart.*** He carries the parties' positions back and forth, filtering and interpreting them the way he thinks best to achieve a settlement. This is an older style of mediation. This style has a problem with parties' perceptions of his neutrality. Parties often begin to mistrust this type of mediator because he is constantly presenting or arguing the other side's position to them. This model of mediation is popular in International Public Mediations and was employed in the Camp David Israeli / Palestinian Negotiations.

THE DEAL MAKER: Often used in the UK. The Deal Maker also follows a "shuttle diplomat" style and ***intentionally keeps the parties apart.*** The Deal Maker is extremely manipulative and may even deceive one or all parties in order to achieve a settlement. He will formulate his own solution to the dispute and then pushes very hard to sell it to the parties. He may attempt to browbeat, intimidate, or coerce a party into accepting that deal. The Deal Maker believes that he knows what is best and most appropriate for the parties. This is the oldest form of mediation and originates out of the labour field. This type of mediator has the greatest problem with the parties' perception of him. He is usually mistrusted by all the parties. Many parties will only use him once. The Deal Maker operates on the basis that the "end justifies the means". This type of mediator confuses mediation with arbitration or acts as a settlement judge. It is popular with lawyers and ex-judge mediators.

THE RESCUER: The Rescuer believes and states that, 'court is the worst place for people to be'. He tries to keep parties out of court and away from lawyers at all costs. Often found in "community mediation centres". The Rescuer usually follows a style that does not allow or severely restricts the use of private sessions with the parties. This greatly reduces their effectiveness. The Rescuer Model is commonly adopted by social workers, psychologists, counsellors or other people ***without*** legal or claims training. The Rescuer rarely has the knowledge, education, mediation training or expertise to mediate serious commercial, personal injury or insurance cases. Often times the Rescuer Model is excellent for small cases such as neighbourhood disputes involving for instance a dispute about a dog barking and for juvenile restitution matters. The Rescuer is frequently very critical of the courts, attorneys and insurance companies and often engages in "court bashing" or "lawyer bashing".

NADR INTEGRATED DISPUTE RESOLUTION SYSTEMS

NADR has employed the Orchestration Model for many years but has further refined the technique in a number of distinct ways. NADR is committed to a range of ADR services including Arbitration, Adjudication and Mediation and hybrid variations of all three, tailored to the needs of those it needs.

NADR caters for :-

1 employer / employee disputes with schemes for specific employers.
2 construction disputes with Dispute Review Boards providing mediation/adjudication/arbitration services.
3 general contract and tort mediations including court ordered mediation.
4 supply and delivery contract mediations and adjudications.
5 charter and hire contracts adjudication/arbitration services.
6 insurance claims settlement.
7 intellectual property disputes.
8 financial services disputes.
9 internet consumer/supplier adjudications.
10 adjudicated, arbitrated and mediated multi-jurisdictional disputes.

ADJUDICATION

Adjudication is a quick and inexpensive method of immediately enforceable, temporarily final dispute settlement, by a third person, known as the Adjudicator. The time scale for adjudication depends on statutory provisions or an agreed time frame in the adjudication contract. In the UK the statutory time frame for Construction Adjudications is 28 days from submission of dispute to adjudication. NADR adjudication proceedings may be conducted with or without a hearing.

Paper only Adjudication. The parties submit written claims, defences, counterclaims and legal submissions to the adjudicator along with expert reports and supporting evidence, having engaged in the usual exchanges of documentation. The adjudicator goes through all the paperwork, makes and publishes a decision. Whilst there is no opportunity at a paper only adjudication to make oral pleading and to engage in cross-questioning, the low cost of such adjudication proceedings is attractive. It is an ideal process for the settlement of disputes involving technical issues and straight forward differences of opinion between the parties.

Adjudication proceedings with hearings. The process is very similar to a fast track arbitral hearing with strict time limits imposed on submissions and cross questioning.

Immediately enforceable. The adjudicator is given the authority by the parties to a dispute (or by Statute if applicable) to make a determination which is immediately enforceable, subject to the terms of the award. Typically the losing party is ordered to pay the winning party a sum of money within a specific period of time. The settlement of the dispute at an early stage enables the parties to get on with business.

Temporarily final. The award is temporarily final in that having complied with the order, the losing party is free to commence arbitration or litigation. Judging from the UK experience so far, it is rare for the parties to so dissatisfied with the adjudication award that they decide to continue the dispute. Assuming that both parties are completely satisfied with the adjudication award the dispute is at an end. Even if one of the parties is dissatisfied with the adjudication award the parties are able to continue their business relationship, on the basis of the award, pending arbitration or litigation.

Arbitration / Litigation and the Adjudication. The arbitrator / judge will be aware that an adjudication has taken place and inevitably will be aware that the claimant / plaintiff was not satisfied with the outcome of the adjudication. The arbitrator / judge will not know the details of the adjudication award until he has made his final award or ruling and turns his attention to the award of costs. If the claimant wins the arbitration or court case he will recover the monies paid out under the adjudication award and the costs of the claim. If he fails the adjudication award is undisturbed. The claimant covers the cost of the failed claim. If the arbitration award or court judgement is less than the adjudication award the claimant will have to pay the costs of the action.

ARBITRATION : NADR provides three types of arbitration service :-

1 Fast Track Paper Only Arbitrations (POA),
2 Fast Track Short Hearing Arbitrations (SHA) and
3 Traditional Arbitration Tribunals (1 or 3 arbitrator panels).

Fast Track Paper Only Arbitrations. The primary function of POA's is to settle consumer / commercial supplier disputes. The cost of the arbitration is borne by the commercial supplier and may be covered by an insurance policy. An NADR Standard Form Term is incorporated into the contract of sale or supply which gives the consumer the right to submit a dispute, about the goods or services supplied, to a POA. Consumers' statutory rights to litigation are unaffected by the POA provision. However, since the service is offered free to the consumer it is a very attractive way for the consumer to settle the dispute. The consumer must first seek to settle the dispute through negotiations with the commercial supplier and follow the supplier's standard complaints procedure. In the unlikely event that this fails to solve the problem the consumer may then submit the dispute to arbitration.

The NADR Dispute Resolution Protected Seal of Approval

Commercial suppliers who incorporate a NADR Paper Only Arbitration Clause into their sale and supply contracts are entitled to display the NADR Dispute Resolution Protected Seal of Approval on products and in advertising materials.

The great value of being part of such a dispute resolution system is that the Dispute Resolution Protected Seal of Approval provides potential consumers with an assurance that the commercial supplier is reputable and that the supplier is committed to providing high quality services. It is an ideal dispute resolution system for domestic service providers, Mail Order Companies and Internet Distributors.

The POA Process. The parties submit written claims, defences, counterclaims and legal submissions to the arbitrator along with expert reports and supporting evidence. Submission may be made to the NADR POA Centre by land mail, e-mail or fax. Where appropriate NADR will arrange and supervise any necessary exchanges of documentation. At an appointed time, the arbitrator goes through all the paperwork, makes a decision and publishes a reasoned award. Whilst there is no opportunity at a paper only arbitrration to make oral pleading and to engage in cross-questioning, the low cost of the arbitration, particularly for the consumer, is attractive.

The POA process is fully supported by advisory documentation. The average consumer can follow the process without the need for legal representation.

Fast Track Short Hearing Arbitrations. A FTSHA is an ideal system for settling disputes where it is important to ensure that the cost of the dispute settlement process is not disproportionate to the issues and the sums of money involved in the dispute. A FTSHA procedure strikes a compromise between the rights of the parties to argue out their case in full and the cost involved in so doing. The interim procedures for submission of claims and counter claims and exchange of documents are conducted within strict time limits. It is essential that the parties follow the pre-hearing procedures strictly and submit all relevant documentation to the arbitrator and comply with disclosure requirements. The pre-hearing procedures are designed to minimise the amount of time subsequently required for the arbitral hearing.

During the arbitral hearing oral submissions, witness statements and cross-questioning are likewise governed by strict time constraints agreed in advance by the parties with the assistance of the arbitrator following NADR procedural guidelines and the terms of the arbitration agreement. Such procedures are without prejudice to the statutory rights of the parties. The time constraints concentrate the minds of the parties. Hearings are conducted in an efficient and concise manner. Whilst the costs of the arbitration are kept to manageable limits, within the confines of the procedure there is scope to adjust the length of hearings.

Arbitration. The parties submit a dispute to NADR for arbitration. In a single arbitrator tribunal NADR appoints the arbitrator. Once the arbitrator accepts the appointment he notifies the parties and arranges a series of conferences to deal with interim issues that need to be dealt with before the arbitral hearing. This will involve setting deadlines for the submission of claims and counterclaims, questions of security of costs and jurisdictional issues (if any), setting the time and place for the arbitral hearing and arrangements to hire

and pay for the venue of the arbitration. NADR guidelines and procedures are designed to ensure that this stage is carried out in a standardised, efficient manner. In a three man arbitral tribunal NADR will provide each party with a short list of potential arbitrators. Each party will select an arbitrator from their list. The two arbitrators then appoint a third arbitrator from a short list provided by NADR.

An arbitral hearing is much like a court hearing but will probably be quicker. Party representatives make oral submissions to establish claims and counter claims. The hearing is conducted in private. The arbitrator does not have to follow court procedures so the hearing is likely to be much less formal. Witnesses present evidence under oath and are subject to cross-questioning. Party representatives will argue the case. The arbitrator can ask the parties and witnesses questions. At the end of the process the tribunal will make a decision and deliver a reasoned award. The award will inform the parties who has won, and what each party is required to do in respect of payment of damages and costs. An arbitral award is enforceable internationally in the courts of all 128 States who are party to the 1957 New York Convention on the Enforceability of Arbitral Awards.

DISPUTE RESOLUTION SCHEMES AND REVIEW BOARDS

Dispute Resolution Schemes (DRS). Apart from the paper only consumer/commercial supplier scheme outlined above, NADR also provides schemes to settle disputes between people and organisations involved in on-going relationships. A general description is provided below of the types of scheme available for specific types of user. NADR will work with you to tailor the scheme to your specific needs.

Employer/Employee DRS. NADR will work with the employer and employee representatives to design an internal grievance procedure or re-evaluate existing procedures. Defined lines of communication for the submission of employee grievances to the employer and for the communication of employer concerns to employees combined with a system of recording communications and outcomes reduces conflict. NADR provides staff training to ensure that all concerned in the process know how it works. In the event of a dispute arising either party may submit the dispute to NADR. An independent conciliation / mediation / adjudication / arbitration, as the case may be, will then be arranged. The process minimises conflict facilitating on-going relationships. It is quick and private. NADR's independence ensures that both parties have confidence in the process.

Goods & Services and Multi-party DRS. Goods and services DRS are ideal for situations where a vendor regularly supplies goods to an organisation and for maintenance and service contracts. A system for dealing with problems directly between the parties proceeds submission of disputes to mediation / adjudication / arbitration. Speed and informality ensure that disruption to business relations is kept to a minimum. Multi-party DRS are ideal where a group of service providers co-operate together to service an organisation. The DRS is available not only for disputes between an individual service supplier and the organisation but also covers disputes between the various service suppliers.

Dispute Review Boards (DRB). These are ideal for major construction projects and other on going relationships where teams of independent specialists work together. The DRB differs from the DRS, in that NADR personnel play an active role in the management of a project as impartial observers, with a specific remit to advise and assist the parties to identify areas of potential conflict. This enables the management team to address issues at an early stage preventing them from turning into problems. By visiting and reviewing progress of the project, NADR personnel understand the background to disputes from the outset. The dispute review scheme involves a step by step process from negotiation and conciliation, through either mediation or adjudication to arbitration. The scheme may involve a single representative from NADR or a three man team including relevant professions. The NADR team makes regular visits to the site and convenes as a Dispute Resolution Panel only if and when required. The process minimises conflict. It is private, efficient, impartial and independent.

NADR IS A GUARDIAN OF THE DISPUTE RESOLUTION PROCESS

NADR follows a strict set of guidelines and ethical standards and has an international remit to develop best practices and provision of ADR services as demonstrated by NADR's mission statement and by NADR's objectives.

NADR MISSION STATEMENT

"To enable those engaged globally in domestic and international commerce to achieve the optimum climate of good relations, by facilitating the settlement of differences between trading partners through the establishment of and provision of an internationally homogenous, wide and comprehensive range of dispute resolution services, grounded on the highest ethical standards which guarantee impartiality and fairness, by synthesizing the best practices in Alternative Dispute Resolution from around the world, and which are tailored to the specific purposes of the various aspects of industry and commerce, whilst bridging the cultural and jurisdictional barriers which traditionally separate and divide them, at a price compatible with commercial needs and within a prompt and appropriate time frame."

NADR is unique in that it has a global mission. NADR will co-operate with governments and ADR institutions world wide to establish universal best practice in ADR provision to ensure universal access to homogenised services, counteracting the fears and prejudices of national, ethnic and cultural boundaries and barriers.

NADR is unique in that its global mission embraces all forms of alternative dispute resolution. NADR has had the vision to combine the various methods of ADR in a multiplicity of ways which enable the user to reap the benefits of each individual method whilst providing the facility to avoid the limitations inherent in each method if used in isolation. Thus, NADR systems embrace not only the orchestrated mediation model, adjudication services with or without hearings and arbitration services which range from fast track procedures to full blown arbitrations but also :-

1 Mediation / adjudication systems which offer a non binding third party decision as a fallback in the event that the parties cannon reach an agreement.
2 Mediation / arbitration systems which combine party autonomy with finality.
3 Mediation / adjudication / arbitration which combines the fall back with finality.

This comprehensive range of services means that NADR can almost certainly provide your organisation with a dispute resolution system that is suitable for your needs

NADR OBJECTIVES

1 To spread the Concepts and Practice of ADR, to a cross-section of industry, professionals (both legal and non-legal), educational institutions and the public in general in order to ensure that the various forms of ADR enter the main stream of commercial practice and become the primary mechanism for commercial dispute resolution.

2 To assist and advise governments on the introduction of legislation to better facilitate the adoption of ADR mechanisms by commerce.

3 To forge a new spirit of co-operation and confidence between the providers of Dispute Resolution Services and commerce.

4 To train (in association with the Nationwide Mediation Academy – the NMA) a new generation of ADR personnel from a diverse range of commercial and legal backgrounds and to inculcate within them the highest standards of ethics, knowledge and expertise.

5 To create and provide a wide range of cost effective Alternative Dispute Resolution services ranging from adjudication, arbitration and conciliatory project review boards through to mediation, to commerce and to the consumer.

6 To recruit ADR specialists old and new from the global community to participate in the provision of the above stated Alternative Dispute Resolution services and to make their services available to commerce though the promulgation of lists and by providing appointing services as appropriate.

7 The maintenance of a strictly enforced barrier between the provision of ADR services and legal advice guaranteeing a total absence of conflicts of interest. ***(NADR does NOT and WILL NOT provide legal advice to parties.)***

8 To co-operate with and work alongside governments and the longstanding bastions of dispute resolution to achieve the above stated objectives.

No other ADR provider has the breadth of objectives embraced and actively pursued by NADR at both a domestic and an international level. We work with ADR Institutions, Professional & Trade Organisations, The Law Society and The Bar, Universities, Governments, Legislators, Industry and Commerce to promote ADR and to educate ADR users and ADR technicians.

USING MEDIATION: AN ATTORNEY'S GUIDE

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It is the policy of the State of Texas to encourage the peaceable resolution of disputes, with special consideration given to…the early settlement of pending litigation through voluntary settlement procedures.
Texas Civil Practices and Remedies Code. Section 154.001, *et seq.* (& Texas Rule of Civil Procedure 1).

We trial lawyers know better than anyone that the trial of a lawsuit consumes money and the energies of many people. Consequently, the Legislature acted in 1986 to provide to the people of Texas another option, appropriately titled the Texas Alternative Dispute Resolution Procedures Act, better known as the "ADR Act". The judiciary now realizes that the ADR process rapidly settles cases, permanently removing them from the judges' dockets, so ADR is now a reality to all litigators. Therefore, to best represent clients, we must become knowledgeable about the types, processes, tactics, and techniques of ADR.

The effective advocate must adjust his or her perception of cases, modify presentations, and prepare clients in a different manner depending on whether the case has been referred for mediation, a mini-trial, a moderated settlement conference, a summary jury trial, or arbitration. We offer the following suggestions to trial counsel for consideration in preparing for a mediation.

MEDIATION

Mediation is the least formal and by far the most commonly employed form of ADR. The Act defines mediation as follows:

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
(b) A mediator may not impose his own judgment on the issues for that of the parties.

This definition envisions an informal and non-adversarial process. The rules of evidence do not apply. Neither do the rules of civil procedure. No testimony is taken, though you may bring anyone or anything you think can assist the parties in settling the case. The client is free to speak directly to the mediator and the other side(s). Everything said or done in the mediation is confidential. This is true even if the case does not settle (Section 154.073). Finally, a mediation usually costs less than a physician's deposition!

The mediator helps the parties reach a settlement by enhancing the communication between the parties. This is accomplished by asking questions and exploring in depth each party's real interests, their perceptions of the case, and the basis for their views. The mediator essentially assists the parties to educate themselves on the facts, issues, and the position(s) of the other side as well as the rationale for their position. The mediator cannot legally or ethically impose his view or judgement on the parties. Instead, the mediator is an "agent of reality". As such, the mediator thereby assists the parties in examining all the aspects of their case, enabling them to make a truly informed evaluation. This frequently leads to greater flexibility, which substantially enhances the prospects for settlement.

THE MEDIATION CONFERENCE

Mediation is informal. However, a general procedure is usually followed. It consists of the steps below.

1. An introduction by the mediator and agreed ground rules (*a joint session).*
2. Case presentation by counsel or the adjuster and comments by the parties (a joint session).
3. Private meeting(s) between the mediator and each side. (*These may include specific confidential disclosures.)*
4. Continued negotiations between the sides (*a joint session*).
5. Additional private meetings, if necessary.
6. Settlement agreements (a joint session).
7. A written agreement or memorandum.

BENEFITS OF MEDIATION TO TRIAL LAWYERS

Mediation provides trial counsel with an informal, off-the-record forum in which to discuss settlement. The client and the adjuster or other persons with actual authority to settle the case must be present. Private mediation providers often require this in their rules, while most court orders specifically mandate such persons' attendance. Consequently, everyone necessary to settle the case is present in this informal, comfortable setting with no artificial time limits. Their attention is devoted solely to efforts to settle the case. Finally, they have present a skilled third party neutral, the mediator. The mediator's purpose is to act

as a catalyst, keep the negotiations proceeding as smoothly as possible, and help guide the parties to a settlement.

The mediator provides the special skills and tactics of a neutral to maintain the focus of the negotiations of the case. You provide the talent, skills, knowledge of the file, and negotiating ability necessary to resolve the case. The best way to approach the task is to view the mediation as a guided settlement conference in which you maintain control of your case. Mediation thereby provides you a number of benefits:

- It opens communication and decreases misunderstandings and hostility.
- It allows you to avoid the risks of trial and to realistically educate your client, with the assistance of the mediator.
- It breaks impasses and allows the parties to explore a variety of settlement options.
- It permits the parties to discuss in private options they cannot publicly explore.
- It helps the parties develop a variety of alternative potential settlements by analyzing their real interests.
- It develops solutions to the dispute and reduces "fault" to only one of several factors to be considered in crafting a solution.
- It provides the parties an opportunity to objectively evaluate all positions without being sidetracked by negotiation posturing.
- It allows clients to participate directly in the settlement process. This permits them to know wand understand what you are doing on their behalf. It also permits you to obtain immediate informed decisions from your client – e.g. approving a settlement offer.
- The speed and versatility of mediation and the client's participation increase client satisfaction.
- In cases that do not settle in mediation – fewer than 20 percent – the parties are assured that a trial was really necessary.

Mediation is not always successful in settling all aspects of a case. Nevertheless, almost every properly conducted mediation will result in a number of benefits:

- It may eliminate superfluous discovery.
- It may reduce the number of issues.
- It may eliminate some issues entirely.
- It will clarify the issues that remain.
- It may reduce the number of parties.
- It will reduce the emotional intensity of the dispute, and the parties will analyze their cases more rationally.
- The parties may reach agreements on the extent of the discovery to be conducted in the case.
- The parties may reach agreements on the use of experts and the informal exchange of the experts' reports.
- The parties may reach agreements on at least the ranges of a potential settlement.
- It may lay the groundwork for future settlement discussions.

THE CLIENT'S ADVANTAGES IN MEDIATION

The key advantage of mediation to clients is their participation in the process. They can assist their lawyer in crafting a settlement that truly meets their needs and desires. It is also much faster and far less expensive than litigation. This reduces both the costs and delays the client may experience. It will eliminate the need for trial in at least 80 percent of the cases mediated. The major benefits of mediation to a client are:

- It is much faster than litigation.
- It is less expensive than litigation, in which the case can be won and the client can still lose.
- The client has greater influence on the settlement process.
- It may eliminate the need for and expense of much discovery and final trial preparation, as well as the expense and uncertainty of trial.

- All parties know and understand the other side's best offer and the basic rationale for that party's position.
- The client is empowered to conclude the case at the earliest reasonable point and knows that without you it would not have happened.
- A neutral third party is present to help generate or maintain the negotiation momentum, create and explore a variety of options for settlement, and provide an informal confidential forum to discuss settlement.

TRIAL COUNSEL'S PREPARATION FOR MEDIATION

The preparation necessary for a mediation is, paradoxically, both simpler and more complex than that required for either a trial or a deposition. There is absolutely no substitute for preparation. Happily, the odds are more than 80 percent that you will resolve your case at the mediation. Consequently, that will probably be the last time you will work on that file.

The following steps are the minimum any good lawyer should take to properly prepare a client for mediation:

1. Explain to the client what mediation is, especially is informality and flexibility.
2. Explain the advantages of mediation.
3. Ascertain the client's true needs in the litigation
4. Rank and prioritize the client's needs.
5. Ascertain what, if any, discovery is necessary.
6. Ascertain what facts, if any, are yet unknown to the other side but which may be necessary or helpful to disclose to best negotiate a settlement.
7. Discuss with the client the possible ranges of settlement. Keep in mind that these may have to be modified based on what occurs at the mediation.
8. Attempt to determine the client's future litigation costs, if the case proceeds to trial.
9. Clearly delineate which items and issues are negotiable and which are not.
10. Assure that the client attends the mediation. The client's presence is critical to success.

The preparation of counsel representing a party in a mediation should include at least these actions:

1. Review the entire file thoroughly.
2. Conclude all legal research on relevant legal issues.
3. Conclude all legal research on damages.
4. Have copies made of any research you wish to use at the mediation session
5. Review the probable jury instructions relevant to the issues in the case. Make copies for use, if desired.
6. Ascertain whether any informal or formal discovery is still needed.
7. Determine whether rulings are needed or desired on any outstanding motions.
8. Review the digest, reporters, advance sheets, and anything else relevant to obtain a realistic range of potential verdicts or settlements.
9. Decide whether rulings are needed or desired on any legal issues yet unresolved.
10. Analyze the client's ability and desire to pay for the costs of additional litigation.
11. Meet with the client to discuss your negotiation strategy.
12. Determine with the client the tactics to be employed at the mediation session
13. Realistically review and ascertain the strengths and weaknesses of your client's case.
14. Realistically review and ascertain the strengths and weaknesses of the other side's case.
15. Discuss with the client whether a mediated settlement or continued litigation is in the client's best interest.

TACTICS AND STRATEGIES FOR MEDIATION

Presenting a case in mediation is different than a trial. Mediation is informal, and the rules of evidence do not apply. Consequently, you should seriously consider permitting your client to speak during your presentation. This enables the client to dramatically emphasize the impact of the events upon him or her and the damages sustained. It also allows you to show your client's effectiveness as a witness.

Since mediation is informal, your client's comments are more like a discussion than a court proceeding. The same is true for the comments of any experts or other witnesses you my use. If it would be helpful to you, consider videotaping key fact witnesses' or experts' presentations. You can use demonstrative evidence with dramatic and often devastating effect at the mediation session.

Mediation is an opportunity to use your imagination, advocacy, and negotiation skills in new ways to benefit your clients. It is now the most effective, efficient, and inexpensive tool you can use to settle cases faster and keep satisfied clients referring cases to you.

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RECENT CONSTRUCTION ADJUDICATION CASES

Atlas Ceiling v Crowngate [2000] CILL 1639

Work commenced on a construction project, before the HGCRA came into force, on the basis of a letter or intent that stated that once concluded, the contract would have retrospective effect and embrace all works done under the letter of intent. ***Fillite (Runcorn) Limited v Aqua-Lift*** *(1989) 45 BLR 27* considered. The concluded contract post dated commencement of the provisions of the HGCRA. Consequently the Act applied to the contract and the duly appointed adjudicator had jurisdiction to determine the dispute. The adjudicator's decision stood. His Honour Judge Anthony Thornton. TCC. 18th February 2000.

Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd [2000] BLR 314

This case considered whether, and if so in what circumstances, an Adjudicator can alter his own decision to correct a clerical mistake or error arising from an accidental slip or omission.

The parties to a construction dispute made submissions to the adjudicator virtually right up to the last moment. Whilst a request by the adjudicator for a 14 day extension in time had been refused the adjudicator had notified the parties that he would make his decision in principle before the end of the 28th day from reference but not issue the decision until two days later, to allow time to do the necessary calculations. Accordingly a 2 day extension was granted. The decision was issued in time. However, once issued the defendant noticed that payments on account had not been taken into account in the calculations as to what was then outstanding and due for payment. The adjudicator, on notification of this mis-calculation, issued a revised decision which took account of the payments on account.

The applicant, whilst accepting that, mistake apart, he would not be entitled to the benefit of what would amount to an over payment, asserted that the adjudicator's decision must be enforced even if it contains errors. ***Macob v Morrison, Sherwood v Mackenzie, VHE v RB STB*** and ***Northern Developments v Nichol.***

Toulmin J held that the Slip rule that operates at common law (***Hanks v. Ace High Productions*** *[1979] IRLR 32* and ***Falilat Akewushola v. SS Home Department*** *[1999] IAR 594*) and in respect of arbitration applies equally to adjudication, so that an adjudicator can correct mere mistakes in a decision to reflect his original intention. This is particularly important since it is clear from ***Bouygues v Dahl-Jensen*** that the court cannot correct errors. Contrary to ***Casella (London) Limited v Banai*** [1990] ICR 215 the adjudicator does not immediately become functus officio on issuing the decision, at least for the purpose of correcting slips, This facility does not however extend to re-opening the hearing and additional argumentation.

His Honour Judge Richard Toulmin. TCC. 5th April 2000.

Bridgeway Construction Ltd v Tolent Construction Ltd [2000] TCC : [2000]CILL 1662

A construction dispute was referred to adjudication. The contract incorporated a modified version of the CIC Model Adjudication Procedure. The Model procedure provides inter alia :-

Clause 28: *"The parties shall bear their own costs and expenses incurred in the adjudication."*

Clause 29: *"The parties shall be joint and severally liable for the adjudicator's fees and expenses."*

The modified version provides inter alia :-

Clause 28: "*The party serving the Notice to Adjudicate shall bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts fees."*

Clause 29: *"The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses."*

The applicant sought a declaration that these provisions were invalid in that they acted as a disincentive to adjudication. The court held that the contract in all ways complied with the HGCRA which was silent on the payment of costs. In consequence the provisions were valid and the successful applicant was liable for the costs. It should be noted that neither party invited the adjudicator to determine what costs, if any were due, simply to determine who was liable for costs, which the adjudicator promptly did on the basis of the terms of the contract. His Honour Judge Mackay observed that the parties had agreed upon these terms and an aggrieved party could not subsequently complain when the terms of the contract impacted adversely upon them. ***Johnson v Moreton [1980]*** *AC 37* distinguished. His Honour Judge Mackay. TCC. 11th April 2000.

Fastrack Contractors Ltd v Morrison Construction Ltd [2000] BLR 168

This concerned a sub-contract for brickwork. The work fell behind schedule. The parties disagreed about who was responsible – the main contractor for bad project /site management or the sub-contractor for failing to get on with the work. Preliminary supervisory notices followed by notice of to transfer work to others and a withdrawal from site by the sub-contractor as acceptance of repudiation followed in short order. The sub-contractor issued to application payments, No12 & No13. The main contractor countered with a set off which exceeded the sums covered by the applications. Fastrack referred application No12 to adjudication and were successful in part.

Fastrack then successfully referred a further dispute to adjudication and recovered a sum greater than that covered by application No13. Morrison denied jurisdiction, participated under protest and here resisted enforcement proceedings. Morrison maintained that the only matter that had ripened into a dispute was quantification of the sum due under Application 13. The dispute should be capped to the sum applied for. Morrison further disputed the jurisdiction of the adjudicator or his power to determine jurisdiction.

As to whether or not the adjudicator had jurisdiction over jurisdiction, ***Sherwood & Casson Ltd v Mackenzie*** *1999;* ***The Project Consultancy Group v The Trustees of the Gray Trust*** *1999 :* ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** *[1999] Building Law Reports 93* considered. The court held that unless the parties accord jurisdiction over jurisdiction to the adjudicator he cannot determine his jurisdiction.

Regarding what is a dispute, ***Halki Shipping Corporation v Spex Oils Ltd.*** *[1998] 1 W.L.R. 726:* ***Monmouthshire County Council v Costelloe & Kemple Ltd*** *5 BLR 83* considered. A dispute can consist of an unsatisfied application for payment. It is the sum of disputed issues extant at the time of referral. His honour held that a dispute may be referred to in specific or in general terms. Whilst a notice cannot be limited to part of a dispute, excluding integral elements of that dispute (*though a party may chose not to pursue further elements of a claim*), nonetheless a notice can be couched in general terms including "*How much money is due*?" In this instance the parties were in dispute as to the final reckoning between the parties. The lawfulness of the determination was at issue, and who had to account to whom. Fine tuning had taken place regarding the exact sums due between the parties. To limit the dispute to that which had been applied for earlier was to limit the dispute to a prior point at time, when the dispute had moved on. The dispute as referred was not substantially different to the dispute that had ripened between the parties. Accordingly the adjudicator had jurisdiction and his decision was enforceable.

His Honour Judge Thornton. TCC. 4th January 2000.

F W Cook Ltd v. Shimizu (UK) Ltd [2000] EWHC TCC 152

This dispute concerned negative and positive elements of a Final Account. No sum was demanded and none was ordered. Rather, the adjudicator settled some outstanding issues, the decided sums to be incorporated into any calculation of the final account. Cook sought to tot up the sums and have them paid up immediately. The court rejected this view. The final account mechanism and retainer provisions etc were not up for decision in this reference. ***Jones v Sherwood Computer Services plc*** *[1992] 1 WLR 277 and* ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** *[2000] BLR 49* distinguished.

His Honour Judge Humphrey Lloyd. TCC. 4th February 2000.

Grovedeck Ltd v. Capital Demolition Ltd [2000] EWHC TCC 139
This case concerned two oral demolition contracts. The court held that an adjudicator does not have jurisdiction over oral construction contracts. Unlike arbitration, specifying (without demure by the other party) the terms of the alleged contract is insufficient to turn it into a relevant construction contract. ***Pepper v Hart*** permits examination of Hansard to determine intent of Parliament.

Regarding award of costs ***John Cothliff Ltd v Allen Build (North West) Ltd*** considered.

Regarding jurisdiction on jurisdiction, ***Smith v Martin*** *[1925] 1 KB 745:* ***Palmers Ltd v. ABB Construction Ltd*** *[1999] BLR 426.* ***Christopher Brown v Oesterreichischer Waldesbesitzer*** *[1954] 1 QB 8.* considered.

An adjudicator cannot act on two disputes on separate contract without agreement of both parties applying Part 8 of the Scheme. ***Fastrack v Morrison*** *[2000]* considered.

His Honour Judge Bowsher.TCC. 24th February 2000.

Herschel Engineering Ltd v Breen Properties Ltd No1 [2000] BLR 272
This concerned a construction contract for electrical works. In due course, the employer rejected two applications for stage payments. The claimant secured a default judgment against the defendants which was subsequently set aside and permission granted to defend subject to a stay for adjudication to be considered. The claimant appealed – that appeal was still pending at the time of this hearing. The claimant then referred the dispute to adjudication. A first reference floundered over fees, but a second reference resulted in a default decision by an adjudicator. In this action the claimant sought summary enforcement of that decision.

The defendants resisted on the grounds that since the court was seized of the dispute, there could not be a concurrent action at adjudication, relying upon ***McHenry v Lewis*** *[1882] 22 ChD 397 :* ***Royal Bank of Scotland Ltd v Citrusdale Investments Ltd*** *[1971] 1 WLR 1469* : ***Doleman & Sons v Ossett Corporation*** *[1912] 3 KB 257.* ***Cie Europeene v Tradax*** *[1986] 2 LLR 301, 305.* referred to.

The defendants further sought to establish an estoppel in that once the claimants had commenced court action they could not then resort to adjudication, relying upon ***Lloyd v Wright*** [*1983] 1 QB 1065.*

The court, with reference to ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** *[1999] BLR 93, 97:* rejected an attempt to treat adjudication as a form of arbitration. The statutory regime provides a distinct right to refer a dispute to adjudication ***"at any time."***

The court further rejected application of the s9 Arbitration Act 1996 procedure to adjudication. Litigation and adjudication are not mutually exclusive and the mere fact of commencing litigation does not, on its own, amount to a waiver. His Honour Judge Dyson. TCC. 14th April 2000

Homer Burgess Ltd v Chirex (Annan) Ltd No2 [2000] BLR 124
This represented the subsequent hearing (see earlier report – ADR News January) on what order to grant as a consequence of the finding that much of the adjudicator's decision was beyond his jurisdiction. The options canvassed by the court were either to "reduce" the decision of the adjudicator or to cherry pick those elements that were within his jurisdiction from those that were not and enforce those elements. It was not open to use the slip rule in the circumstances. Whilst the adjudicator was essentially out of time, the parties had agreed to give the adjudicator an extension of time and the court felt that in the circumstances it would be most appropriate to "reduce" or strike out the decision, enabling the adjudicator to make a fresh decision in the light of the courts interpretation of "plant". Accordingly, the adjudicator's decision was not enforceable. Lord MacFadyen. Outer House, Court of Session. 18th November 1999.

COMMENT : A nice question, not canvassed by the court, no doubt because the parties were not opposed to continuing the adjudication, was whether or not the adjudicator was in fact by that time functus officio.

Nolan Davis Ltd v Steven P Catton (No1) [2000] EWHC 590
The defendant resisted an application for enforcement of an adjudicator's decision on the grounds that no contract had been concluded between the parties and accordingly the adjudicator had no jurisdiction. The question as to whether or not there was a concluded contract was not put to the adjudicator. Rather the issue put to the adjudicator was one in respect of legal personality and the relationship between Mr Catton and the companies with which he was associated and whether or not Mr Catton should be held personally liable.

The problem centred around problems with the trading name of the company (Hazel Green Village Management Ltd) as set out in correspondence – which was incorrectly stated on two occasions but where

Mr Catton was clearly identified. It is clear that on all occasions Nolan Davis had intended to contract with the company. Under the Companies Act s349 an individual can be held personally liable where the company is not properly identified. The parties agreed to submit this issue as a preliminary issue to the adjudicator. He decided that Mr Catton was personally liable and subsequently awarded against Mr.Catton with costs.

His Honour Judge David Wilcox held that even if the adjudicator wrongly decided the jurisdiction issue the court would not interfere. Similarly the court would not disturb a decision on costs. In both cases the parties had conferred jurisdiction on the adjudicator to determine the issue and in consequence to determine his own jurisdiction. ***Northern Developments v Nichol*** applied. Application for summary enforcement granted.

His Honour Judge David Wilcox. TCC. 22nd February 2000.

Nordot Engineering Services Ltd v Siemens plc [2000] EWHC SF 00901 (TCC) 16/00

A dispute arose between sub and main contractor on a project which involved power generation. Potentially therefore the construction may well have been excepted from the HGCRA adjudication procedure by s105. This point was not finally determined by the court.

Nordot submitted the dispute to adjudication. Siemens objected on the basis of a s105 exception but left it to the adjudicator to decide whether or not it was a relevant contract subject to the scheme, agreeing to be bound by that decision. The adjudicator decided that the scheme applied, and went on to determine the dispute. Siemens, in this action, resisted enforcement on jurisdictional grounds, namely that there could be not jurisdiction for an adjudicator to determine disputes relating to exempted contracts.

The court considered ***The Project Consultancy Group v Trustees of the Grey Trust*** *[1999] BLR 377;* ***Westminster Chemicals & Produce Ltd v Eicholz Aloeser*** *[1954] 1 LLR 99;* ***Palmers Ltd v ABB Power Construction Ltd*** *[1999] BLR 426, 436;* ***Homer Burgess Ltd v Chirex Annan Ltd*** *1999* and determined that there is nothing to prevent the parties voluntarily submitting disputes relating to exempted contracts to adjudication subject to the statutory procedure. Whilst it is not possible for one party to unilaterally evade the statutory procedure, there is no reason why parties cannot opt in. See para 20

"It seems to me that the submission that it is not open to the parties to confer jurisdiction on an adjudicator is not sound in principle, I can see no reason as a matter of law, why parties cannot agree to abide by the decision of a third party if they so wish. Clearly that is appropriate in the case of arbitration. Why should it not be appropriate in the case of adjudication I ask? If parties with their eyes open enter into an agreement to the effect that ***"The adjudicator will decide this question and we will be bound by his decision",*** *why should the court not give effect to that agreement? There can be no public policy against that and the mere fact that the system adjudication is established by statute does not, it seems to me, make any difference. One could say exactly the same thing, as a matter of principle, in relation to the question of arbitration, There is no obligation to agree to arbitration before the parties agree to it. Similarly if parties wish to resolve a dispute and submit it to an adjudicator who derives his jurisdiction from the statute nevertheless, it seems to me, it is open to the parties to confer that jurisdiction on him by agreement should they wish."*

His Honour Judge Gilliland. TCC. 14th April 2000.

Northern Developments Ltd v. J & J Nichol [2000] EWHC TCC 176

This dispute concerned a Dom/2 subcontract. ND was the contractor, J&J the subcontractor. Issues regarding delay and the standard of work arose. ND issued a withholding notice. J&J withdrew from site. ND treated this withdrawal as a repudiation of the contract. J&J commenced adjudication. ND raised 1) set off for defective works, 2) loss arising out of delay and 3) the repudiation question in their defence. The adjudicator asked the parties whether these issues should be considered as an integral part of the dispute referred to him. The adjudicator determined that the issues were an integral part of the dispute and proceeded to rule upon them.

The referral was for a decision without reasons and this is what he delivered, but then went on to provide an explanatory note, which was stated not to be part of the decision. Here he explained that the defects were integral to the dispute because they were relevant to the value claimed. J&J challenged this because it was not covered by the withholding notice and thus beyond his jurisdiction. He further determined that there was delay but decided that delay costs were outside the dispute since they were not covered by a withholding notice. Repudiation did not arise out of the contract and was not within his jurisdiction. DN challenged the repudiation issue as a denial of justice.

Macob v Morrison *(1999) BLR 93;* ***Project Consultancy v Gray Trust*** *(1999) BLR 377;* ***Bouygues v Dahl-Jensen*** *1999;* ***Sherwood & Casson v Mackenzie*** *1999 ;* ***VHE Construction v RBSTB*** *2000 ;* ***Outwing v Randell*** *[1999] BLR 156 ;* ***Homer Burgess v Chirex*** *1999.* considered regarding review of the adjudicator's decision. In the circumstances the delay question was mentioned in the withholding notice, even though not quantified. The adjudicator had jurisdiction. Whether or not the decision was correct was another matter, but it could not be challenged here. Application for payment enforced.

Regarding repudiation it was established in ***Heyman v. Darwins*** *[1942] 2 Ll L 65.* that acceptance of repudiation brings **performance** of the contract to an end, it does not end the contract. Since the matter was not the subject of a withholding notice it was outwith the jurisdiction of the adjudicator.

John Cothliff v Allen Build *(1999) CILL 1530* considered regarding the power of an adjudicator to award costs. The HGCRA does not give this power, but the parties may give an adjudicator that power and in this case they did. His Honour Judge Peter Bowsher. TCC. 24th January 2000.

Samuel Thomas Construction Ltd v Bick & Bick [2000] Exeter ZN 900750
Construction Contract : Conversion of a barn to a residence still a residential occupier contract even though occupation not possible till completion. Outside HGCRA.
His Honour Judge Overend. Exeter County Court. 28th January 2000.

Sherwood & Casson Ltd v Mackenzie [2000] CILL 1577
Following the decision of an adjudicator on an interim application, a dispute over the value of the final account was referred to a different adjudicator. The adjudicator delivered his decision which the applicant sought to enforce in these proceedings. The defendant resisted enforcement on the grounds that the second decision rehearsed the same ground as the first decision and accordingly by virtue of Rule 9(2) of the Scheme, the adjudicator should have resigned where as here the dispute was the same or substantially the same as one previously referred to adjudication. The central issue therefore was whether or not the same dispute had been referred to the second adjudicator or whether it was in fact a different dispute.

His Honour Judge Anthony Thornton held firstly that contrary to the assertions of both counsel an adjudicator cannot resign from part of a dispute. If there is a question of duplication he either resigns or affirms his appointment to the dispute referred to him.

The first adjudication concerned interim applications 2 & 3. Application 3 was essentially the last application for work done post practical completion. It excluded retentions. A range of alleged variations and contra-charges were considered. Allowing contra-charges etc Sherwood recovered a mere £1,844 of the £14K+ claimed.

The second adjudication adduced further evidence in relation to both in support of the alleged variations and against the contra-charges, plus partial release of retentions and a loss and expense claim.

Mackenzie's case was that the adjudicator only had jurisdiction over the loss and expense claim and that the other issues were a duplication of the previous adjudication and that the adjudicator could not re-open and reconsider those issues.

The adjudicator found 1) that this was a final account dispute and not the same as the previous dispute 2) interim application sums are paid on account 3) Mackenzie had submitted no evidence as to why variations G & M were incorrect in the absence of which they were accepted 4) the contra-charges had already been determined by the previous adjudicator and those figures were therefore to be applied 5) he dismissed the loss and expense claim 6) awarded £7K+ for the variations and 7) made two discount allowances for retentions at 2½%.

Thornton J summarised the combined effect of ***Macob, PCF v Gray Trust*** and ***Bougues No1*** as follows:-

1. *A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced (**Macob**).*
2. *An decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced (**Bouygues**).*
3. *A decision may be challenged on the ground that the adjudicator was not empowered by the HGCRA to make the decision, because there was no underlying construction contract between the parties (**Project Consultancy**) or because he had gone outside his terms of reference (**Bouygues**).*

4. *The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference (**Bouygues**).*

5. *An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary oral evidence (**Project Consultancy**).*

Thornton J concluded that Mackenzie has mounted a jurisdictional challenge. Unlike the question whether or not a contract exists, which cannot be decided by the adjudicator, a question as to duplication can be decided by the adjudicator – but if he gets it wrong, the decision is subject to review since the Scheme requires an adjudicator to resign in the event of duplication and this can only be enforced by review.

He further found that the dispute concerned revaluations of the interim accounts for the purpose of the final account and was accordingly different. It also included a loss and expense claim. Whilst the contra-charges issue was a duplication it was not a substantial part of the prior decision. In determining the final account the variations and contra-charges had to be taken into account and could not be separated off.

In conclusion the court held that whilst errors of jurisdiction invalidate an adjudication decision, a wrong decision of fact does not and the decision will be enforced pending final settlement.

His Honour Judge Anthony Thornton. TCC. 30th November 1999.

Tim Butler Contractors Ltd v Merewood Homes Ltd [2000] TCC 10/01

This concerned an application for enforcement of an adjudication dispute in respect of two applications for payment pursuant to a construction contract. There was no doubt that this was a construction contract within the remit of the HGCRA. The issue before the court was whether or not the contract was stated to be for less than 45 days or not, since this acts as the trigger under the Scheme for entitlement to stage payments.

A subsidiary question then arises as to whether or not such a decision as to the terms of the contract goes to the jurisdiction of the adjudicator. The court held that it did not. Accordingly the adjudicator had jurisdiction to determine whether or not the 45 day rule applied. The adjudicator had found that the 45 day exception did not apply and thus there was an entitlement to stage payments. That decision was enforceable.

***Homer Burgess** 1999 : **Anisminic Ltd v Foreign Compensation Commission : Macob : Northern Developments** 2000* referred to. His Honour Judge Gilliland. TCC. 12th April 2000.

VHE Construction plc v. RBSTB Trust Co Ltd [2000] EWHC TCC 181

VHE contracted on JCT Form with contractors design to carry of remedial ground works. Clause 30.3.3-3.6 sets out the interim application procedure which included the requirement for withholding notices and the due date for payment following issue of VAT certificate by the applicant.

After practical completion, by interim application No4 VHE applied for a payment £1M+. RBSTB did not issue a withholding notice. VHE did not issue a VAT certificate. VHE commenced adjudication. The adjudicator, Mr C M Linnett decided that no monies were due because the VAT certificate had not been issued but then went on to decide the monies would become due upon issue of a VAT certificate, stating that there could be no abatement against the sum, firstly because there had been no withholding notice and secondly because he had not been given jurisdiction to open up and review the application.

VHE duly issued a VAT certificate but RBSTB did not pay. Instead they commenced a second adjudication this time before Mr Standinger, the terms of reference being to open up, review and revise interim application No4 and requiring the amount due under the first adjudication be reduced accordingly or in the event that the original sum is paid for an immediate reimbursement of the difference. Mr Standinger's decision left a balance of £254K. RBSTB calculated that £207K was due to them from VHE for non completion and sent a cheque to VHE for £47K being the balance of what they considered to be due.

VHE applied for enforcement of the two adjudicator's decisions, factoring in interest on the initial £1M+ to cover the period between the first and second adjudication. Hicks J first noted the Dyson J judgement in ***Macob v Morrison*** and Humphrey Lloyd J in ***Outwing v Randell*** to the effect that the HGCRA requires that the decisions of adjudicators should be promptly complied with Mr Linnett had decided that payment was

due 28 days from issue of VAT certificate. RBSTB should have paid the £1M+ to VHE on the 17th November.

Hicks J decided that Standinger had placed an impediment on the enforcement of Mr Linnett's decision in that it was only enforceable if VHE became immediately liable to repay £783K to RBSTB. He noted that it is hardly surprising that in this action VHE had limited its application to recovering the balance. It would have been open to VHE to demand full payment under adjudication No1 and for RBSTB to counterclaim for the enforcement of adjudication No2 by way of set off. The outstanding balance owing to VHE, taking into account the cheque for £47K was £207K which the court ordered RBSTB to pay.

RBSTB attempted to issue a withholding notice before payment was due under adjudication No2. This was ineffective since it was too late to issue a withholding notice against the application No4 under the contractual mechanism. An assertion that a VAT certificate was required for the revised figure post adjudication No2 was also rejected. Furthermore, the liquidated damages claim was issued too late under the contractual machinery to act as a set off. Kicks J also rejects the assertion that the words without prejudice to contractual rights in clause 30 in relation to the requirement to honour an adjudication decision gives a right to set off a contractual claim for liquidated damages. An assertion that, the contract provisions apart, there is a common law residual right to set off for liquidated damages was also rejected. S111(4) HGCRA required full compliance with the decision of the adjudicator.

Noting the power under Part 24 to order summary judgement in the absence of any real prospect of success, Hicks J found that RBSTB had no real prospect of challenging his judgement and issued summary judgement. His Honour Judge John Hicks. 13th January 2000.

Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607
Squared and Workplace entered into a construction construct some time been 9th October 1997 and the 5th June 1998. A dispute arose between the parties which was referred to adjudication (the Mr Riches named above – who took no part in the action). Workplace sought a declaration that the contract pre-dated the HGCRA and an injunction to prevent the adjudication proceeding.

The court, following a detailed consideration of the history of the contract formation process, which involved changing personalities and protracted negotiation, determined that the contract was concluded at the earliest 20th May, but certainly by 5th June. Consequently, the HGCRA applied. As to whether or not an injunction could be issued (this being considered to determine whether or not the litigation was vexations and thus impacted upon an application for costs) the court stated as follows :-

49. I am not persuaded there is power to grant an injunction to restrain a party initiating a void reference and pursuing proceedings which themselves are void and which may give rise to a void and thus unenforceable adjudication decision. There does not appear to be any legal or equitable interest such as an injunction would protect. Mr Darling was unable to identify one. Doubtless the initiation of such proceedings may be conceived to be a source of harassment, pressure, or needless expense.

50. In the analogous field of arbitration no action lies to prevent this, see ***North London Railway Company v Great Northern Railway Company*** *[1888] 11 QBD 30, approved in* ***Siskina V Distos*** *[1979] AC 210, in the speech of Lord Diplock at page 256, at letter E, where he said and I quote:* ***"That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was firstly laid down in the classic judgment of Cotton LJ in*** **North London Railway Company,** ***which has been consistently followed ever since."***

Bremer Vulkan *[1981] AC 909.* ***Re Cable (deceased)*** *[1977] 1 WLR 7* applied.
His Honour Judge David Wilcox. TCC. 16th February 2000.

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